No. 23-

IN THE

Supreme Court of the United States

CESAR ROMERO AND
TATIANA SPICAKOVA ROMERO,

Petitioners,

v.

LI-CHUAN SHIH, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court order that excludes landowners from their real property and allows other private parties to permanently physically invade and occupy the owners' land without compensation either effects a taking in violation of the Fifth Amendment to the U.S. Constitution or violates the landowners' due process rights under the Fourteenth Amendment to the U.S. Constitution?

2. Whether the newly decreed judicial doctrine of "implied *exclusive* easement," which excludes Landowners from their real property and appropriates (without compensation) a right to permanently physically invade and occupy Landowners' property for the enjoyment of third parties either effects a per se taking in violation of the Fifth Amendment to the U.S. Constitution or violates Landowners' due process rights under the Fourteenth Amendment to the U.S. Constitution?

PARTIES TO THE PROCEEDINGS

The following were parties before the Supreme Court of California:

Cesar Romero and Tatiana Spicakova Romero; Plaintiffs/Cross-Defendants /Appellants.

Li-Chuan Shih and Tun-Jen Ko; Defendants/ Cross-Complainants /Respondents.

U.S. Bank National Association; Cross-Defendant/Respondent.

RELATED CASES

- *Romero v. Shih*, B310069, Court of Appeal of the State of California, Second Appellate District, Division 8. Case pending on remand from order of the Supreme Court of the State of California.

- *Romero v. Shih*, No. S27503, Supreme Court of the State of California. Judgment entered February 1, 2024.

- *Romero v. Shih*, S275023, Supreme Court of the State of California. Order granting Shi-Kos' petition for review and denying Romeros' petition for review entered August 10, 2022.

- *Romero v. Shih*, B310069, Court of Appeal of the State of California, Second Appellate District, Division 8. Order denying Romeros' motion for rehearing entered May 25, 2022.

- *Romero v. Shih*, B310069, Divison 8. Court of Appeal of the State of California, Second Appellate District. Judgment entered May 5, 2022.

- *Romero v. Shih*, EC064933, Superior Court of the State of California, Los Angeles County. Judgment entered October 26, 2020.

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PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

Cesar and Tatiana Spicakova Romero (the "Romeros") are the legal owners of a 9,891 square foot tract of real property in Sierra Madre, California. In 2020, a trial court judicially decreed an implied exclusive easement over a substantial portion (13 percent) of the Romeros' land that, for the first time in California's legal history: (1) barred the landowners from accessing, possessing and using their own land; (2) granted private parties a right to physically access and occupy someone else's land, without compensation, twenty-four hours per day, 365 days per year; and (3) refrained entirely from considering necessity.

Even though California's Intermediate Appellate Court acknowledged the general constitutional prohibition against the taking of private property and concluded that "the law prohibits a court from recognizing an implied easement that precludes the property owners from making all or most practical uses of the easement area," App. 2, the State Supreme Court disagreed. Instead, the California Supreme Court created a new doctrine—"implied *exclusive* easement"—that appropriates, *without* compensation, a right to physically access and occupy a landowner's property for the enjoyment of private parties and to the exclusion of the property owner.

In so doing, the California Supreme Court's newly minted judicial power grab represents a direct attack on two principles this Court has recognized for centuries: (1) that private property cannot be taken unless it is for purposes which are of "public character[,]" *Madisonville*

Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 251 (1905); and (2) that private property cannot be taken *without* just compensation. U.S. Const. Amdt. V. Here, the California courts took the Romeros' property without any finding that the taking would benefit the public use, *and* they did so without providing any compensation to the Romeros.

Roughly three years ago, this Court recognized that "the very idea of property entails 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'" *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149 (2021) (quoting 2 W. Blackstone, Commentaries on the Laws of England 2 (1766)). The California court system has not only stripped the Romeros of their ability to exclude others from their privately owned land—i.e., the "sine qua non" of property ownership. Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730, 752 (1998). It has also allowed private parties, who have no legal claim to that property, to use their right to exclude *against them*. To describe the effect thrust upon them by the California judiciary in any other way rejects reality.

The "Constitution measures a taking of property not by what a State says, or by what it intends, but by what it *does*." *Hughes v. Washington*, 389 U.S. 290, 298 (1967) (Stewart, J., concurring). And here, the California courts decreed that the Romeros have no right to access or use their property whatsoever, and no right to exclude. And the California courts' use of the "exclusive easement" nomenclature when they took the Romeros' land without compensation does not absolve them of this constitutional

violation. This Court has previously recognized that even an easement can effect a taking that must be compensated, and it has also recognized that the right to exclude "falls within [the] category of interests that the Government cannot take without compensation." *Kaiser Aetna v. United States,* 444 U.S. 164, 180 (1979).

This sort of infringement on the Romeros' property rights is anathema to basic notions of property ownership, the Fifth Amendment's Takings Clause, and the Fourteenth Amendment's Due Process Clause.[1] And given the tremendously deleterious impact this sort of judicial power grab may have if allowed to metastasize, the Court should either grant the Romeros' petition for certiorari or summarily reverse the California Supreme Court. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702 (2010).

OPINION BELOW

The California Supreme Court's opinion is reported at *Romero v. Shih*, 541 P.3d 1112 (2024). It is also reproduced at App. 1-36.

JURISDICTION

The California Supreme Court's judgment was entered on February 1, 2024. *See* App. 1. Accordingly, this Court has jurisdiction under 28 U.S.C. § 1257(a).

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1. Adding insult to injury, the Romeros must pay the trespassers for successfully stealing the Romeros' land and the Romeros must continue to pay taxes and liability insurance on the property they own but cannot use and of which the trespassers have exclusive use.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides: "nor shall private property be taken for public use, without just compensation."

The Fourteenth Amendment to the United States Constitution provides: "No state shall . . . deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In 2014, the Romeros purchased real property in Sierra Madre, California, for use as their primary residence. The Romero grant deed conveyed 9,891 square feet of land and was unencumbered by any easement. That same year, Li-Chuan Shih and Tun-Jen Ko purchased the lot directly adjacent to the Romeros' property to be used as a rental property. The Shih-Kos grant deed conveyed a 7,853 square foot lot. The Shih-Kos are not U.S. citizens, do not reside in the United States, never bothered to testify either at deposition or trial, and have profited and will continue to profit from using the Romeros' land.

In 2015, the Romeros discovered that the Shih-Kos' tenants trespassed over thirteen percent of the Romeros' land. Critically, that piece of land has no buildings on it and only consists of an unimproved backyard, a side yard, a concrete slab, and flower beds. When the Shih-Kos refused to cease the trespass, the Romeros sued them in the California Superior Court, Los Angeles Division. The Shih-Kos countersued the Romeros, seeking to exclude the Romeros from their own land and asserting

claims for equitable easement, implied easement, quiet title, and declaratory relief. The Romeros argued that granting the Shih-Kos an exclusive easement (either implied or equitable) would run afoul of the United States Constitution before the trial court.[2]

After protracted litigation, a five-day bench trial commenced in March 2020. On the second day of trial, the Superior Court Judge commented:

> It seems to me that everybody is in agreement that if . . . there were an easement in favor of the [Shih-Kos'] property, that is essentially for exclusive use. . . . I mean, it would be, with regard to an easement, an exclusive use. It's not like the Romeros are going to every so often hop over the fence and walk along there because they own the property.
>
> . . . .
>
> I'm not really thinking you are getting much pushback on the factual matter that if an easement were to arise by implication, generally speaking the use of that easement by the [Shih-Kos] have it for largely exclusive purposes. App. 48.

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2. See, e.g., App. 62 ("I mean, I bought a lot of almost 10,000 square [feet], and it was important to us to have a large lot, and it's still important to us. Because it's our land and I believe in property rights."); App. 62 ("I believe in our constitutionally protected property rights I have bought, paid for, and legally own the approximate 10,000-square-foot lot."); see also, e.g., App. 124 ("Mrs. Romero likewise testified that essentially the primary harm to her was the violation of her constitutional property rights.").

Both sides agreed with the Superior Court that, as a practical matter, an easement in favor of the Shih-Kos would mean that the Romeros would lose all access to approximately thirteen percent of their real property. And although the Romeros asked the trial court to explain why the judicial creation of an exclusive easement would not violate the U.S. Constitution, the trial court refused to do so.[3]

Despite Mr. Romero's insistence during the trial that "it's our land, and I believe in property rights," and Mrs. Romero's plea that she "believe[s] in [the] constitutionally protected property rights [they] have bought, paid for, and legally own," App. 48, their assertion of their rights fell on deaf ears. On September 28, 2020, the Superior Court concluded that the Shih-Kos, and all

3. See, e.g., App 139 ("On March 9, 2020, [the] Romeros filed a Request for Statement of Decision specifically asking [the trial court] to explain why granting an exclusive easement over approx. 13% of [the] Romeros' land does not violate the Fifth Amendment to the United States Constitution. The proposed SOD does not address this issue at all and the Romeros request again that [the trial court] specifically address[ ] this issue."); App. 140 (asking the trial court to address whether "the Fifth Amendment of the United States Constitution allow[s] private property to be taken for private and exclusive use" and whether "the United States Constitution allow[s], under any Amendment, private property to be taken for private and exclusive use"; and then asserting that "the confiscation of [the] Romeros' entire piece of land . . . amounts to an unconstitutional taking in violation of state and federal law") (emphasis omitted); App. 142-143 (requesting "a statement of decision . . . explaining the factual and legal bases for [the trial court's] decision regarding the following controverted issue: . . . [W]hy the granting of such an [equitable exclusive] easement does . . . not violate[] the Fifth Amendment to the United States Constitution?").

their successors-in-interest, "possess an implied easement over the eight-foot strip of land," and, alternatively, an equitable easement over the strip (the latter of which would entitle the Romeros to roughly $70,000 in compensation). App. 112. The impact of the court order was that the Romeros' land was effectively reduced by thirteen percent (from 9,891 square feet to 8,595 square feet) while the Shih-Kos' land (and all their successors-in-interest) gained exclusive possession of 1,296 square feet of land they never owned, effectively increasing their land by seventeen percent (from 7,853 square feet to 9,149 square feet), all while the Romeros paid taxes on the 1,296 square feet that the Shih-Kos have exclusive use of.

The Romeros appealed to the California Court of Appeal, arguing (among other things) that the awarding of exclusive easement, whether implied or equitable, "is in tension with the general constitutional prohibition against the taking of private property." App. 182. They also maintained their argument that "there is a general constitutional prohibition against the taking of private property." App. 182-183. The California Court of Appeal reversed in part and affirmed in part.

In so doing, the California Court of Appeal first recognized that exclusive easements are largely disfavored. This is so because they "permit[] the dominant owner to use the easement area," which "amount[s] almost to a conveyance of the fee." App. 71. And, then, the court concluded that because (1) the Shih-Kohs' exclusive use of approximately 1,300 square feet of the Romeros' land could not be considered "de minimis," and (2) an easement of this magnitude was not necessary to protect the public or to ensure essential utility services, the Court held that the Superior Court erred by granting the Shih-Kohs an

exclusive implied easement on the Romeros' property.[4] App. 75-81.

Notwithstanding everything it had just said about exclusive *implied* easements (e.g., their propriety only in very limited circumstances, none of which applied to the Romero/Shih-Ko dispute), the Court of Appeal affirmed the Superior Court's grant of an exclusive *equitable* easement (which had the same rights-stripping effect of an exclusive *implied* easement). In the Court of Appeal's view, "[w]here there has been an encroachment on land without any legal right to do so, [a] court may exercise its powers in equity to affirmatively fashion an interest in the owner's land which will protect the encroacher's use, namely, a judicially created easement sometimes referred to as an 'equitable easement.'" App. 82.

Despite an owner's constitutionally protected property interests, all of which have been held sacred since the time of William Blackstone, the Court of Appeal reasoned that, "[i]n making its determination, the court engages in equitable balancing to determine, on the one hand, whether to prevent such encroachment or, on the other hand, permit such encroachment and award damages to the property owner." App. 82. In other words, the court would dispense with any pesky fundamental rights and instead divvy up real property whichever way it believed to be most "fair."

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4. See also App. 79 ("The easement granted by the trial court essentially divests [the Romeros] of nearly all rights that owners customarily have in residential property, including access and practical usage. . . . Though [the Shih-Kos] label the 1,296-square-foot encroachment as a nonexclusive implied easement, the remedy they seek ousts [the Romeros] for all practical purposes.").

In so doing, the Court of Appeal conceded that "[e]quitable easements give the trespasser what is, in effect, the right of eminent domain by permitting him to occupy property owned by another." App. 83 (quotation marks and citation omitted). This brazen judicial de facto taking, however, did not trouble the court at all. The court affirmed without hesitation the Superior Court's decision to grant an *exclusive* easement to the Shih-Kos after concluding that they had acted innocently, that the Romeros would not be irreparably injured by the grant, and that the hardship inflicted on the Shih-Kos if they were evicted would be greatly disproportionate to the hardship inflicted on the Romeros by allowing the Shih-Kos to perpetuate their trespass. The Romeros petitioned for rehearing, again asserting their rights under the U.S. Constitution, App. 150, but the Court of Appeal denied it, App. 102.

Shortly after, both the Shih-Kos and the Romeros each filed petitions for review with the California Supreme Court. App. 155-197; 198-212. The Shih-Kos argued that the Court of Appeal erred by rejecting their exclusive implied easement argument. App. 198-212. The Romeros, in turn, asked the California Supreme Court to take up the following question:

> Whether a court order awarding an exclusive easement which effectively takes real property from a private citizen and gives it to another private citizen for no reason other than to confer a private benefit violates the Takings Clause and is void?

App. 219. Specifically, the Romeros noted that *this* Court "has recognized that a government taking of private real property for no reason other than to confer a private benefit on a particular private party is void." App. 245. They then argued that, accordingly, "the state court's award of an exclusive easement[,] which has the effect of taking real property from one private citizen and giving it to another private citizen . . . is void and in violation of the Takings Clause." App. 246.

On August 10, 2022, the California Supreme Court granted the Shih-Kos' petition but denied the Romeros' request. App. 135. In so doing, the California Supreme Court limited its consideration to the following question: "Did the trial court correctly find the existence of an implied easement under the facts?" *Romero v. Shih*, 514 P.3d 233 (Cal. 2022).[5]

On February 1, 2024, the California Supreme Court held that it would, as an issue of first impression, recognize the possibility of an implied exclusive easement, thereby reversing the Court of Appeal on this issue. App. 2-3. It did so even though the Romeros continued to maintain that

5. To avoid any risk of forfeiture, the Romeros filed a timely, protective petition for certiorari on November 8, 2022, from the California Intermediate Appellate Court's recognition of the *equitable* exclusive easement doctrine (the issue the California Supreme Court declined to consider) which was denied on January 7, 2023. Whichever label the California courts affix to their property-stripping decree (equitable or implied), the constitutional problem arises from the exclusivity of the easement granted to the Shih-Kos. For this reason, the Romeros respectfully request that the Court consider both issues (the equitable-exclusive-easement issue and the implied-exclusive-easement issue), even though this petition focuses on the latter.

"[r]eal property ownership is a fundamental right protected by the United States Constitution (Fifth Amendment)," App. 219, and they advanced the argument that if a state court "eliminates an established property right" through a judicial decision, then such court will have violated the United States Constitution,"[6] App. 252. In the California Supreme Court's (mistaken) view, this constitutional argument was "without merit." App. 33.

REASONS FOR GRANTING THE PETITION

Reduced to its essence, the decision of the California Supreme Court is this: the California courts have vested themselves with a power that operates outside of constitutional constraints by allowing themselves to exclude landowners' from their real property; granting third parties the right to take access, possession and use of someone else's land without compensation; and transferring the right to exclude to third parties to others for use against the property owner. Despite the Romeros' fundamental right to use, access, and exclude others from their property, the California Supreme Court has decreed that third parties can exclude *the Romeros* from a portion of the *Romeros' property*.

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6. Although the California Supreme Court seemed to believe that the Romeros had not raised the constitutional issues giving rise to this Petition for Certiorari, the Romeros did indeed advance them throughout this litigation, *see supra* at n.3, and the California Supreme Court addressed them, *see* App. 33-34. Indeed, in their filings, the Romeros asserted that "[j]udicially created doctrines such as exclusive easements (whether implied or equitable) can violate the Due Process Clause and/or Takings Clause of the United States Constitution," App. 251, and they advanced the argument that if a state court "eliminates an established property right" through a judicial decision, then such court will have violated the United States Constitution. App. 251.

This is true no matter which varietal of easement the California courts choose to affix to their judicial infringement of the Romeros' fundamental rights. Their error was ignoring the "exclusive" modifier. Simply put, granting an *exclusive* easement has the same practical effect as granting fee simple title because the trespasser gains the right to exclude the landowner. Nothing in this Court's jurisprudence can remotely justify a state court's decision to do so.

In California, "an 'easement will be implied when, at the time of conveyance of property, the following conditions exist'":

> (1) "the owner of property conveys or transfers a portion of that property to another";
>
> (2) "the owner's prior existing use of the property was of a nature that the parties must have intended or believed that the use would continue; meaning that the existing use must either have been known to the grantor and the grantee, or have been so obviously and apparently permanent that the parties should have known of the use"; and
>
> (3) "the easement is reasonably necessary to the use and benefit of the quasi-dominant tenement."

Thorstrom v. Thorstrom, 196 Cal. App. 4th 1406, 1420 (2011) (citation omitted). In typical cases, "an easement is not a type of ownership, but rather an incorporeal interest

in land . . . which confers a right upon the owner thereof to some profit, benefit, dominion, or lawful use out of or over the estate of another." *Hansen v. Sandridge Partners, L.P.*, 22 Cal. App. 5th 1020, 1032 (2018) (emphasis removed) (citing *Guerra v. Packard*, 236 Cal. App. 2d 272, 285 (1965); *Silacci v. Abramson*, 45 Cal. App. 4th 558, 564 (1966)). In other words, the landowner still *possesses* the land. The party with an easement (traditionally understood) has a subordinate claim to *use* the owner's land.

The fundamental constitutional problem at the heart of this case arises when a court declares an easement to be exclusive—i.e., the non-landowner gains authority to exclude the landowner from his own property. Naturally, courts have recognized the problem with this arrangement. See, e.g., *Iorfida v. Stamos*, 90 A. D. 3d 993, 995 (N.Y. 2d App. Div. 2011) ("Exclusive easements, which give the dominant landowner the right to exclude the servient landowner (whose land is burdened by the easement), are disfavored by courts."); *Latham v. Garner*, 673 P.2d 1048, 1050 (Idaho 1983) ("Because an exclusive grant in effect strips the servient estate owner of the right to use his land for certain purposes, thus limiting his fee, exclusive easements are not generally favored by the courts."). "An exclusive interest labeled 'easement' may be so comprehensive as to supply the equivalent of an estate, i.e., ownership." *Raab v. Casper*, 51 Cal. App. 3d 866, 876 (1975). In other words, an easement designed to completely exclude the owner of the property "create[s] the practical equivalent of an estate" and, traditionally, "require[s] proof and findings of the elements of adverse possession." *Id.*, at 877. Indeed, to permit a trespasser to have exclusive use of land, to the exclusion of the owner, "perverts the classical distinction in real property law

between ownership and use." *Harrison v. Welch*, 116 Cal. App. 4th 1084, 1092 (2004) (citing *Silacci*, 45 Cal. App. 4th, at 564).

California had (before this case) historically (and correctly) discouraged the creation of exclusive easements. See *Pasadena v. California-Michigan Land & Water Co.*, 17 Cal. 2d 576, 578 (1941). So too, have other States throughout the Nation. See, e.g., *Iorfida*, 90 A. D. 3d, at 995; *Latham*, 673 P.2d, at 1050. The rationale is obvious; allowing private parties "to obtain the fruits of adverse possession under the guise of a prescriptive easement to avoid having to satisfy the tax element[,]" *Hansen*, 22 Cal. App. 5th, at 1033, makes no sense and undermines any semblance of property law stability. See *Mehdizadeh v. Mincer*, 46 Cal. App. 4th 1296, 1305–1307 (1996).[7] Traditionally, California law has allowed exclusive easements only to accommodate utility services, for purposes of public health and safety, or when the intrusion is "de minimis" (e.g., less than an inch), a fact that the California Court of Appeal recognized. *See* App. 75-76.

Given the danger to property rights, the California courts have used exclusive easements sparingly (and, before this case, had apparently not recognized the availability of implied exclusive easements at all). Rather than applying the common-sense, property-rights-assuring approach to easements that the law demands, the California Supreme Court shredded the Romeros' constitutionally protected property rights. And even though the California Supreme

7. See also *Silacci v. Abramson*, 45 Cal. App. 4th 558, 562–564 (1996); *Raab v. Casper*, 51 Cal. App. 3d 866, 876–877 (1975); *Hansen v. Sandridge Partners, L.P.*, 22 Cal. App. 5th 1020, 1033–1035 (2018).

Court noted that "easements by implication are not favored in the law[,]" App. 14; *Romero v. Shih*, 541 P.3d 1112, 1124 (2024), it nonetheless left open the possibility that the Romeros may be stripped of their fundamental property rights even though their deed plainly protects more than the California courts were willing to recognize.

I. The California Supreme Court's opinion cannot be squared with this Court's precedents.

In resolving the Romeros' appeal, the California Supreme Court showed no concern with recognizing an implied exclusive easement. Because this principle cannot justify a judicial edict that tells a landowner that she may not access, possess, or use property that she owns (even though she is required to pay taxes on it) because someone with no ownership interest in the land has an *exclusive* easement over it, the California Supreme Court erred.

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2009), six justices of this Court held (for different reasons) that if a state court "declares that what was once an established right of private property no longer exists," a constitutional violation has arisen. 560 U.S. at 717. Four justices—lead by Justice Scalia—concluded such an action would violate the Takings Clause of the Fifth Amendment. Two others reasoned that it would violate the Due Process Clause of the Fourteenth Amendment. Given that a constitutional infringement of a property right can arise via judicial decree, the question here is whether the California Supreme Court has taken away "an established" private-property right that would otherwise be enjoyed by the Romeros.

Plainly, it has. Throughout this Court's Taking Clause jurisprudence, it has held fast to the notion that "private property cannot be taken by the Government, National or state, except for purposes which are of a public character." *Madisonville Traction Co.*, 196 U.S., at 251. Indeed, the Framers understood that property is a natural, fundamental right, and therefore prohibited the government from "tak[ing] property from A. and giv[ing] it to B." *Calder v. Bull*, 3 Dall. 386, 388 (1798).[8] And a mere three terms ago, this Court reaffirmed a property owner's right to "'sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'" *Cedar Point Nursery*, 594 U.S., at 149 (quoting 2 W. Blackstone, Commentaries on the Laws of England 2 (1766)).

That final point bears emphasizing. The "'power to exclude," one of the "most treasured strands in an owner's bundle of property rights,'" *Chmielewski v. City of St. Pete Beach*, 890 F. 3d 942, 949 (CA11 2018) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982)), is anathema to the notion that a court can expropriate a landowner's power to exclude *and use it against him* under the guise of creating an *easement*. In no uncertain terms, this Court has placed beyond dispute that "[w]here 'permanent physical occupation' of land is concerned, . . . the government" may not "decree

8. See also *Wilkinson v. Leland*, 27 U.S. 627, 658 (1829); *Vanhorne's Lessee v. Dorrance* 2 U.S. 304, 311 (Cir. Ct. Pa. 1795); *Kaukauna Water Power Co. v. Green Bay & Mississippi Canal Co.*, 142 U.S. 254, 273 (1891) ("[A] case of taking the property of one man for the benefit of another . . . is not a constitutional exercise of the right of eminent domain.").

it anew . . . no matter how weighty the asserted 'public interests' involved." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028 (1992) (quoting *Loretto*, 458 U.S., at 426).

To be certain, this is not a scenario where a State has "transfer[ed] property from one private party to another" for "future 'use by the public.'" *Kelo v. City of New London*, 545 U.S. 469, 477 (2005). The courts below rejected the notion that the public has any interest whatsoever in the Romeros' land. Nor can the trampling of the Romeros' property rights be seen as anything less than a total deprivation. They have been forced, via judicial fiat, to turn over *every* strand of rights from the bundle that they would otherwise be permitted to exercise in the 1,296 square feet: (1) right of possession; (2) right of control; (3) right of exclusion; (4) right of enjoyment; and (5) right of disposition. See generally *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945); *see also Cedar Point Nursery,* 594 U.S., at 149.

In other words, California did not "simply take a single "strand" from the 'bundle' of property rights." *Loretto*, 458 U.S., at 435. Instead, "it chop[ped] through the bundle, taking a slice of every strand." *Id.* Each of those slices were transferred to *other* individuals—the Shih-Kos *and* all their successors-in-interest, who had no legal claim to them until the California Supreme Court's decision.

Critically, the California Supreme Court's decision to force the Romeros to cede their property rights against their will cannot be defended under the single, limited exception to the principle that the government always violates the Constitution when it deprives a property

owner of a critical stick from his property-rights bundle. If, and only if, the deprivation "inhere[s] in the title itself" or can be located "in the restrictions that background principles of the State's law of property and nuisance already place[d] upon land ownership," *Lucas*, 505 U.S., at 1029, may the State maintain the deprivation without running afoul of our Nation's charter. In those instances, the landowner got what he bargained for. But if the principle (1) is "newly legislated or decreed"; or (2) cannot be remediated "under the State's law of private nuisance, or by the State under its complementary power to abate nuisances that affect the public generally," then the principle is not a mere background principle of the state's property law. *Id.*

Without question, the exclusive easement that the court imposed on the Romero's property was "newly decreed." Simply put, it did not exist before the California courts "decreed" it in favor of the Shih-Kos. Indeed, before this case, implied exclusive easements were *never* recognized in the State. Nor can it be said that any exclusive easement "inhere[ed] in the title" of the Romeros' land. In California, "the deed is the final and exclusive memorial of the intention and rights of the parties." *Wing v. Forest Lawn Cemetery Assn.*, 101 P. 2d 1099, 1103 (Cal. 1940), and the Romeros' deed indisputably establishes that they have legal title over land that private third parties have been given authority to exclude them from.

II. The questions presented are exceptionally important.

Allowing state courts to ration out existing property rights represents an expansive new threat to the very

notion of property ownership. Property rights are both fundamental and zero sum. Allowing courts to trump otherwise black-and-white property rights (e.g., who has the right to exclude: a property owner or a trespasser) contravenes principles dating to the original works of John Locke; animating the American Founding; and continuing unabashedly through 2021 when this Court decided *Cedar Point Nursery*. If left intact, the California Supreme Court's newly decreed judicial power grab will wreak havoc on the rights of untold thousands of property owners and open the flood gates to real estate fraud because the California Supreme Court has now recognized "implied exclusive easement" as a valid exception to the common law of statute of frauds. In other words, conveyance of land no longer needs to be in writing, and it will be up to the courts, operating outside of constitutional constraints, to decide what property rights, if any, the landowner actually has.

Generally speaking, a property owner may assert every right contained in the bundle to the exclusion of every other person. The notion that property rights can be wrested away by court-decreed implication is both anathema to the very idea of property ownership and violative of all notions of federal supremacy. Indeed, the California Supreme Court's opinion turns the Supremacy Clause on its head by allowing state-court decrees to trounce federal Constitutional rights.

Allowing this rule to remain will result in far-reaching litigation that will increase rapidly and dramatically, as more and more individuals ask courts to encroach on another's property rights and more and more courts become comfortable assessing how to parse via "equity"

and "fairness" what long-gone parties may have "implied." And the uncertainty will not end there. The stability of property rights is the foundation for a healthy economy. See *E. Enters. v. Apfel*, 524 U.S. 498, 548 (1998) (Kennedy, J., concurring in the judgment and dissenting in part) (noting that a drastic change in the law "can destroy the reasonable certainty and security which are the very objects of property ownership").[9] If property rights are subject to sudden and dramatic changes, they become less stable. And this instability injects considerable uncertainty into the financial markets while damaging the real estate industry, the mortgage industry, and the economy.

Finally, it bears noting that the California Supreme Court's decision, if allowed to stand, would raise profound questions under the unconstitutional conditions doctrine, which sounds in notions of due process and fundamental fairness. This doctrine prevents the government from using conditions "to produce a result which it could not command directly." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) (quotation marks and citation omitted, and cleaned up).[10] Here, the California courts faulted the

9. See also Todd J. Zywicki, The Rule of Law, Freedom, and Prosperity, 10 Sup. Ct. Econ. Rev. 1, 22 (2003) ("Individuals are more willing to invest in economic growth where property rights are stable.").

10. See also *Chavez v. Martinez*, 538 U.S. 760, 769 n. 2 (2003) ("States cannot condition public employment on the waiver of constitutional rights"); *Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.* 271 U. S. 583, 592–593 (1926) (invalidating regulation that required the petitioner to give up a constitutional right "as a condition precedent to the enjoyment of a privilege"); *Southern Pacific Co. v. Denton*, 146 U.S. 202, 207 (1892) (invalidating statute

Romeros for defending *all* their property, which in effect punished them for asserting their constitutional rights. This is, similarly, anathema to very heart of our U.S. Constitution. California's new, judicially created rule that landowners must surrender a portion of their property as a condition precedent to avoid having all of it taken should be scrutinized by this Court. In the absence of review, landowners will feel compelled to relinquish their property rights out of fear of the state judiciary's newly decreed power to seize all the land the trespasser desires if the landowners fail to "voluntarily" surrender a portion of their land. This risk cries out for this Court's review.

CONCLUSION

The Romeros wish to enjoy the very property on which their personal home sits. They, like all Americans, "do not expect their property, real or personal, to be actually occupied or taken away." *Horne v. Dep't of Agric.*, 576 U.S. 351, 361 (2015). The California courts erred by lending their imprimatur to "tak[ing] property from A. and giv[ing] it to B." *Calder*, 3 Dall., at 388, and appropriating the Romeros' right to exclude, all *without* providing the Romeros with compensation (just or otherwise). Doing so violated the U.S. Constitution and will have tremendously adverse consequences on property rights if not corrected by this Court. For all these reasons, the Court should grant the petition for certiorari.

"requiring the corporation, as a condition precedent to obtaining a permit to do business within the State, to surrender a right and privilege secured to it by the Constitution").

Respectfully submitted,

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IN THE SUPREME COURT OF CALIFORNIA

TATANA SPICAKOVA ROMERO et al.,
Plaintiffs, Cross-defendants and Appellants,

v.

LI-CHUAN SHIH et al.,
Defendants, Cross-complainants and Respondents;

U.S. BANK NATIONAL ASSOCIATION,
Cross-defendant and Respondent.

S275023

Second Appellate District, Division Eight
B310069

Los Angeles County Superior Court
EC064933

February 1, 2024

Justice Kruger authored the opinion of the Court, in which Chief Justice Guerrero and Justices Corrigan, Liu, Groban, Jenkins, and Evans concurred.

This dispute over a residential driveway in Sierra Madre raises a significant question about the law of easements. Under California law, the parties to a sale of real property may grant or reserve easements as part of the transaction. This may be done expressly, in a written instrument, or impliedly, based on clear evidence of the parties' intent. In this case, the trial court concluded that the parties to a 1986 division and sale of two adjacent residential properties intended to create an implied easement over an eight-foot-wide strip

of land that belonged to one parcel, but that had been used as the driveway to the home on the neighboring parcel. As a consequence, the current owners of the neighboring parcel may continue to use that strip of land as a driveway.

The Court of Appeal reversed. The court concluded that regardless of what the parties to the 1986 sale might have intended, the law prohibits a court from recognizing an implied easement that precludes the property owners from making all or most practical uses of the easement area. Because recognizing the neighbors' nonpossessory right to use the land as a driveway would effectively prevent the property owners from using the land for their own purposes, the Court of Appeal concluded that the easement could have been created only in a written instrument and not by implication.

We took this case to decide whether the law imposes such a limitation on the recognition of implied easements. We now conclude that it does not. The evidentiary standard for recognizing an implied easement is a high one, and that standard will naturally be more difficult to meet where, as here, the nature of the easement effectively precludes the property owners from making most practical uses of the easement area. But if there is clear evidence that the parties to the 1986 sale intended for the neighboring parcel's preexisting use of the area to continue after separation of title, the law obligates courts to give effect to that intent.

We reverse and remand for the Court of Appeal to consider whether substantial evidence supports the trial court's finding that an implied easement existed under the circumstances of this case.

I.

In the early 1940's, Edwin and Ann Cutler (the Cutlers) purchased adjacent parcels of property on West Alegria Avenue in Sierra Madre. Soon after, the Cutlers built a home on the parcel lying to the east, at 643 West Alegria Avenue (the 643 Property). In the years that followed, the Cutlers built a brick garden planter in the front left corner of the yard and next to it, a driveway running along the western edge of the property for its entire length. The planter and driveway encroached by about eight feet onto the Cutler's other parcel, which lay directly to the west at 651 West Alegria Avenue (the 651 Property). A chain-link fence marked the western edge of the driveway and planter, separating the 643 Property and the encroachments from the remainder of the 651 Property. The encroaching area consisted of a strip of land measuring about 8 feet wide by about 157 feet long, for a total area of almost 1,300 square feet, or about 13 percent of the 651 Property's 10,000-square-foot lot.

Aside from the encroachments, the 651 Property remained undeveloped for several decades. In 1985, the Cutlers allowed their son Bevon and a family friend, David Shewmake, to build a house on the 651 Property so that it could be sold for profit. According to

their arrangement, once the house was built and sold, Bevon and Shewmake would use the proceeds from the sale to pay the Cutlers for the land and would retain the profits on the house for themselves.

In furtherance of this project, Edwin Cutler applied to the city to adjust the boundary between the 643 Property and the 651 Property to the line marked by the chain-link fence. The Sierra Madre Planning Commission approved his request, subject to a city engineer's review of the parcel map and boundary line adjustment. But for reasons that are not clear from the record, the process was never completed and the legal boundary line remained as before.

Although the lot line adjustment had not been completed, the Cutlers, Bevon, and Shewmake proceeded much as if it had been. They obtained building permits from the city and completed construction on the house, and the chain-link fence separating the 651 Property from the 643 Property was replaced with a concrete block wall.

In 1986, the Cutlers conveyed the 651 Property to Bevon and Shewmake, and on the same day, Bevon and Shewmake sold the property to another family. Both grant deeds described the 651 Property according to the original boundary lines, without mentioning or accounting for the encroachments on the strip of land along the property's eastern edge. In the years that followed, the Cutlers executed several grant deeds for the 643 Property that included a legal description of the eight-foot-wide strip. Because the lot line adjustment

had not been completed, the Cutlers did not actually own that strip of land; those grant deeds were therefore "wild deeds," outside the chain of title and ineffective to convey title to the area. (See 3 Miller & Starr, Cal. Real Estate (4th ed. 2023) § 8:58, p. 8-175 ["If a deed purports to convey property that is not owned by the grantor, it is ineffective to convey the property, and it is a 'wild deed' that can have no effect on title of the person who holds real title to the property"] fn. omitted.)

The properties remained in this configuration, with the 643 Property making use of the encroaching area as a garden planter and driveway, during the next three decades. The 651 Property was sold once during this period, in 2005. Plaintiffs Cesar and Tatana Spicakova Romero (the Romeros) then purchased the 651 Property in 2014. That same year, defendants Li-Chuan Shih and Tun-Jen Ko (the Shih-Kos) purchased the 643 Property from Ann Cutler's estate.

At the time they purchased their respective properties, neither the Romeros nor the Shih-Kos were aware of any easements, encroachments, or boundary disputes. None had been disclosed by the sellers in the respective purchase agreements or advertising materials, and neither party had taken steps to verify that the concrete block wall separating the properties conformed to the true boundary line. The Romeros did not discover that anything was amiss until about a year after purchasing the 651 Property, when Cesar Romero was taking measurements in his front yard for a landscaping project and realized that the yard was not as

wide as he expected. The Romeros commissioned a survey, which confirmed that the 643 Property's garden planter and driveway were encroaching on the 651 Property.

The Romeros filed a lawsuit against the Shih-Kos, requesting that the Shih-Kos be ordered to remove all encroachments and pay damages. The Shih-Kos filed a cross-complaint alleging that when the Cutlers separated the 643 and 651 Properties in 1986, they created an implied easement over the disputed area in favor of the 643 Property. In the alternative, the Shih-Kos asked the court to create an equitable easement in favor of the 643 Property over the disputed area, which would entitle the Romeros to compensation for the burden imposed on their property.

The matter proceeded to a bench trial focusing on the easement issue. The parties presented evidence regarding the history of the two properties and the circumstances surrounding their separation in 1986, discussed above, as well as evidence of the effect that the alleged easement would have on each property. As relevant here, the Shih-Kos' appraisal expert, Daniel Poyourow, testified about the uses of the disputed area that would remain to the Romeros' 651 Property if the trial court were to award an easement in favor of the 643 Property. Poyourow explained that the Romeros could continue to use the easement area for "setback purposes" – i.e., to calculate how far any structure must be set back from the true property line – and for "FAR uses" – apparently referring to the "floor area ratio," or the permissible floor area of a building in

relation to the size of the lot where the building is located. He also testified that certain subsurface uses remained to the 651 Property – e.g., for the running of underground pipes or cables. On cross-examination, however, Poyourow acknowledged that his appraisal report had characterized the easement as "effectively exclusive" and that the potential for the 651 Property to take advantage of any remaining uses was "remote." Overall, Poyourow estimated that the "residual value" of the uses of the property to the 651 property represented approximately 2 percent of the value of the disputed area.

After the bench trial, the trial court entered judgment for the Shih-Kos, concluding that they possessed an implied easement over the disputed strip of land. The court found that it was "clear under the circumstances" that when the Cutlers separated and sold the two properties in 1986, "the parties to the transaction intended the 643 Property's encroachment on the 651 Property would continue after the division." Specifically, the court noted that "all the Cutlers, the Shewmakes, and every successive owner of either property (until now) [have] allowed for and/or behaved as if the 643 Property has the right to encroach upon the disputed strip of land with the driveway, planter, and block wall – all of which have remained unchanged in their use and function since at least the initial property separation." The court also determined that the encroachment was reasonably necessary to the beneficial enjoyment of the 643 Property because without the

easement, the 643 Property's driveway would be too narrow for normal use.

In finding an implied easement, the trial court rejected the Romeros' argument that California law prohibits the recognition of an implied easement that would effectively exclude the property owner from any practical use of the disputed area. The trial court reasoned that "the focus of the [implied easement] analysis is what the parties intended at the time of the division or conveyance; whether their intended use was exclusive or not is beside the point." The trial court ordered that the implied easement would run with the land and, "consistent with the original grantor and grantee's intent in 1986, shall terminate if the 643 Property ceases its continued use of the easement for a driveway, planter and wall/fence."

In the alternative, the trial court created an equitable easement over the disputed area in the event the implied easement was overturned on appeal. The court relied on a series of appellate decisions permitting courts in certain situations to exercise their powers in equity to fashion an interest in the owner's land that will protect an innocent encroacher's use of the property, on the condition that the encroacher pay damages to the property owner. (See generally *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 764–765 (*Hirshfield*).) The court determined that even if the Shih-Kos were ultimately found to have no preexisting right of use, they could continue to use the disputed property but would be obligated to pay damages to the Romeros in the amount of $69,000.

The Court of Appeal reversed on the implied easement issue. (*Romero v. Shih* (2022) 78 Cal.App.5th 326, 362 (*Romero*).) The critical question, the appellate court concluded, was whether the easement was "exclusive." (*Id.* at pp. 349, 350.) Here, according to the Court of Appeal, the implied easement was "exclusive" in the sense that the easement "essentially divests [the Romeros] of nearly all rights that owners customarily have in residential property, including access and practical usage." (*Id.* at p. 354.)

The appellate court acknowledged that California law has recognized similarly "exclusive" easements in cases where the easement was created by express grant and the written instrument either explicitly provided or clearly implied a right to exclusive use of the easement area (for instance, by indicating that the easement is "'"for parking and garage purposes"'"). (*Romero*, *supra*, 78 Cal.App.5th at p. 350, citing *Blackmore v. Powell* (2007) 150 Cal.App.4th 1593, 1599–1600 (*Blackmore*).) But the court held that the same rule should not obtain for easements implied by law.

The appellate court relied for its conclusion on a line of cases concerning prescriptive easements, which are easements acquired through the open, continuous, and hostile use of another's land. (*Romero*, *supra*, 78 Cal.App.5th at pp. 350–352.) In those cases, several appellate courts have held that a court cannot recognize a prescriptive easement that has the effect of leaving the fee title holder with no practical use of the land subject to the easement. (*Ibid.*) To recognize such a prescriptive easement, the courts have reasoned, would

undermine the integrity of the statute governing the acquisition of a real property estate by adverse possession by permitting claimants " 'to obtain the fruits of adverse possession' " without satisfying the statutory requirements, including the payment of taxes. (*Id.* at p. 350, quoting *Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1033 (*Hansen*).) The Court of Appeal in this case found this rationale "based on the distinction between estates and easements – equally applicable to exclusive implied easements." (*Romero*, at p. 352.)[1]

Having concluded there could be no implied easement over the disputed strip of land in favor of the 643 Property (*Romero*, *supra*, 78 Cal.App.5th at p. 353), the court did not address the Romeros' alternative argument that the implied easement finding was not supported by substantial evidence (*id.* at p. 355). The court did, however, affirm the trial court's imposition of an equitable easement and upheld the award of $69,000 in damages to the Romeros (*id.* at p. 362).

Both sides petitioned for review. We granted the Shih-Kos' petition to decide whether, as the Court of Appeal held, the law forbids recognition of an implied

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[1] The court noted that some courts have recognized implied "exclusive" easements for encroachments that are either " 'de minimis' " or "necessary to protect the health or safety of the public or for essential utility purposes," but neither description applies to the disputed easement at issue here. (*Romero*, *supra*, 78 Cal.App.5th at p. 352.)

easement that would effectively exclude the property owners from most practical uses of the easement area.

II.

"Interests in land can take several forms, including 'estates' and 'easements.'" (*Hansen*, *supra*, 22 Cal.App.5th at p. 1032.) "An estate is an ownership interest in land that is, or may become, possessory." (*Ibid.*) "An easement," by contrast, "gives a nonpossessory and restricted right to a specific use or activity upon another's property, which right must be *less* than the right of ownership." (*Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1306 (*Mehdizadeh*).)

The law recognizes several methods of creating an easement. Among other methods, the parties to a real property transaction may grant or reserve an easement as part of the conveyance of land; an individual may acquire an easement by prescription, through the continuous, hostile, and adverse use of the property; or a court acting in equity may order that an easement be created under specified circumstances. (6 Miller & Starr, Cal. Real Estate, *supra*, § 15:13, pp. 15-70–15-72.) The scope of the easement, like the scope of any servitude on land, "is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired." (Civ. Code, § 806.)

When an easement is granted or reserved as part of a real property transaction, the grant or reservation may appear expressly in the terms of a written instrument. (See, e.g., *Gray v. McCormick* (2008) 167

Cal.App.4th 1019.) But even without a writing, California law recognizes the grant or reservation of the easement by implication in appropriate cases. (See, e.g., *Fristoe v. Drapeau* (1950) 35 Cal.2d 5 (*Fristoe*); see generally 6 Miller & Starr, Cal. Real Estate, *supra*, § 15:19, pp. 15-94–15-95.) "'The doctrine of implied easements is applied by the courts to carry into effect the intention of the parties as manifested by the facts and circumstances of the transaction.'" (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 132 (*Horowitz*).)

California has codified the doctrine of implied easements in Civil Code section 1104 (section 1104). Section 1104, which has remained unchanged since its 1872 enactment, provides: "A transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." In other words, when a grantor conveys a portion of an estate to another party but fails to expressly grant an easement in the written instrument, the law infers that the grantor and grantee intended the conveyed portion of the property to enjoy any preexisting uses of the grantor's remaining estate that were "obvious[] and permanent[]," and the law accordingly implies an easement. (§ 1104; see, e.g., *Kytasty v. Godwin* (1980) 102 Cal.App.3d 762, 768 [§ 1104 "creates an implied easement as an exception to the general rule that

interests in real property can only be created by an express writing or by prescription"].) "In such cases, for purposes of identification, the portion or parcel that is being used is called the 'quasi-servient tenement,' and the portion or parcel benefited by the use is called the 'quasi-dominant tenement.'" (6 Miller & Starr, Cal. Real Estate, *supra*, § 15:20, p. 15-98, fn. omitted.) Where the statutory conditions are otherwise satisfied, "if the owner conveys the quasi-dominant tenement, the grantee receives an implied easement for the use and benefit of his or her property over the quasi-servient tenement retained by the owner-grantor." (*Id.* at p. 15-99.)

Though recognized in statutory law, the doctrine of implied easements is at least equally a product of the common law as elaborated in judicial decisions. The cases make clear that the law of implied easements is broader than section 1104, read in isolation, might suggest. For instance, "[a]lthough the Civil Code speaks only in terms of implying an easement in favor of a grantee, 'California also recognizes easements by implied reservation. The result is that a purchaser may take not only the obvious *benefits* but the obvious *burdens* as well.'" (*Horowitz*, *supra*, 79 Cal.App.3d at p. 133.) In a similar vein, this court has explained that "[t]he factors enumerated in section 1104 of the Civil Code are not exclusive of other possible factors which may have a bearing in ascertaining the extent of an easement created by implication. Section 1104, which relates to the creation of easements by implied grant, must be read with section 806 of the Civil Code, which

defines the extent of all servitudes, and also in the light of the common law rules governing easements by implication." (*Fristoe*, *supra*, 35 Cal.2d at p. 9.)

Synthesizing the statutory text and common law elaboration of the doctrine, California appellate courts have summarized the elements of an implied easement as follows: "[A]n 'easement will be implied when, at the time of conveyance of property, the following conditions exist: (1) the owner of property conveys or transfers a portion of that property to another; (2) the owner's prior existing use of the property was of a nature that the parties must have intended or believed that the use would continue; meaning that the existing use must either have been known to the grantor and the grantee, or have been so obviously and apparently permanent that the parties should have known of the use; and (3) the easement is reasonably necessary to the use and benefit of the quasi-dominant tenement.'" (*Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406, 1420 (*Thorstrom*).)

Implied easements are not favored in the law. Because an implied easement deprives the property owner of the exclusive use of that property, courts do not lightly infer that the parties intended to create one. (*Orr v. Kirk* (1950) 100 Cal.App.2d 678, 681.) Moreover, given the ordinary rule that courts should construe a reservation in any grant against the grantor, a court "will imply an easement in favor of the grantee more easily than it will imply an easement in favor of a grantor." (*Ibid.*; see Civ. Code, § 1069 ["A grant is to be interpreted in favor of the grantee, except that a

reservation in any grant . . . is to be interpreted in favor of the grantor."].) In either case, courts exercise substantial caution in recognizing implied easements, requiring "'clear evidence'" of the parties' intent, taking into account "'"the circumstances attending the transaction, the particular situation of the parties, and the state of the thing granted."'" (*Thorstrom*, *supra*, 196 Cal.App.4th at p. 1420; accord, *Walters v. Marler* (1978) 83 Cal.App.3d 1, 21, disapproved on other grounds in *Gray v. Don Miller & Associates, Inc.* (1984) 35 Cal.3d 498, 507; *Orr*, at p. 681.)

The question before us concerns the recognition of what the Court of Appeal had described as "exclusive" implied easements, by which the court meant an implied easement that "only permits the dominant owner to use the easement area." (*Romero, supra*, 78 Cal.App.5th at p. 349.) Some clarification of this usage is helpful. In general, the term "'exclusive'" in the context of easements and other servitudes simply refers to "the right to exclude others." (Rest.3d Property, Servitudes (2000) § 1.2, com. c, p. 14.) The exclusivity of an easement is not so much a binary attribute – either an easement is exclusive or it is not – as a matter of degree. (*Ibid.* ["The degree of exclusivity of the rights conferred by an easement . . . is highly variable."].) Exclusivity in this context "includes two aspects: who may be excluded and the uses or area from which they may be excluded." (*Ibid.*) At one end of the spectrum, easement holders may be limited to narrow, specific uses of the property, and may have "no right to exclude anyone from making any use that does not

unreasonably interfere" with those narrow uses. (*Ibid.*) At the other end of the spectrum, easement holders may possess "the right to exclude everyone, including the servient owner, from making any use of the land within the easement boundaries." (*Ibid.*) When the Court of Appeal in this case used the term "exclusive" easement, it was referring to easements that sit closer to the latter end of this spectrum – to what we might consider "highly exclusive" or "broadly exclusive" easements.

Though an easement may be broadly exclusive, it is nonetheless necessarily limited in scope. An easement is "considered a nonpossessory interest in land because it generally authorizes limited uses of the burdened property for a particular purpose," leaving the property owner "the right to make all uses of the land that do not unreasonably interfere with exercise of the rights granted by the [easement]." (Rest.3d Property, Servitudes, *supra*, § 1.2, com. d, pp. 14–15.) Broadly exclusive easements "may involve uses that make any actual use of the premises by the transferor unlikely, but they are still considered nonpossessory interests if the transferor is not excluded from the entire parcel and retains the right to make uses that would not interfere with the easement." (*Id.* at p. 15.) When an exclusive easement has been established, a dominant tenement owner may use the easement area only for a limited set of purposes, and the easement may be terminated if the dominant tenement owner ceases to use the area for those purposes. (6 Miller & Starr, Cal. Real Estate,

supra, § 15.77, pp. 15-282–15-284; *McCarty v. Walton* (1963) 212 Cal.App.2d 39, 45.)

The easement the trial court recognized here fits this model: It was broadly exclusive, in that it gave the Shih-Kos a right to use the easement in a manner that effectively excluded the Romeros from most practical uses of the surface area, if not the areas below and above the surface, but it was nonetheless limited in that it preserved the Romeros' property rights not inconsistent with the Shih-Kos' usage, including the right to terminate the easement if the Shih-Kos ceased to use it for the specified limited purposes.

The question now before us is whether, as the Court of Appeal held, an implied easement that excludes the servient tenement owner from making most practical uses of the easement's surface area is impermissible as a matter of law. As the Court of Appeal acknowledged, effectively exclusive easements are not impermissible as a general matter. Courts have upheld granted or reserved easements of comparable scope where the parties have expressly granted or reserved a restricted right of use as part of the transaction. (*Romero*, *supra*, 78 Cal.App.5th at p. 350; see, e.g., *Gray v. McCormick*, *supra*, 167 Cal.App.4th at p. 1029; *Blackmore*, *supra*, 150 Cal.App.4th at pp. 1599–1601.) The Court of Appeal held, however, that California law prohibits courts from recognizing effectively exclusive *implied* easements, as distinct from express easements.

The Court of Appeal relied for this conclusion on a line of cases pertaining to easements acquired by prescription. The cases begin with *Raab v. Casper* (1975) 51 Cal.App.3d 866, in which the defendants had built a house near the boundary line dividing their property from the plaintiffs' property and inadvertently built "part of their driveway, utility lines, yard and landscaping on plaintiffs' land." (*Id.* at p. 876.) The trial court awarded the defendants a prescriptive easement over the land containing the encroachments, but the Court of Appeal reversed. (*Id.* at p. 878.) The appellate court understood the trial court's judgment as "designed to exclude plaintiffs from defendants' domestic establishment, employing the nomenclature of easement but designed to create the practical equivalent of an estate." (*Id.* at p. 877.) "Achievement of that objective," the court held, "required proof and findings of the elements of adverse possession, not prescriptive use." (*Ibid.*) Because the defendants had not established the necessary elements of adverse possession – in particular, the requirement that the defendants paid taxes on the disputed land (see Code Civ. Proc., § 325) – the court reversed the judgment. (*Raab*, at pp. 877–878.)

Several courts have since followed *Raab* in prohibiting the acquisition of an easement by prescription where the easement would deprive the property owner of all or most practical uses of the easement area. (See *Hansen, supra*, 22 Cal.App.5th at p. 1034 [rejecting prescriptive easement for farming that would not allow the owner "to use the [d]isputed [l]and for any 'practical purpose'"]; *Mehdizadeh, supra*, 46

Cal.App.4th at pp. 1305, 1308 [rejecting prescriptive easement that was limited to "landscaping and recreation" because the easement would leave the owner with "only a minimal right to use it"]; *Silacci v. Abramson* (1996) 45 Cal.App.4th 558, 564 (*Silacci*) [rejecting prescriptive easement for an enclosed yard that would "amount[ ] to giving [the true owner's] land completely, without reservation, to [the encroacher]"]; *Harrison v. Welch* (2004) 116 Cal.App.4th 1084, 1093 [rejecting prescriptive easement for use as a woodshed because "'as a practical matter [such use] . . . prohibits the true owner from using his land'"].)

The concern underlying this line of cases – that claimants could "obtain the fruits of adverse possession under the guise of a prescriptive easement" – arises because of the high degree of similarity between the elements of a prescriptive easement and the elements of adverse possession. (*Hansen*, *supra*, 22 Cal.App.5th at p. 1033.) Both the law of prescriptive easements and the law of adverse possession permit a party to acquire rights to property through their own unilateral conduct – that is, by using or occupying the property – and, generally speaking, the elements of the doctrines closely resemble each other. (*Id.* at pp. 1032–1033.) Crucially, however, adverse possession requires claimants to prove that they have paid taxes assessed against the property in order to claim title. (*Ibid.*; Code Civ. Proc., § 325, subd. (b).) The creation of easements by prescription does not. To ensure adherence to this statutory tax requirement, the courts in the *Raab* line have considered it "especially important to maintain

the distinction between easements and estates *in the context of prescription*. (See Code Civ. Proc., § 325, subd. (b).) That is, if courts allowed claimants to obtain by prescription a functional estate without satisfying the statutory requirements of adverse possession, then Code of Civil Procedure section 325, subdivision (b)'s tax requirement would be nullified." (*Hansen*, at p. 1036.)[2]

The Court of Appeal in this case believed the logic of the exclusive prescriptive easement cases equally applicable to implied easement cases. We are not convinced. Prescriptive easement cases like *Raab* and *Hansen* are grounded in a concern for maintaining the integrity of the adverse possession statute and its demanding standard for the acquisition of another's property through occupation. (*Hansen*, *supra*, 22 Cal.App.5th at p. 1036.) But as *Hansen* itself recognized, not all easement claims raise the same concerns. (*Ibid*.) *Hansen* acknowledged that courts have

[2] The appellate case law is not uniform in forbidding broadly exclusive prescriptive easements. (See *Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041, 1048 [granting prescriptive easement that excluded servient tenement owner where uses of the property were limited to "reservoir purposes only"]; cf. *Hirshfield, supra*, 91 Cal.App.4th at p. 769, fn. 11 [questioning breadth of rule stated in the *Raab* line of cases: "Since the scope of a prescriptive easement is determined by its historical use [citations], and since exclusive easements, while rare, are possible [citation], we believe the holdings [of the cases] may be overbroad."].) We do not decide here whether *Otay*, *Raab*, or any of the other so-called exclusive prescriptive easements were decided correctly. The only question now before us concerns the law of implied easements, which are materially different from easements acquired by prescription.

permitted exclusive express easements, for instance. (*Id.* at p. 1035.) But it explained that, unlike in prescriptive easement cases, express easement cases involve no danger that the claimant could shoehorn what is in reality a claim for adverse possession, which has nothing to do with the terms of a land transaction, into a cause of action for an express easement, which has everything to do with the terms of a land transaction and nothing to do with the claimant's hostile use of the property. (*Id.* at p. 1036.) In other words, "permitting *express* exclusive easements does not create the same statutory nullification issue that *prescriptive* exclusive easements do." (*Ibid*.)

In this regard, implied easements are similar to express easements; to recognize an implied easement creates none of the statutory nullification concerns underlying the *Raab* line of cases. To establish the existence of an implied easement, a plaintiff must allege and prove a specific set of circumstances surrounding a particular land transaction: that a common owner of property conveyed a portion of that property to another, that the parties to the transaction must have intended to maintain the benefits and burdens between the newly divided estates after the separation of title, and that the resulting easement was reasonably necessary to the dominant estate. (See 6 Miller & Starr, Cal. Real Estate, *supra*, § 15:20, pp. 15-97–15-102; accord, *Thorstrom*, *supra*, 196 Cal.App.4th at p. 1420.) Those circumstances bear little resemblance to the elements of adverse possession, which, again, does not concern the terms (either express or implied) of a land

transaction. For that reason, there is little reason to fear that claimants might seek an implied easement merely as a means of circumventing the statutory tax requirement or some other adverse possession element. Thus, while it may be necessary to prohibit courts from recognizing prescriptive easements that effectively exclude the property owner from the easement area, the same is not true in express or implied easement cases. (Cf. *Hirshfield*, *supra*, 91 Cal.App.4th at pp. 768–769 [distinguishing equitable easements on the same ground].)

Unlike in prescriptive easement cases, the court's primary duty in cases involving easements created by grant or reservation – whether express or implied – is to give effect to the intent of the parties to the relevant land transaction. In cases involving express easements, at least, courts have long recognized this duty, even when following the parties' intent produces unusually expansive rights of use. As the Court of Appeal in this case acknowledged, courts have generally held that even when a written instrument does not explicitly state that a granted easement is to be exclusive, courts may nevertheless recognize an exclusive easement where there is a clear indication of such an intention. (See, e.g., *Romero, supra*, 78 Cal.App.5th at p. 350; cf. *Pasadena v. California-Michigan etc. Co.* (1941) 17 Cal.2d 576, 578–579 [case involving an express easement noted that "[n]o intention to convey such a complete interest [that would permit the dominant tenement owner to exclude others from the easement area] can be imputed to the owner of the servient

tenement in the absence of a clear indication of such an intention"].)

In *Gray v. McCormick*, *supra*, 167 Cal.App.4th at page 1022, for example, the court enforced the express terms of a residential development's Master Declaration of Covenants, Conditions, Restrictions and Reservation of Easements (Master CC&Rs), which granted an "exclusive easement" to Lot 6, the dominant tenement, over a 16-foot-wide by 90-foot-long strip of land on Lot 3, the servient tenement. The dominant tenement owners sought to improve the strip of land with a driveway, perimeter walls, and landscaping, and to prohibit the servient tenement owners from making any use of the easement area. (*Id.* at p. 1023.) The servient tenement owners conceded that the Master CC&Rs expressly created an easement, but they objected to the dominant tenement owners' characterization of its scope. Specifically, they argued that the label "exclusive" did not evince an intent to exclude them from their own property. (*Id.* at p. 1025.) A contrary interpretation, they asserted, would violate the law by effectively "grant[ing] the owners of the dominant tenement fee ownership over the easement area." (*Id.* at p. 1029.) The appellate court rejected the argument. The court reasoned that the easement provision "repeatedly uses language of exclusivity," and that any uncertainty about the meaning of that language was dispelled by the surrounding context, which imposed on the dominant tenement owners the costs of improving and maintaining the easement area and required them to indemnify the servient tenement owners for

any liability resulting from the exclusive use of the easement. (*Id.* at p. 1026.)

Similarly, in *Blackmore*, *supra*, 150 Cal.App.4th at page 1597, the court construed an express easement "for 'parking and garage purposes' over a defined area" on the servient tenement, holding that the dominant tenement owner could construct a garage on the easement area for the owner's exclusive use. The court concluded that "exclusive use of the garage" was "'a necessary incident' of the easement," because "a shared garage would generate disputes about allocation of parking spaces, security, and maintenance costs." (*Id.* at p. 1599.)

In such cases, California appellate courts have recognized that exclusive easements, while rare, can exist where the parties' intent is sufficiently clear in the written instrument creating the easement. (See also *Heath v. Kettenhofen* (1965) 236 Cal.App.2d 197, 206 [dominant tenement owner entitled to exclusive use of 10-foot-wide strip within easement area for parking].) Implied easement cases are not fundamentally dissimilar. Just as in cases where a court must interpret the terms of a written conveyance, the court's duty in an implied easement case is to give effect to the intent of the parties. (*Fristoe*, *supra*, 35 Cal.2d at p. 8.) As we explained in *Fristoe*, this principle accords with the overarching instruction in Civil Code section 806, that "'the extent of a servitude is determined by the terms of the grant.'" (*Fristoe*, at p. 9.) We observed: "Under this section . . . , the controlling factor is the terms of the grant. When the grant is implied, its terms must

be inferred from all of the circumstances of the case. The effect of section 806 is to establish intent as the criterion, and this is in accord with the rationale of the rules governing easements by implication." (*Ibid.*) Nothing in the language of the statutes suggests a limitation to this principle whereby the parties must preserve a certain quantum of practical uses for the owner. (See Civ. Code, §§ 806, 1104.) The scope of the burden imposed on the servient tenement is determined by the parties' intent (*ibid.*), even if that intent was to create a privilege to use the property in a way that effectively precludes the property owners from making their own use of the easement area.

Although the parties have not cited, and we have not found, any cases directly addressing the question presented here concerning implied easements, California appellate courts have generally measured the scope of an implied easement by following the intent of the parties, regardless of whether giving effect to that intended scope would mean precluding the servient tenement owner from making most practical uses of the land. In *Dixon v. Eastown Realty Co.* (1951) 105 Cal.App.2d 260, for example, the court recognized an implied easement over a small area of the plaintiffs' land that contained an encroaching portion of the defendant's garage, which effectively excluded the plaintiffs entirely from the disputed area. (*Id.* at pp. 263–264.) Likewise, in *Zeller v. Browne* (1956) 143 Cal.App.2d 191, the court recognized an implied easement over a strip of land on the defendants' property that contained a concrete walkway, stairway, and

retaining wall, providing the plaintiff an apparently exclusive pathway to access a higher elevation at the rear of their house. (*Id.* at pp. 194–195.) In *Thorstrom*, by contrast, the court reversed a trial court judgment "that granted defendants an implied easement for exclusive use of water from a well on" the plaintiff's property. (*Thorstrom*, *supra*, 196 Cal.App.4th at p. 1411.) The court concluded that "the scope of the easement granted to defendants is excessive" (*ibid.*) – but not because implied easements that prevent the servient tenement owner from using the easement are impermissible as a matter of law. Rather, the court held that the scope of the easement was impermissibly broad only because there was no evidence in the record suggesting that the well "was drilled, constructed and used to benefit defendants' parcel alone." (*Id.* at p. 1423.) Accordingly, the plaintiffs retained the right, as the owners of the servient tenement, to use the well on their property in any manner that did not interfere with the defendants' own reasonable residential uses. (*Id.* at pp. 1423– 1424; see *Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702 ["Every incident of ownership not inconsistent with the easement and the enjoyment of the same is reserved to the owner of the servient estate."].) The reasoning of these cases suggests that an implied easement, like an express one, may effectively exclude the servient tenement owner from the easement area in rare cases where the circumstances show that the relevant parties clearly intended that result.

Taking a different view, the Court of Appeal posited that implied easements are essentially different from easements where "the language of the creating instrument clearly expresses an intention that the use of the easement area shall be exclusive to the dominant owner." (*Romero*, *supra*, 78 Cal.App.5th at p. 350.) But the court did not explain why it thought that such an intention must be memorialized in the creating instrument and may not be found elsewhere. Perhaps the court believed that in order to convey an interest as comprehensive as an exclusive easement, a party should have to do so in writing, much as if the party were conveying ownership of the land. (Cf. Civ. Code, § 1624, subd. (a)(3) [the Statute of Frauds, which requires a contract "for the sale of real property, or of an interest therein," to be made in writing].) But the doctrine of implied easements is a settled exception to the Statute of Frauds. (1 Miller & Starr, Cal. Real Estate, *supra*, § 1:74, pp. 1-277–1-278.) Courts have recognized this exception as necessary to avoid injustice when the circumstances of the transaction have mitigated the evidentiary concerns underlying the general rule that interests in land must be transferred in writing. (See Rest.3d Property, Servitudes, *supra*, § 2.11, com. c, p. 155.)

Or perhaps the appellate court's concern was simply a practical one: If a court is to recognize an easement so comprehensive as to effectively preclude the property owner's practical use of the land, it should be very certain that this is what the parties intended. If this was indeed the court's concern, we share it. But

an express statement requirement goes farther than necessary to respond to the concern. Given the consequences of recognizing an easement where the parties' intent to create one appears only by implication rather than expressly in a written instrument, the common law already requires claimants seeking to establish such implied intent to clear a high bar: The preexisting use of the quasi-servient tenement must have been "'so obviously and apparently permanent'" that the law may conclude "'the parties *must have* intended or believed that the use would continue'" after the division of the property. (*Thorstrom*, *supra*, 196 Cal.App.4th at p. 1420, italics added.)

Again, easements by implication are not favored in the law. But where the circumstances of a land transaction clearly evince an intent to continue the quasi-dominant tenement's preexisting uses of the quasi-servient tenement, and where the circumstances also clearly evince an intent that the easement be comprehensive in scope, the bar is cleared and the relevant legal requirements have been satisfied. (Cf. Rest.3d Property, Servitudes, *supra*, § 2.11, com. c, p. 155 ["servitude burdens are established by implication only . . . where the evidentiary concerns underlying the Statute of Frauds have been met"].) In discerning the intended scope of an easement, we see little reason to distinguish between an intent clearly expressed in writing and an intent clearly inferable from "all the facts and circumstances." (*Fristoe*, *supra*, 35 Cal.2d at p. 8.)

To give effect to implied easements, even when those easements may be comprehensive in scope,

protects the reasonable expectations of the parties to land transactions in a manner consistent with the usual presumption that the parties "'contract[ed] in reference to the condition of the property at the time of the sale.'" (*Rosebrook v. Utz* (1941) 45 Cal.App.2d 726, 729 (*Rosebrook*).) Here, for example, the trial court concluded that any reasonable person observing the two properties in 1986, when the Cutlers divided them, would have assumed the 643 Property retained at least some continuing interest in the disputed strip of land. The trial court further found that the Cutlers' successors made just that assumption: For almost 30 years, between the original separation of the properties in 1986 and the Romeros' discovery of the encroachments in 2015, "every successive owner of either property (until now) has allowed for and/or behaved as if the 643 Property has the right to encroach upon the disputed strip of land with the driveway, planter, and block wall – all of which have remained unchanged in their use and function since at least the initial property separation." The question of whether the trial court's findings are supported by substantial evidence remains to be considered. But if these are indeed the facts of the case, they offer a concrete illustration of why a blanket prohibition on exclusive implied easements would encourage litigation to upset long-standing and until-now settled uses of the property.

The Romeros suggest, on the flip side, that our conclusion will create uncertainty in land titles. The argument is that by permitting the recognition of exclusive implied easements, we will undermine the ability of

buyers to rely on readily available and accurate legal descriptions of property contained in recorded deeds. (See *Mehdizadeh*, *supra*, 46 Cal.App.4th at p. 1308.) The same concern inheres to some extent in every case involving an implied easement, because an implied easement by definition is not expressly set out in any written conveyance. The law, however, treats that concern as outweighed by the interest in protecting the reasonable expectations of landowners and purchasers by giving effect to what the parties "'must have intended'" given the "'obvious[] and apparently permanent'" nature of the preexisting use. (*Thorstrom*, *supra*, 196 Cal.App.4th at p. 1420; see also *Rosebrook*, *supra*, 45 Cal.App.2d at p. 729.)[3]

Contrary to the Romeros' argument, our conclusion does not "pervert[] the classical distinction in real property law between ownership and use." (*Silacci*, *supra*, 45 Cal.App.4th at p. 564.) As we have already explained, there remain important differences between an easement with even this degree of exclusivity and an estate or ownership interest. The trial court's judgment granted the Shih-Kos the right to maintain the preexisting use of the disputed strip of land as a driveway, garden planter, and concrete block wall; it did not give the Shih-Kos the right to make any other use of the disputed area. And although the trial court determined the easement would run with the land, it

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[3] Here, the "obviously and apparently permanent" nature of the use in question means that the Romeros could have discovered the existence of the easement with reasonable diligence at the time they purchased the 651 Property.

ordered that the easement would terminate if the 643 Property ceased to use the disputed area for those preexisting, limited uses. The Romeros benefit from this limitation because they are provided certainty that the easement area will never be used for any activity that might have a more intrusive impact on their property. Moreover, as the Shih-Kos' appraisal expert testified at trial, the Romeros retained any rights to use the strip of land that would not interfere with the 643 Property's easement – namely, the right to any subsurface uses, however often there might be a need for them, and the right to use the easement area to calculate the minimum setback from the property line and the maximum floor area ratio of their home under applicable zoning laws.

The easement therefore is not so comprehensive in scope as to extinguish the servient tenement owner's property rights in the disputed area. Though the Shih-Kos possess a right to exclude the Romeros from the driveway, they are not permitted to exclude the Romeros from *all* potential uses of the easement. And because the Shih-Kos may only use the land for a driveway, a garden planter, and a concrete block wall, the Romeros retain the right to terminate the easement if the property is used for another purpose. These differences are sufficient to distinguish the rights accorded to the Shih-Kos by the trial court from a fee interest. (See *Gray v. McCormick*, *supra*, 167 Cal.App.4th at p. 1031 ["Here, the owners of Lot 6 have not acquired fee title to the easement area; rather, their use of the [exclusive] easement area is limited to access, ingress

and egress purposes, not all conceivable uses of the property."]; *Blackmore*, *supra*, 150 Cal.App.4th at p. 1600 [noting that the exclusive use of a garage on the easement area "does not rise to fee ownership" because the rights given to the easement holder were "circumscribed" and the exclusivity was "intended solely to protect these restricted rights"]; see also Rest.3d Property, Servitudes, *supra*, § 1.2, com. d, p. 15 ["Easements and profits may authorize the exclusive use of portions of the servient estate, and may involve uses that make any actual use of the premises by the transferor unlikely, but they are still considered nonpossessory interests if the transferor is not excluded from the entire parcel and retains the right to make uses that would not interfere with the easement or profit."].)

The Romeros also argue that our conclusion "contravenes the fundamental maxim of jurisprudence that equity must follow the law." They argue that the Legislature has created an exclusive path to obtaining title to property through adverse possession, in Code of Civil Procedure section 325, and we may not circumvent those requirements by recognizing an alternative means of accomplishing the same end. (See *Marsh v. Edelstein* (1970) 9 Cal.App.3d 132, 140–141.) But the Shih-Kos are not seeking to obtain title to property through adverse possession. As we have explained, section 1104, which codifies the doctrine of implied easements, addresses a wholly different set of circumstances than the adverse possession statute. In holding that exclusive implied easements are not impermissible as a matter of law, we do not "lend [our]

aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly." (*Marsh*, at p. 141.) Instead, we interpret and apply section 1104 "in the light of the common law rules governing easements by implication." (*Fristoe*, *supra*, 35 Cal.2d at p. 9.)

Finally, in their answering brief, the Romeros argue that the trial court's judgment recognizing an exclusive implied easement violates the Due Process and Takings Clauses of the Fifth Amendment. The Romeros did not raise this issue below and therefore have forfeited the objection. (Cal. Rules of Court, rule 8.500(c)(1); see, e.g., *Lewis v. Superior Court* (2017) 3 Cal.5th 561, 578.) But the argument is without merit in any event. The trial court's implied easement finding did not result in the *creation* of any new property rights; it instead clarified the respective rights of the neighbors as determined by the intentions of the parties at the time the two adjacent parcels were severed and sold to third parties. (See § 1104 [providing that the implied easement passes at the time of the transfer that divides the grantor's estate].) In other words, the trial court's finding means the Romeros purchased the 651 Property subject to the implied easement; their bundle of property rights never included the right to make practical use of the easement's surface area. This is not a taking. (*Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection* (2010) 560 U.S. 702, 715 (plur. opn. of Scalia, J.); *id.* at p. 727 ["And insofar as courts merely clarify and elaborate property

entitlements that were previously unclear, they cannot be said to have taken an established property right."].)

Our conclusion does not end the proceedings in this case. As noted, the Romeros contend that even if the law permits exclusive easements by implication, substantial evidence does not support the trial court's conclusion that an implied easement exists in this case. Based on its conclusions on the exclusivity issue, the Court of Appeal declined to evaluate the evidentiary support for the trial court's finding. We now remand for the Court of Appeal to consider the question.

To the extent the Romeros challenge the evidentiary showing of intent to create an easement across their property, the issue for the court to consider is whether the evidence shows that the parties clearly intended for the preexisting use of the quasi-servient tenement to continue after the separation of title. Remarking on this issue, the Court of Appeal suggested, without formally deciding, that this question may be answered by evidence indicating that "the original grantor Edwin Cutler's intent was . . . to effectuate a variance/lot line adjustment between the 643 and 651 properties." (*Romero, supra*, 78 Cal.App.5th at p. 354.) We note, however, that considered in the abstract, evidence that a party intended to effectuate a variance does not eliminate the possibility that the parties also intended for the preexisting use of the quasi-servient tenement to continue after the separation of title. We express no view on the issue as it arises in this case, nor do we express any view on the weight or significance to be given to the evidence of the uncompleted

lot line adjustment among the other relevant facts presented here. The matter is for the Court of Appeal to resolve in the first instance.

III.

We reverse the judgment of the Court of Appeal as to the cause of action for the implied easement and remand for further proceedings consistent with this opinion.

KRUGER, J.

We Concur:
GUERRERO, C. J.
CORRIGAN, J.
LIU, J.
GROBAN, J.
JENKINS, J.
EVANS, J.

See next page for addresses and telephone numbers for counsel who argued in Supreme Court.

Name of Opinion Romero v. Shih

Procedural Posture (see XX below)
Original Appeal
Original Proceeding
Review Granted (published) XX 78 Cal.App.5th 326
Review Granted (unpublished)
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Judge: Curtis A. Kin

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CERTIFIED FOR PUBLICATION

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

TATANA SPICAKOVA ROMERO et al., Plaintiffs, Cross-defendants and Appellants, v. LI-CHUAN SHIH et al., Defendants, Cross-complainants and Respondents; U.S. BANK NATIONAL ASSOCIATION, Cross-defendant and Respondent.	B310069 (Los Angeles County Super. Ct. No. EC064933)

APPEAL from a judgment of the Superior Court of Los Angeles County, Curtis A. Kin, Judge. Affirmed in part, and reversed in part.

McCormick, Barstow, Sheppard, Wayte & Carruth and Scott M. Reddie, for Plaintiffs, Cross-defendants and Appellants.

Songstad Randall Coffee & Humphrey, Janet E. Humphrey and Elyn C. Holt for Defendants, Cross-complainants and Respondents.

No appearance by Cross-defendant and Respondent.

After a bench trial, the trial court resolved a property line dispute between two neighbors by creating an easement in favor of respondents, the encroaching property owners. It granted respondents an exclusive implied easement and, alternatively, an equitable easement over the entire 1,296-square-foot encroachment. Appellants appeal the judgment.

We reverse the judgment on the cause of action for implied easement, and affirm the judgment on the cause of action for equitable easement.

FACTUAL AND PROCEDURAL BACKGROUND

A. *The Two Properties at Issue*

The two neighboring properties at issue are located next door to each other at 643 West Algeria Avenue (643 property) and 651 West Algeria Avenue (651 property) in Sierra Madre, California.

Tatana and Cesar Romero (appellants) own 651 property. Li-Chuan Shih and Tun-Jen Ko (respondents) own 643 property. At times we refer to the 651 address as appellants' 651 property and the 643 address as respondents' 643 property.

B. *Prior Owners' Application for a Lot Line Adjustment*

In 1941, Edwin and Ann Cutler (the Cutlers) purchased both properties. At the time of purchase, the 643 property was improved with a home, while 651 property was a vacant lot. The Cutlers resided in the house located at the 643 address with their son Bevon.[1]

More than 40 years later, on February 4, 1985, Edwin submitted to the Planning Commission of the City of Sierra Madre (the City) an application for a variance, seeking a property lot line adjustment. The lot line adjustment would have increased the width of respondents' 643 property from 50 to 58 feet, and reduced the width of appellants' 651 property (the vacant lot) from 63 to 55 feet. The application asked, "How are other owners able to use their property that cannot be done on this lot at present?"—to which Edwin provided, "Driveway and fence line."

On February 21, 1985, the City's Planning Department recommended approval of the variance as requested. The minutes from the Planning Commission's meeting held that day provide: "Mr. Cutler told the Commission that the driveway is extremely narrow and he intended at the time of purchase to divide the property and adjust the width of the driveway." The minutes further provide: "In order to adjust the boundary line, Mr. Cutler will need an engineer-surveyed parcel map and must meet county regulations." Finally,

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[1] When referring to Edwin, Ann, or Bevon Cutler individually, we use their first names to avoid confusion.

the minutes note Edwin's application is "[a]pproved; subject to city engineer review of parcel map and boundary line adjustment." (Some capitalization omitted.)

Edwin thereafter retained the services of registered civil engineer John B. Abell (Abell) of John B. Abell, Inc., who prepared a survey and new legal description for the two properties, dated May 8, 1985.

The new legal description for respondents' 643 property, post lot line adjustment, included additional language: "The west 50 feet of Lot 15 of Wheeler Heights, in the City of Sierra Madre, County of Los Angeles, State of California, as per Map recorded in Book 8, page 5 of Maps, in the office of the county recorder of said County. [¶] *Together with the easterly 8.00 feet of Lot 'B' of Gurhardy Heights, as per Map recorded in Book 13, page 188 of Maps, in the office of the county recorder of said County, lying south of the easterly prolongation of the north line of Lot 12 of said tract.*" (Italics added; boldface and some capitalization omitted.)

Similarly, the legal description for appellants' 651 property, post lot line adjustment, contained additional language: "The east 35.2 feet of Lot 12 of Gurhardy Heights, in the City of Sierra Madre, as per Map recorded in Book 13, page 188 of Maps, in the office of the county recorder of said County, and all that portion of Lot 'B' of said tract lying south of the easterly prolongation of the north line of said Lot 12. [¶] *Except therefrom the easterly 8.00 feet, (measured at right angles to*

the easterly line), of said Lot 'B.'" (Italics added; boldface and some capitalization omitted.)

The problem at the root of the parties' dispute is that there is no evidence the City ever reviewed or approved the survey and new legal description. A certificate of compliance was never executed by the City. Similarly, there is no evidence the lot line adjustment was ever recorded. But the Cutlers later acted as if the new legal description was operative.

C. *Prior Owners' Improvements on 651 Property*

Later that year, in 1985, the Cutlers' son Bevon partnered with David Shewmake (Shewmake) to build a house on the vacant lot (appellants' 651 property) and sell it for profit. During construction of the house, Bevon and Shewmake built a six-foot-tall block wall between the two properties, along the new legal boundary line surveyed and described by Abell, but never certified by the City.

In May 1986, a Notice of Completion was issued and recorded for construction of the house on appellants' 651 property. The Notice stated a legal description of 651 property identical to the original legal description for the 63-foot-wide lot and not the reduced 55-foot-wide lot proposed in Edwin's application for variance. The legal description specified in the Notice did not include the additional language post lot line adjustment in the legal description/survey prepared by Abell: "*Except therefrom the easterly 8.00 feet, (measured at right angles to the easterly line), of said Lot 'B.'*"

(Italics added, boldface and some capitalization omitted.)

D. *Transfers of Title from 1986 until 2014*

On May 9, 1986, the Cutlers recorded a grant deed transferring title to appellants' 651 property to Bevon and Shewmake, each receiving an undivided ½ interest as tenants in common. The legal description provided in the grant deed did not contain the additional language per Abell's legal description *after* the tentatively approved lot line adjustment. The legal description specified in the grant deed was again identical to the original legal description for the 63-foot-wide lot and not the reduced 55-foot-lot Edwin requested in his variance application.[2]

That same date, on May 9, 1986, Bevon and Shewmake executed a grant deed transferring title to 651 property to Manfred and Elizabeth Leong (Leongs). The legal description on the grant deed again did not contain the additional language reflecting a lot line adjustment.

Twenty years later, on January 20, 2006, a grant deed was recorded transferring the 651 property from the Leongs to Dawn Hicks. The legal description in the

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[2] After conveying their interest in 651 property to Bevon and Shewmake in 1986, the Cutlers executed a series of wild deeds in 1989, 1992, and 1998 as to the "easterly 8.00 feet of Lot 'B'." These wild deeds were ineffective and not within the chain of title as the Cutlers no longer owned the property when they executed the deeds.

grant deed for the original 63-foot-wide larger lot was used again.

On April 9, 2014, a grant deed with the original lot dimensions was recorded transferring title of the 651 property to appellants.

Before closing escrow on the 651 property, appellants executed the California Residential Purchase Agreement, which includes the following provisions. "Buyer acknowledges that the square footage of the Property has not been measured by Seller . . . (including the square footage of the lot and home) and the square footage quoted on any marketing tools . . . is deemed approximate and not guaranteed. . . . Buyer is buying the Property AS IS, . . . WITH ALL FAULTS AND LIMITATIONS and Buyer acknowledges Buyer's responsibility to perform all due diligence and investigation regarding Buyer's acquisition of the Property, including the measurement or confirmation of the square footage of the Property."

On July 1, 2014, a grant deed was recorded transferring title to the 643 property to respondents Tun-Jen Ko and Li-Chuan Shih. The legal description in the grant deed did not contain the additional language increasing their square footage as reflected in Edwin's lot line adjustment application.

The Seller Property Questionnaire—received, initialed, and signed by respondents on June 24, 2014—provided there are no "[s]urveys, easements, encroachments or boundary disputes" regarding 643 property. The Buyer's Inspection Advisory initialed and signed

by respondents on May 20, 2014 provided: "The physical condition of the land and improvements being purchased is not guaranteed by either Seller or Brokers. For this reason, you should conduct thorough investigations of the Property personally and with professionals who should provide written reports of their investigations." The Buyer's Inspection Advisory further provides: "YOU ARE ADVISED TO CONDUCT INVESTIGATIONS OF THE ENTIRE PROPERTY, INCLUDING BUT NOT LIMITED TO . . . Square footage, room dimensions, lot size, age of improvements and boundaries. . . . Fences, hedges, walls, retaining walls and other natural or constructed barriers or markers do not necessarily identify true Property boundaries. (Professionals such as appraisers, architects, surveyors and civil engineers are best suited to determine square footage, dimensions and boundaries of the Property.)" (Boldface omitted.)

E. *Appellants' Civil Complaint*

On February 10, 2016, appellants initiated a civil action against respondents. The operative third amended complaint, filed on May 22, 2019, alleged causes of action for wrongful occupation of real property, quiet title, trespass, private nuisance, wrongful disparagement of title, and permanent injunction.

The complaint alleged the following: "One of the main reasons [appellants] purchased [the 651] property was because it was advertised to have an approximately 10,000 square foot lot." In June 2015,

appellants retained licensed land surveyor James Kevorkian (Kevorkian) to prepare a survey of the boundaries of their property. Appellants were then made aware that respondents were "encroaching" onto their property. The total area encroached upon is a strip of land measuring approximately 8.25 feet by 157.14 feet, totaling 1,296 square feet, "or approximately 13% of [appellants'] total land area which they legally own and on which they have paid and continue to pay property taxes." The encroaching area include the block wall between the two properties, respondents' planters near the front sidewalk, and a portion of respondents' driveway parallel to the misplaced wall. Respondents' purchase of the neighboring 643 property did not include any easement, as "the Seller's Transfer Disclosure Statement and other sale documents . . . did not disclose any encroachments or easements." In July 2015, appellants asked respondents to remove the encroachments and "share in the cost of building a new fence on the property line" but respondents "refused to do so."

Appellants argued respondents' encroachments prevent them from entering or using approximately 1,296 square feet of their land; this "continuing trespass" continues to result in damage "on a daily basis" depriving appellants of their "right to exclusive possession and peaceful enjoyment" of their property. Respondents have "no right, title or interest" in or to appellants' property that "would lawfully allow them . . . to enter upon and use any portion of" appellants' property. Appellants believed they "are entitled to a

permanent injunction" requiring respondents to remove all encroachments. As a result of respondents' actions, appellants have suffered and continue to suffer general, compensatory, and consequential damages in an amount no less than $300,000.

F. *Respondents' Cross-Complaint*

On May 5, 2016, respondents filed a cross-complaint against appellants for implied easement, equitable easement, quiet title, and declaratory relief.[3]

The cross-complaint alleged appellants' and respondents' neighboring properties "were in the past owned by the same owner(s)" who "installed pavement and built a wall, planters and other improvements on the properties, which currently exist on the properties." The prior "owner(s) made a variance request with the City of Sierra Madre to create two parcels and widen the driveway for [respondents' property]." The improvements "have existed since 1985, and [respondents] and their predecessors in interest have used the [i]mprovements without complaint since at least that time." Appellants "threaten to remove the [i]mprovements and build a new fence on the property line . . . which would impact [respondents'] use and enjoyment of [their property]." Respondents "will suffer irreparable harm if they are not granted an easement" over the improvements located on appellants' property

[3] Respondents also named appellants' lender, U.S. Bank National Association, as a cross-defendant so it would be bound by any judgment awarding an easement.

"because the value of [respondents' property] would be significantly diminished and the driveway . . . would not be wide enough to access [respondents' property]." Respondents argued this created an equitable easement over appellants' property in the area of the improvements.

Respondents also argued the "acts of the prior owner[s]" of the properties "created an implied easement," referring to the variance request, the separation of title to the properties, the "obvious and permanent use of the [i]mprovements for the benefit of" respondents' property, and "[r]easonable necessity of the use giving rise to the easement."

Respondents sought "to quiet title to an equitable easement and/or an implied easement" over appellants' land; they requested the easement run with the land and be binding on all successors-in-interest. They requested "a judicial determination of their rights and remedies . . . relating to the parties' claims." In addition, respondents requested appellants pay for respondents' "out-of-pocket expenses and other administrative, investigative, and ancillary expenses incurred."

G. *Trial*

A five-day bench trial took place on March 9, 10, 11, 12, 2020 and June 30, 2020.

An important exchange took place between the parties and the court on the second day of trial. The court stated: "It seems to me that everybody is in

agreement that if the easement were either—if there were an easement in favor of the 643 property, that is essentially for exclusive use. [¶] . . . [¶] . . . I mean, it would be, with regard to an easement, an exclusive use. It's not like the Romeros are going to every so often hop over the fence and walk along there because they own the property." Counsel for respondents responded: "I agree with that statement, your honor." The court further stated, "I'm not really thinking you are getting much pushback on the factual matter that if an easement were to arise by implication, generally speaking the use of that easement by the property owners of 643 have it for largely exclusive purposes."

The evidence at trial established no real dispute about the basic historical facts; the evidence fell into two categories. Besides establishing the City's zoning and variance requirements and the extent of the encroachment, the testimony focused on the effect of the encroachment on the parties. This was developed through the testimony of appellant and several expert witnesses.

1. Zoning and Variance Requirements and Extent of Encroachment

Vincent Gonzalez (Gonzalez), the Director of Planning and Community Preservation for the City, described the procedure for obtaining a lot line variance in 1985: "[T]he matter would go before the Planning Commission. They would make the decision to deny or recommend. Once that is done, then the applicant

submits for the lot line adjustment or subdivision. [¶] And the documents would include a recorded survey and, also, a legal description of the intended division of lots at the conclusion of the subdivision, and, also, a certificate of compliance would be required to be completed and signed by the property owner, the Director of Public Works, the Director of Planning and Community Preservation, and the city engineer." "Usually what occurs is the property owner or city engineer, the public works director, and, in some cases, the planning director, will sign a certificate of compliance stating that everything—the legal description has been prepared, the plat map has been prepared, and has been reviewed and evaluated by the city [engineer], confirmed all those findings. [¶] The certificate of compliance is signed [and] given to the property owner for recordation of the county."

Gonzalez confirmed he found in the City's files a copy of Edwin's 1985 application for a variance request. He confirmed the application requested a lot line adjustment. He confirmed the Planning Commission recommended approval of the variance, subject to conditions. "[B]efore the [variance], the granting of the lot line adjustment is the first step in the process, and then the property owner subsequently obtains a survey, a record of survey, legal description. And that would ultimately be reviewed by the city engineer." The property owner "would need to obtain [a civil] engineer to survey the parcel." The property owner "would have submitted [the record of survey and legal description], after it was prepared by the civil engineer,

to the public works department to the city engineer for review."

Gonzalez did not know "whether the city engineer ever reviewed . . . the site plan and the legal description" prepared by Abell. He stated: "It appears that there was a survey completed. There is also that a legal description was prepared. But I see no evidence that the certificate of compliance was ever signed and recorded." He confirmed no lot line adjustment was recorded; however, he also confirmed he did not see anything in the City's files indicating Edwin had withdrawn his variance application.

In 2014, the City required new construction to have a driveway width of 10 feet; this remains the driveway width requirement for the City. The City "consider[s] a 10-foot-wide driveway reasonable."

In terms of parking space requirements, this residential zone requires "[t]wo spaces per dwelling unit in a garage or carport." Respondents' 643 property, thus, must have two parking spaces in a garage or carport. In terms of parking, James Guerra, a building inspector for Building and Safety for the City for approximately 22 years, confirmed that the City's overnight parking ordinance allows residents to obtain overnight parking permits for the annual fee of $97.

Yuchi David Tsai (Tsai) was respondents' real estate agent in connection with their purchase and management of 643 property. He showed the property to respondent Ms. Shih sometime in May 2014. He believed the property line was where the "block wall

[was] up." He also believed the front planter box was part of 643 property because "the planter box material [was] the same thing, consistent throughout the 643 [property]." Tsai recalled explaining the seller's purchase agreement and real estate transfer disclosure agreement to respondents, and "after [he] explained, Ms. Shih sign[ed] the agreement." Tsai confirmed reviewing the preliminary title report with respondents; he also confirmed the preliminary title report specified 643 property lot was 50 (not 58) feet wide. He was not aware of any encroachments or easements affecting either property at the time respondents finalized the transaction.

Tsai discovered the property line issue when appellants came to his office in 2015 and informed him of the survey findings. The next day, Tsai went to the City and "learned the same owner owned the other side, and then there was a subdivider to build the other property." He saw the Planning Commission's meeting notes and recalled "it described the variance was approved" and thus, he concluded "the block [wall] was built on the new property line." When he informed respondents of the circumstances, they were "surprised."

David Knell (Knell), a licensed land surveyor, researched the L.A. County Surveyor's website, viewed the survey history and historical maps, reviewed Kevorkian's record survey of 651 property, and conducted a field survey of the two properties. He concluded the following improvements on respondents' 643 property encroach onto appellants' 651 property: portion of the driveway, the planter, and the air

conditioner unit attached to the side of the garage located at the back end of the driveway behind the house. The width of the encroachment totals 8.7 feet, and the total square footage of the encroachment is 1,296. The distance from the side of the garage on 643 property to the true property line is 0.8 feet, i.e., about 10 inches. The air conditioner "sticks out from" the side of the garage "into the 651 property, and that dimension is 1.2 feet." Should the property line reflect what is in the deeds, the width of the driveway on respondents' 643 property at its narrowest point is 7.2 feet.

Knell confirmed that the survey map prepared for Edwin by Abell did not have Abell's stamp or seal on it. Every parcel map that Knell has ever prepared and recorded in any county recorder's office in California "had to have the stamp or seal for the licensed surveyor or the civil engineer who is taking responsibility for that document," as that is "clearly stated in the Subdivision Map Act." A completed lot line adjustment requires a recorded parcel map/deed, and recordation requires the stamp or seal on the map/deed. Knell has never seen a parcel map or subdivision map without a stamp or seal for the licensed civil engineer or land surveyor who had signed it. He referred to Abell's survey map as a "draft," that is, "it just was not a finished product, so I think 'draft' is an appropriate word."

Catherine Connen (Connen), the president and principal civil engineer at John B. Abell, Inc., is a registered civil engineer and has worked with her father, John B. Abell, since 1982. Her father's business maintained accounts receivable records in the ordinary

course of business. It was the custom and practice of the company in 1985 to maintain records reflecting amounts billed, amounts owed, and amounts paid by customers. Payments received from customers were recorded in the accounts receivable ledger.

Connen brought with her to court "the actual original ledgers for the period of 1985." A page from the ledger provided the job number ("2-1452"), the client ("Ed Cutler"), the site address or street ("Alegria Ave"), the amount billed ("$165"), and the date billed ("6-4-85"). It also provided space to specify the amount paid by the client and the date paid, but those areas were left blank next to Cutler's name, possibly meaning the amount owed was not paid.

2. Effect of the Encroachment

Then a battle of expert witnesses ensued.

Steven McCormick (McCormick), a licensed commercial general contractor, analyzed the feasibility of the property line easement being vacated and its effects "on the viability of the home."

The City had enacted a 10-foot minimum driveway width for properties located in R1 zones in the City. The 643 property is located in an R1 zone. The City also had setback requirements for properties in R1 zones: "The front-yard setback is 25 feet, the side-yard setbacks are 5 feet, and the rear-yard setback is 15 feet." Additionally, zoning ordinances in R1 zones in the City required two covered parking spaces.

McCormick gave his opinion on how respondents' 643 property would be impacted if it did not have use of the entire encroachment area: "Well, obviously, the width of the driveway would be reduced. The section going along the length of the home would be down to 7.2 feet," which did not comply with the City's current zoning codes. If the driveway width was 7.2 feet, "[y]ou would be very limited on the cars that can get through there. It would really boil down to subcompacts and . . . a certain percentage of compact cars. But midsize and full size cars either [w]on't fit or would be extremely tight getting through there." He determined the foregoing by looking up car dimensions on the website automobiledimension.com. He concluded that a Toyota Prius would fit through a 7.2-feet-wide driveway, a Tesla Model S (the smaller Tesla) would just barely fit with the side-mirrors retracted, but the Tesla Model X (the largest Tesla) would not fit. Additionally, he believed one would be unable to open the doors and exit a car in a 7.2-feet-wide driveway. "[E]ven with a Toyota Prius, you could not get out of the car between the house and the wall, but . . . once you get back to the garage, there is room back there."

He opined on alternative ways to widen the driveway for respondents' 643 property in the event the block wall was moved to reflect actual property lines. He came "up with the possibility of tearing off the side of the house and moving the footings and [to] reframe the house back about 4 feet from its existing position." He believed respondents "certainly would be able to widen the driveway, but it creates a couple of problems.

The first problem, besides cost, is the fact" that moving the wall over would cause the secondary bedroom to "shrink down to the point where it violated the L.A. County habitability requirements." To constitute a bedroom, the room must be at least 100 square feet, but moving the wall over would cause the secondary bedroom to be less than 100 square feet. Per McCormick, the total cost of the demolition and rebuild was $99,120.27.

McCormick also offered his opinion on how the garage on 643 property would be impacted. "[I]f the easement area was removed and a new wall was put up along . . . the property line that's in contention here, essentially, you would have just a few inches between that fence and the left-side exterior wall of . . . the garage." Thus, "two things would occur. One, there is an area for parking. [There] was a camper trailer unit there before. You would lose that [parking area]." Two, "[t]here is an air-conditioning unit that's been mounted on the side of the [garage] wall, which you can see on the left-hand side, protrudes into that space. So the fact that there is only a few inches, you cannot repaint or maintain that exterior wall." If the block wall was moved to the property line, the distance between the block wall and the garage wall would not comply with the City's five-foot setback requirements.

He performed a cost estimate to move the garage over to accommodate the five-foot setback requirement of the City and reached the total cost of $73,343. The garage would need to move "somewhere between 5 and 6 feet" to comply with the five-foot setback

requirement. The effect of moving or shrinking the garage by five or six feet would result in the garage "being about like 12 to 14 feet wide," which would be enough to comfortably fit one vehicle, but not two. He determined another alternative would be to "do a carport in front of the garage, but you end up essentially parking tandem. So one [parking spot] would be inside the garage and one [parking spot] would be outside in the carport." Finally, he provided a cost estimate of $2500 for relocating the air-conditioning unit from the side of the garage.

Next, licensed professional land surveyor Kevorkian determined the width of the encroachment area as 8.25 feet and the length as 157.13 feet from front to rear. The total square footage of the encroachment totaled 1,296.32 square feet.

He confirmed the land survey he prepared for appellants had his stamp on it. When asked why he put his stamp on it, he answered, "Because it's legal. It makes it legal." ~(RT 401; 4AA 520)~

Steve Helfrich (Helfrich), a licensed general contractor, civil engineer, and geotechnical engineer, also testified about the width of the driveway. The driveway width at its narrowest is 7.2 feet for a length of about 27.5 feet—where the driveway borders respondents' residence. The driveway gets wider as it approaches the back garage and is wider at the sidewalk near the planter box.

Helfrich opined that a 2018 Toyota Prius (with a width of 69.3 inches) would be able to make a

multipoint turn in the 20-foot-by-20-foot area in front of the garage and then go back down to the street via the driveway. If the property line were moved to reflect true lot lines, "the width of the driveway is 86 inches, and the width of the Prius without the mirrors is 69 inches. So you have—it depends on how wide the mirrors are, but I think that there's more than a few inches on each side." Besides the 20-by-20 area where a car may maneuver around, the only other way to get in and out of the garage would be to back out of the driveway. When asked why he chose only to concentrate on a 2018 Toyota Prius in his analysis, Helfrich answered: "That was, I felt, representative of a compact car."

Gidon Vardi (Vardi), a certified building inspector and construction and safety consultant with a general contractor's license, reviewed McCormick's cost estimate report. which essentially "calls for complete demolition and rebuilding of [respondents'] property and dwelling" as well as "the garage and adjacent structure." Vardi believed McCormick's estimates were simply "excessive and unreasonable."

Daniel Poyourow (Poyourow), a licensed real estate appraiser and real estate broker, had prepared diminution in value appraisals, including in the Sierra Madre area. A diminution in value appraisal is based upon the before and after condition of a property.

Poyourow analyzed and valued appellants' 651 property "before, and then after, [he] considered the loss in land use, and valued the land separately. [He] [a]llocated a certain portion of the land to the

easement area, and . . . diminished the value based upon a loss of certain rights and uses." He collected comparable sales data on land and improved properties, prepared an adjustment grid, analyzed the data, and drew the following conclusions.

Using the sales comparison approach, he set the value of appellants' 651 property, including the area of the encroachment, at $1.310 million. He placed the land value of the property at $710,000. He calculated the diminution in value from losing the encroachment area measured at 1,224 square feet as $68,264. Relying on Kevorkian's square footage of 1,296 square feet, the diminution in value increased to $71,000.

Poyourow "examined what rights or uses would remain to [appellants'] 651 property." He opined some uses do remain, even though the property is used primarily by respondents. He set the diminution in value as a result of the encroachment at $67,000; thus, the net value of appellants' 651 property, after subtracting out the diminution in value, was $1.243 million. He added that appellants' 651 property could support another 300 square feet of structure which is "really important and a big value to the 651 property."

As for respondents' 643 property—with a lot size of 7,853 square feet without the encroachment and 9,072 square feet with the encroachment—Poyourow used the sales comparison approach and set the value of the property with the encroaching area at $915,000. He calculated the value of the encroachment area itself at $67,000. He valued respondents' property without

the encroachment area at $782,000, with a total diminution of $133,000 (or $137,000 for 1,296 square feet).

Poyourow looked at the hardship or burdens that respondents' 643 property would experience as a result of losing the encroachment. "[T]hey would lose some parking because the driveway would become so narrow." "They would also lose that open third parking space." He opined the cost to replace a second and third open parking space would be $19,000 each; he opined loss of the garage parking resulted in a $15,000 reduction in value for the two spaces, totaling $53,000 for loss of parking. He conceded a resident can park on the street overnight with an annual permit costing less than $200. He also conceded the loss of the planter box "is primarily an aesthetic issue, just the planter boxes themselves. [He was] more concerned with the driveway issues." Finally, he estimated $2,500 as the cost of relocating the air conditioning unit on the side of the garage.

In his appraisal, Poyourow stated the subject encroachment area is "effectively exclusive." "The surface area is being exclusively used [by respondents] right now." The potential for any remaining use by appellants "is remote." He stated that the prospect of appellants installing new pipes underneath the encroachment area "would be remote, but it is possible to do."

David Harding (Harding), a licensed real estate appraiser in central California, also calculated the diminution in value for each property. Using the sales

comparison approach, he appraised appellants' 651 property including the 1,296 square foot encroaching area at $1.375 million. Without the disputed area, his appraised value was $1,264,840. He attributed $110,160 as the value of the 1,296-square-foot encroachment area.

Harding took his diminution in value calculation one step further by analyzing the "diminution of value to the property over and above the value of the land." He calculated a diminution of value for appellants' property of 15 percent, which amounted to an even lower total appraised value of $1.075 million. And the "total difference between the value in the before condition and the value in the after condition" is $300,000. When asked how he reached the figure of 15 percent, he stated: "This is too convoluted. I come across this type of thing a lot in my diminution of value analysis appraisals. They're complicated issues, and admittedly there's unfortunately no way to support them accurately with market data. [¶] So I thought about it a lot, and I came to—you know about 10 percent, that seems a little low. I think that's more than that. 20 percent seemed high. 15 percent is in the middle of that. It seemed like a comfortable figure. I calculated what that equated to in terms of a dollar value."

Finally, appellants Cesar and Tatana Romero testified about their damages. The advertised lot size for the 651 property was very close to 10,000 square feet. The lot size was appellants' main criteria and they would not have purchased the 651 property if it had been advertised as an 8,500-square-foot lot.

The fact that there was an encroachment from the adjacent property was never disclosed to appellants when they purchased the 651 property.

Before purchasing the property, Cesar noted the house was "in bad condition" so his inspection of the property and "main focus was on the house"; he did not look at the block wall or the neighboring property. A year after purchasing 651 property, Cesar "was doing some work in the front to improve [his] yard, and [had] to do some measurements to order some building materials." "When [he took] the measurements, it didn't seem like the right width of the yard." Appellants hired James Kevorkian who prepared a survey and informed them of the encroachment. Appellants wanted to resolve the encroachment issue without court intervention. They contacted Tsai about the issue, but Tsai was "dismissive." The next day, Tsai informed appellants of his findings from the Planning Commission meetings and the lot line adjustment request.

Since appellants' purchase of 651 property, they have paid property taxes on the property, including the nearly 1,300-square-foot disputed land. Since their purchase of the property, they have not been able to use that 1,300 square feet for any purpose; they are, in fact, physically prevented from using or accessing it because of the block wall. As things stand now, appellants have conceived no plans for use of the disputed area. However, they have ideas for use of the disputed land should they get it back. Cesar testified, "[W]e would like to be able to have more area there so that we can increase our privacy. We would like to plant . . . in the

front. . . . My wife wants to plant an orchard. I would like to place a pool in the back." Appellants have "been in this lawsuit for—going on almost five years now and spent maybe close to $300,000 in order to actually be able to assert the rights of something that I've actually bought. [¶] I mean, I bought a lot of almost 10,000 square foot, and it was important to us to have a large lot, and it's still important to us. Because it's our land, and I believe in property rights."

Tatana echoed her husband's testimony. She testified, "13 percent of [her] property" is being exclusively used by the occupants of 643 property. "I believe in our constitutionally protected property rights I have bought, paid for, and legally own the approximate 10,000-square-foot lot." As it currently stands, she is "precluded" from utilizing the 1,296 square feet in any way. Yet, she and her husband would be exposed to the potential of unlimited and perpetual liability for "any injuries that might happen on an area over which I have no control." She gave an example of how there are a lot of young children living on West Algeria Avenue between "the ages from zero, newborns, to 5, 6, 7 years old, and they play a lot on West [Algeria] Avenue. They are running around, learning how to ride a bicycle, tricycle. They are using the sidewalk quite a bit." "[W]hat could happen is that the young child could trip over a loose brick or something that the tenants of the 643 property would do, and if that child happens to trip and suffer, God forbid, a catastrophic brain injury or paralysis, I will be exclusively personally liable for being responsible for those injuries because I'm the legal owner

of that particular strip of land, and that is a huge problem."

Appellants had title insurance with First American Title Insurance Company. After respondents filed their cross-complaint, First American Title Insurance Company paid appellants $95,000 for their loss of use of the encroachment area.

H. *Statement of Decision*

On August 24, 2020, the trial court issued its proposed statement of decision. Respondents requested one clarification, which the court adopted. Appellants raised 53 objections to the proposed statement of decision and requested additional and alternative findings. We note appellants' Objection No. 22, where they objected to trial court's granting of the easement as it is "essentially permanent" and "not narrowly drawn to promote justice."

On September 28, 2020, the trial court filed its statement of decision and concluded respondents "possess an implied easement over the eight-foot strip of land." The court further concluded that if there were no such implied easement, an equitable easement should arise, which would entitle appellants to compensation of $69,000.

The court's lengthy statement of decision provided, in relevant part:

Implied Easement

The court found "all the conditions exist for an implied easement in favor of the 643 Property over the eight-foot strip of land." The easement "shall run with the land, and, consistent with the original grantor and grantee's intent in 1986, shall terminate if the 643 Property ceases its continued use of the easement for a driveway, planter, and wall/fence."

The court also found "the continued encroachment onto the disputed strip of land is reasonably necessary" and referred to the fact that the 643 property's driveway would measure 7.2 feet at its narrowest point, which fell several feet short of the City's minimum driveway width requirement of 10 feet.

The court found the implied easement "is not necessarily 'exclusive,' as various subsurface uses (e.g., running underground pipes or cables) are available to the 651 Property."

Equitable Easement

The court found "all three factors for the creation of an equitable easement are present" and exercised its discretion to impose a "judicially created, equitable easement over the strip of land . . . for the 643 Property to maintain a driveway, planter and wall/fence [that] should run with the land, but should terminate if the 643 Property were to cease its continued use of that land for a driveway, planter and wall/fence."

The court found respondents were "innocent parties with no knowledge of the encroachments and no basis to know of them." The court further found appellants "would not suffer any irreparable harm from such continued encroachment." While appellant Cesar Romero "testified generally that removal of such encroachments would afford him greater privacy and the ability to plant trees and/or build a pool in his backyard, there was no evidence at trial of any actual plans [appellants] had to increase privacy, landscape, or construct a pool that their lot in its current state would prevent or adversely affect in some substantial manner."

While appellants argued "the continued encroachment . . . burdens them because they continue to pay property taxes for land being used by another", there was "no evidence . . . concerning property taxes [appellants] actually pay for the 651 Property and what, if any, unfair tax burden [they] assume for the strip of land they cannot fully use." Regarding the "potential legal liability for the strip of land," the court believed "any such liability (or pecuniary damage flowing therefrom) is too speculative and uncertain to carry much weight." "Largely, it appears to the Court that any harm to [appellants] is emotional or psychological. . . . [W]hile the hardship to [appellants] may be felt substantially by them, it is greatly outweighed by the actual harm [respondents] would suffer absent an easement over the strip of land."

The court referred to McCormick's testimony about "the impracticality and great expense of alternatives

to the easement" and found there is no "viable, reasonable alternatives to an easement." The court "rejects the testimony of . . . Helfrich, who opined that the driveway on the 643 Property could continue to be used even if it were narrowed to the actual property line" as his opinion "was based solely on . . . one car—a 2018 Prius." The court also "found unhelpful the testimony of . . . Vardi" as he "did not meaningfully explain how he arrived at [construction and repair] costs." The court found Harding's testimony about the diminution in value to the properties "wholly unreliable and entirely unconvincing" as he "had never previously appraised any property in Sierra Madre" and had "only conducted two diminution in value appraisals involving encroachments ever." The court found Harding's testimony "either should have been excluded or stricken in its entirety for lack of foundation and reliability or should be disregarded and afforded no weight to the extent it was admissible."

The court considered the diminution in value to the respective properties. The court viewed Poyourow's testimony "the only competent evidence of such diminution in value." The court referred to Poyourow's conclusion that the "effect of an easement over the disputed area would be a diminution of value to the 651 Property of $67,000, or an additional $4,000 if using the slightly greater square footage calculation of [appellants'] survey for the area of encroachment" and $133,000 as the diminution in value to the 643 property without the easement. "[T]he balance of hardships greatly favors [respondents]."

The court found appellants entitled to compensation if subject to the equitable easement, and found "the best measure of damage . . . is the diminution in value to their property." The court credited Poyourow's calculations and split the $4,000 additional amount based on the square footage difference, and "conclude[d] that $69,000 would constitute just compensation to [appellants] for the creation of an equitable easement."

Remaining Claims

Having found an implied easement in favor of respondents' 643 property, the court found the easement dispositive of the remaining claims in the third amended complaint and the cross-complaint.

On October 26, 2020, the trial court filed its judgment and appellants timely appealed.

DISCUSSION

Appellants make three primary arguments on appeal. First, they argue the trial court's judgment "should be reversed because, as a matter of law, the court cannot create an exclusive implied easement." Second, appellants argue "[a]ssuming implied exclusive easements are permissible, the court erred in creating an implied easement." Appellants believe substantial evidence does not support the court's findings as to the elements for implied easement. Third, appellants contend the court abused its discretion and "erred in

creating an equitable easement" which "is not narrowly tailored to promote justice and is significantly greater in scope and duration than what is necessary to protect [respondents'] needs."

We address appellants' first two contentions in part B and their third contention in part C.

A. *Easements, Generally*

An easement is a "'restricted right to *specific, limited, definable* use or activity upon another's property, which right must be *less* than the right of ownership.'" (*Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702, first italics added (*Scruby*).) An easement gives a nonpossessory and restricted right to a specific use or activity upon another's property. (*McBride v. Smith* (2018) 18 Cal.App.5th 1160, 1174.) An easement "is not a type of ownership, but rather an 'incorporeal interest in land . . . "'which confers a right upon the owner thereof to *some* profit, benefit, dominion, or lawful use out of or over the *estate* of another.'"'" (*Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1032 (*Hansen*).) The key distinction between an ownership interest in land and an easement interest in land is that the former involves possession of land whereas the latter involves a limited use of land. (*Ibid*.)

Civil Code section 801 provides a list of 18 types of "land burdens, or servitudes upon land . . . as incidents or appurtenances . . . called easements" including, among other things, the right of pasture; the right

of fishing; the right of taking game; the right-of-way; the right of taking water, wood, minerals, and other things; and the right of using a wall as a party wall. (Civ. Code, § 801.)

"The general rule is clearly established that, despite the granting of an easement, the owner of the servient tenement may make any use of the land that does not interfere unreasonably with the easement." (*Pasadena v. California-Michigan etc. Co.* (1941) 17 Cal.2d 576, 579 (*Pasadena*).) The owner of the dominant tenement must use his/her easements and rights in such a way so as to impose as slight burden as possible on the servient tenement. (*Scruby, supra*, 37 Cal.App.4th at p. 702.)

B. *The Court Erred in Granting an Exclusive Implied Easement that Amounted to Fee Title.*

1. Standard of Review

The party claiming an implied easement has the burden of proving each element of the cause of action by a preponderance of the evidence, and the factual findings of the trial court are binding on the appellate court if supported by substantial evidence. (*Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406, 1419 (*Thorstrom*); *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 145; *Orr v. Kirk* (1950) 100 Cal.App.2d 678, 684 (*Orr*).) The court looks to all facts, the situation of the parties and the properties, and the circumstances surrounding the transaction to determine, as a question of fact, whether the parties intended to create the easement.

(*Tusher*, at pp. 144-145; *George v. Goshgarian* (1983) 139 Cal.App.3d 856, 861-863; *Piazza v. Schaefer* (1967) 255 Cal.App.2d 328, 332.)

2. Applicable Law

Under certain circumstances, the law implies that the parties intended to create or transfer an easement by a grant or reservation when there is no written document evidencing their intent and, in some cases, even when there is no oral agreement regarding the easement; thus, implied easements are "an exception to the general rule that interests in real property can only be created by an express writing or prescription." (*Kytasty v. Godwin* (1980) 102 Cal.App.3d 762, 768.)

Implied easements are not favored. (*Thorstrom, supra*, 196 Cal.App.4th at p. 1420; *Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 131 (*Horowitz*).) The factual circumstances that permit the creation of implied easements are fairly well established and the implication can only arise where certain facts are present. (*County of Los Angeles v. Bartlett* (1962) 203 Cal.App.2d 523, 529-5306; *Orr, supra*, 100 Cal.App.2d at p. 681; *Navarro v. Paulley* (1944) 66 Cal.App.2d 827, 829 (*Navarro*).) The courts jealously guard against any unreasonable or inequitable extensions of these rules beyond their original objectives. (6 Miller & Starr, Cal. Real Estate (4th ed. 2021) § 15:19.)

Civil Code section 1104 provides the circumstances under which the law implies the existence of an easement: "A transfer of real property passes all

easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed." (Civ. Code, § 1104.)

In contrast to a *non-exclusive* easement, wherein the servient owner (in this case, appellants) may continue to use the easement area so long as such use does not unreasonably interfere with the use by the dominant owner (here, respondents), an *exclusive* easement only permits the dominant owner to use the easement area. (*Scruby, supra*, 37 Cal.App.4th at pp. 702-703.) Granting an exclusive easement in effect strips the servient estate owner of the right to use the land for certain purposes, thus limiting the fee title; therefore, exclusive easements generally are not favored by the courts. Prior courts have referred to exclusive easements as "rare" (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 769, fn. 11 (*Hirshfield*)) and as "an unusual interest in land; it has been said to amount almost to a conveyance of the fee." (*Pasadena, supra*, 17 Cal.2d at p. 578.)

Until recently, exclusive easements were found principally in older utility easement cases. (See, e.g., *Salvaty v. Falcon Cable Television* (1985) 165 Cal.App.3d 798, 804.) However, more recent cases have upheld exclusive easements in situations where the express language of the granting instrument either uses the

phrase "exclusive easement" (*Gray v. McCormick* (2008) 167 Cal.App.4th 1019, 1025-1026 (*Gray*)) or the parties intend that the dominant owner's use necessarily must be exclusive (e.g., an easement " 'for parking and garage purposes' "). (*Blackmore v. Powell* (2007) 150 Cal.App.4th 1593, 1599-1600 (*Blackmore*).) Thus, so called "exclusive easements" are not prohibited under California law so long as the language of the creating instrument clearly expresses an intention that the use of the easement area shall be exclusive to the dominant owner. (*Gray*, at p. 1032.) In other words, an easement is nonexclusive unless it has been made exclusive by the express terms of the instrument creating it or the parties have evidenced their clear intent that it is exclusive. (*Pasadena, supra*, 17 Cal.2d at p. 578-579; *Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041, 1047 & fn. 4 (*Otay*); 6 Miller & Starr, Cal. Real Estate (4th ed. 2021) § 15:65.)

3. Analysis

We note this is a case of first impression as we have found no case that permits or prohibits *exclusive* implied easements. We have reviewed case precedent regarding exclusive easements generally, and note the following.

In most cases involving *prescriptive* easements, the courts have not allowed the easement owner exclusive use (equivalent to fee title) of the servient tenement. (See, e.g., *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1305-1307 (*Mehdizadeh*); *Silacci v.*

Abramson (1996) 45 Cal.App.4th 558, 562-564 (*Silacci*); *Hansen, supra*, 22 Cal.App.5th at pp. 1033-1035; *Raab v. Casper* (1975) 51 Cal.App.3d 866, 876-877.) "The notion of an exclusive prescriptive easement, which as a practical matter completely prohibits the true owner from using his land, *has no application to a simple backyard dispute*. . . . An easement, after all, is merely the right to cross the land of another . . . is not an ownership interest, and certainly does not amount to a fee simple estate." (*Silacci*, at p. 564, italics added; see *Pasadena, supra*, 17 Cal.2d at pp. 578-579.) Similarly, an adjoining property owner cannot obtain the equivalent of adverse possession (and exclusive use of neighboring property) by alleging the elements of a prescriptive easement. (*Hansen*, at p. 1033.) "Unsurprisingly, claimants have often tried to obtain the fruits of adverse possession under the guise of a prescriptive easement to avoid having to satisfy the tax element. [Citations.] That is, they seek judgments 'employing the nomenclature of easement but . . . creat[e] the practical equivalent of an estate.' [Citation.] Such judgments 'pervert[] the classical distinction in real property law between ownership and use.'" (*Ibid*.)

In *Kapner v. Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182, a survey showed that some of Kapner's improvements including portions of his driveway, gate, and perimeter fence encroached on another's parcel. (*Id*. at p. 1186.) The Court of Appeal affirmed that Kapner could not acquire an exclusive prescriptive easement over neighboring land by enclosing that land

with a fence. (*Id*. at pp. 1186-1187.) The court further found Kapner's use of the neighboring land was not in the nature of an easement; instead, the landowner had enclosed and possessed the land. (*Ibid*.) The landowner could not establish adverse possession because he had not satisfied the necessary requirement of paying taxes for the enclosed land. (*Id*. at p. 1187.) "[A]dverse possession may not masquerade as a prescriptive easement." (*Id*. at p. 1185.)

Mehdizadeh is similar to the facts of the case before us, as it also involved a dispute between neighbors after discovery that a fence built many years earlier was not located on the legal boundary between their properties. In *Mehdizadeh*, a prior owner of property A built a fence between property A and property B in 1967. (*Mehdizadeh, supra*, 46 Cal.App.4th at p. 1301.) The owner of property B, who purchased the property after the fence was built, paid half of the cost, even though the parties did not know whether the fence was located on the property line. (*Ibid*.) Property A was sold in 1985 to the current owners, who "knew from plot maps" that the fence was not on the property line. (*Ibid*.) After property B was sold to the current owners in 1990, the owner of property A obtained a survey that showed the fence was 10 feet within the property line of property A. He constructed a new fence on the surveyed boundary. (*Ibid*.) The 10-foot area between the properties was used by the owner of property B for vegetation, a sprinkler/irrigation system, and the owner's dog. (*Id*. at pp. 1301-1302.) The owner of property B

filed an action to establish a prescriptive easement over the 10-foot strip. (*Id*. at p. 1302.)

The Court of Appeal held that the owner of property B could not establish title by adverse possession to the disputed parcel because he had not paid the taxes for the parcel. (*Mehdizadeh, supra*, 46 Cal.App.4th at p. 1305.) He could not acquire an easement by prescription if the easement were to be exclusive and would grant rights tantamount to a fee title. (*Ibid* [the easement granted by the trial court "would divest [property A owner] of nearly all rights that owners customarily have in residential property. A fence will bar [their] access to the property, and they cannot build on, cultivate, or otherwise use it."].) The easement included a fence that barred the owner of property A from physical access and excluded his use of the property, except minimally for light and air. (*Id*. at p. 1308.) Owner of property B could not acquire a prescriptive easement which is substantially equivalent to a fee title, by satisfying the lesser requirements for prescription. "To affirm the creation of this novel 'fencing easement' would dispossess an unconsenting landowner of property while circumventing readily available, accurate legal descriptions." (*Ibid*.)

Prior decisions recognize two exceptions where exclusive prescriptive easements have been allowed. The first is an exception in cases involving utility services or important essential public health and safety purposes. (See *Otay, supra*, 1 Cal.App.4th at p. 1046.) However, at least one court has declined to follow *Otay*, holding that the exclusive easement found by the court

"was the practical equivalent of an estate and should only have been permitted upon satisfaction of the elements of adverse possession." (*Hansen, supra*, 22 Cal.App.5th at p. 1035.)

The second involves the de minimis rule. In some cases, courts have denied a mandatory injunction to compel the removal of an encroachment by an adjoining landowner if the encroachment comes within the de minimis rule. For instance, where the encroachment of the wall of a building on the adjoining property was from one-half to five-eighths of an inch, the court in *McKean v. Alliance Land Co.* (1927) 200 Cal. 396 (*McKean*), sustained a judgment denying a mandatory injunction and instead awarded damages of $10 where there was no direct evidence that the less-than-an-inch encroachment caused any actual damage to the plaintiff. (*Id*. at p. 399.) The court stated that where the injury was so slight as to bring it within the maxim "de minimis," a mandatory injunction should not be issued. (*Ibid*.)

We find the rationales for precluding exclusive prescriptive easements—based on the distinction between estates and easements—equally applicable to exclusive implied easements. Unless the language of the creating instrument expressly provides the intention that the easement be "exclusive" to the dominant owner (see *Gray, supra*, 167 Cal.App.4th at p. 1021 ["[t]he express easement in question clearly provides that the easement is for the exclusive use of the owners of the dominant tenement"]), we are hard-pressed to infer the granting of an exclusive implied easement

which precludes a property owner from any practical use and is nearly the equivalent of a fee interest. Based on the foregoing, we hold, in the first instance, that an exclusive implied easement which, for all practical purposes, amounts to fee title cannot be justified or granted unless: 1) the encroachment is "de minimis" (see *McKean, supra*, 200 Cal. at p. 399, 253 P. 134; see *Rothaermel v. Amerige* (1921) 55 Cal.App. 273, 275-276); or 2) the easement is necessary to protect the health or safety of the public or for essential utility purposes. (*Mehdizadeh, supra*, 46 Cal.App.4th at p. 1306).

Here, there was no express grant of an exclusive easement. And the encroachment, totaling 1,296 square feet of appellants' 9,815-square-foot property, cannot reasonably be qualified as de minimis as it amounts to approximately 13.2 percent of appellants' property. Additionally, nothing in the record suggests the encroachment is necessary for essential utility purposes or to protect general public health or safety.

Moving on to whether the implied easement was in fact exclusive, appellants argue the trial court's decision awards respondents "exclusive use and possession of 13% of [appellants'] property [which] is not . . . legally permissible" and amounts to fee title. Whether an exclusive easement constitutes fee title or amounts to ownership in fee, rather than an easement, depends on the circumstances of the case, including the terms of any applicable conveyance. (*Blackmore, supra*, 150 Cal.App.4th at p. 1593.) In determining whether a conveyance creates easement or estate, courts look to the

extent to which the conveyance limits the uses available to the grantor; an estate entitles the owner to the exclusive occupation of a portion of the earth's surface; that is, the property owner "would not be able to use the [d]isputed [l]and *for any 'practical purpose.'*" (*Hansen, supra*, 22 Cal.App.5th at p. 1034, italics added; see also *Silacci, supra*, 45 Cal.App.4th at p. 564 ["as a practical matter," easement completely prohibited true owner from using his land].) We review the relevant facts and evidence.

First, we note that while the trial court's statement of decision provides the implied easement "is not necessarily 'exclusive,' as various subsurface uses (e.g., running underground pipes or cables) are available to 651 property," that is not what was stated and agreed-upon by the court and respondents' counsel during the second day of trial ("It seems to me that everybody is in agreement that if . . . there were an easement in favor of the 643 property, that is essentially for exclusive use.") Second, the three cases cited by the court in the statement of decision are inapposite. Neither *Horowitz, supra*, 79 Cal.App.3d 120, nor *Rosebrook v. Utz* (1941) 45 Cal.App.2d 726, involve implied easements that were exclusive to the owner of the dominant tenement. And the facts in *People v. Bowers* (1964) 226 Cal.App.2d 463, an eminent domain action to condemn property for state park purposes, are distinguishable from the case before us.

Third, and most significant, there is no evidence in the record that appellants could utilize the subsurface of the 1,296 square feet for any "practical purpose."

There is no evidence suggesting that appellants could run underground pipes or cables for any meaningful purpose or any conceivable use. The evidence at trial was that appellants' property already has all the necessary utilities and water pipes, and appellants could not foresee any practical subsurface use. We agree with appellants that the theoretical possibility of running a pipe under the easement does not render the easement non-exclusive.

Respondents' own expert Poyourow testified that the subject encroachment area is "effectively exclusive" and that the potential for any remaining use by appellants is remote. Poyourow also testified that the prospect of appellants installing new pipes underneath the encroachment area "would be remote, but it is possible to do so."

Similar to the fence in *Mehdizadeh, supra*, 46 Cal.App.4th at p. 1308, which barred the owner of property A from physical access and excluded his use of the property, except minimally for light and air, the block wall between the 651 and 643 properties completely precludes appellants from accessing 1,296 square feet of their land. The easement granted by the trial court essentially divests appellants of nearly all rights that owners customarily have in residential property, including access and practical usage. (See *id*. at p. 1305 [property owner cannot access, "build on, cultivate, or otherwise use" their land].) Though respondents label the 1,296-square-foot encroachment as a nonexclusive implied easement, the remedy they seek ousts appellants for all practical purposes.

Respondents' reliance on *Dixon v. Eastown Realty Co.* (1951) 105 Cal.App.2d 260 is misplaced, as it involves a "slight encroachment of defendant's garage building on plaintiffs' property." (*Id*. at p. 261.) The garage wall encroached upon plaintiff's property "a distance of 0.35 of a foot at its northwest corner and 0.15 of a foot at the northeast corner." (*Id*. at p. 262.) Thus, it comes within the de minimis rule. Respondents' reliance on *Navarro* is also misplaced, as the court found the defendant's garage that extended "approximately five feet north into" another's property was not reasonably necessary based on "testimony that it could be moved from its location straddling the boundary line to a location entirely on defendant's property." (*Navarro, supra*, 66 Cal.App.2d at pp. 828, 830.) Nothing in that case suggests an implied easement can be exclusive.

During oral argument, respondents emphasized that the focus of our analysis should be on what the parties *intended*, as the purpose of implied easements is to give effect to the actual intent of the parties involved with the creation/conveyance of the easement. (*Thorstrom, supra*, 196 Cal.App.4th at p. 1420.) We find, however, that this undercuts, rather than helps, their case because the evidence relied upon by respondents demonstrates the original grantor Edwin Cutler's intent was not to create or convey an easement, but to effectuate a variance/lot line adjustment between the 643 and 651 properties. We cannot say an application for variance resulting in a change to fee title/*ownership* of a portion of property, demonstrates an

intent to create an easement for *use* of a portion of property. To do so would be inappropriate given substantial case precedent differentiating between ownership interest in land and an easement interest in the limited use of another's land (see *Scruby, supra*, 37 Cal.App.4th at p. 702; see *Hansen, supra*, 22 Cal.App.5th at p. 1032) and the general constitutional prohibition against the taking of private property (see U.S. Const., 5th Amend.; Cal. Const., art. I, § 19, subd. (a)).

Thus, we reverse that portion of the judgment awarding an exclusive implied easement to respondents. Because we reverse the trial court's imposition of an exclusive implied easement, we find moot appellants' second contention that the implied easement is not supported by substantial evidence.

C. *We Affirm the Trial Court's Creation of an Equitable Easement.*

1. Standard of Review

We review a court's decision whether to recognize an equitable easement under the abuse of discretion standard. (*Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 1005-1006 (*Nellie Gail*).) We defer to the trial court's factual findings so long as they are supported by substantial evidence, and determine whether, under those facts, the court abused its discretion. (*Id*. at p. 1006.) Under that standard, we resolve all evidentiary conflicts in favor of the judgment and will not disturb the court's decision so long as it is "fashioned on the evidence and

equities presented, and [is] narrowly tailored to promote justice." (*Hirshfield, supra*, 91 Cal.App.4th at pp. 771-772.)

2. Applicable Law

Where there has been an encroachment on land without any legal right to do so, the court may exercise its powers in equity to affirmatively fashion an interest in the owner's land which will protect the encroacher's use, namely, a judicially created easement sometimes referred to as an "equitable easement." (*Hirshfield, supra*, 91 Cal.App.4th at pp. 764-765; *Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003, 1008 (*Tashakori*).) In making its determination, the court engages in equitable balancing to determine, on the one hand, whether to prevent such encroachment or, on the other hand, permit such encroachment and award damages to the property owner. (*Hirshfield*, at p. 759.)

California courts have "discretionary authority to deny a landowner's request to eject a trespasser and instead force the landowner to accept damages as compensation for the judicial creation of an [equitable] easement over the trespassed-upon property in the trespasser's favor, provided that the trespasser shows that (1) her trespass was '"innocent"' rather than '"willful or negligent,"' (2) the public or the property owner [seeking the injunction] will not be '"'irreparabl[y] injur[ed]'"' by the easement, and (3) the hardship to the trespasser from having to cease the trespass is '"'greatly disproportionate to the hardship

caused [the owner] by the continuance of the encroachment.'"'" (*Shoen v. Zacarias* (2015) 237 Cal.App.4th 16, 19 (*Shoen*); accord *Tashakori, supra*, 196 Cal.App.4th at pp. 1008-1009 [factors apply to both physical encroachments and disputed rights of access over neighbors' properties].)

Unless all three elements are established, a court lacks discretion to grant an equitable easement. (*Shoen, supra*, 237 Cal.App.4th at p. 19; see *Ranch at the Falls LLC v. O'Neal* (2019) 38 Cal.App.5th 155, 184-185.) This is true even if the court believes the imposition of an equitable easement is fair and equitable under all circumstances. (*Shoen*, at pp. 19-21.) Thus, the court's focus must be on the three elements, rather than "a more open-ended and free-floating inquiry into which party will make better use of the encroached-upon land, which values it more, and which will derive a greater benefit from its use." (*Id*. at p. 21.)

"'Overarching the analysis'" is the importance of the legal owner's property rights and "'the principle that since the [encroacher] is the trespasser, he or she is the wrongdoer; therefore, "doubtful cases should be decided in favor of the [property owner with legal title]."'" (*Nellie Gail, supra*, 4 Cal.App.5th at p. 1004; accord *Shoen, supra*, 237 Cal.App.4th at pp. 19, 21.) Equitable easements give the trespasser "what is, in effect, the right of eminent domain by permitting him to occupy property owned by another." (*Christensen v. Tucker* (1952) 114 Cal.App.2d 554, 560 (*Christensen*).) Such a right is in tension with the general constitutional prohibition against the taking of private

property (U.S. Const., 5th Amend. [private property shall not be taken for public use, without just compensation]; Cal. Const., art. I, § 19, subd. (a) [same]). (*Shoen*, at p. 21.) "This is why courts approach the issuance of equitable easements with 'an abundance of caution' [citation], and resolve all doubts against their issuance." (*Ibid.*) This also "explains why additional weight is given to the owner's loss of the exclusive use of the property arising from her ownership, independent of any hardship caused by the owner's loss of specific uses in a given case. And it elucidates why there must be a showing that the hardship on the trespasser be greatly disproportionate to these hardships on the owner. To allow a court to reassign property rights on a lesser showing is to dilute the sanctity of property rights enshrined in our Constitutions." (*Ibid.*)

3. Analysis

Appellants challenge the court's ruling with respect to each element. We address each in turn.

a. *Element #1*: Trespass must be innocent and not willful or negligent.

The encroaching party's innocent intent is "paramount"—if the encroaching party is "willful, deliberate, or even negligent in his or her trespass, the court will enjoin the encroachment." (*Hirshfield, supra*, 91 Cal.App.4th at p. 769.)

Substantial evidence supports the trial court's finding that respondents were innocent and did not have knowledge of their encroachment on appellants' 651 property. The Seller Property Questionnaire executed by respondents provides there are no "[s]urveys, easements, encroachments or boundary disputes" regarding respondents' 643 property. In addition, their agent Tsai testified that neither he nor his clients knew of the encroachment at the time of purchase.

Appellants argue documentary evidence established that respondents were negligent. They refer to the Buyer's Inspection Advisory signed by respondents before close of escrow, advising respondents to conduct a thorough inspection of the entire property to make sure the lot size and boundaries were accurate. The document also warns that the square footage, lot size, boundaries, fences or walls "do not necessarily identify true property boundaries." Appellants contend respondents "did not do what they were advised to do, that is investigate the true square footage and boundaries" and, as such, were negligent.

Respondents, on the other hand, argue appellants' transactional documents "contained the same advisory, yet they too did not conduct an investigation." Respondents contend appellants "cannot credibly argue that [respondents] should have verified lot size and boundaries [to discover] the existence of the encroachments when [appellants] themselves did no such investigation and did not discover the encroachments until a year after purchase."

We agree. Case law provides that the court may refuse to enjoin a negligent encroachment "if there is corresponding contributory negligence by the landowner." (*Hirshfield, supra*, 91 Cal.App.4th at p. 769.)

Thus, the first element is satisfied.

b. *Element #2*: Appellant must not be irreparably injured by the easement.

If the party seeking an injunction of encroachments "will suffer irreparable injury by the encroachment, the injunction should be granted regardless of the injury to [the encroaching party], except, perhaps, where the rights of the public will be adversely affected." (*Christensen, supra*, 114 Cal.App.2d at p. 563.) The phrase "irreparable injury" is interchangeable with "irremedial injury," "unusual hardship," and "substantial hardship." (See *Hirshfield, supra*, 91 Cal.App.4th at p. 760.)

The trial court found appellants "would not suffer any irreparable harm from such continued encroachment" because "the evidence . . . does not indicate [appellants] would suffer any concrete, serious harm." Substantial evidence supports the trial court's finding. Appellants' use of the lot since their time of purchase has remained exactly the same before and after the discovery of the encroachment. While appellants testified that enjoining respondents' encroachment would allow them to increase their privacy, plant an orchard in the front, and place a pool in the back, the record

before us does not contain evidence of any actual plans to do so, either before or after the reveal.

Appellants argue the continued encroachment causes them irreparable injury because they "will have to continue paying property taxes on property they cannot even use." Appellants "will also be subject to potential civil liability to the extent anyone gets hurt on the 1,296 square foot area because, even though they cannot use that area, [they] are still the legal owners of that area." These are valid arguments indeed. However, they fail as the record before us contains no evidence, let alone substantial evidence, about the amount of property taxes appellants pay for their 9,815-square-foot property and what amount of their property tax payment is attributed to the 1,296-square-foot encroachment. Similarly, there is no substantial evidence indicating the likelihood or existence of premises liability in connection with the encroachment area other than appellants' speculation about children possibly "trip[ping] over a loose brick."

Thus, the second element is also satisfied.

c. *Element #3*: The hardship to the trespasser from ceasing the trespass is greatly disproportionate to the hardship caused to the landowner by the continuing encroachment.

Through the doctrine of "balancing conveniences" or "relative hardship," courts may create equitable easements by refusing to enjoin what otherwise would

be deemed an encroachment or nuisance. (*Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 265 (*Linthicum*); see also *Christensen*, *supra*, 114 Cal.App.2d at pp. 562-563.) "These labels suggest that an equitable easement may issue if the conveniences or hardships merely favor the trespasser, when the doctrine actually requires that they tip disproportionately in favor of the trespasser." (*Shoen, supra*, 237 Cal.App.4th at p. 20.)

In *Shoen*, for instance, the court found it was error to impose an equitable easement where the hardship to a neighbor in having to spend $300 to remove patio furniture from the landowner's property was not "greatly disproportionate" to the hardship on the landowner in losing the use of the property. (*Shoen, supra*, 237 Cal.App.4th at pp. 18, 21-22 [finding deprivation of substantial benefit falls short of imposing substantial hardship].) The typical hardship required to permit an equitable easement is where the trespasser "would be forced to move buildings or be airlifted to their landlocked property." (*Id*. at p. 22.)

Appellants contend respondents cannot demonstrate the disproportionality of their hardship because "there is no testimony from them about their trespass or hardship." Appellants believe respondents' "failure to testify is dispositive and therefore the court abused its discretion in finding an equitable easement."

Not so. The record contains substantial evidence supporting the inference that the hardship experienced by appellants is greatly outweighed by the actual harm respondents would suffer if the encroachments were

enjoined. McCormick testified the driveway for respondents' 643 property would be reduced to 7.2 feet at its narrowest point (for an approximate 32-foot stretch between the actual property line and the side of the house on respondents' property. This would result in a driveway width of less than 10 feet, the minimum required by the City. In addition, reducing the driveway width to 7.2 feet would severely limit most vehicles from using the driveway and would preclude individuals from opening car doors to exit or enter a vehicle. There was also expert testimony that the existence of the encroachment resulted in a diminution of value of $67,000 (or $4,000 more using 1,296 square footage) to appellants' 651 property, whereas the diminution of value to respondents' 643 property without the easement is $133,000.

Thus, the third element is also satisfied, and the trial court was within its power to grant an equitable easement.

d. The scope and duration of the equitable easement must be narrowly tailored.

Finally, appellants challenge the terms and scope of the trial court's equitable easement, arguing that it is not narrowly tailored.

Courts limit the rights of the equitable easement holder both in duration and scope (*Hirshfield, supra*, 91 Cal.App.4th at pp. 753, 771 [the equitable easement interest would terminate when the defendants either "sell or fail to reside in their house"]); this aligns with

"why courts approach the issuance of equitable easements with '[ ]an abundance of caution' [citation], and resolve all doubts against their issuance." (*Shoen, supra*, 237 Cal.App.4th at p. 21.) The scope of an equitable easement *should not be greater than is reasonably necessary to protect the use interest* of the purported dominant tenement owner. (*Christensen, supra*, 114 Cal.App.2d at p. 563; *Linthicum, supra*, 175 Cal.App.4th at pp. 267-269 [abundance of caution is warranted when imposing easement on unwilling landowner].) So long as the equitable easement is "fashioned on the evidence and equities presented, and narrowly tailored to promote justice," the decision granting the equitable easement will not be disturbed. (*Hirshfield*, at p. 772.)

Appellants contend most of the 1,296-square-foot easement has nothing to do with respondents' use and interest in "reasonably necessary" ingress/egress and is far too encompassing in scope. They argue the equitable easement is not narrowly tailored and is greater than reasonably necessary to protect respondents' interest in reasonable ingress/egress via driveway use; they urged us to modify the equitable easement.

At oral argument, respondents argued this court should not exercise equity and should not modify the easement. Respondents contend the evidence with respect to their equitable easement cause of action considered the entire 1,296 square-foot encroachment as a whole, and there was no evidence in the record to suggest a number less than 1,296 square feet. They cited to testimony from appellant Ms. Romero where she told the underlying court she did not want to give

up any of the disputed 1,296 square feet belonging to her. Respondents believe appellants have thus waived the issue, i.e., whether the scope of the easement could be more narrowly tailored to meet the "no greater than reasonably necessary use" standard.

We agree with respondents.

Although the trial court's detailed 13-page statement of decision does not expressly specify the equitable easement is "narrowly tailored" and not greater than "reasonably necessary" to protect respondents' use interest, it does however specify that the "equitable easement should run with the land, but *should terminate if the 643 Property were to cease its continued use of that land for a driveway, planter and wall/fence*." (Italics added.) Thus, the trial court's judicially crafted equitable easement is limited in scope and duration such that the current use of the easement area as a "driveway, planter and wall/fence" must continue, as is, or else the equitable easement is extinguished.

In addition, appellants made this same argument via their September 8, 2020 objections to the trial court's proposed statement of decision, claiming the equitable easement is "not narrowly drawn to promote justice." Thereafter, the trial court filed its final statement of decision on September 28, 2020; it "decline[d] to address every legal and factual issue raised by [appellants] or respond point by point to each issue and contention (however immaterial)," citing to *Peak-Las Positas Partners v. Bollag* (2009) 172 Cal.App.4th 101, 112 [" 'A statement of decision need not address all the

legal and factual issues raised by the parties' "]. There is nothing in the record that leads us to conclude the trial court did not consider appellants' objections when it crafted an easement that would extinguish when the area was no longer used for its present purposes.

Finally, and most importantly, the trial court provided appellants multiple opportunities to provide evidence and argument as to how the easement could be more narrowly tailored. The court asked appellants during trial: "Let me ask, because I don't think the number 1,200 is particularly magical. . . . So what would be less than this?" "[W]hat would be equitable under the circumstances. It could be greater or smaller than what is asked for by [respondents]." The court later asked appellants again: "If in equity I were to find that [respondents] were entitled to some measure of land so they could have a functional driveway, . . . do you have an alternative proposal that would be more narrowly tailored to their need?" The court repeated its question to appellants later: "Well, again, I asked you from zero to 1,296 [square feet,] what do you propose, and you have said zero or 1,296." "So if there's some other formulation of square footage that the Court could reasonably tailor an equitable easement, then I certainly will hear you out as to that."

Despite the trial court's repeated invitations, appellants instead doubled down and in the final moments of trial, appellant Tatana Romero stated: "I just wanted to clarify . . . I heard something about giving up to two feet. And I want to make sure I'm not authorizing anyone to give up anything, and we're not going

to give up any part of the disputed land. That's it." Appellants opted for an all-or-nothing approach; in this case, this strategy hurt them because they failed to include as part of the record any evidence about how the easement may have been more narrowly tailored and not greater than reasonably necessary for respondents' use.

We are hard pressed to find the trial court abused its discretion when it created an equitable easement that merely maintains the improvements on the disputed land that have been in use and existence for decades.

DISPOSITION

The judgment is reversed as to the cause of action for implied easement. The judgment is affirmed as to the cause of action for equitable easement. Respondents shall recover their costs on appeal.

CERTIFIED FOR PUBLICATION

STRATTON, J.

We concur:

GRIMES, Acting P. J.

HARUTUNIAN, J.*

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* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT]
[February 16, 2022]

Tentative Opinion
February 23, 2022 Calendar
Division Eight

B310069 – *Romero et al. v. Shih et al.*

We have received a request for oral argument from one or more of the parties to this appeal. Here is a summary of the court's tentative opinion.

Appellants make three primary arguments on appeal.

I. First, they argue the trial court's judgment "should be reversed because, as a matter of law, the court cannot create an exclusive implied easement." We are inclined to agree.

We have not found any case that permits or prohibits *exclusive* implied easements. In most cases involving prescriptive easements, the courts have not allowed the easement owner exclusive use (equivalent to fee title) of the servient tenement. (See, e.g., *Silacci v. Abramson* (1996) 45 Cal.App.4th 558, 562–564 (*Silacci*); *Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1033–1035 (*Hansen*). "The notion of an exclusive prescriptive easement, which as a practical matter completely prohibits the true owner from using his land, *has no application to a simple backyard dispute.*" (*Silacci*, at p. 564.)

Prior decisions recognize two exceptions where exclusive prescriptive easements have been allowed. The first is an exception in cases involving utility services or essential public health and safety purposes. (See *Otay Water Dist. v. Beckwith* (1991) 1 Cal.App.4th 1041, 1046.) The second involves the de minimis rule. (M*cKean v. Alliance Land Co.* (1927) 200 Cal. 396.)

We are inclined to find the rationales for precluding exclusive prescriptive easements—based on the distinction between estates and easements—equally applicable to exclusive implied easements. We are hard-pressed to infer the granting of an exclusive implied easement which precludes a property owner from any practical use and is nearly the equivalent of a fee interest. We are inclined to hold that an exclusive implied easement which, for all practical purposes, amounts to fee title cannot be justified or granted unless: 1) the encroachment is "de minimis"; or 2) the easement is necessary to protect the health or safety of the public or for essential utility purposes. (*Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1306).

Here, there was no express grant of an exclusive easement. And the encroachment, totaling 1,296 square feet of appellants' 9,815-square-foot property, cannot reasonably be qualified as de minimis as it amounts to approximately 13.2 percent of appellants' property. Additionally, nothing in the record suggests the encroachment is necessary for essential utility purposes or to protect general public health or safety.

Whether an easement amounts to ownership in fee, rather than an easement, depends on the circumstances of the case, including the terms of any applicable conveyance. (See *Blackmore v. Powell* (2007) 150 Cal.App.4th 1593.) In determining whether an encroachment constitutes an easement or estate, courts look to the extent to which the encroachment limits the uses available to the grantor; an estate entitles the owner to the exclusive occupation of a portion of the earth's surface; that is, the property owner "would not be able to use the [d]isputed [l]and *for any 'practical purpose.'*" (*Hansen, supra*, 22 Cal.App.5th at 1034, italics added; see also *Silacci, supra*, 45 Cal.App.4th at p. 564 ["as a practical matter," easement completely prohibited true owner from using his land].)

We tentatively find there is no evidence in the record that appellants could utilize the subsurface of the 1,296 square feet for any "practical purpose." There is no evidence suggesting that appellants could run underground pipes or cables for any meaningful purpose or any conceivable use. The evidence at trial was that appellants' property already has all the necessary utilities and water pipes, and appellants could not foresee any practical subsurface use. Respondents' own expert Poyourow testified that the subject encroachment area is "effectively exclusive" and that the potential for any remaining use by appellants is remote. Poyourow also testified that the prospect of appellants installing new pipes underneath the encroachment area "would be remote, but it is possible to do so." We are inclined to agree with appellants that the theoretical possibility

of running a pipe under the easement does not render the easement non-exclusive.

Therefore, we are inclined to reverse the implied easement portion of the judgment.

II. Second, appellants argue substantial evidence does not support the court's findings as to the elements for implied easement. Because we are inclined to reverse the trial court's imposition of an exclusive implied easement, we find appellants' second contention moot.

III. Third, appellants contend the court abused its discretion in creating an equitable easement which "is not narrowly tailored to promote justice and is significantly greater in scope and duration than what is necessary to protect [respondents'] needs." Unless all three elements for an equitable easement are established, a court lacks discretion to grant an equitable easement. (*Shoen v. Zacarias* (2015) 237 Cal.App.4th 16, 19.) We will not disturb the court's decision so long as it is "fashioned on the evidence and equities presented, and [is] narrowly tailored to promote justice." (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 771-772 (*Hirshfield*).)

Element #1: We tentatively find substantial evidence supports the trial court's finding that respondents were innocent and did not have knowledge of their encroachment on appellants' 651 property. The Seller Property Questionnaire executed by respondents provides there are no "[s]urveys, easements, encroachments or boundary disputes" regarding respondents'

643 property. In addition, their agent Tsai testified that neither he nor his clients knew of the encroachment at the time of purchase.

Appellants argue documentary evidence—the Buyer's Inspection Advisory signed by respondents—established that respondents were negligent. Respondents, on the other hand, argue appellants' transactional documents "contained the same advisory, yet they too did not conduct an investigation." We are inclined to agree. Case law provides that the court may refuse to enjoin a negligent encroachment "if there is corresponding contributory negligence by the landowner." (*Hirshfield, supra*, 91 Cal.App.4th at pp. 769–770.)

Element #2: We tentatively find substantial evidence supports the trial court's finding that appellants would not suffer irreparably injury/harm from the continued encroachment. Appellants' use of the lot since their time of purchase has remained exactly the same before and after the discovery of the encroachment. While appellants testified that enjoining respondents' encroachment would allow them to increase their privacy, plant an orchard in the front, and place a pool in the back, the record before us does not contain evidence of any actual plans or intent to do so.

Appellants argue the continued encroachment causes them irreparable injury because they "will have to continue paying property taxes on property they cannot even use" and will "be subject to potential civil liability to the extent anyone gets hurt on the 1,296

square foot area because . . . [they] are still the legal owners of that area." We tentatively find these arguments fail as the record before us contains no evidence, let alone substantial evidence, about the amount of property taxes appellants pay for their 9,815-square-foot property and what amount of their property tax payment is attributed to the 1,296-square-foot encroachment. Similarly, there is no substantial evidence indicating the likelihood or existence of premises liability in connection with the encroachment area other than appellants' speculation about children in the neighborhood possibly "trip[ping] over a loose brick."

Element #3: We tentatively find the record contains substantial evidence supporting the inference that the hardship experienced by appellants is greatly outweighed by the actual harm respondents would suffer if the encroachments were enjoined. McCormick testified the driveway for respondents' 643 property would be reduced to 7.2 feet at its narrowest point. This would result in a driveway width of less than 10 feet, the minimum required by the City. In addition, reducing the driveway width to 7.2 feet would severely limit most vehicles from using the driveway and would preclude individuals from opening car doors to exit or enter a vehicle. There was also expert testimony that the existence of the encroachment resulted in a diminution in value of $67,000 (or $4,000 more using 1,296 square footage) to appellants' 651 property, whereas the diminution in value to respondents' 643 property without the easement is $133,000.

And finally, appellants challenge the terms and scope of the trial court's equitable easement, arguing that it is not narrowly tailored. The scope of an equitable easement should not be greater than is reasonably necessary to protect the interests of the purported dominant owner. (*Christensen v. Tucker* (1952) 114 Cal.App.2d 554, 563; *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 267-269 [abundance of caution is warranted when imposing easement on unwilling landowner].) We do not have a tentative on this argument, but we request the parties to be prepared to argue the issue of modification. We present three proposed modifications about which we would like to hear from counsel.

First, most of the 1,296-square-foot equitable easement has nothing to do with respondents' "reasonably necessary interest" to reasonable ingress/egress and is far too encompassing in scope. The City "consider[s] a 10-foot-wide driveway reasonable." The narrowest point of the driveway is 7.2 feet in width. Thus, one proposed modification would be to increase the driveway by three feet at its narrowest point so that the driveway is 10.2 feet in width, which is more than the City's requirement. Such a modification would not include portions of respondents' driveway near the sidewalk and the back garage that is more than 10.2 feet in width and encroach on appellants' land.

Second, there appears to be no evidence in the record about respondents' use of the flower bed such that an easement over that area might be

unsustainable. Respondents' own expert Poyourow testified the flower bed has aesthetic value only and that his main concern were "the driveway issues." Plus, Edwin's application for variance itself refers only to the "[d]riveway and fence line" as the uses available to 643 property upon the sought-after line adjustment; it does not specify a flower bed.

Third, with respect to the side yard area between respondents' garage and the true boundary, a modification of the easement such that the encroachment extends a total of five feet would ensure there is no violation of the City's five-foot side yard setback requirement for properties in R1 zones. This also would obviate respondents' concerns about losing a portion of their two-car garage and relocating the air-conditioning unit from one side of the garage to another.

If these modifications were made, the block wall between the parties' properties could be moved to facilitate the narrowing of the easement.

If you wish to cite and discuss any significant new authority at argument that was not cited in any party's brief because it was not available in time to be included, you must give your opponent the citation in a letter before argument, and file a copy of the letter with the clerk's office. (Cal. Rules of Court, rule 8.254.)

The court will not entertain further briefing or grant a continuance based on the issuance of this tentative opinion.

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION 8

TATIANA SPICAKOVA ROMERO et al.,
Plaintiffs, Cross-defendants, and Appellants,
v.
LI-CHUAN SHIH et al.,
Defendants, Cross-complainants and Respondents;
US BANK NATIONAL ASSOCIATION,
Cross-defendant and Respondent.

B310069
Los Angeles County Super. Ct. No. EC064933

(Filed May 25, 2022)

THE COURT:

Petition for rehearing filed by appellant's on May 10, 2022, is denied.

/s/ Stratton	/s/ Grimes	/s/ Harutunian
STRATTON, P . J.	GRIMES, J.	HARUTUNIAN, J*

* Judge of the San Diego Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES

CESAR ROMERO, an individual; and TATANA SPICAKOVA ROMERO, an individual,

Plaintiffs,

v.

LI-CHUAN SHIH, an individual; TUN-JEN KO, an individual; and DOES 1-50, inclusive,

Defendants.

LI-CHUAN SHIH, an individual, and TUN-JEN KO, an individual,

Cross-Complainants,

v.

CESAR ROMERO, an individual; TATANA SPICAKOVA ROMERO, an individual; ALL PERSONS UNKNOWN CLAIMING ANY LEGAL OR EQUITABLE RIGHT, TITLE, ESTATE, LIEN, OR INTEREST IN THE PROPERTY DESCRIBED IN THE

Case No.: EC064933

Original Complaint Filed: February 10, 2016

Assigned for all Purposes To: Honorable Curtis A. Kin, Judge
Dept: NCE

~~**[PROPOSED]**~~ **SECOND AMENDED JUDGMENT**

Cross-Complaint Filed: May 5, 2016

Trial Date: March 9, 2020
Time: 9:00 a.m.
Dept.: NCE

(Filed Apr. 5, 2021)

CROSS-COMPLAINT ADVERSE TO CROSS-COMPLAINANTS' TITLE, OR ANY CLOUD UPON CROSS-COMPLAINANTS' TITLE THERETO; and ROES 1 through 40, Inclusive,

Cross-Defendants.

WHEREAS, this action was tried before the Court without a jury on March 9, 10, 11 and 12, 2020. Closing arguments were heard by the Court on June 30, 2020;

WHEREAS, Janet E. Humphrey, Esq. and Elyn C. Holt, Esq. appeared on behalf of Defendants/Cross-Complainants, LI-CHUAN SHIN and TUN-JEN KO ("Shih-Kos"); Charles D. Cummings, Esq. and Kristen Robison, Esq. appeared on behalf of Plaintiff/Cross-Defendants, CESAR ROMERO and TATANA ROMERO ("Romeros"); and Brian S. Edwards, Esq. appeared on behalf of Cross-Defendant U.S. BANK NATIONAL ASSOCIATION ("US Bank");

WHEREAS, pursuant to the Court's Final Statement of Decision issued September 28, 2020, (**Exhibit "A"** attached hereto), the Court hereby enters Judgment as follows:

THEREFORE, IT IS HEREBY ADJUDGED AND DECREED as follows:

1. **Shih-Kos' Second Cause of Action for Implied Easement against Romeros and US**

Bank. The Court finds an Implied Easement in favor of the Shih-Ko's over that strip of land as described in Trial Exhibit 747 (**Exhibit "B"** attached hereto) burdening the property located at 651 Alegria Avenue, Sierra Madre California ("651 Property") and for the benefit of the property located at 643 Alegria Avenue, Sierra Madre, California ("643 Property") to maintain a driveway, planter and wall/fence ("Easement"). The Implied Easement shall run with the land and shall terminate if the 643 Property ceases its continued use of the Easement to maintain a driveway, planter and wall/fence.

2. **Shih-Kos' First Cause of Action for Equitable Easement against Romeros and US Bank.** In the alternative, if for any reason that the Implied Easement is invalid, set aside or for any reason cannot stand, the Court creates an Equitable Easement in favor of the Shih-Kos over that strip of land as described in Trial Exhibit 747 (**Exhibit "B"**) burdening the 651 Property for the benefit of the 643 Property to maintain a driveway, planter and wall/fence. The Court finds that sixty-nine thousand dollars and no cents ($69,000) is just compensation to the Romeros or their successors in interest for the Equitable Easement which is only payable if the Implied Easement is invalid, set aside or for any reason cannot stand and the 643 Property wants the Equitable Easement to maintain a driveway, planter and wall/fence. The Equitable Easement shall run with the land on the 651 Property and shall terminate if the 643

Property ceases its continued use of the Easement to maintain a driveway, planter and wall/fence.

3. **Shih-Kos' Third Cause of Action for Quiet Title against Romeros and US Bank.**
The Court quiets title finding an Implied Easement in favor of the Shih-Ko's over that strip of land as described in Trial Exhibit 747 (**Exhibit "B"**) burdening the 651 Property for the benefit of the 643 Property to maintain a driveway, planter and wall/fence ("Easement"). The Implied Easement shall run with the land on the 651 Property and shall terminate if the 643 Property ceases its continued use of the Easement to maintain a driveway, planter and wall/fence. In the alternative, if for any reason that the Implied Easement is invalid, set aside or for any reason cannot stand, the Court creates an Equitable Easement in favor of the Shih-Kos over that strip of land as described in Trial Exhibit 747 (**Exhibit "B"**) burdening the 651 Property for the benefit of the 643 Property to maintain a driveway, planter and wall/fence, The Court determines that sixty-nine thousand dollars and no cents ($69,000) is just compensation to the Romeros or their successors in interest for the Equitable Easement which is only payable if the Implied Easement is invalid, set aside or for any reason cannot stand and the 643 Property wants the Equitable Easement to maintain a driveway, planter and wall/fence. The Equitable Easement shall run with the land on the 651 Property and shall terminate if the 643 Property ceases its continued use of

the Easement to maintain a driveway, planter and wall/fence.

4. Shih-Kos' Fourth Cause of Action for Declaratory Relief against Romeros and US Bank.

The Court declares an Implied Easement in favor of the Shih-Ko's over that strip of land as described in Trial Exhibit 747 (**Exhibit "B"**) burdening the 651 Property for the benefit of the 643 Property to maintain a driveway, planter and wall/fence ("Easement"). The Implied Easement shall run with the land on the 651 Property and shall terminate if the 643 Property ceases its continued use of the Easement to maintain a driveway, planter and wall/fence. The Court further declares that, in the alternative, if for any reason that the Implied Easement is invalid, set aside or for any reason cannot stand, the Court creates an Equitable Easement in favor of the Shih-Kos over that strip of land as described in Trial Exhibit 747 (**Exhibit "B"**) burdening the 651 Property for the benefit of the 643 Property to maintain a driveway, planter and wall/fence. The Court determines that sixty-nine thousand dollars and no cents ($69,000) is just compensation to the Romeros or their successors in interest for the Equitable Easement which is only payable if the Implied Easement is invalid, set aside or for any reason cannot stand and the 643 Property wants the Equitable Easement to maintain a driveway, planter and wall/fence. The Equitable Easement shall run with the land on the 651 Property and shall terminate if the 643

Property ceases its continued use of the Easement to maintain a driveway, planter and wall/fence.

5. **Romero's Third Amended Verified Complaint for 1) Wrongful Occupation of Real Property; 2) Quiet Title; 3) Trespass; 4) Private Nuisance; 5) Wrongful Disparagement of Title; and 6) Permanent Injunction.**
Judgment is entered in favor of the Shih/Kos and against the Romeros on all causes of action in the Romeros' Third Amended Complaint.

6. The Shih/Kos are awarded costs in the amount of $26,356.40.

IT IS SO ORDERED [SEAL] /s/ Curtis A. Kin

Dated: April 5, 2021 Curtis A. Kin/Judge

Respectfully Submitted By:

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LI-CHUAN SHIH and TUN-JEN KO

EXHIBIT "A"

Superior Court of the State of California
County of Los Angeles - North Central Division
Glendale Courthouse / Department E

CESAR ROMERO, et al., Plaintiffs / Cross-Defendants, v. LI-CHUAN SHIH, et al., Defendants / Cross-Complainants.	Case No.: EC064933 STATEMENT OF DECISION (Filed Sep. 28, 2020)

I.

INTRODUCTION

This case involves a dispute between the owners of adjacent residential properties located at 651 West Algeria Avenue ("651 Property") and 643 West Algeria Avenue ("643 Property") in Sierra Madre, California. Both properties were once owned, by husband and wife, Edwin and Ann Cutler, until the properties were separated in 1986. Since April 2014, plaintiffs and cross-defendant Cesar Romero and Tatana Spicakova Romero ("the Romeros") have owned the 651 Property. Defendants and cross-complainants Li-Chuan Shih). and Tun-Jen Ko ("the Shih-Kos") have owned the 643 Property since July 2014.

The dispute concerns an approximately eight-foot wide strip of land along the adjacent east and west property lines of the 651 and 643 properties, respectively. The strip of land is part of the 651 Property and is owned by the Romeros. However, for decades, a garden planter and driveway belonging to the 643 Property have stood on the disputed strip of land, including when both the Romeros and Shih-Kos purchased their respective properties. The strip of land also contains a block wall, which separates the 651 and 643 properties, albeit approximately eight feet west of the actual property line between them.

Due to the property encroachments, in the operative Third Amended Verified Complaint, the Romeros have asserted causes of action against the Shih-Kos for: (1) Wrongful Occupation of Real Property; (2) Quiet Title; (3) Trespass; (4) Private Nuisance; (5) Wrongful Disparagement of Title; and (6) Permanent Injunction. Relatedly, in their Verified Cross Complaint, the Shih-Kos have brought causes of action against the Romeros for: (1) Equitable Easement; (2) Implied Easement; (3) Quiet Title; and (4) Declaratory Relief. In addition, the Shih-Kos named the Romero's lender, U.S. Bank National Association, as a cross-defendant so that it would be bound by any judgment awarding an easement.

The matter proceeded to a bench trial before this Court. The central issue was whether the Shih-Kos possess an implied easement over the disputed strip of land, as all parties agreed such an easement would be dispositive of the parties' competing claims. As an

alternative, the Shih-Kos also contended that, if there were no implied easement, the Court should judicially create an equitable easement for the 643 Property over the strip of land, which would also dispose of the parties' claims but would entitle the Romeros to compensation for the imposition of such an easement.

On August 24, 2020, the Court issued its Proposed Statement of Decision, tentatively finding in favor of the Shih-Kos on all claims and permitting the parties to lodge any objections thereto. Thereafter, the Shih-Kos requested one clarification, seeking correction of a typographical error that made a substantive difference (i.e., omission of a "not"), which the Court hereby adopts. The Romeros "object to the entire Proposed Statement of Decision" and have raised 53 objections and/or requests (some consisting upwards of 54, 67, and 97 subparts) in a 139-page filing. (*See* Plaintiffs and Cross-Defendants' 9/8/20 Objections at 2, 5-11, 53-64, 66-72.)

This constitutes the Court's final Statement of Decision, which states the factual and legal basis for the Court's decision and discusses the principal controverted issues upon which the outcome of the case turns. (*See* CCP § 632; *Vukovich v. Radulovich* (1991) 235 Cal.App.3d 281, 295.) In so doing, the Court declines to address every legal and factual issue raised by the Romeros or respond point by point to each issue and contention (however immaterial) set forth in their voluminous filing. (*Muzquiz v. City of Emeryville* (2000) 79 Cal.App.4th 1106, 1124-1125; *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal.App.4th 1372;

see also Peak-Las Positas Partners v. Bollag (2009) 172 Cal.App.4th 101, 112 ["A statement of decision is required only to state ultimate facts and the legal grounds upon which the judgment rests. . . . A statement of decision need not address all the legal and factual issues raised by the parties"].)

For the reasons that follow, the Court concludes the Shih-Kos possess an implied easement over the eight-foot strip of land. Further, the Court finds that, if there were no such implied easement, an equitable easement should arise, which would entitle the Romeros to compensation of $69,000.

II.

DISCUSSION.

A. Implied Easement

An easement conveys rights in or over the land of another. (*Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406, 1415.) It involves primarily the privilege of doing a certain act on, or to the detriment of, another's property. (*Ibid.*) Where an easement has not been granted or conveyed expressly, it may nonetheless be created by implication. (*Id*, at 1415-1416.) Ordinarily, an implied easement arises during the division of land "where there is an obvious ongoing use that is reasonably necessary to the enjoyment of the land granted." (*Id*. at 1419 [quoting *Zanelli v. McGrath* (2008) 166 Cal.App.4th 615, 634; *see also* Civ. Code § 1104.)

"[A]n easement will be implied when, at the time of conveyance of property, the following conditions exist: 1) the owner of property conveys or transfers a portion of that properly to another; 2) the owner's prior existing use of the property was of a nature that the parties must have intended or believed that the use would continue; meaning that the existing use must either have been known to the grantor and the grantee, or have been so obviously and apparently permanent that the parties should have known of the use; and 3) the easement is reasonably necessary to the use and benefit of the quasi-dominant tenement." (*Id.* at 1420; *see also Fischer v. Hendler* (1942) 49 Cal.App.2d 319, 322.) In determining whether an implied easement has arisen, there must be clear evidence that the parties so intended as shown by all the fact and circumstances, (*Thorstrom*, 196 Cal.App.4th at 1420 ["In order to determine the intent, the court will take into consideration the circumstances attending the transaction, the particular situation of the parties, and the state of the thing granted."].)

Here, the Court finds that all the conditions exist for an implied easement in favor of the 643 Property over the eight-foot strip of land. Undisputedly, Edwin and Ann Cutler previously owned both the 643 and 651 properties. (*See* Trial Exs. 4 & 5.) In May 1986, they split those properties and transferred the 651 Property to both their son Bevon Cutler (and his wife Judy) and Bevon's business partner David Shewmake (and his wife Sally). (*See* Ex. 26.)

At trial, David Shewmake was the only witness with firsthand knowledge of either the state of the 643 and 651 properties at the time of transfer in 1986 or the intended use of the properties at the time. Shewmake initially knew the Cutlers because his father was an electrician who did repair work for the Cutlers at the 643 Property, where the Cutlers resided with their son Bevon. According to Shewmake, as far back as the 1960s, the planter and driveway belonging to the 643 Property were in place and have not changed in any meaningful way since that time. Also, during that time, a chain link fence stood where the block wall now stands. In or around, 1985 the chain link fence was replaced by the block wall, which has largely remained unchanged through present day. As for the 651 Property, it was a vacant lot until Bevon Cutler and Shewmake as business partners developed the property by building a house upon it, which was completed in 1986.

Shewmake credibly testified that, when the 651 Property was developed and ultimately split from the 643 Property in 1986, there was no intent to remove the driveway or planter. To the contrary, the 643 Property's encroachment was, if anything, made more permanent in that the chain link fence was replaced with a bleak wall during that time frame. In Shewmake's view, the property line between the 643 and 651 properties was where the block wall had been erected.

Just as Shewmake, as grantee, understood the disputed strip of land would continue to be used by the 643 Property, the actions of Edwin Cutler, as grantor, also reflect that same understanding and intent. In

fact, Edwin Cutler applied to the City of Sierra Madre for a variance or lot line adjustment of eight feet between the two properties in February 1985, which, if finalized, would have actually transferred the disputed strip of land from the 651 Property to the 643 Property and rendered the chain link fence as the actual property line divider. Of note, in his application, Edwin Cutler stated "Driveway and fence line" in response to the question "How are other owners able to use their property that cannot be done on this lot at present?" (Ex. 7 at p. 2.) The staff for the Sierra Madre Planning Department recommended approval of Edwin Cutler's request (Ex. 10), and, on February 21, 1985, the Planning Commission approved the request. Also of note, the Minutes for that Planning Commission meeting state: "Mr. Cutler told the Commission that the driveway is extremely narrow and he intended at the time of purchase to divide the property and adjust the width of the driveway." (Ex. 11.) Those Minutes also state that, "[i]n order to adjust the boundary line, Mr. Cutler will need an engineer-surveyed parcel map." (Ex. 11.) City records reflect that such a parcel map was prepared by a John B. Abell and submitted to the City. (Ex 14.) Nonetheless, although all necessary documents had apparently been submitted, the City's Director of Planning testified at trial that the City never issued a certificate of compliance and that the eight-foot adjustment to the lot line was never recorded. In other words, the lot line adjustment was never finalized, and the eight-foot strip of land remained part of the 651 Property. However, the Director of Planning also testified at trial that nothing in the City records indicated

Edwin Cutler had affirmatively abandoned his request for a lot line adjustment or that such request was denied or closed out by the City.

The Romeros argue that Edwin Cutler's failure to complete the lot line adjustment process should be viewed as his intent at the time not to allow the 643 Property to use the disputed area. In so contending, the Romeros also rely on the fact that the business records for John Abell's engineering firm indicate Edwin Cutler did not pay Abell for the parcel map reflecting the lot line adjustment. The Romeros also ascribe meaning to the fact that the parcel map submitted to the City lacked a seal or stamp by John Abell. Divorced from all context, Edwin Cutler's failure to fully complete the process might be viewed as his purposeful abandonment of the plan to adjust the lot line.

In view of all the surrounding circumstances, however, Edwin Cutler's failure to complete the lot line adjustment process is most reasonably viewed as an oversight or lack of follow through. What is clear under the circumstances is that Edwin Cutler intended the 643 Property to continue with its use of the existing driveway and planter and for the fence (later block wall) to separate the two properties. As discussed above, Edwin Cutler expressly so stated in his application for the lot line adjustment and during the City Planning Commission meeting when seeking approval. (*See* Exs. 7 & 11.) As is also noted above, Shewmake shared that same intent and understanding. Moreover, the parties to the separation of the 643 and 651 properties acted consistently with that expressed intent. In

June 1985 (after Edwin Cutler had embarked upon the lot line adjustment process in February 1985), Bevon Cutler applied for and obtained the permit to build the now existing block wall in the disputed area (Ex. 21), which ultimately was built and remains standing as the effective dividing line between the 643 and 651 properties. Years later, in 1989 and 1992, Edwin Cutler recorded so-called "wild deeds" for the 643 Property which reflect the eight-foot lot line adjustment as if it had been finalized. (Exs. 29 & 80.) Lastly, and most important, all the Cutlers, the Shewmakes, and every successive owner of either property (until now) has allowed for and/or behaved as if the 643 Property has the right to encroach upon the disputed strip of land with the driveway, planter, and block wall—all of which have remained unchanged in their use and function since at least the initial property separation in 1986. The Court thus finds that the parties to the transaction intended the 643 Property's encroachment on the 651 Property would continue after the division of such properties in 1986. (*Thorstrom*, 196 Cal.App.4th at 1422 ["[I]n determining the intent of the parties as to the extent of the grantee's rights consideration must be given not only to the actual uses being made at the time of the severance, but also to such uses as the facts and circumstances show were within the reasonable contemplation of the parties at the time of the conveyance"); *Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 133 ["The court in each case, examines all of the facts and circumstances surrounding the transaction to give effect to the actual intent of the parties"].)

Finally, the Court finds that the continued encroachment onto the disputed strip of land is reasonably necessary. For purposes of an implied easement, "reasonably necessary" to the beneficial enjoyment of 643 Property means no more than "for the benefit thereof." (*Thorstrom*, 196 Cal.App.4th at 1420-1421.) As discussed below with respect to the balance of hardships for an equitable easement, the Court finds the Shih-Kos' need for the continued encroachment is greatly disproportionate to the hardship suffered by the Romeros, which is more than sufficient to satisfy the "reasonably necessary" factor here. But, suffice it to say, as Edwin Cutler recognized in 1986, the 643 Property's use of the disputed strip on the 651 Property to avoid the problem of the "extremely narrow" driveway remains reasonably necessary. (*See* Ex. 11.) Indeed, it is undisputed. that, without the easement, the 643 Property's driveway would measure 7.2 feet at its narrowest point, would fall several feet short of the City's minimum driveway width of 10 feet, and would accommodate only the narrowest of oars at best.

For all of the foregoing reasons, the Court finds that the conditions for an implied easement over the disputed strip of land are met. In so concluding, the Court rejects the Romeros' additional contention that, as a matter of law, the Court may not find an implied easement for "exclusive use" here. To begin with, the implied easement at issue is for the continued use of the driveway, planter, and block wall. It is not necessarily "exclusive," as various subsurface uses (*e.g.*, running underground pipes or cables) are available to

the 651 Property. Moreover, insofar as the driveway, planter, and block wall might be viewed effectively as the exclusive use of the eight-foot strip, the Romeros point to no authority that prohibits such an implied easement. To the contrary, for quite some time, the courts have recognized implied easements in cases concerning the continued existence and more permanent use of land, including roads and driveways. (*See*, *e.g.*, *Horowitz*, 79 Cal.App.3d at 123-424 [implied easement for paved driveway]; *Rosebrook v. Utz*, (1941) 45 Cal.App.2d 726, 727-728 [implied easement for gravel road]; *see also People v. Bowers* (1964) 226 Cal.App.2d 463, 466 [noting that establishment of an implied easement requires "something upon the servient estate which is either visible *or in the nature of a permanent artificial structure*"] [emphasis added].) As discussed above, the focus of the analysis is what the parties intended at the time of the division or conveyance; whether their intended use was exclusive or not is beside the point.

Accordingly, the Court finds there is an implied easement over the strip of land, as described in Trial Exhibit 747, for the 643 Property to maintain a driveway, planter and wall/fence. Such easement shall run with the land, and, consistent with the original grantor and grantee's intent in 1986, shall terminate if the 643 Property ceases its continued use of the easement for a driveway, planter and wall/fence.

B. Equitable Easement

Having found an implied easement for the 643 Property to continue its use of the eight-foot strip of land on the 651 Property, the Court need not reach the issue of whether any such easement should arise as a matter of equity. In closing argument, both the Romeros and Shih-Kos acknowledged the finding of an implied easement would obviate any need for an equitable easement, but both parties urged the Court to reach this issue, which had been fully tried before the Court. Accordingly, in the interests of judicial economy, the Court will address the Shih-Kos' contention that the Court should create an equitable easement in the event the Court's finding of an implied easement cannot stand.

Where there has been an encroachment on land without any legal right to do so, the Court may exercise its equity powers to affirmatively fashion an interest in the owner's land which will protect the encroacher's use, namely, a judicially created easement sometimes referred to as an "equitable easement." (*Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 764-765; *see also Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003, 1008.) In determining whether to do so, the Court engages in equitable balancing to determine whether to prevent such encroachment, on the one hand, or instead to permit it and award damages to the land owner, on the other hand. (*Hirshfield*, 91 Cal.App.4th at 759.) In order to create an equitable easement, three factors must be present: (1) the encroacher must be "innocent" in that his or her encroachment is not willful or negligent;

(2) the land owner must not suffer irreparable injury from the encroachment; and (3) the hardship to the encroacher must be greatly disproportionate to the hardship the continued encroachment would cause to the land owner. (*Shoen v. Zacarias* (2015) 237 Cal.App.4th 16, 19; *Hirshfield*, 91 Cal.App.4th at 759; *Tashakori*, 196 Cal.App.4th at 1009.)

Here, the Court finds that all three factors for the creation of an equitable easement are present. There can be no serious doubt the Shih-Kos were "innocent" parties, as there is no evidence they had any knowledge of the encroachment on the 651 Property. Nor did they have any reason to know. When the Shih-Kos purchased the 643 Property, the Seller Property Questionnaire indicated there were no known easements, encroachments, or boundary disputes. (*See* Ex. 51 at p. 2.) Likewise, the Real Estate Transfer Disclosure Statement indicated there were no "encroachments, easements or similar matters that may affect your interest in the subject property." (Ex. 52 at p. 2.) The Romeros admit as much in their verified complaint. (3d Amend. Compl. ¶ 7 [alleging "documents for the [643] Property during Shih and Ko's purchase transaction did not disclose any encroachments or easements"]). Moreover, David Tsai, the real estate agent for the Shih-Kos' purchase of the 643 Property, testified neither he nor his clients had any reason to know about the encroachments. Indeed, Tsai believed the brick planter in the disputed area was part of the 643 Property because it was made of the same material as the other planter boxes on the 643 Property. Rather

similarly, Mr. Romero acknowledged at trial that he had no reason to suspect there was any encroachment on the 651 Property when he purchased it, because, for example, he assumed the block wall was located on the property line. If Mr. Romero concedes he had no reason to know of the encroachments, it is hard to see how the Shih-Kos should be expected to have suspected otherwise. The Court thus finds the Shih-Kos were innocent parties with no knowledge of the encroachments and no basis to know of them.

Further, the Court finds that, without granting an easement over the disputed strip of land, the hardship to the Shih-Kos would be greatly disproportionate to any hardship the Romeros would suffer by virtue of permitting the continued encroachment. Relatedly, the Court finds the Romeros would not suffer any irreparable harm from such continued encroachment. With respect to the harms and/or hardship to the Romeros, the evidence before this Court does not indicate they would suffer any concrete, serious harm. Mr. Romero essentially testified that he bought the 651 Property because he liked what he saw. The use of the lot Mr. Romero saw at the time of purchase remains exactly the same if the 643 Property is granted an easement to keep the encroaching driveway, planter, and block wall where they were when Mr. Romero bought his lot. Further, although Mr. Romero testified generally that removal of such encroachments would afford him greater privacy and the ability to plant trees and/or build a pool in his backyard, there was no evidence at trial of any actual plans the Romeros had to increase privacy,

landscape, or construct a pool that their lot in its current state would prevent or adversely affect in some substantial manner.

The Romeros also argue that the continued encroachment by the 643 Property burdens them because they continue to pay property taxes for land being used by another and because they may be exposed to landowner liability for the actions or inaction of the 643 Property owners on the Romeros' land. There was, however, no evidence introduced at trial—indeed, not even with respect to damages (discussed below)—concerning property taxes the Remoras actually pay for the 651 Property and what, if any, unfair tax burden the Romeros assume for the strip of land they cannot fully use. As for potential legal liability for the strip of land, the Court recognizes the possibility of such a hardship befalling the Romeros as the landowners, but any such liability (or pecuniary damage flowing therefrom) is too speculative and uncertain to carry much weight when balancing the hardship to the Romeros. Indeed, there was no evidence adduced at trial that any owner of the 651 or 643 properties has ever faced any sort of premises liability in connection with the eight-foot strip of land.

Largely, it appears to the Court that any harm to the Romeros is emotional or psychological. At bottom, Mr. Romero testified that he felt harmed because the strip of land is his, he has a right to it, and the encroachments deny him access to it. He further testified that lot size was the main criteria in deciding to purchase the 651 Property such that he would

not have bought the property if he had known the nearly 10,0000 square foot lot was effectively reduced by approximately 1,000 square feet due to the encroachment. Mrs. Romero likewise testified that essentially the primary harm to her was the violation of her constitutional property rights. She, too, testified that the fact of a 10,000 square foot lot was important to her. While the Romero's failure to conduct a survey or otherwise confirm prior to purchase that their property actually consisted of 10,000 usable square feet belies their professed claims of the premiere importance of a 10,000 square foot lot, the Court recognizes the Romeros' upset over the impingement of their property rights is very real, nontrivial, and heartfelt. Indeed, the seriousness of those feelings is reflected in the hard-fought litigation that has occurred in this matter costing upwards of $300,000 according to Mr. Romero, the separate suit the Romeros brought against their title insurer, and the various hiring and firing of their lawyers and expert appraisers throughout. Nonetheless, while the hardship to the Romeros may be felt substantially by them, it is greatly outweighed by the actual harm the Shih-Kos would suffer absent an easement over the strip of land.

As general contractor Steven McCormick testified, without an easement, the driveway for the 643 Property would be reduced to 7.2 feet at its narrowest point for an approximate 32 foot stretch between the property line and the side of the residence on the 643 Property. Not only would this fall far short of the 10 feet minimum driveway width required by the City of

Sierra Madre, but it would severely limit the types of vehicles that could use the driveway. Plus, no car could meaningfully open its doors for the purpose of entry or exit along the 32-foot stretch of narrow driveway. Moreover, for those limited compact cars that could drive up the non-code-compliant driveway, there would be insufficient room to turnaround and such vehicles would be required to back up the entire stretch of the narrow driveway to exit. Further, without the easement, a border wall on the property line would be mere inches from the wall of the garage at the back of the 643 Property, resulting in the need to relocate the air conditioner on that side of the garage and the inability to repaint or meaningfully maintain that garage wall. In the Court's view, such consequences of no easement would substantially impair the use and function of the 643 Property.

Further, McCormick testified as to the impracticality and great expense of alternatives to the easement. In order to widen the driveway to make it functional and code-compliant, the side of the home on the 643 Property would need to be torn back by approximately four feet and reframed. This would result in the current bedroom at the side of the house being reduced in size to below the minimum 100 square foot requirement for a bedroom in Los Angeles, thereby downgrading the house to a 1 bed/1 bath house. Further, if the border wall were placed on the actual boundary line inches from the two-car garage at the back of the 643 Property, that garage would have to be reduced such that it could no longer fit two cars, and

the air conditioner would have to be relocated. According to McCormick, these alternatives would cost over $200,000. (*See* Ex. 742.)

In balancing the hardships, the Court does not find any viable, reasonable alternatives to an easement. In so finding, the Court rejects the testimony of licensed civil engineer and general contractor Steven Helfrich, who opined that the driveway on the 643 Property could continue to be used even if it were narrowed to the actual property line. Helfrich's opinion was based solely on his conclusion that one car—a 2018 Prius—could fit through the narrowest stretch of such a driveway. He did not consider any other vehicles that might use the driveway, and it is not altogether clear that even a 2018 Prius could make it through the narrow driveway with its sideview mirrors fully extended. Likewise, the Court found unhelpful the testimony of construction and safety consultant Gidon Vardi. Although Vardi estimated various construction and repairs to the 643 Property would cost approximately $28,000, he did not meaningfully explain how he arrived at such costs or why he included (or excluded) any particular items of construction or repair as a workable and reasonable alternative to permitting the existing driveway, planter, and block wall to remain.

Lastly, in evaluating the respective harms and hardships to the parties, the Court considered the diminution in value to the respective properties due to the easement or lack thereof. In this regard, the only competent evidence of such diminution in value was the expert testimony of real estate appraiser and broker

Daniel Poyourow. Poyourow specializes in diminution in value studies, including easements and encroachments, and has completed hundreds of diminution in value appraisals over the course of his career. Further, in conducting his diminution in value appraisal for the properties at issue here, Poyourow inspected the properties, spoke to brokers familiar with the Sierra Madre market, and used comparable sales from properties in Sierra Madre based on his discussions with those brokers who best knew the relevant market. Ultimately, Poyourow concluded that the effect of an easement over the disputed area would be a diminution of value to the 651 Property of $67,000, or an additional $4,000 if using the slightly greater square footage calculation of the Romeros' survey for the area of encroachment. As for the 643 Property, Poyourow calculated the diminution in value to that property without the easement to be $133,000.

The Court acknowledges there was additional testimony regarding diminution in value by the Romeros' expert David Harding. According to Harding, the diminution in value to the 651 Property due to the easement is approximately $300,000, and the diminution in value to the 643 Property due to the lack of an easement is approximately $148,000. The Court, however, finds such testimony wholly unreliable and entirely unconvincing. Harding has over 20 years' experience as a real estate appraiser, but he acknowledged that he had never previously appraised any property in Sierra Madre and had only appraised a few properties in all of Los Angeles County, which were commercial

properties. Notably, he has only conducted two diminution in value appraisals involving encroachments ever. He did not make up for such lack of relevant experience or familiarity with the relevant real estate market by consulting with other brokers or appraisers knowledgeable about Sierra Madre. Rather, he compounded the weakness of his appraisal methodology and ultimate conclusions by using comparable sales outside the Sierra Madre area and two sales that were over four years old. He also did not inspect the 643 Property. Further, for example, he appears to have created out of whole cloth an additional 15% diminution in value for the 651 Property based on made-up, subjective criterion such as loss of privacy, less desirable shape, and decreased curb appeal. For all those reasons, the Court finds Harding's testimony either should have been excluded or stricken in its entirety for lack of foundation and reliability or should be disregarded and afforded no weight to the extent it was admissible. Either way, the Court is left with only the testimony of Daniel Poyourow as reliable, competent evidence of the effect of the easement on diminution in value to the 643 and 651 properties, which supports the Court's finding that the balance of hardships greatly favors the Shih-Kos.

In light of all the foregoing, the Court concludes that, in the absence of an implied easement, the Court should, in the exercise of its discretion, impose a judicially created, equitable easement, over the strip of land, as described in Trial Exhibit 747, for the 643 Property to maintain a driveway, planter and wall/

fence. Such equitable easement should run with the land, but should terminate if the 643 Property were to cease its continued use of that land for a driveway, planter and wall/fence.

When the Court creates an equitable easement, the land owner is ordinarily entitled to damages as compensation. (*Tashakori* 196 Cal.App.4th at 1014; *Nellie Gail Ranch Owners Assn. v. McMullin* (2016) 4 Cal.App.5th 982, 1003 ("[A] trial court has discretion to deny an injunction and instead compel the plaintiff to accept damages as compensation for a judicially created easement that allows the defendant to maintain the encroaching improvement"].) Such damages may be based on the diminishment in value of the owner's property resulting from the continued encroachment. (*See Tashakori,*, 196 Cal.App.4th at 1014.) Such damages may also be based on the fair market purchase price of the land over which the encroachment is permitted. (*See Hirshfield*, 91 Cal.App.4th at 772.)

Here, the Court finds the Romeros are entitled to compensation if subject to the equitable easement described herein. In so finding, the Court rejects the Shih-Kos argument that the Court should deny such compensation because, according to the Shih-Kos, the Romeros have engaged, in "bad conduct" with "unclean hands" that is "incredibly offensive" and "very aggressive." While the behavior of a party might be a relevant equitable consideration in other contexts, the Court does not find that is the case here. Moreover, even if the Court could should consider the Romeros' conduct in its analysis, the Court finds such factor to be

substantially outweighed by the far more relevant factors of whether and how the Romeros would actually be damaged.

Under the circumstances, the Court finds the best measure of damage to the Romeros due to the creation of an equitable easement is the diminution in value to their property. (*See Tashakori*, 196 Cal.App.4th at 1014.) As discussed above, the Court credits Poyourow's conclusion that the easement would diminish the 651 Property by $67,000. In addition, as Poyourow acknowledged, the diminution may be $4,000 more if using the square footage calculation of the Romeros' survey. As the Court understands it, the difference in square footage for the easement as between the Romeros' survey and the Shih-Kos' survey depends on which side of the block wall one begins measuring. The Court will, accordingly, split the difference and concludes that $69,000 would constitute just compensation to the Romeros for the creation of an equitable easement. The Court does not find there is any other convincing evidence in the record to support a different amount. As noted above, the Court is unpersuaded by Harding's valuation opinion. Likewise, the $95,000 the Romeros accepted to resolve their claim against their title insurer is an unhelpful measure of damages here. While that figure may have been based largely on the value of the easement, there was no evidence before this Court concerning the reliability of that number or how it was calculated such that this Court should give any weight to it. The same also holds true for any of the other valuations obtained by the Romeros in connection with that case.

C. Remaining Claims

Having found an implied easement in favor of the 643 Property over the disputed eight-.foot strip of land, the Court agrees with the parties that such finding is dispositive of the remaining claims in the operative Third Amended Verified Complaint of the Romeros and Verified Cross-Complaint of the Shih-Kos. More specifically, because such implied easement gave the Shih-Kos the right to use the 651 Property for the complained of encroachments, the Romeros are not entitled to any of the equitable relief or damages they seek, and the Shih-Kos are entitled to judgment in their favor on all causes of action in the Third Amended Verified Complaint. For these same reasons, in addition to prevailing on their first and second causes of action for equitable easement and implied easement, the Shih-Kos are entitled to judgment in their favor on the remaining causes of action for quiet title and declaratory relief in their Verified Cross-Complaint, as against both the Romeros and U.S. Bank National Association.

III.

CONCLUSION

For all the foregoing reasons, the Court finds in favor of the Shih-Kos on the above-discussed claims and cross-claims in this matter. Within 15 days after service of this Statement of Decision, the Shih-Kos shall file and serve a Proposed Judgment in accordance herewith.

Dated: September 28, 2020

/s/ Curtis A. Kin
HON. CURTIS A. KIN
Los Angeles County
Superior Court

EXHIBIT "B"

EXHIBIT "A"

Legal Description

That portion of Lot B of Gurhardy Heights, in the City of Sierra Madre, County of Los Angeles, State of California, as per map recorded in Book 13 page 188 of maps, in the Office of the County Recorder of said county, described as follows:

Beginning at the southeasterly corner of said Lot B, also being the southwesterly corner of Lot 15 of Wheeler Heights, as per map recorded in Book 8 page 5 of Maps, records of said county; thence along the easterly line of said Lot B, North 00°10'20" West, 157.14 feet to the easterly prolongation of the northerly line of Lot 12 of said Gurhardy Heights; thence along said prolongation, South 89°39'25" West, 7.48 feet; thence leaving said prolongation, South 00°03'12" West, 157.14 feet to the southerly line of said Lot B; thence along said southerly line, North 89°40'00" East, 8.10 feet to the Point of Beginning.

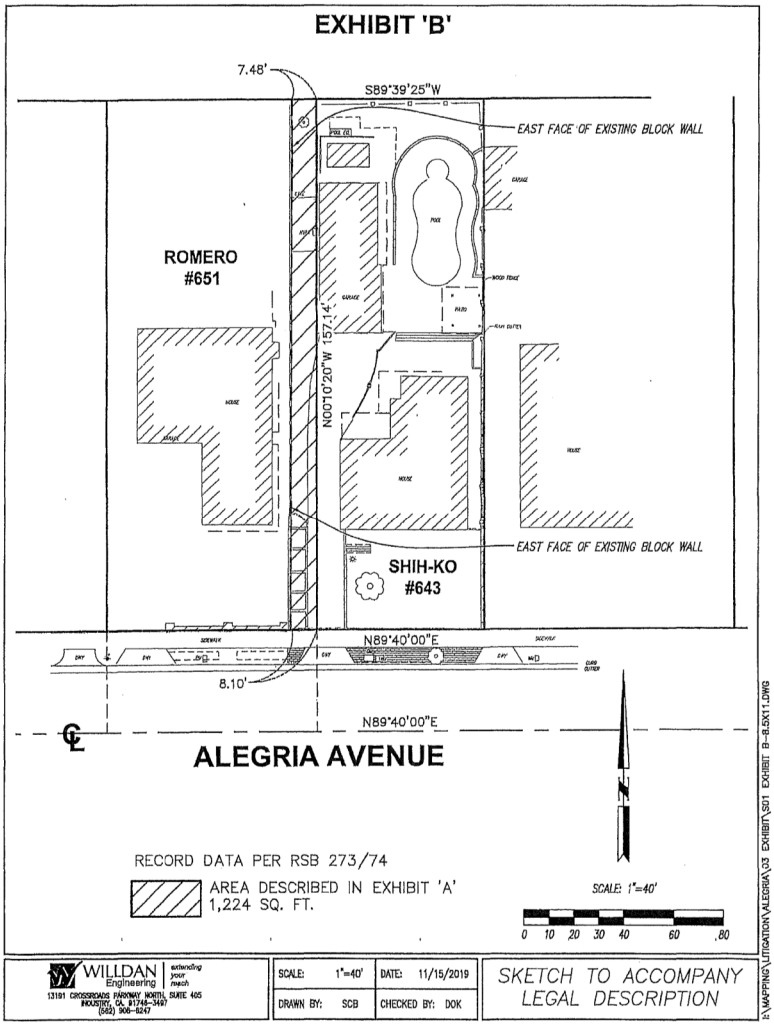
The westerly line of the above described land is intended to be the easterly face of an existing block wall and its northerly and southerly prolongations.

Contains 1,224 square feet, more or less

As shown on Exhibit B attached hereto, and made a part hereof

Prepared under my supervision:

/s/ David O. Knell 11-15-2019 [SEAL]
David O. Knell PLS 5301 Date



[Proofs Of Service Omitted]

Court of Appeal, Second Appellate District,
Division Eight - No. B310069

S275023

IN THE SUPREME COURT OF CALIFORNIA

En Banc

TATANA SPICAKOVA ROMERO et al.,
Plaintiffs, Cross-defendants and Appellants,

v.

LI-CHUAN SHIH et al., Defendants,
Cross-complainants and Respondents;

U.S. BANK NATIONAL ASSOCIATION,
Cross-defendant and Respondent.

(Filed Aug. 10, 2022)

The petition for review of defendants, cross-complainants, and respondents Li-Chuan Shih et al. is granted. The petition for review of plaintiffs, cross-defendants, and appellants Tatana Spicakova Romero et al. is denied.

The issue to be briefed and argued is limited to the following: Did the trial court correctly find the existence of an implied easement under the facts?

Pending review, the opinion of the Court of Appeal, which is currently published at 78 Cal.App.5th 326, may be cited, not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority that would in turn allow trial courts to exercise discretion under *Auto Equity Sales,*

Inc. v. Superior Court (1962) 57 Cal.2d 450, 456, to choose between sides of any such conflict. (See *Standing Order Exercising Authority Under California Rules of Court, Rule 8.1115(e)(3), Upon Grant of Review or Transfer of a Matter with an Underlying Published Court of Appeal Opinion*, Administrative Order 2021–04–21; Cal. Rules of Court, rule 8.1115(e)(3) and corresponding Comment, par. 2.)

Cantil-Sakauye
Chief Justice

Corrigan
Associate Justice

Liu
Associate Justice

Kruger
Associate Justice

Groban
Associate Justice

Jenkins
Associate Justice

Guerrero
Associate Justice

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Tatiana Romero
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In Pro Se

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

NORTH CENTRAL DISTRICT – GLENDALE COURTHOUSE

CESAR ROMERO, an individual, and TATANA S. ROMERO, an Individual, Plaintiffs, v. LI-CHUAN SHIH, in individual; TUN-JEN KO, an individual; and DOES 1-50, inclusive, Defendants.	**Case No. EC064933** **UNLIMITED CIVIL JURISDICTION** (Assigned for all purposes to the Hon. Curtis Kin Dept. E) **PLAINTIFFS AND CROSS-DEFENDANTS OBJECTIONS TO PROPOSED STATEMENT OF DECISION AND REQUEST FOR ADDITIONAL AND ALTERNATIVE FINDINGS** Non-Appearance Review Date: September 28, 2020 Time: 1:30pm Dept. E (Filed Sep. 8, 2020)
LI-CHUAN SHIH, in individual; TUN-JEN KO, an individual, Cross-Complainant, v. CESAR ROMERO, an individual, and TATANA SPICAKOVA ROMERO,	

an Individual, ALL PERSONS UNKNOWN CLAIMING ANY LEGAL OR EQUITABLE RIGHT, TITLE, ESTATE, LIEN, OR INTEREST IN THE PROPERTY DESCRIBED IN THE CROSS-COMPLAINT ADVERSE TO CROSS-COMPLAINANTS' TITLE, OR ANY CLOUD UPON CROSS-COMPLAINANTS' TITLE THERETO; AND ROES 1 through 40, Inclusive,

Cross-Defendants

Plaintiffs/Cross-Defendants Cesar Romero and Tatiana Romero ("Romeros") submit the following objections to the Court's Proposed Statement of Decision ("SOD") filed on August 24, 2020 and request alternative and additional findings. Romeros' objections are submitted pursuant to *Code of Civil Procedure* § 634, and California Rules of Court, Rule 3.1590.

OBJECTIONS

Romeros object to the entire Proposed Statement of Decision on the grounds that the award of an essentially perpetual exclusive easement that is binding on 643 Property successors-in-interest is against the law, amounts to unconstitutional taking of private property, grants Shih/Ko a private right of eminent domain,

violates the Subdivision Map Act (Government Code §§66410 *et. seq.*), violates the Statute of Frauds (Civil Code § 1624), it violates Romeros' due process rights and is abuse of discretion. Further, the SOD is wholly unsupported by evidence, vague, ambiguous, and condones and promotes negligence and fraud.

What is set forth in the proposed SOD is taken from Shih/Ko and what Shih/Ko argued throughout trial, while the Court entirely disregarded, dismissed, omitted and/or ignored legal arguments, witnesses, material facts and evidence introduced by Romeros and Romeros' experts. The Court went as far as disqualifying, ignoring, dismissing, and/or discrediting **all** of Romeros' experts either as non-credible, irrelevant or inexperienced, while putting all the weight to Shih/Ko's experts who have a history of misrepresentations and making inaccurate statements.

* * *

Objection No. 2:

On March 9, 2020, Romeros filed a Request for Statement of Decision specifically asking this Court to explain why granting an exclusive easement over approx. 13% of Romeros' land does not violate the Fifth Amendment to the United States Constitution. The proposed SOD does not address this issue at all and the Romeros request again that this Court specifically addresses this issue.

* * *

Objection No. 20:

* * *

xxv. Does the Fifth Amendment of the United States Constitution allow **private property** to be taken for **private and exclusive use**?

* * *

xxvi. Does the United States Constitution allow, under any Amendment, **private property** to be taken for **private and exclusive use**?

* * *

Objection No. 45:

* * *

Romeros object on the grounds that this conclusion is abuse of discretion as the confiscation of Romeros' entire piece of land is beyond reasonable and necessary, is unsupported by evidence, amounts to an unconstitutional taking in violation of state and federal law, unsupported by settled California law as detailed herein and condones and promotes negligence and fraud in violation of law as detailed herein.

* * *

Dated: September 7, 2020

/s/ Cesar Romero
CESAR ROMERO
PLAINTIFF

/s/ Tatiana Romero
TATIANA ROMERO
PLAINTIFF

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, CENTRAL DISTRICT

CESAR ROMERO, an individual, and TATANA SPICAKOVA ROMERO, an Individual, Plaintiffs, v. LI-CHUAN SHIH, in individual; TUN-JEN KO, an individual; and DOES 1-50, inclusive, Defendants.	Case No. EC 064933 **REQUEST FOR STATEMENT OF DECISION** The Hon. Curtis Kin, Dept. E Action Filed: 2/10/16 Trial Date: 03/09/20 (Filed Mar. 9, 2020)

LI-CHUAN SHIH, an individual, and TUN-JEN KO, an individual,

Cross-Complainant,

v.

CESAR ROMERO, an individual, TATANA SPICAKOVA ROMERO, an Individual; ALL PERSONS UNKNOWN CLAIMING ANY LEGAL OR EQUITABLE RIGHT, TITLE, ESTATE, LIEN, OR INTEREST IN THE PROPERTY DESCRIBED IN THE CROSS-COMPLAINT ADVERSE TO CROSS-COMPLAINANTS' TITLE, OR ANY CLOUD UPON CROSS-COMPLAINANTS' TITLE THERETO; and ROES 1 through 40, Inclusive,

Cross-Defendants

Plaintiffs and Cross-Defendants Cesar Romero and Tatana Spicakova Romero submit the following request for a statement of decision under Code of Civil Procedure section 632 and California Rule of Court 3.1590(d) explaining the factual and legal bases for its decision regarding the following controverted issue:

1. Whether there is an implied exclusive easement by reservation of the 8.25 feet wide by 157.14 feet long (1,296 sf) disputed strip of land located at 651 Alegria Avenue. Sierra Madre, CA 91024 (the "Romero Property") which is for the benefit of 643 Alegria Avenue, Sierra Madre, CA 91024 (the "Shih/Ko Property").

2. Whether the court finds an equitable exclusive easement that is 8.25 feet wide by 157.14 feet long (1,296 sf) disputed strip of land located at 651 Alegria Avenue, Sierra Madre, CA 91024 (the "Romero Property") which is for the benefit of 643 Alegria Avenue, Sierra Madre, CA 91024 (the "Shih/Ko Property"). If so, what just compensation and/or damages does the court award to the plaintiffs/Romeros? If so, why the granting of such an easement does not violated the Fifth Amendment to the United States Constitution?

DATED:
March 9, 2020

SULLIVAN, WORKMAN & DEE, LLP
CHARLES D. CUMMINGS
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By: /s/ Charles D. Cummings
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Attorneys for Plaintiffs and Cross-Defendants CESAR ROMERO AND TATANA SPICAKOVA ROMERO

[Proof Of Service Omitted]

Case No. B310069

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE SECOND APPELLATE DISTRICT

DIVISION EIGHT

CESAR ROMERO and
TATANA SPICAKOVA ROMERO

Plaintiffs and Appellants,

v.

LI-CHUAN SHIH and TUN-JEN KO

Defendants and Respondents.

On Appeal From the
Los Angeles County Superior Court
Case No. EC064933
Before the Honorable Curtis A. Kin

PETITION FOR REHEARING

(Filed May 10, 2022)

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[4] **I.**
INTRODUCTION

In the Opinion, this Court concluded the court awarded easement left the Romeros with no practical use of that portion of their property. This Court further concluded that, absent two very narrow exceptions which do not apply here, an implied easement that leaves the fee title holder with no practical use of that portion of its property is an exclusive easement which, under the law, is not legally permissible. Thus, this Court reversed the implied easement finding. This Court did not, however, address whether the same exclusivity rule applies to the court ordered equitable easement, notwithstanding the Romeros' briefing on the issue and the Romeros' counsel's argument on the issue at the oral argument. This petition for rehearing should be granted so this Court can properly address this dispositive issue.

Additionally, notwithstanding the exclusivity issue, this Court committed legal error by reversing the burden of proof on a key element of the equitable

easement claim, and committed a factual error regarding driveway width requirements.

Finally, because the Romeros succeeded on obtaining a reversal on one of the key issues on appeal, the Romeros are requesting this Court to reconsider its award of costs to [5] Respondents and to, instead, order that both sides are to bear their own costs.

II.
ARGUMENT

A. Rehearing is merited so this Court can address and rule on whether the exclusivity rule applies to equitable easements, a dispositive issue addressed in the briefing and at oral argument but not even mentioned in the Court's Opinion

A rehearing petition may be granted where the Court's Opinion fails to address a material issue in the case. (See *In re Jessup's Estate* (1889) 81 Cal. 408, 471.) Here, as shown below, the Court's Opinion fails to address a key and dispositive issue presented through the briefing and oral argument.

The second full paragraph on page 30 of the opening brief argues: "The rationale for precluding exclusive prescriptive easements, however, is equally applicable to court ordered implied *and equitable* easements." (italics added.) That paragraph goes on: "Regardless of the label (prescriptive, implied, equitable, etc.), if a court ordered easement awards a use that effectively divests the true owner of any ability to use

the property, that easement is prohibited. Such a ruling violates the rule of law requiring courts 'to [6] observe the traditional distinction between easements and possessory interests in order to foster certainty in land titles.' "

The next 8 pages of the opening brief then explains why exclusive easements should not be legally permissible. The last paragraph of that argument section on page 39 of the opening brief explained the rationale precluding exclusive prescriptive easement "is based on the distinction between easements and estates" and "[t]hat distinction applies to *all easements*, not just prescriptive easements." (Italics added.) The conclusion of the opening brief on page 75 states: "The exclusive easement ordered by the court is not permitted as a matter of law." The point is again made on page 14 of the Romeros' reply brief: "In analogizing to prescriptive easement cases, the point being made is that no court ordered easements (prescriptive, implied, equitable) can be for exclusive use to the exclusion of the owner of the property."

When this Court's tentative ruling came out, the tentative was that "the court cannot create an exclusive implied easement" and that, in this case, because the Romeros were left with no practical use of the easement area, the court ordered implied easement was not permissible as a matter of law. There was no mention in the tentative, however, about whether the rule precluding exclusive easements also applied to the court ordered equitable easement. As such, at oral [7] argument, counsel for the Romeros stressed that it was the

Romeros' position, as shown in their briefing, that the rule precluding exclusive easements applies to all court ordered easements, including equitable easements.

This Court's Opinion, however, does not address that issue at all. There is no discussion or analysis about whether the exclusivity rule also applies to equitable easements or whether the court ordered equitable easement was also in error because it amounts to an exclusive easement that leaves the Romeros with no practical use of their property.

Once this Court concluded the court ordered easement precluded the Romeros from all practical use of that portion of their property, a court ordered easement that does not fall within the two very limited exceptions should not be legally permissible, period. Given the rationale for precluding exclusive easements absent very limited exceptions, there is no rational basis for concluding the exclusivity test applies to court ordered prescriptive and implied easements, but not equitable easements.

The issue presented through this petition is dispositive, but this Court's Opinion does not address the issue. Accordingly, the Romeros respectfully request that their petition for rehearing be granted so this Court can address and rule on whether the exclusivity rule also applies to the [8] equitable easement and, if so, whether the trial court erred by creating an exclusive equitable easement that precludes the Romeros from all practical use of that portion of their property.

It is submitted given this Court's findings that the court ordered easement deprives the Romeros of all practical use of their property and the two limited exceptions do not apply, it necessarily follows that the trial court abused its discretion in awarding an equitable easement.

B. The Court committed legal error by reversing the burden of proof on the equitable easement

The Shih-Kos had the burden of establishing all of the elements of an equitable easement, which includes establishing the requested easement is narrowly tailored and not greater than reasonably necessary to protect their use interest in a driveway. (See *Shoen v. Zacarias* (2015) 237 Cal.App.4th 16, 19.) Because the awarding of an equitable easement "is in tension with the general constitutional prohibition against the taking of private property" the analysis of the elements begins "tipped in favor of the Romeros. (See *id.* at 19-20.) All doubts are to be resolved in the Romeros' favor. (See *id.* at 21.) The remedy has been called "extreme." (*Id.* at 20.) The typical type of hardship required to overcome the heavy presumption in the Romeros' favor is where the trespasser "would be forced to move buildings or be airlifted to their landlocked property." (See *Id.* [9] at 21.) "Deprivation of a substantial benefit . . . falls short of the imposition of a substantial hardship." (*Ibid.*)

As expressed by the trial court, this case was about "avoid[ing] the problem of the extremely narrow driveway." (2AA/308.) There is no evidence in this record to support a finding that, e.g., the flower planters—which are on the Romeros' property—are necessary to avoid the problem of the extremely narrow driveway or to protect the Shih-Kos' use of a driveway. There is also no evidence as to how the backyard (the 23 feet between where the garage building ends and the back property line is located) is necessary for driveway use—it is not. (3AA/491; 4AA/519-520.) Neither the trial court nor this Court explained why the Shih-Kos "need" all of that area "to avoid the problem of the extremely narrow driveway." Thus, the Shih-Kos did not meet their high burden of proof—akin to having to move buildings or be airlifted to their property—that the garden planter and other portions of the purported easement area are necessary to protect their use of the driveway.

In the Opinion, however, this Court put the burden on the Romeros to "provide evidence and argument as to how the easement could be more narrowly tailored." (Opinion, at p. 49.) This Court criticized the Romeros for opting "for an all or nothing approach" by not wanting to give up any of their property. (Opinion, at p. 50.) In doing so, this Court [10] committed legal error by switching the burden of proof to the Romeros. (See, e.g., *Curcio v. Pels* (2020) 47 Cal.App.5th 1, 14-15 [reversing because the trial court improperly shifted the burden of proof]; *In re Marriage of Schwartz* (1980) 104

Cal.App.3d 92, 96 [improper shifting of the burden of proof "is, itself, sufficient to mandate a reversal."].)

The Shih-Kos had a heavy burden of proving what they were requesting was narrowly tailored for purposes of protecting their use of a driveway, and there is no evidence in the record that the Shih-Kos ever offered—before or during trial—to take anything less than the entire strip of land. For example, the Shih-Kos had a heavy burden of proving the garden planter and area behind their garage was reasonably necessary for their use of a driveway. There is no such evidence, nor could there be as those areas are not necessary to address "the problem of the extremely narrow driveway."

It was not up to the Romeros to decide how much of their property they wanted to give away to the Shih-Kos. It was up to the Shih-Kos to prove that everything they were requesting was necessary to address the problem of the extremely narrow driveway. Reversing the standard of proof on this issue to the property owner is contrary to clearly established law, creates uncertainty in land titles and would create a terrible precedent for property owners.

[11] C. The Court committed a factual error about the required width of the driveway

On page 12 of the Opinion, the Court correctly notes that in "2014, the City required *new construction* to have a driveway width of 10 feet; this remains the driveway width requirement for the City. The City

'consider[]s a 10-foot-wide driveway reasonable.'" (Italics added.) But then, on page 46 of the Opinion, this Court concludes: "This would result in a driveway width of less than 10 feet, *the minimum required by the City*." (Italics added.) That is not a factually accurate statement because the 10-foot width requirement only applies to new construction. Here, the City of Sierra Madre would consider the 643 property "legal non-conforming" because, when the home and driveway were built, there was no minimum width driveway requirements.

D. The cost award should be modified

Appellate courts have discretion to deviate from the general prevailing party rule and, in the "interests of justice," may make any award of costs. (Cal. Rule Crt. 8.278(a)(5); *Mann v. Quality Old Time Service, Inc.* (2006) 139 Cal.App.4th 328, 341.) Here, even though the Romeros secured a reversal on the court's award of an implied easement—the principal finding at the trial court—this Court has awarded costs to Respondents. In the interest of justice, [12] this Court should modify its Opinion and order that both sides are to bear their own costs.

III.
CONCLUSION

This Court's Opinion does not address a key and dispositive issue presented through the briefing in this case. The Court also committed a significant legal error

by reversing the burden of proof on the equitable easement claim and committed a factual error regarding the required width of the Shih-Kos' driveway. Accordingly, this Court should grant this petition. Additionally, given the Romeros' partial success on appeal, this Court should also revise the Opinion by ordering both sides are to bear their own costs.

Dated: May 10, 2022

McCORMICK, BARSTOW, SHEPPARD, WAYTE & CARRUTH LLP

By: */s/ Scott M. Reddie*
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Attorneys for CESAR ROMERO and TATANA SPICAKOVA ROMERO

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[Proof Of Service Omitted]

Case No. S

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

CESAR ROMERO and
TATANA SPICAKOVA ROMERO

Plaintiffs and Appellants,

v.

LI-CHUAN SHIH and TUN-JEN KO

Defendants and Respondents.

After a decision by the Court of Appeal,
Second Appellate District, Division Eight,
Case No. B310069

PETITION FOR REVIEW

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[7] **I.**
PETITION

Cesar Romero and Tatana Spicakova Romero, the plaintiffs in the underlying action and the appellants in the appeal ("Romeros"), petition this Court for review of the May 5, 2022, opinion issued by the Second District Court of Appeal, Division Eight (Stratton, J., Grimes, Acting P.J., Harutunian, J.), a copy of which is attached.

II.
ISSUES PRESENTED

1. Whether the rule of law precluding court ordered *exclusive* prescriptive and implied easements also applies to court ordered equitable easements?

2. Whether the fee title holder, or the party requesting a court-ordered equitable easement, has the burden of proof showing that the requested easement is narrowly tailored and not greater than reasonably necessary to protect the trespasser's needed use interest?

III.
WHY REVIEW SHOULD BE GRANTED

Absent finding an easement is de minimis or necessary for public health or safety, court ordered *exclusive* prescriptive and implied easements are not permitted as a matter of law. Prior cases permitting exclusive *equitable* easements all involved situations

where the easement was de minimis or [8] necessary for public health or safety. Now, for the first time, a Court of Appeal has affirmed a court ordered exclusive *equitable* easement that is not de minimis or necessary for public health or safety, creating a conflict with existing cases. And, in doing so, the Court of Appeal has also created additional new precedent contrary to existing authority by shifting the otherwise heavy burden of proof on the trespasser to the property owner. The Court of Appeal's published Opinion permitting an exclusive equitable easement over 13% of Petitioners' residential property regardless of necessity creates dangerous new precedent contrary to fundamental real property rights. Review should be granted so this Court can settle the law as it relates to permissible equitable easements and resolve the conflict now created by the Court of Appeal Opinion.

Real property ownership is a fundamental right protected by the United States Constitution (Fifth Amendment) and the California Constitution (Art. I, sec. 19). The California Constitution also protects the inalienable right of "acquiring, possessing, and protecting property." (Art. 1, sec. 1.) And, as this Court has stated, in the field of land titles "certainty and stability are the watchwords of an orderly society." (*Buehler v. Oregon-Washington Plywood Corp.* (1976) 17 Cal.3d 520, 532-532. See also *Drake v. Martin* (1994) 30 Cal.App.4th 984, 996 ["Public policy favors stability [9] of title to real property."]; *Kreisher v. Mobile Oil Corp.* (1988) 198 Cal.App.3d 389, 403-404 ["[S]tability is at a premium" in the area of land titles].) Unless the Court

of Appeal's Opinion is corrected, the rights of owners of real property will be subject to the whims of courts rather than straightforward rules providing the certainty essential to fee title holders of real property.

Fee title ownership of land gives the owner a possessory right in the land. An easement, on the other hand, is not a possessory ownership right but is, instead, a right to use, for a specified limited purpose, a portion of land owned by someone else.

In general, there are two types of easements: (1) an easement expressly granted in a written and recorded instrument; and (2) an easement created by a court based on specified criteria (i.e., prescriptive, implied and equitable). A real property owner can, of course, voluntarily grant to a third party an easement which, in effect, gives that third party exclusive use and possession of the easement area. Given the importance of real property ownership rights, however, there are limitations to court created easements which are involuntarily imposed over the objection of the fee title property owner.

[10] As the Court of Appeal Opinion acknowledged, courts have uniformly recognized that, absent two very limited exceptions (de minimis and public safety), a court cannot create a *prescriptive* easement in favor of a third party which has the effect of leaving the fee title holder with no practical use of the property subject to the easement. The rationale is awarding such an *exclusive* prescriptive easement would be akin to a taking of property, which is not permitted.

In this case, the trial court created an exclusive implied easement or, alternatively, an exclusive equitable easement which left the Romeros with no practical use of 13% of their residential property which serves as their primary residence. On appeal, the Romeros argued the rationale precluding court ordered *exclusive* prescriptive easements which are not de minimis or necessary for public health or safety should apply to all court ordered easements, including the implied easement and equitable easement ordered by the trial court. Based on the same rationale precluding exclusive prescriptive easements, the Court of Appeal concluded, in a case of first impression, that exclusive implied easements which are not de minimis or necessary for public health or safety are not permitted as a matter of law.

For unknown reasons, the Court of Appeal did not address at all whether the same rule applies to court ordered equitable easements. Although the Court of Appeal concluded [11] the court ordered easement was exclusive, was not de minimis or necessary for public health or safety, and left the Romeros with no practical use of 13% of their residential property, the Court of Appeal affirmed the judgment creating the equitable easement without addressing the exclusivity issue.

The rationale precluding exclusive prescriptive and implied easements should equally apply to equitable easements. The fact that the Court of Appeal's Opinion is silent on that issue will lead to confusion and uncertainty in the State of California about whether exclusive equitable easements which are

not de minimis or necessary for public health or safety are permissible. This case presents the perfect vehicle for this Court to provide the needed certainty regarding equitable easements.

Additionally, there is long-standing precedent that the person requesting the court-ordered equitable easement has an extremely heavy burden of establishing the required elements, one of which is showing the requested easement is narrowly tailored and not greater than reasonably necessary to protect the needed use interest. The Court of Appeal's Opinion has shifted the narrowly tailored burden to the fee title holder, which creates a conflict with existing precedent. In doing so, the Court of Appeal also improperly concluded a fee title holder can lose constitutionally protected real [12] property rights simply because the fee title holder chose not to voluntarily give-up any of his/her property.

This Court should grant review to clarify whether the exclusivity rule precluding prescriptive and implied easements which are not de minimis or necessary for public health or safety also applies to equitable easements. This Court should further grant review to resolve the apparent conflict about the burden of proof on the narrowly tailored element of an equitable easement. Alternatively, this Court should grant review and transfer the case back to the Court of Appeal with instructions for the Court of Appeal to (1) address whether the exclusivity rule applies to equitable easements and/or (2) properly analyze the narrowly tailored requirement using the proper burden of proof.

IV.
BACKGROUND

A. The parties and the properties

This case involves a dispute over a 1,296 square foot strip of land between the owners of adjacent residential properties located at 651 West Algeria Avenue ("651 Property") and 643 West Algeria Avenue ("643 Property") in Sierra Madre, California. (2AA/303.)

Petitioners Cesar Romero and Tatana Spicakova Romero ("the Romeros") have owned the 651 Property since [13] April 2014, and Respondents Li-Chuan Shih and Tun-Jen Ko ("the Shih-Kos") have owned the 643 Property since July 2014. (2AA/303.) The Romeros use the 651 Property as their primary residence whereas the 643 Property is used as a rental property (RT/246). It is undisputed the Romeros are the fee title owners of the 1,296 square foot strip of land. (2AA/303.)

B. The original owner of both properties starts, but then abandons, his effort to change the lot line between the 651 Property and the 643 Property

In the 1960s, the 643 Property and 651 Property were owned by Edwin and Ann Cutler. (RT/146-147.) The Cutlers lived in the home on the 643 Property and the 651 Property was a vacant lot. (RT/146-147.) The 643 Property was 50 feet wide and 157 feet deep. (See, e.g., 2AA/351-353.) The 651 Property was 63 feet wide and 157 feet deep. (*Ibid.*)

On February 4, 1985, Edwin Cutler submitted to the City of Sierra Madre Planning Commission an application for a variance, which would have the effect of increasing the width of the 643 Property to 58 feet and decreasing the width of the 651 Property to 55 feet. (2AA/346-353.) A variance was required prior to any boundary line adjustment because, at that time, the Sierra Madre Municipal Code required a lot width of at least 60 feet. (2AA/349.) Obtaining Planning Commission approval was just the first step in the process. [14] (RT/181, 187.) Once approved, the applicant was required to obtain and record a survey and legal description—to be reviewed by the city engineer—and obtain a certificate of compliance signed by the director of public works. (RT/181, 187.) In the end, however, Mr. Cutler never completed the process, so the lot line was never adjusted. (2AA/358-361; RT/189-191, 218-222, 351-354.) There is no evidence in the record regarding why Edwin Cutler never completed the process.

C. After efforts to adjust the lot line are apparently abandoned, a home is built on the 651 Property

In mid-1985, after apparently having abandoned his efforts to obtain a lot line adjustment, Edwin Cutler, his son Bevon Cutler, and David Shewmake entered into an agreement wherein Bevon and David would build a home on the 651 Property and then, when the home was sold, Edwin would receive from the sale the value of the undeveloped lot and Bevon and David would split the net remaining proceeds from the

sale. (RT/148, 161, 167-168.) As part of the process of building the home on the 651 Property, Bevon and David built a six foot high brick wall between the two properties. (2AA/363; RT/161.) They built the brick wall in the same location where there was an existing chain link fence without verifying whether the chain link fence was on the property line. (RT/160.)

[15] **D. When the 651 Property sold, all relevant documentation contains its original legal description**

A "Notice of Completion" for the home on the 651 Property was issued on May 8, 1986. (2AA/371-372.) The legal description on the Notice of Completion is the original legal description, for a 63 foot wide lot. (2AA/371-372.) Prior to the issuance of the Notice of Completion, Edwin Cutler and Ann Cutler grant deeded the 651 Property to Bevon and David. (2AA/365-366.) Because the lot line was never adjusted, the grant deed from Edwin Cutler contained the original legal description of a 63 foot wide property. (2AA/365-366.) There was no reference in the deed to any easement in favor of the 643 Property.

The 651 Property was then sold, and Bevon and David executed a grant deed in favor of the buyers, Manfred and Elizabeth Leong, which was recorded on May 9, 1986. (2AA/368-369.) The legal description remained the same and no easement was referenced. (2AA/368-369.)

E. When the Shih-Kos purchased the 643 Property, they failed to properly inspect the boundary lines

In June 2014, the 643 Property was sold to the Shih-Kos for $658,500. (3AA/475-485.) The 643 Property was advertised for sale as a 50 foot wide lot, and the Shih-Kos were aware of the width of the lot. (RT/252, 254.) The legal [16] description in the grant deed is the original 643 Property legal description, a 50 foot wide lot. (3AA/446-447, 485; RT/250-251.) There is nothing about the easterly 8 feet of the 651 Property or any easements in favor of the 643 Property. (3AA/443-461; RT/233-234.) Prior to close of escrow, the Shih-Kos were specifically advised to independently verify the lot size and boundaries because those items had not been verified by the seller, but they chose not to. (4AA/522.)

F. The 643 Property trespasses on 1,296 square feet, or 13% of the 651 Property

There is no dispute that, if the Shih-Kos had investigated the boundaries of the 643 Property as they were advised to do before closing escrow, that investigation would have revealed the planter, portions of the driveway, and a portion of the back and side yard trespassed on the 651 Property a total of 1,296 square feet (157.14 foot length of the property by 8.25 foot width), which amounts to 13% of the Romeros' property. (4AA/512-520.)

G. The Romeros purchase the 651 Property and the deed contains the original legal description with no reference to an easement in favor of the 643 Property

Turning to the 651 Property, in 2005 the Leongs sold the 651 Property to Dawn Hicks. (2AA/384.) The legal description in the grant deed confirms the property is 63 feet wide. (2AA/384.) There is no reference that the 651 Property [17] is encumbered by an easement in favor of the 643 Property. (2AA/384.) The 651 Property was foreclosed upon in 2012. (2AA/387-389.) At that time, the legal description remained the same, 63 feet wide. (2AA/388.)

On April 9, 2014, the Romeros purchased the 651 Property for $892,500. (3AA/403, 410.) No one told the Romeros the 651 Property was encumbered by an easement in favor of the 643 Property. (RT/661.) The lot size was advertised at approximately 9,900 square feet. (RT/660, 713.) The size of the lot was an important factor in their decision to purchase. (RT/661, 713.)

H. The Romeros discover the Shih-Kos are trespassing on 1,296 square feet of their property

In 2015, while Mr. Romero was working on some yard improvements and taking some measurements, the measurements seemed inconsistent with a lot size of 9,900 square feet. (RT/663-664.) As a result, the Romeros hired a surveyor, James Kevorkian, to conduct a survey of their property. (RT/662.) Mr. Kevorkian

concluded the brick wall was not built on the property line. (4AA/512-520; RT/389-393, 401.) Rather, the true property line was 8.25 feet closer to the 643 Property. (3AA/491; 4AA/514-520; RT/392.)

As a result, the brick garden bed (which is 5.53 feet wide) is on the 651 Property. (3AA/491; 4AA/519-520.) [18] Additionally, 2.72 feet of the 643 Property driveway, to the east of the planter bed, is on the 651 Property. At the north end of the garden bed, where the brick wall starts, 8.25 feet of concrete slab is on the 651 Property. The garage on the 643 Property, located at the north end of the driveway, is 0.8 feet from the true property line and was constructed entirely on the 643 Property. There is a small window air conditioning unit on the garage that encroaches 1.2 feet into the true property line. (4AA/510; RT/167.) From the southwest corner of the Shih-Kos' garage to the back end of the 643 Property line, 8.25 feet by 69 feet (20 feet + 25 feet, 10 inches + 23 feet) of the backyard and side-yard is on the 651 Property. (3AA/491; 4AA/514-520.) The total trespass area is 8.25 feet wide and 157.13 feet deep, which equates to 1,296 square feet, or approximately 13% of the 651 Property. (3AA/491; 4AA/519-520; RT/272-273, 393.)

I. No structures on the 643 Property will have to be moved if a wall is built on the true property line

The trespass area is clearly depicted on a number of photos and renderings. (3AA/491-495; 4AA/509-510,

528, 537.) If the brick wall is moved to the actual property line, the first 30 feet of the 643 Property driveway would be 8.37 feet wide, the next 27.5 feet of the driveway (where it borders the 643 Property home) would be 7.2 feet wide, and thereafter the driveway would widen again. (3AA/491; 4AA/519-520.) [19] The newly constructed brick wall would be 0.8 feet to the west of the 643 garage. (4AA/515, 519.) Thus, if the brick wall is moved to the true property line, no structures on the 643 Property would have to be moved and the 643 Property would not be landlocked.

J. The Romeros advise the Shih-Kos about the trespass, but the Shih-Kos do not agree to permit the Romeros to build a wall on the true property line

After learning about the encroachment, the Romeros realized they were unable to use 13% of their property because it was separated by a 6 foot high brick wall and raised brick planter box, and was being exclusively used by the 643 Property. (RT/714.) The Romeros desired to relocate the brick wall to the actual property line so they would have full use and enjoyment of their property. (RT/663.) Moving the brick wall to the actual property line will provide them with more privacy, will permit them to plant additional trees and an orchard, and will give them more room to put in a pool. (RT/670.)

The Shih-Kos primarily live in Taiwan. (RT/228.) The 643 Property is a rental property managed by

David Tsai, who also served as the Shih-Kos' real estate broker when they purchased the 643 Property. (RT/227, 246.) After learning the location of the true property line, the Romeros contacted [20] Mr. Tsai, provided him with a copy of the survey and stated they intended to move the brick wall to the actual property line. (3AA/487-489; RT/235-236, 663.) Thereafter, Mr. Tsai went to the City of Sierra Madre and learned about Edwin Cutler's 1985 variance application. (RT/241.) Based on what Mr. Tsai found, he incorrectly believed the lot line had previously been adjusted. (RT/241-242.) Thus, Mr. Tsai did not agree to a relocation of the brick wall.

K. The Romeros file their complaint and the Shih-Kos cross-complain

Unable to resolve the issue, on February 10, 2016, the Romeros filed a complaint against the Shih-Kos alleging causes of action for trespass, quiet title and declaratory relief. (4AA/562.) The operative third amended complaint, filed on May 22, 2019, alleges causes of action for wrongful occupation of real property, quiet title, trespass, private nuisance, wrongful disparagement of title and permanent injunction. (1AA/37-120.) The Shih-Kos filed a cross-complaint alleging causes of action for equitable easement, implied easement, quiet title and declaratory relief. (1AA/12-25.)

[21] **L. Following a court trial, the court orders that the Shih-Kos, and all future owners of the 643 Property, have an exclusive implied easement or, alternatively, an exclusive equitable easement to use and possess 13% of the Romeros' property**

A court trial took place over four days in March 2020. The trial focused on the claims of implied and equitable easements over the 8-foot strip because, as the court stated, if it found an easement exists, that finding would dispose of the other claims. (2AA/304.) The court and the parties agreed at trial that given the nature of the disputed area, if the court were to conclude the 643 Property has easement rights with respect to the 1,296 square foot area, it would amount to an *exclusive* easement in favor of the 643 Property and that the Romeros would have no right or ability to use that portion of their property. (RT/442-443.)

On August 24, 2020, the court issued its proposed Statement of Decision, finding the Shih-Kos have an implied easement over the entire 1,296 square foot area. Alternatively, the court found the Shih-Kos have an equitable easement over the same area. (1AA/139.) The court overruled the Romeros' objections to the proposed Statement of Decision (1AA/151-289) and, on September 28, 2020, the court issued its Statement of Decision. (2AA/303-315.)

The court concluded "the Shih-Kos possess an implied easement over the eight-foot strip of land. Further, the Court [22] finds that, if there were no such

implied easement, an equitable easement should arise, which would entitle the Romeros to compensation of $69,000." (2AA/304.) In so finding, the court rejected the Romeros' argument that a court does not have the power to award what is in effect an exclusive easement that precludes the actual property owner from any practical use of their property. (2AA/308.) The court further concluded its easement findings were diapositive of the other claims raised by the parties. (2AA/314.)

Judgment was entered on October 26, 2020, and the Romeros thereafter timely appealed. (2AA/317-320, 342.)

M. The Court of Appeal reverses the court-created implied easement, finding it was an exclusive easement and exclusive implied easements are not permissible as a matter of law

The Court of Appeal began its analysis by discussing the distinction between an easement and fee title ownership: "The key distinction between an ownership interest in land and an easement interest in land is that the former involves possession of land whereas the latter involves a limited use of land." (Opinion, at 28, citing *Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1032.)

Prior courts have held a court created prescriptive easement which precludes the fee title holder of any practical use of his or her property is an *exclusive*

easement which is [23] not permissible as a matter of law. (Opinion, at 32.) "Such judgments 'pervert[ ] the classical distinction in real property law between ownership and use.' " (Opinion, at 32.) The Court then noted "this is a case of first impression as we have found no case that permits or prohibits *exclusive* implied easements." (*Ibid.*)

The Court found "the rationales for precluding exclusive prescriptive easements—based on the distinction between estates and easements—equally applicable to exclusive implied easements." (Opinion, at 35.) "Based on the foregoing, we hold, in the first instance, that an exclusive implied easement which, for all practical purposes, amounts to fee title cannot be justified or granted unless: 1) the encroachment is 'de minimis' [citation]; or 2) the easement is necessary to protect the health or safety of the public or for essential utility purposes. [Citation.]."

The Court concluded the court ordered implied easement (1) did not leave the Romeros with any practical use of the easement area, (2) was not de minimis, and (3) was not necessary to protect the health or safety of the public or for essential utility purposes. (Opinion, at 36-39.) Therefore, as a matter of law, the trial court erred in awarding an exclusive implied easement.

[24] **N. For unexplained reasons, the Court of Appeal did not determine whether the exclusivity rule also applies to the court created equitable easement**

In their opening brief, the Romeros argued: "The rationale for precluding exclusive prescriptive easements, however, is equally applicable to court ordered implied *and equitable* easements." (AOB, at 30, italics added.) That paragraph goes on: "Regardless of the label (prescriptive, implied, equitable, etc.), if a court ordered easement awards a use that effectively divests the true owner of any ability to use the property, that easement is prohibited. Such a ruling violates the rule of law requiring courts 'to observe the traditional distinction between easements and possessory interests in order to foster certainty in land titles.' "

The next 8 pages of the opening brief explains why court-ordered exclusive easements should not be legally permissible. The last paragraph of that argument section on page 39 of the opening brief explained the rationale precluding exclusive prescriptive easement "is based on the distinction between easements and estates" and "[t]hat distinction applies to *all easements*, not just prescriptive easements." (Italics added.) The conclusion of the opening brief on page 75 states: "The exclusive easement ordered by the court is not permitted as a matter of law." The point is again made on page 14 of the Romeros' reply brief: "In analogizing to prescriptive easement cases, the point being [25] made is that no court ordered easements (prescriptive, implied,

equitable) can be for exclusive use to the exclusion of the owner of the property."

When the Court of Appeal's tentative ruling came out, the tentative was that "the court cannot create an exclusive implied easement" and that, in this case, because the Romeros were left with no practical use of the easement area, the court ordered implied easement was not permissible as a matter of law. There was no mention in the tentative about whether the rule precluding exclusive easements also applied to the court ordered equitable easement. As such, at oral argument, counsel for the Romeros stressed it was the Romeros' position, as shown in their briefing, that the rule precluding exclusive easements applies to all court ordered easements, including equitable easements.

The Court's Opinion, however, does not address that issue at all. There is no discussion or analysis about whether the exclusivity rule also applies to equitable easements or whether the court ordered equitable easement was also in error because it amounts to an exclusive easement that leaves the Romeros with no practical use of their property.

Accordingly, the Romeros timely filed a petition for rehearing, requesting the Court of Appeal to address the issue of whether the exclusivity rule also applies to the court [26] ordered equitable easement. The petition for rehearing also argued the Court of Appeal committed a legal error by reversing the burden of proof on the equitable easement. The Court of Appeal denied the petition for rehearing without explanation.

V.
LEGAL DISCUSSION

A. The same rationale for precluding exclusive prescriptive and implied easements applies to equitable easements.

1. The distinction between an easement and an estate/possessory interest

"Interests in land can take several forms, including 'estates' and 'easements.'" (*Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1032.) "An estate is an ownership interest in land that is, or may become, possessory." (*Ibid.*) "In contrast, an easement is not a type of ownership, but rather an incorporeal interest in land . . . which confers a right upon the owner thereof to *some* profit, benefit, dominion, or lawful use out of or over the *estate* of another." (*Ibid.*, internal quotation marks omitted, citing *Guerra v. Packard* (1965) 236 Cal.App.2d 272, 285; *Silacci v. Abramson* (1966) 45 Cal.App.4th 558, 564.)

"An easement is, by definition, '*less* than the right of ownership.'" (*Ibid.*, citing *Mehdizadeh v. Mincer* (1996) 46 [27] Cal.App.4th 1296, 1306.) It is "an interest in the land of another, which entitles the owner of the easement to a *limited use* or enjoyment of the other's land." (*Main Street Plaza v. Cartwright & Main, LLC* (2011) 194 Cal.App.4th 1044, 1053, italics added.) The key distinction between an ownership interest in land and an easement interest in land is the former involves *possession* of land whereas the latter involves *use* of land. (*Hansen*, *supra*, 22 Cal.App.5th at 1032.)

Because easements involve use of property and not possession, the owners of the dominant tenement (easement user) and servient tenement (actual property owner) are required to cooperatively share the easement area. "Every incident of ownership not inconsistent with the easement and the enjoyment of the same is reserved to the owner of the servient estate." (*Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406, 1422, citing *Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702.)

"'An easement defines and calibrates the rights of the parties affected by it. The owner of the dominant tenement must use his or her easements and rights in such a way as to impose as slight a burden as possible on the servient tenement.'" (*Ibid.*) "[T]he owner of the servient tenement may make any use of the land that does not interfere unreasonably with the easement." (*Ibid.*, internal quotation marks omitted.)

[28] Courts "are required to observe the traditional distinction between easements and possessory interests in order to foster certainty in land titles." (*Kapner v. Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182, 1187.) Here, the Court of Appeal Opinion violates that tenet because it upheld a court-ordered equitable easement which effectively takes 13% of the Romeros' property and gives it to the Shih-Kos and all future owners of the 643 Property for their exclusive use and possession for, what could be, forever.

2. Because the equitable easement awarded by the trial court and affirmed by the Court of Appeal is exclusive and is not de minimis or necessary for public health or safety, it is not permissible as a matter of law

a. The three general types of court-ordered easements and their elements

In general, there are three types of court-created easements: prescriptive, implied and equitable. Each has its own set of elements. "To establish the elements of a prescriptive easement, the claimant must prove use of the property, for the statutory period of five years, which use has been (1) open and notorious; (2) continuous and uninterrupted; (3) hostile to the true owner; and (4) under claim of right." (*Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1032, citing *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1305.)

[29] "[A]n 'easement will be implied when, at the time of conveyance of property, the following conditions exist: 1) the owner of property conveys or transfers a portion of that property to another; 2) the owner's prior existing use of the property was of a nature that the parties must have intended or believed that the use would continue; meaning that the existing use must either have been known to the grantor and the grantee, or have been so obviously and apparently permanent that the parties should have known of the use; and 3) the easement is reasonably necessary to the use and

benefit of the quasi-dominant tenement. . . .'" (*Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406, 1420.)

Turning to equitable easements, the trespasser—party attempting to obtain an easement—has the burden of showing that: "(1) her trespass was innocent rather than willful or negligent, (2) the public or the property owner will not be irreparabl[y] injur[ed] by the easement, and (3) the hardship to the trespasser is greatly disproportionate to the hardship caused [to the owner] by the continuance of the encroachment." (*Shoen v. Zacarias* (2015) 237 Cal.App.4th 16, 19, internal quotation marks omitted, citing *Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003, 1009; *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 265; *Christensen v. Tucker* (1952) 114 Cal.App.2d 554, 559, 562-563; *Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 576.) [30] Additionally, the easement must not be greater than is reasonably necessary to protect the trespasser's use interest. (*Linthicum v. Butterfield* (2009) 175 Cal.App.4th 256, 268.)

"[T]he equitable nature of [an equitable easement] does not give a court license to grant easements on the basis of 'whatever [a court] deems important," even when the established requirements are present. (*Shoen v. Zacarias, supra*, 237 Cal.App.4th at 19.)

The analysis of whether to grant an equitable easement begins "tipped in favor of the property owner due to the owner's substantial interest in exclusive use of her property arising from her ownership of her land" and because "[s]uch a right is in tension with the

general constitutional prohibition against the taking of private property." (*Shoen v. Zacarias*, *supra*, 237 Cal.App.4th at 19, 20.) As such, the hardship to the owner is "presumptively heavy" and the trespasser has the burden of proving "she will suffer a *greatly disproportionate* hardship from denial of the easement." (*Id.* at 20.) "[T]o allow a court to reassign property rights on a lesser showing is to dilute the sanctity of property rights enshrined in our Constitutions." (*Ranch at the Falls LLC v. O'Neal* (2019) 38 Cal.App.5th 155, 184, quoting *Shoen*, *supra*, 237 Cal.App.4th at 21.)

[31] This "prevents equitable easements from becoming a means of obtaining an adverse easement without having to satisfy the more onerous requirements of prescriptive easements. . . ." (*Shoen, supra*, 237 Cal.App.4th at 21, citations omitted.) "[C]ourts approach the issuance of equitable easements with 'an abundance of caution' [citation], and resolve all doubts against their issuance [citation]." (*Ibid*.)

Because of the extreme nature of the remedy, equitable easements have generally been limited to "cases involving permanent physical encroachments such as buildings [citations], walls [citation], reservoirs [citation], and utility lines [citations], as well as in cases involving intermittent trespasses necessary to access landlocked parcels of property [citations]." (*Shoen v. Zacarias, supra*, 237 Cal.App.4th at 20.)

b. The long-standing rationale precluding exclusive prescriptive easements applies equally to exclusive equitable easements

Although the elements of the three court-ordered easements are different, the rationale precluding court-ordered *exclusive* prescriptive and now implied easements which are not de minimis or necessary for public health or safety is the same. It is based on honoring the important [32] distinction between fee title ownership (possessory interests) and easements in order to foster certainty in land titles. This same rationale should preclude exclusive equitable easements.

The court in *Raab v. Casper* (1975) 51 Cal.App.3d 866, 876, discussed the distinction between an actual easement and something that is labeled an easement but is, in effect and reality, an unauthorized conveyance of ownership because it completely excludes the property owner:

> An exclusive interest labeled "easement" may be so comprehensive as to supply the equivalent of an estate, i.e., ownership. In determining whether a conveyance creates an easement or estate, it is important to observe the extent to which the conveyance limits the uses available to the grantor; an estate entitles the owner to the exclusive occupation of a portion of the earth's surface. [Citations.] "'"If a conveyance purported to transfer to A an *unlimited* use or enjoyment of Blackacre, it would be in effect a conveyance of ownership to A, not of an easement."'"

"Where an incorporeal interest in the use of land becomes so comprehensive as to supply the equivalent of ownership, and conveys an unlimited use of real property, it [33] constitutes an estate, not an easement." (*Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1300, citing *Raab v. Casper*, *supra*, 51 Cal.App.3d at 876-877.) An easement designed to completely exclude the owner of the property "create[s] the practical equivalent of an estate" and, as such, "require[s] proof and findings of the elements of adverse possession, not prescriptive use." (*Raab v. Casper*, *supra*, 51 Cal.App.3d at 877.)

To permit a trespasser to have exclusive use of land, to the exclusion of the owner, "perverts the classical distinction in real property law between ownership and use." (*Harrison v. Welch* (2004) 116 Cal.App.4th 1084, 1092, citing *Silacci v. Abramson* (1996) 45 Cal.App.4th 558, 564 [prescriptive easement not permitted for encroaching woodshed because the woodshed, as with any substantial building structure, "as a practical matter completely prohibits the true owner from using his land"].)

The court in *Kapner v. Meadowlark Ranch Ass'n* (2004) 116 Cal.App.4th 1182 contains a good explanation of why exclusive easements are prohibited. In *Kapner*, Sylvan Kapner purchased a five acre parcel of real property in 1986 along with a 1/80th undivided interest in a 60 foot-wide roadway parcel. A paved road 20 feet wide meanders through the 60-foot wide roadway parcel. (*Id.* at 1185-86.) When Kapner purchased his property, it was unimproved. (*Id.* at [34] 1186.) By

November 1987, approximately one year after the purchase, Kapner had completed improvements including a house, driveway, gate and perimeter fence. (*Ibid.*)

In 2001, the Meadowlark Ranch Association (MRA) the association in charge of administering the protective covenants and restrictions—obtained a survey which showed that some of Kapner's improvements, including portions of the driveway, gate and perimeter fence, encroached onto the 60-foot wide roadway parcel. (*Ibid*.) None of the improvements, however, encroached on the paved portion of the road. (*Ibid*.) After Kapner refused to remove the encroachments or sign an encroachment agreement, a lawsuit was filed. (*Ibid*.) The trial court found in favor of the MRA. The judgment required Kapner to either sign an encroachment agreement (stating he would remove them if it ever became necessary) or remove the encroachments. Kapner appealed, arguing the trial court erred in finding he had not acquired a prescriptive easement over the areas enclosed by his improvements. (*Ibid.*)

After discussing prescriptive easements and noting a prescriptive easement "is not an ownership right, but a right to a specific use of another's property," the court of appeal noted: "But Kapner's use of the land was not in the nature of an easement. Instead, he enclosed and *possessed* the land in question." (*Ibid.*, italics added.) The court of appeal affirmed the judgment, noting that, because Kapner *possessed* the [35] land, he was not entitled to a prescriptive *easement*; otherwise, there would be no true distinction between an easement and a possessory interest. The court stated:

> To escape the tax requirement for adverse possession, some claimants who have exercised what amounts to possessory rights over parts of neighboring parcels, have claimed a prescriptive easement. Courts uniformly have rejected the claim. [Citations.] These cases rest on the traditional distinction between easements and possessory interests. [Citation.]
>
> . . . . We are required to observe the traditional distinction between easements and possessory interests in order to foster certainty in land titles. Moreover, the requirement for paying taxes in order to obtain title by adverse possession is statutory. [Citation.] The law does not allow parties who have *possessed* land to ignore the statutory requirement for paying taxes by claiming a prescriptive easement.
>
> Because Kapner enclosed and *possessed* the land in question, his claim to a prescriptive easement is without merit.

[36] (*Id.* at 1187, emphasis added.)

The same result was reached in the more recent decision of *Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020. In *Hansen*, the plaintiff planted ten acres of pistachio trees on what turned out to be the neighbor's property. Plaintiff sought an easement to use the ten acres to continue farming the trees, to the exclusion of the actual property owner being able to use and farm the property. The *Hansen* court concluded that such an easement is not permitted because

it is, in effect, creating a change in title, which cannot occur absent establishing a valid claim for adverse possession. (*Id.* at 1032.)

The court stated: "There is a difference between a prescriptive use of land culminating in an easement (i.e., an incorporeal interest) and adverse possession which creates a change in title or ownership (i.e., a corporeal interest); the former deals with the use of land, the other with possession; although the elements of each are similar, the requirements of proof are materially different." (*Ibid.*, citing *Raab v. Casper* (1975) 51 Cal.App.3d 866, 876.) The court further stated:

> Unsurprisingly, claimants have often tried to obtain the fruits of adverse possession under the guise of a prescriptive easement to avoid having to satisfy the tax element. [Citation.] That is, they [37] seek judgments "employing the nomenclature of easement but . . . creat[ing] the practical equivalent of an estate." [Citation.] Such judgments "pervert [ ] the classical distinction in real property law between ownership and use." [Citation.] The law prevents this sophistry with the following rule: If the prescriptive interest sought by a claimant is so comprehensive as to supply the equivalent of an estate, the claimant must establish the elements of adverse possession, not those of a prescriptive easement. [Citation.] In other words, the law simply "does not allow parties who have possessed land to ignore the statutory requirement for paying taxes by claiming a prescriptive easement."

(*Id.* at 1033.) Because what plaintiffs sought in a boundary dispute was access and usage of the property to the exclusion of Sandridge, plaintiffs could not be awarded an easement. Rather, plaintiffs' only available remedy was proving a claim for adverse possession, which it failed to do.

Here, the Court of Appeal's affirmance of an equitable easement provides the Shih-Kos, and all future owners, with *use and possession* of the 1,296 square foot area to the complete exclusion of the Romeros. The Opinion "'divests [the Romeros] of nearly all rights that owners customarily have' including access and usage." (*See Hansen, supra*, 22 [38] Cal.App.5th at 1034.) The Romeros will be unable "to use the Disputed Land for any 'practical purpose.'" (*See ibid*.) The Shih-Kos' exclusive possession and occupation of the 1,296 square foot area takes their claim out of the realm of the law of easements. "Because the interest sought by [the Shih-Kos] was the *practical* equivalent of an estate, they were required to meet the requirements of adverse possession, including payment of taxes." (*See ibid*.) They failed to do so.

There is no rational basis for not applying the same exclusivity rule to equitable easements. The Court of Appeal concluded the court-ordered easement has left the Romeros with no practical use of 13% of their property. And, the Court of Appeal concluded imposing such an easement over 13% of the Romeros' property is not de minimis. Therefore, as a matter of law, the court-ordered equitable easement is not permissible.

c. The existing equitable easement cases which have permitted exclusive equitable easement involve de minimis or public health and safety issues

There are cases where Courts of Appeal have permitted exclusive equitable easements. A review of those cases reveals they involved de minimis encroachments or encroachments necessary to protect public health or safety. The Romeros are unaware of any cases where a court has permitted an [39] exclusive equitable easement over anywhere near 13% of the fee title holder's property and regardless of necessity.

One of the leading cases on equitable easements is *Christensen v. Tucker* (1952) 114 Cal.App.2d 554. *Christensen* involved an encroachment of about 229 square feet, or 2.5 percent of the property at issue. (*Id.* at 556.) The court noted there were no claims the encroachment would interfere with any of the fee title holder's future development plans. (*Id.* at 557.) Importantly, the court made clear equitable easements are justified in situations "where expensive structures have been constructed that overhang adjoining property or trespass *to a minor degree*. . . ." (*Id.* at 560.) In other words, where the encroachment is de minimis.

The cases cited in the *Christensen* court confirm exclusive equitable easements have only been permitted in cases where the encroachment is de minimis or necessary to protect public health or safety. In *Ukhtomski v. Tioga Mutual Water Co.* (1936) 12 Cal.App.2d 726, a reservoir serving 500 people encroached on a neighboring

property. The court permitted the encroachment because there would be "serious injury to the public if the reservoir were ordered removed." (*Christensen*, at 560.) The other cases cited in *Christensen* involved encroachments of inches or a few feet, which were all clearly de minimis. (*Id.* at 560-561.) And, the more recent case of *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 755-756, [40] involved encroachments of well under 1% of the property, also clearly de minimis.

Here, because the encroachment over 13% of the Romeros' property is not de minimis or necessary to protect public health or safety, the court ordered equitable easement is not permitted as a matter of law.

B. The Court of Appeal improperly shifted the burden of proof on the narrowly tailored requirement of an equitable easement from the trespasser to the landowner

The Shih-Kos had the burden of establishing entitlement to an equitable easement. (See *Shoen v. Zacarias* (2015) 237 Cal.App.4th 16, 19.) Because the awarding of an equitable easement "is in tension with the general constitutional prohibition against the taking of private property" the analysis of the elements begins "tipped in favor of the Romeros. (See *id.* at 19-20.) All doubts are to be resolved in the Romeros' favor. (See *id.* at 21.) The remedy has been called "extreme." (*Id.* at 20.) The typical type of hardship required to overcome the heavy presumption in the Romeros' favor is where the trespasser "would be forced to move

buildings or be airlifted to their landlocked property." (See *id.* at 21.) "Deprivation of a substantial benefit . . . falls short of the imposition of a substantial hardship." (*Ibid*.)

[41] In awarding an equitable easement, "the affirmative relief granted should not be greater than is reasonably necessary to protect defendant." (*Christensen v. Tucker* (1952) 114 Cal.App.2d 554, 563. See also *Hirshfield v. Schwartz* (2001) 91 Cal.App.4th 749, 772 ["the relief granted could be no greater than what was reasonably necessary to protect that use."].)

The court in *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 268-269, contains a good discussion of the issue:

> The scope of an equitable easement should not be greater than is reasonably necessary to protect the defendant's interests. [Citation.] All that is necessary to protect the Butterfields' interest in their properties is a roadway sufficient to provide reasonable access to their parcels and that conforms to governmental regulations governing such roadways.
>
> The original Forest Service SUP allowed only a 12–foot–wide roadway over the 66–foot–wide right-of-way. Robert Bjorklund testified the existing roadway is 25 feet at its widest part. The Butterfields argue the trial court's site view alone is sufficient to support a 66–foot–wide right-of-[42]way. [Citation.] But we are unconvinced. The court stated in its statement of decision that its site visit showed the

> terrain was too steep for an alternative route. The court said nothing about the scope of the right-of-way. Given the present width of the roadway, it seems highly unlikely that a 66–foot–wide right-of-way is necessary.
>
> An abundance of caution is warranted when imposing an easement on an unwilling landowner. The best solution is to remand so that the trial court can clarify the judgment with regard to the width of the roadway. The court may consider expert opinion on what is reasonably necessary to provide legal access to the Butterfields' parcels.

As expressed by the trial court, this case was about "avoid[ing] the problem of the extremely narrow driveway." (2AA/308.) There is no evidence in this record to support a finding that, e.g., the flower planters—which are on the Romeros' property—are necessary to avoid the problem of the extremely narrow driveway or to protect the Shih-Kos' use of a driveway. There is also no evidence as to how the backyard (the 23 feet between where the garage building ends and the back property line is located) is necessary for driveway use—it is not. (3AA/491; 4AA/519-520.) Neither the trial court nor [43] the Court of Appeal explained why the Shih-Kos "need" all of that area "to avoid the problem of the extremely narrow driveway." In fact, the Court of Appeal stated in its tentative ruling that "most of the 1,296 square foot equitable easement has nothing to do with respondents' reasonably necessary interest' to reasonable ingress/egress and is far too encompassing in scope." Thus, the Shih-Kos did not meet

their high burden of proof—akin to having to move buildings or be airlifted to their property—that the garden planter and other portions of the purported easement area are necessary to protect their use of the driveway.

In the Court of Appeal Opinion, however, the Court put the burden on the Romeros to "provide evidence and argument as to how the easement could be more narrowly tailored." (Opinion, at p. 49.) The Court of Appeal criticized the Romeros for opting "for an all or nothing approach" by not wanting to give up any of their property and concluded the Romeros' refusal to want to give up any portion of their land justified taking from them the entire strip of land regardless of necessity. (Opinion, at p. 50.) In doing so, the Court of Appeal committed legal error and created new precedent contrary to existing authority by switching the burden of proof to the Romeros. (See, e.g., *Curcio v. Pels* (2020) 47 Cal.App.5th 1, 14-15 [reversing because the trial court improperly shifted the burden of proof]; *In re Marriage of Schwartz* (1980) 104 [44] Cal.App.3d 92, 96 [improper shifting of the burden of proof "is, itself, sufficient to mandate a reversal."].)

The Shih-Kos had a heavy burden of proving what they were requesting was narrowly tailored for purposes of protecting their use of a driveway, and there is no evidence in the record that the Shih-Kos ever offered—before or during trial—to take anything less than the entire strip of land. For example, the Shih-Kos had a heavy burden of proving the garden planter and area behind their garage was reasonably

necessary for their use of a driveway. There is no such evidence, nor could there be as those areas are not necessary to address "the problem of the extremely narrow driveway."

It was not up to the Romeros to decide how much of their property they wanted to give away to the Shih-Kos. It was up to the Shih-Kos to prove that everything they were requesting was necessary to address the problem of the extremely narrow driveway. Reversing the standard of proof on this issue to the property owner is contrary to clearly established law and has created a conflict in the Courts of Appeal. Not only that, but by placing this burden on the property owner, the Court has created an untenable situation where the fee title holder will be forced to agree to give up a constitutionally protected real property right in order to protect his/her real property rights.

[45] Finally, the Court of Appeal's conclusion on page 48 of the Opinion that the Romeros waived their rights because they did not want to give up any portion of their property just further shows the devastating impact of improperly reversing the burden of proof. There is no discussion or analysis how the "narrowly tailored" standard can be conditioned on the landowners' waiver of property rights without violating the fundamental tenet of our jurisprudence that landowners have the right to protect their property. Furthermore, the Court of Appeal's statements on pages 49-50 of the Opinion that the Romeros provided no alternatives to narrowly tailor the requested easement are just not accurate. During closing argument, upon

questioning by the trial court, counsel for the Romeros explained how the garden planters, side-yard and backyard area were not necessary for driveway access, and also explained it was unnecessary for the driveway to be 15 feet wide in some places. (RT/775-785.)

VI.
CONCLUSION

Review should be granted so this Court can clarify whether exclusive equitable easements which are not de minimis or necessary to protect public health or safety are legally permissible. Review should also be granted so this Court can clarify who has the burden of proof on the narrowly tailored element. Alternatively, this Court should grant [46] review and transfer the matter back to the Court of Appeal with instructions that it (1) determine whether equitable easements which are not de minimis or necessary for public health or safety can be exclusive, and/or (2) properly analyze the narrowly tailored element under the proper burden of proof.

Dated: June 14, 2002

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Case No. S

IN THE
SUPREME COURT OF CALIFORNIA

CESAR ROMERO and
TATANA SPICAKOVA ROMERO,

Plaintiffs and Appellants,

v.

LI-CHUAN SHIH and TUN-JEN KO,

Defendants and Respondents.

REVIEW OF A PUBLISHED DECISION BY
THE COURT OF APPEAL, SECOND APPELLATE
DISTRICT, DIVISION EIGHT, CASE NO. B310069
LOS ANGELES COUNTY SUPERIOR COURT
CASE NO. EC064933, THE HONORABLE
CURTIS A. KIN PRESIDING JUDGE

PETITION FOR REVIEW

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[4] ISSUES PRESENTED

Whether implied easements may be found to maintain exclusive use encroachments?

Whether the law of prescriptive easements is applicable to preclude the finding of an implied easement for an exclusive use?

INTRODUCTION

This case allows this Court the opportunity to settle an important legal issue with regard to the availability of implied easements for exclusive use encroachments. In its Opinion, a copy of which is attached, the Court of Appeal relies on prescriptive easement cases for its holding that an implied easement may not be found for exclusive use, except in cases: 1) involving utility services or important public health and safety purposes; or 2) where the encroachment by the adjoining landowner is de minimis

(the "de minimis rule"). (*Romero v. Shih* (2022) 78 Cal.App.5th 326, 352.) The Court of Appeal's decision creates conflict because it is contrary to other decisions recognizing the implied grant of an easement for exclusive uses. Moreover, the rationale under the law for prescriptive easements has no application to implied easements.

Importantly, the issue of exclusivity of implied easements significantly impacts the title insurance industry. Title insurers issue title policies that insure against loss or damage arising from encroachments. Implied easements [5] protect an insured owner's right to maintain encroachments that are reasonably necessary for the use and enjoyment of their property in many circumstances. The Court of Appeal's decision restricts this right and creates substantial confusion as to the state of the law regarding implied easements. Resolution of this important issue by this Court is necessary to clarify the law applicable to implied easements.

BACKGROUND

A. The Operative Complaint and Cross-Complaint.

On February 10, 2016, Tatana Spicakova Romero and Cesar Romero ("Romeros") initiated a civil action against Li-Chuan Shih and Tun-Jen Ko ("Shih-Kos"). The operative third amended complaint filed on May 22, 2019, alleged causes of action for wrongful occupation of real property, quiet title, trespass, private

nuisance, wrongful disparagement of title and permanent injunction. (*Romero v. Shih* (2022) 78 Cal.App.5th 326, 334.)

On May 5, 2016, the Shih-Kos filed a cross-complaint against the Romeros for implied easement, equitable easement, quiet title and declaratory relief. (*Id.* at 335.) The Shih-Kos also named the Romeros' lender, U.S. Bank National Association, as a cross-defendant so it would be bound by any judgment awarding an easement. (*Id.* at 335, fn 3.)

[6] **B. The Trial Court's Decision.**

On September 28, 2020, the trial court filed its statement of decision and concluded the Shih-Kos "possess an implied easement over the eight-foot strip of land." The court further concluded that if there were no such implied easement, an equitable easement should arise, which would entitle appellants to compensation of $69,000. (*Id.* at 345.) The trial court's statement of decision provided, in relevant part:

> *Implied Easement*
>
> The court found "all the conditions exist for an implied easement in favor of the 643 Property over the eight-foot strip of land." The easement "shall run with the land, and, consistent with the original grantor and grantee's intent in 1986, shall terminate if the 643 Property ceases its continued use of the easement for a driveway, planter, and wall/fence."

> The court also found "the continued encroachment onto the disputed strip of land is reasonably necessary" and referred to the fact that the 643 property's driveway would measure 7.2 feet at its narrowest point, which fell several feet short of the City's minimum driveway width requirement of 10 feet.
>
> The court found the implied easement "is not necessarily 'exclusive,' as various subsurface uses (e.g., running underground pipes or cables) are available to the 651 Property."

(*Id.* at 345.)

[7] **C. The Court of Appeal Opinion.**

On October 26, 2020, the trial court filed its judgment and the Romeros timely appealed. (*Id. at* 347.) On May 5, 2022, the Court of Appeal filed its Opinion, which reversed the judgment on the cause of action for implied easement and affirmed the judgment on the cause of action for equitable easement. The Court of Appeal applied the laws of prescriptive easements holding that implied easements are not available for exclusive uses, with the exception of: 1) de minimis encroachments; or 2) if needed to protect general public health or safety. (*Id. at 352.*)

On May 25, 2022, the Shih-Kos's Petition for Rehearing with respect to the implied easement claim was denied.

LEGAL DISCUSSION

I. IMPLIED EASEMENTS ARE AVAILABLE FOR LIMITED EXCLUSIVE USE

A. The Court of Appeal Decision is in Conflict with Other Cases Finding Implied Easements for Exclusive Uses

In its Opinion, the Court of Appeal states "this is a case of first impression as we have found no case that permits or prohibits exclusive [8] implied easements." (*Romero v. Shih* (2022) 78 Cal.App.5th at 350.)[1] In fact, there are a number of cases that permit implied easements for an exclusive use, or uses similar to the uses in this case. These same implied easement cases do not discuss or mention that an exclusive use would prohibit the finding of an implied easement. There is also no mention in these cases of the de minimis rule. Therefore, the Court of Appeal Opinion is in conflict with prior court decisions.

"An easement is an incorporeal interest in the land of another that gives its owner the right to use the land of another or to prevent the property owner from using his land." (6 Miller & Starr, Cal. Real Estate (4th

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[1] Respondents do not concede that the easement is for an exclusive use. The implied easement found by the trial court is a limited use and does not amount to fee title. Mr. Poyourow, an appraiser, testified to air and subsurface uses, as well as the ability of the Romeros to include the surface square footage in calculations to increase the size of a permissible structure on their property, which was "really important and a big value to the 651 Property." (*See eg. Id.* at 341-43.)

ed. 2021) Easements, § 15:1, p. 15-4[2].) An easement creates an interest in real property and must be created or transferred as real property by an express or implied grant or reservation, or by prescription. (*Elliott v. McCombs* (1941) 17 Cal.2d 23, 30.)

By definition, California Civil Code section 1104 recognizes that an implied easement may be found where the use is permanent:

> The transfer of real property passes all easements attached thereto, and creates in favor thereof an easement to use other real property of the person whose estate is transferred in the same manner and to the same extent as such property was obviously and permanently used by the person whose estate is transferred, for the benefit thereof, at the time when the transfer was agreed upon or completed.

(*Cal. Civ. Code §1104.*)

Miller and Starr state that "an easement may be implied where a building on the quasi-dominant tenement encroaches on the quasi-servient tenement as a result of the conveyance." (6 Miller & Starr Cal. Real Estate (4th ed. 2021) Easements, §15:20, p. 15-95.) Miller and Starr then cite to the following three (3) cases:

---

[2] S*ee also* Cal. Civ. Code § 887.010 ("As used in this chapter, "easement" means a burden or servitude upon land, whether or not attached to other land as an incident or appurtenance, that allows the holder of the burden or servitude to do acts upon the land.")

1. *Zeller v. Browne* (1956) 143 Cal.App.2d 191. The Court granted plaintiff an implied easement for a walkway, stairway and retaining wall in favor of Lot 39. Lots 39 and 40 were hillside properties and each had their own entrances. Lot 39 (the dominant tenement) used a walkway, stairway and retaining wall which encroached onto Lot 40 (the servient tenement) to access the upper level of Lot 39. (*Id.* at 192.) Despite the fact the encroaching improvements were used exclusively by plaintiff, the court found an implied easement based on the fact the improvements existed at the [10] time ownership of Lots 39 and 40 was severed, and the continued use of the improvements was reasonably necessary for Lot 39 (*Id.* at 194-95.)

2. *Dixon v. Eastown Realty Co.* (1951) 105 Cal.App.2d 260. Defendant owned an apartment building on Lot 19 and a two-story garage on Lot 23 and six feet of Lot 21, which had been constructed when the properties were under common ownership. The buildings were separated by a 47-inch walk. Plaintiff acquired the apartment building and sued Defendant's successor to the garage, claiming an encroachment of the garage wall (.35 feet at one corner (over 4 inches) and .015 feet at another). The garage included an elevated tower, the bottom of which was approximately 12.5 feet above ground level, that also encroached by 13.5 inches (*Id* at 262.) The court found an implied easement for the encroaching garage. (*Id* at 264-265.) Obviously, an implied easement for an encroaching garage is an exclusive use of the surface, yet the court never mentioned that an exclusive use would bar an implied

easement, nor did the court discuss the "de minimis rule".

3. *Navarro v. Paulley* (1944) 66 Cal.App.2d 827. This case involved an alleged implied easement for a five (5) foot garage and fence encroachment. Two adjoining lots were owned by one person who constructed a garage at the rear of the properties, principally on one of the lots but encroaching five (5) feet into the adjoining lot. The Court of Appeal affirmed the denial of an implied easement, stating: "So far as the garage is concerned, it may well be that the trial court drew the inference from the testimony that it could be moved from its location straddling the boundary line to a location entirely on defendant's property without any great hardship to the defendant. There is, therefore, substantial evidence to support the [11] findings of fact, and the judgment." (*Id*. at 830.) The importance of this case is that the Court of Appeal recognized that an implied easement could be available for exclusive use because in analyzing whether an implied easement could be found, the Court of Appeal did not say that an implied easement could not be found because the use at issue (an encroaching garage) was exclusive.

In addition to these three (3) cases cited by Miller and Starr, there are additional cases where implied easements were found for exclusive use. Those cases include:

4. *Owsley v. Hammer* (1951) 36 Cal.2d 710. This case allowed an implied easement in favor of lessee for an apparent exclusive use by the lessee. The

owner-lessor of a building under construction exhibited blueprints to defendant-lessee of a store in the building. These showed a patio, display windows and entrances from the street. The court of appeal held that the plaintiff, the owner's successor, had no right to close the passageways and patio. Access to the street and use of the patio for display of merchandise were contemplated by the parties when the lease was made, and were reasonably necessary for the full enjoyment of the leased premises. (*Id.* at 720.)

5. *Horowitz v. Noble* (1978) 79 Cal.App.3d 120. This case involved a black topped driveway/access passageway providing access to a garage on the dominant tenement (Lot 2, an apartment building with a garage) which overlapped or encroached by twelve (12) feet onto the servient tenement (Lot 1, a vacant lot). The Court specifically found that the dominant [12] tenement (Lot 2, apartment building/garage) holder did not have enough room on his own property but had to cross the property line to access the garage. (*Id.* at 717-718.) There is no indication that the owner of the servient tenement (Lot 1, the vacant lot) used the passage way at all but the court granted an implied easement in favor of the dominant tenement without any discussion about whether exclusive use of the passage way would bar an implied easement.

These foregoing implied easement cases are in conflict with *Romero v. Shih* and are authority that implied easements for a limited exclusive use are permissible. There is no mention in these cases that exclusivity would bar an award of an implied easement.

There is also no mention in these cases of the de minimis rule.

II. THIS COURT SHOULD REJECT THE APPLICATION OF PRESCRIPTIVE EASEMENT CASES TO PRECLUDE EXCLUSIVE USE IMPLIED EASEMENTS

The Court of Appeal Opinion states that: "We find the rationales for precluding prescriptive easements – based on the distinctions between estates and easements – equally applicable to excusive implied easements." (*Romero v. Shih* (2022) 78 Cal.App.5th at 352.) In fact, the rationales are markedly different.

The rationale for prohibiting prescriptive easements for exclusive use is to avoid an end run around the requirement that taxes be paid to satisfy the elements of adverse possession. As the court in *Hirshfield v. Schwartz* (2002) [13] 91 Cal.App.4th 749 explained, prescriptive easement cases are different because these cases concern themselves solely with defending the integrity of the adverse possession laws. (*Id*. at 767-68 [decisions restricting the scope of prescriptive easements are not applicable.]) This rationale does not apply to easements by implication.

Implied easement cases are not concerned with defending the integrity of adverse possession laws, and in fact there is no implied easement case that makes any mention of adverse possession at all. Rather, the concern in implied easement cases is to imply the grant of an easement based on the party's intention

to transfer the obvious burdens and benefits with the property conveyed. (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 131-133.)

The element of intent for prescriptive easement is also very different from cases involving an easement by implication. The grant of adverse possession or a prescriptive easement requires an intent to dispossess the owner of the disputed property. (*Gilardi v. Hallam* (1981) 30 Cal.3d 317, 321-322.) Thus, prescriptive easements arise from a hostile act or a trespass.

By contrast, the rationale for implying an easement is based on the preexisting use of the quasi-dominant tenement in such a manner that the parties must have intended the continued use after the transfer of title. (*Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 8.) An implied easement exists to affirm a permanent use that existed at the time of separation of title which is consistent with the intent of the grantor. (*County of Los Angeles v. Bartlett* (1962) 203 [14] Cal.App.2d 523, 529-350.)[3]

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[3] The Court of Appeal mistakenly concludes that to find an implied grant of an easement, there must be a finding of an intent to "**create or convey an easement**." (*Id*. at 354.) (emphasis added) This is not correct. The intent required is not specifically to create an easement. It is simply that the grantor intended the encroachments remain after the division of title. "[In] determining the intent of the parties as to the extent of the grantee's rights, we are of the opinion that consideration must be given not only to the actual uses being made at the time of the severance, but also to such uses as the facts and circumstances show were within the reasonable contemplation of the parties at the time of the conveyance." (*Fristoe v. Drapeau* (1950) 35 Cal.2d 5, 10.) "If the owner's

Thus, because the rationales for and the elements of prescriptive easements and implied easements, are not the same, prescriptive easement case law does not apply to implied easements.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition for Review.

Dated: June 14, 2002

SONGSTAD RANDALL COFFEE & HUMPHREY LLP

By: /s/ Janet E. Humphrey
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[Proof Of Service Omitted]

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use of the servient tenement has continued for a period of time in an obvious and permanent manner, a division of his title implies that the parties intended to transfer the obvious burdens and benefits with the property conveyed." (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 131-132.)

Case No. S275023

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

CESAR ROMERO and
TATANA SPICAKOVA ROMERO

Plaintiffs and Appellants,

v.

LI-CHUAN SHIH and TUN-JEN KO

Defendants and Respondents.

After a decision by the Court of Appeal,
Second Appellate District, Division Eight,
Case No. B310069

ANSWER TO PETITION FOR REVIEW

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[7] **I.**
ADDITIONAL ISSUE PRESENTED

1. Whether a court order awarding an exclusive easement which effectively takes real property from a private citizen and gives it to another private citizen for no reason other than to confer a private benefit violates the Takings Clause and is void?

II.
WHY REVIEW SHOULD BE DENIED

Absent finding an easement is de minimis or necessary for public health or safety, court ordered *exclusive* prescriptive are not permitted as a matter of law. In its Opinion, the Court of Appeal properly concluded the rationale precluding exclusive prescriptive easements also applies to court-ordered implied easements. Review should, therefore, be denied.

Real property ownership is a fundamental right protected by the United States Constitution (Fifth Amendment) and the California Constitution (Art. I, sec. 19). The California Constitution also protects the inalienable right of "acquiring, possessing, and protecting property." (Art. I, sec. 1.) And, as this Court has stated, in the field of land titles "certainty and stability

are the watchwords of an orderly society." (*Buehler v. Oregon-Washington Plywood Corp.* (1976) 17 Cal.3d 520, 532-532. See also *Drake v. Martin* (1994) 30 [8] Cal.App.4th 984, 996 ["Public policy favors stability of title to real property."]; *Kreisher v. Mobile Oil Corp.* (1988) 198 Cal.App.3d 389, 403-404 ["[S]tability is at a premium" in the area of land titles].)

Fee title ownership of land gives the owner a possessory right in the land. An easement, on the other hand, is not a possessory ownership right but is, instead, a right to use, for a specified limited purpose, a portion of land owned by someone else.

In general, there are two types of easements: (1) an easement expressly granted in a written and recorded instrument; and (2) an easement created by a court based on specified criteria (i.e., prescriptive, implied and equitable). A real property owner can, of course, voluntarily grant to a third party an easement which, in effect, gives that third party exclusive use and possession of the easement area. Given the importance of real property ownership rights, however, there are limitations to court created easements which are involuntarily imposed over the objection of the fee title property owner.

As the Court of Appeal Opinion acknowledged, courts have uniformly recognized that, absent two very limited exceptions (de minimis and public safety), a court cannot [9] create a *prescriptive* easement in favor of a third party which has the effect of leaving the fee title holder with no practical use of the property

subject to the easement. The rationale is awarding such an *exclusive* prescriptive easement would be akin to a taking of property, which is not legally permitted.

In this case, the trial court created an exclusive implied easement which left the Romeros with no practical use of 13% of their residential property which serves as their primary residence. On appeal, the Romeros argued the rationale precluding court ordered *exclusive* prescriptive easements which are not de minimis or necessary for public health or safety should apply to all court ordered easements, including the implied easement ordered by the trial court. Based on the same rationale precluding exclusive prescriptive easements, the Court of Appeal correctly concluded, in a case of first impression, that exclusive implied easements which are not de minimis or necessary for public health or safety are not permitted as a matter of law.

The Shih-Kos' petition for review should be denied. Moreover, this Court should review whether any court ordered exclusive easement which deprives the property owner of all practical use of the property owner's property and gives it to another private party is void and in violation of the Takings Clause.

[10] III.
BACKGROUND FACTS

A. The parties and the properties

This case involves a dispute over a 1,296 square foot strip of land between the owners of adjacent residential properties located at 651 West Algeria Avenue ("651 Property") and 643 West Algeria Avenue ("643 Property") in Sierra Madre, California. (2AA/303.)

Cesar Romero and Tatana Spicakova Romero ("the Romeros") have owned the 651 Property since April 2014, and petitioners herein Li-Chuan Shih and Tun-Jen Ko ("the Shih-Kos") have owned the 643 Property since July 2014. (2AA/303.) The Romeros use the 651 Property as their primary residence whereas the 643 Property is used as a rental property (RT/246). It is undisputed the Romeros are the fee title owners of the 1,296 square foot strip of land. (2AA/303.)

B. The original owner of both properties starts, but then abandons, his effort to change the lot line between the 651 Property and the 643 Property

In the 1960s, the 643 Property and 651 Property were owned by Edwin and Ann Cutler. (RT/146-147.) The Cutlers lived in the home on the 643 Property and the 651 Property was a vacant lot. (RT/146-147.) The 643 Property was 50 feet [11] wide and 157 feet deep. (See, e.g., 2AA/351-353.) The 651 Property was 63 feet wide and 157 feet deep. (*Ibid.*)

On February 4, 1985, Edwin Cutler submitted to the City of Sierra Madre Planning Commission an application for a variance, which would have the effect of increasing the width of the 643 Property to 58 feet and decreasing the width of the 651 Property to 55 feet. (2AA/346-353.) A variance was required prior to any boundary line adjustment because, at that time, the Sierra Madre Municipal Code required a lot width of at least 60 feet. (2AA/349.) Obtaining Planning Commission approval was just the first step in the process. (RT/181, 187.) Once approved, the applicant was required to obtain and record a survey and legal description—to be reviewed by the city engineer—and obtain a certificate of compliance signed by the director of public works. (RT/181, 187.) In the end, however, Mr. Cutler never completed the process, so the lot line was never adjusted. (2AA/358-361; RT/189-191, 218-222, 351-354.) There is no evidence in the record regarding why Edwin Cutler never completed the process.

C. After efforts to adjust the lot line are apparently abandoned, a home is built on the 651 Property

In mid-1985, after apparently having abandoned his efforts to obtain a lot line adjustment, Edwin Cutler, his son [12] Bevon Cutler, and David Shewmake entered into an agreement wherein Bevon and David would build a home on the 651 Property and then, when the home was sold, Edwin would receive from the sale the value of the undeveloped lot and Bevon and David would split the net remaining proceeds from the

sale. (RT/148, 161, 167-168.) As part of the process of building the home on the 651 Property, Bevon and David built a six foot high brick wall between the two properties. (2AA/363; RT/161.) They built the brick wall in the same location where there was an existing chain link fence without verifying whether the chain link fence was on the property line. (RT/160.)

D. When the 651 Property sold, all relevant documentation contains its original legal description

A "Notice of Completion" for the home on the 651 Property was issued on May 8, 1986. (2AA/371-372.) The legal description on the Notice of Completion is the original legal description, for a 63 foot wide lot. (2AA/371-372.) Prior to the issuance of the Notice of Completion, Edwin Cutler and Ann Cutler grant deeded the 651 Property to Bevon and David. (2AA/365-366.) Because the lot line was never adjusted, the grant deed from Edwin Cutler contained the original legal description of a 63 foot wide property. (2AA/365-[13]366.) There was no reference in the deed to any easement in favor of the 643 Property.

The 651 Property was then sold, and Bevon and David executed a grant deed in favor of the buyers, Manfred and Elizabeth Leong, which was recorded on May 9, 1986. (2AA/368-369.) The legal description remained the same and no easement was referenced. (2AA/368-369.)

E. When the Shih-Kos purchased the 643 Property, they failed to properly inspect the boundary lines

In June 2014, the 643 Property was sold to the Shih-Kos for $658,500. (3AA/475-485.) The 643 Property was advertised for sale as a 50 foot wide lot, and the Shih-Kos were aware of the width of the lot. (RT/252, 254.) The legal description in the grant deed is the original 643 Property legal description, a 50 foot wide lot. (3AA/446-447, 485; RT/250-251.) There is nothing about the easterly 8 feet of the 651 Property or any easements in favor of the 643 Property. (3AA/443-461; RT/233-234.) Prior to close of escrow, the Shih-Kos were specifically advised to independently verify the lot size and boundaries because those items had not been verified by the seller, but they chose not to. (4AA/522.)

[14] F. The 643 Property trespasses on 1,296 square feet, or 13% of the 651 Property

There is no dispute that, if the Shih-Kos had investigated the boundaries of the 643 Property as they were advised to do before closing escrow, that investigation would have revealed the planter, portions of the driveway, and a portion of the back and side yard trespassed on the 651 Property a total of 1,296 square feet (157.14 foot length of the property by 8.25 foot width), which amounts to 13% of the Romeros' property. (4AA/512-520.)

G. The Romeros purchase the 651 Property and the deed contains the original legal description with no reference to an easement in favor of the 643 Property

Turning to the 651 Property, in 2005 the Leongs sold the 651 Property to Dawn Hicks. (2AA/384.) The legal description in the grant deed confirms the property is 63 feet wide. (2AA/384.) There is no reference that the 651 Property is encumbered by an easement in favor of the 643 Property. (2AA/384.) The 651 Property was foreclosed upon in 2012. (2AA/387-389.) At that time, the legal description remained the same, 63 feet wide. (2AA/388.)

On April 9, 2014, the Romeros purchased the 651 Property for $892,500. (3AA/403, 410.) No one told the Romeros the 651 Property was encumbered by an easement [15] in favor of the 643 Property. (RT/661.) The lot size was advertised at approximately 9,900 square feet. (RT/660, 713.) The size of the lot was an important factor in their decision to purchase. (RT/661, 713.)

H. The Romeros discover the Shih-Kos are trespassing on 1,296 square feet of their property

In 2015, while Mr. Romero was working on some yard improvements and taking some measurements, the measurements seemed inconsistent with a lot size of 9,900 square feet. (RT/663-664.) As a result, the Romeros hired a surveyor, James Kevorkian, to conduct a survey of their property. (RT/662.) Mr.

Kevorkian concluded the brick wall was not built on the property line. (4AA/512-520; RT/389-393, 401.) Rather, the true property line was 8.25 feet closer to the 643 Property. (3AA/491; 4AA/514-520; RT/392.)

As a result, the brick garden bed (which is 5.53 feet wide) is on the 651 Property. (3AA/491; 4AA/519-520.) Additionally, 2.72 feet of the 643 Property driveway, to the east of the planter bed, is on the 651 Property. At the north end of the garden bed, where the brick wall starts, 8.25 feet of concrete slab is on the 651 Property. The garage on the 643 Property, located at the north end of the driveway, is 0.8 feet from the true property line and was constructed entirely on the 643 Property. There is a small window air conditioning [16] unit on the garage that encroaches 1.2 feet into the true property line. (4AA/510; RT/167.) From the southwest corner of the Shih-Kos' garage to the back end of the 643 Property line, 8.25 feet by 69 feet (20 feet + 25 feet, 10 inches + 23 feet) of the backyard and side-yard is on the 651 Property. (3AA/491; 4AA/514-520.) The total trespass area is 8.25 feet wide and 157.13 feet deep, which equates to 1,296 square feet, or approximately 13% of the 651 Property. (3AA/491; 4AA/519-520; RT/272-273, 393.)

I. No structures on the 643 Property will have to be moved if a wall is built on the true property line

The trespass area is clearly depicted on a number of photos and renderings. (3AA/491-495; 4AA/509-510,

528, 537.) If the brick wall is moved to the actual property line, the first 30 feet of the 643 Property driveway would be 8.37 feet wide, the next 27.5 feet of the driveway (where it borders the 643 Property home) would be 7.2 feet wide, and thereafter the driveway would widen again. (3AA/491; 4AA/519-520.) The newly constructed brick wall would be 0.8 feet to the west of the 643 garage. (4AA/515, 519.) Thus, if the brick wall is moved to the true property line, no structures on the 643 Property would have to be moved and the 643 Property would not be landlocked.

[17] **J. The Romeros advise the Shih-Kos about the trespass, but the Shih-Kos do not agree to permit the Romeros to build a wall on the true property line**

After learning about the encroachment, the Romeros realized they were unable to use 13% of their property because it was separated by a 6 foot high brick wall and raised brick planter box, and was being exclusively used by the 643 Property. (RT/714.) The Romeros desired to relocate the brick wall to the actual property line so they would have full use and enjoyment of their property. (RT/663.) Moving the brick wall to the actual property line will provide them with more privacy, will permit them to plant additional trees and an orchard, and will give them more room to put in a pool. (RT/670.)

The Shih-Kos primarily live in Taiwan. (RT/228.) The 643 Property is a rental property managed by

David Tsai, who also served as the Shih-Kos' real estate broker when they purchased the 643 Property. (RT/227, 246.) After learning the location of the true property line, the Romeros contacted Mr. Tsai, provided him with a copy of the survey and stated they intended to move the brick wall to the actual property line. (3AA/487-489; RT/235-236, 663.) Thereafter, Mr. Tsai went to the City of Sierra Madre and learned about Edwin Cutler's 1985 variance application. (RT/241.) Based on what Mr. Tsai found, he incorrectly believed the lot line had [18] previously been adjusted. (RT/241-242.) Thus, Mr. Tsai did not agree to a relocation of the brick wall.

K. The Romeros file their complaint and the Shih-Kos cross-complain

Unable to resolve the issue, on February 10, 2016, the Romeros filed a complaint against the Shih-Kos alleging causes of action for trespass, quiet title and declaratory relief. (4AA/562.) The operative third amended complaint, filed on May 22, 2019, alleges causes of action for wrongful occupation of real property, quiet title, trespass, private nuisance, wrongful disparagement of title and permanent injunction. (1AA/37-120.) The Shih-Kos filed a cross-complaint alleging causes of action for equitable easement, implied easement, quiet title and declaratory relief. (1AA/12-25.)

L. Following a court trial, the court orders that the Shih-Kos, and all future owners of the 643 Property, have an exclusive implied easement or, alternatively, an exclusive equitable easement to use and possess 13% of the Romeros' property

A court trial took place over four days in March 2020. The trial focused on the claims of implied and equitable easements over the 8-foot strip because, as the court stated, if it found an easement exists, that finding would dispose of the other claims. (2AA/304.) The court and the parties agreed at trial that given the nature of the disputed area, if the court [19] were to conclude the 643 Property has easement rights with respect to the 1,296 square foot area, it would amount to an *exclusive* easement in favor of the 643 Property and that the Romeros would have no right or ability to use that portion of their property. (RT/442-443.)

On August 24, 2020, the court issued its proposed Statement of Decision, finding the Shih-Kos have an implied easement over the entire 1,296 square foot area. Alternatively, the court found the Shih-Kos have an equitable easement over the same area. (1AA/139.) The court overruled the Romeros' objections to the proposed Statement of Decision (1AA/151-289) and, on September 28, 2020, the court issued its Statement of Decision. (2AA/303-315.)

The court concluded "the Shih-Kos possess an implied easement over the eight-foot strip of land. Further, the Court finds that, if there were no such implied

easement, an equitable easement should arise, which would entitle the Romeros to compensation of $69,000." (2AA/304.) In so finding, the court rejected the Romeros' argument that a court does not have the power to award what is in effect an exclusive easement that precludes the actual property owner from any practical use of their property. (2AA/308.) The court further concluded its easement findings were diapositive of the other claims raised by the parties. (2AA/314.)

[20] Judgment was entered on October 26, 2020, and the Romeros thereafter timely appealed. (2AA/317-320, 342.)

M. The Court of Appeal reverses the court-created implied easement, finding it was an exclusive easement and exclusive implied easements are not permissible as a matter of law

The Court of Appeal began its analysis by discussing the distinction between an easement and fee title ownership: "The key distinction between an ownership interest in land and an easement interest in land is that the former involves possession of land whereas the latter involves a limited use of land." (Opinion, at 28, citing *Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1032.)

Prior courts have held a court created prescriptive easement which precludes the fee title holder of any practical use of his or her property is an *exclusive*

easement which is not permissible as a matter of law. (Opinion, at 32.) "Such judgments 'pervert[ ] the classical distinction in real property law between ownership and use.' " (Opinion, at 32.) The Court then noted "this is a case of first impression as we have found no case that permits or prohibits *exclusive* implied easements." (*Ibid.*)

The Court found "the rationales for precluding exclusive prescriptive easements—based on the distinction between [21] estates and easements—equally applicable to exclusive implied easements." (Opinion, at 35.) "Based on the foregoing, we hold, in the first instance, that an exclusive implied easement which, for all practical purposes, amounts to fee title cannot be justified or granted unless: 1) the encroachment is 'de minimis' [citation]; or 2) the easement is necessary to protect the health or safety of the public or for essential utility purposes. [Citation.]."

The Court concluded the court ordered implied easement (1) did not leave the Romeros with any practical use of the easement area, (2) was not de minimis, and (3) was not necessary to protect the health or safety of the public or for essential utility purposes. (Opinion, at 36-39.) Therefore, as a matter of law, the trial court erred in awarding an exclusive implied easement.

IV.
LEGAL DISCUSSION

A. The same rationale for precluding exclusive prescriptive easements applies to implied easements

1. The distinction between an easement and an estate/possessory interest

"Interests in land can take several forms, including 'estates' and 'easements.'" (*Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1032.) "An estate is an ownership interest in land that is, or may become, possessory." (*Ibid.*) "In contrast, an easement is not a type of ownership, but rather an incorporeal interest in land . . . which confers a right upon the owner thereof to *some* profit, benefit, dominion, or lawful use out of or over the *estate* of another." (*Ibid.*, internal quotation marks omitted, citing *Guerra v. Packard* (1965) 236 Cal.App.2d 272, 285; *Silacci v. Abramson* (1966) 45 Cal.App.4th 558, 564.)

"An easement is, by definition, '*less* than the right of ownership.'" (*Ibid.*, citing *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1306.) It is "an interest in the land of another, which entitles the owner of the easement to a *limited use* or enjoyment of the other's land." (*Main Street Plaza v. Cartwright & Main, LLC* (2011) 194 Cal.App.4th 1044, 1053, italics added.) The key distinction between an ownership interest in land and an easement interest in land is the former involves *possession* of land whereas the latter involves *use* of land. (*Hansen, supra*, 22 Cal.App.5th at 1032.)

Because easements involve use of property and not possession, the owners of the dominant tenement (easement user) and servient tenement (actual property owner) are required to cooperatively share the easement area. "Every incident of ownership not inconsistent with the easement and the enjoyment of the same is reserved to the owner of the [23] servient estate." (*Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406, 1422, citing *Scruby v. Vintage Grapevine, Inc.* (1995) 37 Cal.App.4th 697, 702.)

"'An easement defines and calibrates the rights of the parties affected by it. The owner of the dominant tenement must use his or her easements and rights in such a way as to impose as slight a burden as possible on the servient tenement.'" (*Ibid.*) "[T]he owner of the servient tenement may make any use of the land that does not interfere unreasonably with the easement." (*Ibid.*, internal quotation marks omitted.)

Courts "are required to observe the traditional distinction between easements and possessory interests in order to foster certainty in land titles." (*Kapner v. Meadowlark Ranch Assn.* (2004) 116 Cal.App.4th 1182, 1187.)

2. Because the implied easement awarded by the trial court is exclusive and is not de minimis or necessary for public health or safety, it is not permissible as a matter of law

a. The three general types of court-ordered easements and their elements

In general, there are three types of court-created easements: prescriptive, implied and equitable. Each has its own set of elements. "To establish the elements of a [24] prescriptive easement, the claimant must prove use of the property, for the statutory period of five years, which use has been (1) open and notorious; (2) continuous and uninterrupted; (3) hostile to the true owner; and (4) under claim of right." (*Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1032, citing *Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1305.)

"[A]n 'easement will be implied when, at the time of conveyance of property, the following conditions exist: 1) the owner of property conveys or transfers a portion of that property to another; 2) the owner's prior existing use of the property was of a nature that the parties must have intended or believed that the use would continue; meaning that the existing use must either have been known to the grantor and the grantee, or have been so obviously and apparently permanent that the parties should have known of the use; and 3) the easement is reasonably necessary to the use and benefit of the quasi-dominant tenement. . . .'"

(*Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406, 1420.)

Turning to equitable easements, the trespasser—party attempting to obtain an easement—has the burden of showing that: "(1) her trespass was innocent rather than willful or negligent, (2) the public or the property owner will not be irreparabl[y] injur[ed] by the easement, and (3) the hardship [25] to the trespasser is greatly disproportionate to the hardship caused [to the owner] by the continuance of the encroachment." (*Shoen v. Zacarias* (2015) 237 Cal.App.4th 16, 19, internal quotation marks omitted, citing *Tashakori v. Lakis* (2011) 196 Cal.App.4th 1003, 1009; *Linthicum v. Butterfield* (2009) 175 Cal.App.4th 259, 265; *Christensen v. Tucker* (1952) 114 Cal.App.2d 554, 559, 562-563; *Warsaw v. Chicago Metallic Ceilings, Inc.* (1984) 35 Cal.3d 564, 576.) Additionally, the easement must not be greater than is reasonably necessary to protect the trespasser's use interest. (*Linthicum v. Butterfield* (2009) 175 Cal.App.4th 256, 268.)

b. The long-standing rationale precluding exclusive prescriptive easements applies equally to exclusive implied easements

Although the elements of the three court-ordered easements are different, the rationale precluding court-ordered *exclusive* prescriptive which are not de minimis or necessary for public health or safety is equally applicable to all court-ordered easements,

including implied easements. It is based on honoring the important distinction between fee title ownership (possessory interests) and easements in order to foster certainty in land titles.

The court in *Raab v. Casper* (1975) 51 Cal.App.3d 866, 876, discussed the distinction between an actual easement [26] and something that is labeled an easement but is, in effect and reality, an unauthorized conveyance of ownership because it completely excludes the property owner:

> An exclusive interest labeled "easement" may be so comprehensive as to supply the equivalent of an estate, i.e., ownership. In determining whether a conveyance creates an easement or estate, it is important to observe the extent to which the conveyance limits the uses available to the grantor; an estate entitles the owner to the exclusive occupation of a portion of the earth's surface. [Citations.] "'"If a conveyance purported to transfer to A an *unlimited* use or enjoyment of Blackacre, it would be in effect a conveyance of ownership to A, not of an easement."'"

"Where an incorporeal interest in the use of land becomes so comprehensive as to supply the equivalent of ownership, and conveys an unlimited use of real property, it constitutes an estate, not an easement." (*Mehdizadeh v. Mincer* (1996) 46 Cal.App.4th 1296, 1300, citing *Raab v. Casper, supra*, 51 Cal.App.3d at 876-877.) An easement designed to completely exclude the owner of the property "create[s] the practical

equivalent of an estate" and, as such, "require[s] proof and findings of the elements of adverse [27] possession, not prescriptive use." (*Raab v. Casper, supra*, 51 Cal.App.3d at 877.)

To permit a trespasser to have exclusive use of land, to the exclusion of the owner, "perverts the classical distinction in real property law between ownership and use." (*Harrison v. Welch* (2004) 116 Cal.App.4th 1084, 1092, citing *Silacci v. Abramson* (1996) 45 Cal.App.4th 558, 564 [prescriptive easement not permitted for encroaching woodshed because the woodshed, as with any substantial building structure, "as a practical matter completely prohibits the true owner from using his land"].)

The court in *Kapner v. Meadowlark Ranch Ass'n* (2004) 116 Cal.App.4th 1182 contains a good explanation of why exclusive easements are prohibited. In *Kapner*, Sylvan Kapner purchased a five acre parcel of real property in 1986 along with a 1/80th undivided interest in a 60 foot-wide roadway parcel. A paved road 20 feet wide meanders through the 60-foot wide roadway parcel. (*Id.* at 1185-86.) When Kapner purchased his property, it was unimproved. (*Id.* at 1186.) By November 1987, approximately one year after the purchase, Kapner had completed improvements including a house, driveway, gate and perimeter fence. (*Ibid.*)

[28] In 2001, the Meadowlark Ranch Association (MRA)—the association in charge of administering the protective covenants and restrictions—obtained a survey which showed that some of Kapner's

improvements, including portions of the driveway, gate and perimeter fence, encroached onto the 60-foot wide roadway parcel. (*Ibid.*) None of the improvements, however, encroached on the paved portion of the road. (*Ibid.*) After Kapner refused to remove the encroachments or sign an encroachment agreement, a lawsuit was filed. (*Ibid.*) The trial court found in favor of the MRA. The judgment required Kapner to either sign an encroachment agreement (stating he would remove them if it ever became necessary) or remove the encroachments. Kapner appealed, arguing the trial court erred in finding he had not acquired a prescriptive easement over the areas enclosed by his improvements. (*Ibid.*)

After discussing prescriptive easements and noting a prescriptive easement "is not an ownership right, but a right to a specific use of another's property," the court of appeal noted: "But Kapner's use of the land was not in the nature of an easement. Instead, he enclosed and *possessed* the land in question." (*Ibid.*, italics added.) The court of appeal affirmed the judgment, noting that, because Kapner *possessed* the land, he was not entitled to a prescriptive *easement;* otherwise, there would be no true distinction between an easement and a possessory interest. The court stated:

> [29] To escape the tax requirement for adverse possession, some claimants who have exercised what amounts to possessory rights over parts of neighboring parcels, have claimed a prescriptive easement. Courts uniformly have rejected the claim. [Citations.] These cases

> rest on the traditional distinction between easements and possessory interests. [Citation.]
>
> . . . . We are required to observe the traditional distinction between easements and possessory interests in order to foster certainty in land titles. Moreover, the requirement for paying taxes in order to obtain title by adverse possession is statutory. [Citation.] The law does not allow parties who have *possessed* land to ignore the statutory requirement for paying taxes by claiming a prescriptive easement.
>
> Because Kapner enclosed and *possessed* the land in question, his claim to a prescriptive easement is without merit.

(*Id.* at 1187, emphasis added.)

The same result was reached in the more recent decision of *Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th [30] 1020. In *Hansen*, the plaintiff planted ten acres of pistachio trees on what turned out to be the neighbor's property. Plaintiff sought an easement to use the ten acres to continue farming the trees, to the exclusion of the actual property owner being able to use and farm the property. The *Hansen* court concluded that such an easement is not permitted because it is, in effect, creating a change in title, which cannot occur absent establishing a valid claim for adverse possession. (*Id.* at 1032.)

The court stated: "There is a difference between a prescriptive use of land culminating in an easement

(i.e., an incorporeal interest) and adverse possession which creates a change in title or ownership (i.e., a corporeal interest); the former deals with the use of land, the other with possession; although the elements of each are similar, the requirements of proof are materially different." (*Ibid.*, citing *Raab v. Casper* (1975) 51 Cal.App.3d 866, 876.) The court further stated:

> Unsurprisingly, claimants have often tried to obtain the fruits of adverse possession under the guise of a prescriptive easement to avoid having to satisfy the tax element. [Citation.] That is, they seek judgments "employing the nomenclature of easement but . . . creat[ing] the practical equivalent of an estate." [Citation.] Such judgments "pervert [31] [] the classical distinction in real property law between ownership and use." [Citation.] The law prevents this sophistry with the following rule: If the prescriptive interest sought by a claimant is so comprehensive as to supply the equivalent of an estate, the claimant must establish the elements of adverse possession, not those of a prescriptive easement. [Citation.] In other words, the law simply "does not allow parties who have possessed land to ignore the statutory requirement for paying taxes by claiming a prescriptive easement."

(*Id.* at 1033.) Because what plaintiffs sought in a boundary dispute was access and usage of the property to the exclusion of Sandridge, plaintiffs could not be awarded an easement. Rather, plaintiffs' only available remedy was proving a claim for adverse possession, which it failed to do.

Here, the trial court's award of an implied easement provided the Shih-Kos, and all future owners, with *use and possession* of the 1,296 square foot area to the complete exclusion of the Romeros. The Romeros were divested "of nearly all rights that owners customarily have including access and usage." (*See Hansen, supra*, 22 Cal.App.5th at 1034.) Based on the trial court's decision, the Romeros would be unable "to use the Disputed Land for any 'practical [32] purpose.'" (*See ibid.*) The Shih-Kos' exclusive possession and occupation of the 1,296 square foot area takes their claim out of the realm of the law of easements. "Because the interest sought by [the Shih-Kos] was the *practical* equivalent of an estate, they were required to meet the requirements of adverse possession, including payment of taxes." (*See ibid.*) They failed to do so.

There is no rational basis for not applying the same exclusivity rule to implied easements. Thus, the Court of Appeal correctly concluded court-ordered implied easements which are not de minimis or necessary for public health and safety and which leave the fee title holder with no practical use of the fee title holder's property are not permissible as a matter of law.

c. The cases cited by the Shih-Kos do not support a finding that exclusive implied easements which are not de minimis or necessary for public health or safety are permissible

On pages 9-12 of their petition, the Shih-Kos cite to five cases which they contend support their position

that exclusive implied easements are permissible. None of those cases, however, actually support their position or state or suggest exclusive implied easements are permissible.

[33] In *Zeller v. Browne* (1956) 143 Cal.App.2d 191, the Robinsons built two adjacent homes (one on Lot 39 and one on Lot 40) that were cut into a hillside on a steep slope. (*Id.* at 192.) The Lot 39 home had a walkway and stairway to reach the upper levels of the home and the attic, but the walkway and stairway partially encroached on Lot 40. Robinson sold the Lot 39 home to Zeller and the Lot 40 home to Browne. A few years later, Browne constructed a chain link fence on "Lot 40 parallel to and approximately 0.34 of a foot northerly of the southerly line thereof thus preventing [Zeller's] access to and from said walk and stairway." (*Id.* at 193.)

In affirming the granting of an easement for Zeller to use the walkway and stairway that slightly encroached upon Browne's property, the court noted that the existing stairway and walkway was the only "means of getting from a lower to a higher level of Lot 39 and to respondent's attic" and that Zeller "was, by the building department, denied a permit to construct another stairway." (*Id.* at 194-195.) Thus, not only does this case fall within the *de minimis* exception, but the easement was in fact necessary for ingress and egress to and from the upper levels of the house.

The *Dixon* case cited by the Shih-Kos falls within the de minimis exception. In *Dixon*, the court noted the encroachment of the garage was "slight," consisting of

"0.35 of a foot at its northwest corner and 0.15 of a foot at the [34] northeast corner thereof." (*Dixon v. Eastown Realty Co.* (1951) 105 Cal.App.2d 260, 261-262.) It is also of note that the encroachment occurred between two buildings that were separated by a 47 inch walkway and, thus, the encroachment had no impact on the use of the walkway. (*Id.* at 262.)

Next, the Shih-Kos rely on *Navarro v. Paulley* (1944) 66 Cal.App.2d 827, a case where a garage encroached five feet on to the neighbor's property. (*Id.* at 828.) The court found no easement existed because the garage could be moved to a new location. There is nothing in the case that expressly or impliedly recognizes an implied easement can be for exclusive use outside of the two recognized exceptions for exclusive use easements.

The Shih-Kos assert on page 11 of their petition the Court in *Owsley v. Hammer* (1951) 36 Cal.2d 710, 720 "allowed an implied easement in favor of lessee for an *apparent* exclusive use by the lessee." (Italics added.) There is nothing in *Owsley*, however, stating or suggesting the implied easement was exclusive. Instead, the Court noted the easement area "had been in constant use by the general public, and is used as a shortcut between Broxton and Kinross Avenues." (*Id.* at 715.)

[35] Finally, *Horowitz* involved a road use easement that was *not exclusive* to either property owner. (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 125, 129-134.)

B. An award by a court of an exclusive easement violates the Takings Clause and is void

The Takings Clause of the Fifth Amendment of the United States Constitution states "private property [shall not] be taken for public use, without just compensation." The Fourteenth Amendment extends the Takings Clause to actions by state and local government. The Takings Clause can apply to judicial decisions. (*Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection* (2010) 560 U.S. 702, 715 ["If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation."].)

The United State Supreme Court has recognized that a government taking of private real property for no reason other than to confer a private benefit on a particular private party is void:

> [36] The State of Hawaii has never denied that the Constitution forbids even a compensated taking of property when executed for no reason other than to confer a private benefit on a particular private party. 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.

(*Hawaii Housing Authority v. Midkiff* (1984) 467 U.S. 229, 245. See also *Kelo v. City of New London, Comm.* (2005) 545 U.S. 469, 477 ["as for the first proposition,

the City would no doubt be forbidden from taking petitioners' land for the purpose of conferring a private benefit on a particular private party."].)

Here, the state court's award of an exclusive easement which has the effect of taking real property from one private citizen and giving it to another private citizen in a residential boundary dispute is void and in violation of the Takings Clause.

V.
CONCLUSION

For the reasons stated above, this Court should deny the Shih-Kos' petition for review. Moreover, this Court should review whether any court ordered exclusive easement in a [37] private boundary dispute between private parties is void and in violation of the Takings Clause.

Dated: July 5, 2022

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Case No. B310069

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FOR THE SECOND APPELLATE DISTRICT

DIVISION EIGHT

CESAR ROMERO and TATANA SPICAKOVA ROMERO

Plaintiffs and Appellants,

v.

LI-CHUAN SHIH and TUN-JEN KO

Defendants and Respondents.

On Appeal From the
Los Angeles County Superior Court
Case No. EC064933
Before the Honorable Curtis A. Kin

APPELLANTS' REPLY BRIEF

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* * *

Because the awarding of an equitable easement "is in tension with the general constitutional prohibition against the taking of private property" the analysis of the elements begins "tipped in favor of" the Romeros. (See *id.* at 19-20.) All doubts are to be resolved in the Romeros' favor. (See *id.* at 21.) The remedy has been called "extreme." (*Id.* at 20.)

* * *

The Shih-Kos also downplay the significance of the Romeros losing 13% of the property they paid for (see pages 67-68 of the opening brief) and, in doing so, they also completely ignore that there is a general constitutional prohibition against the taking of private property. (*Shoen, supra*, 237 Cal.App.4th at 19, 20.)

* * *

III.
CONCLUSION

The court's award to the Shih-Kos of an exclusive implied easement is not supportable as a matter of law. Even if the court had the power to award an exclusive implied easement in a residential boundary dispute, substantial evidence does not support the order. The court also abused its discretion in awarding the alternative equitable easement. The judgment should be

reversed with instructions that the trial court litigate the Romeros' remaining claims.

Dated: August 6, 2021

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Case No. S275023

IN THE SUPREME COURT OF CALIFORNIA

CESAR ROMERO and TATIANA SPICAKOVA ROMERO

Plaintiffs and Appellants,

v.

LI-CHUAN SHIH and TUN-JEN KO

Defendants and Respondents,

US BANK NATIONAL ASSOCIATION,

Cross-Defendant and Respondent.

After a Published Decision by the Court of Appeal, Second Appellate District, Division Eight, Case No. B310069

After an Appeal from the Los Angeles County Superior Court, Case No. EC064933

ANSWER BRIEF ON THE MERITS

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* * *

C. Judicially created doctrines such as exclusive easements (whether implied or equitable) can violate the Due Process Clause and/or Takings Clause of the United States Constitution

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* (2009) 560 U.S. 702, 717 (2009), six Justices held if a state court "declares that what was once an established right of private property no longer exists" a constitutional violation has occurred. Four Justices concluded such an action would violate the Takings Clause of the Fifth Amendment:

> If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.

(*Id.* at 715.) Two Justices concluded such an action would violate the Due Process Clause of the Fourteenth Amendment:

> If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law. The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power.

(*Id.* at 735, Kennedy, J., concurring.) "The Takings Clause is an essential part of the constitutional structure, for it protects private property from expropriation without just compensation; and the right to own and hold property is necessary to the exercise and preservation of freedom." (*Id.* at 734, Kennedy, J., concurring.) The takeaway is that if a state court "eliminates an established property right" through a judicial decision, then such court will have violated the United States Constitution.

1. Established property rights and the right to exclude

Ownership of private property comes with a "bundle of rights." These legal rights include: (1) right of possession; (2) right of control; (3) right of exclusion; (4) right of enjoyment; and (5) right of disposition. (*U.S. v. General Motors Corp.* (1945) 323 U.S. 373, 378; accord *Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 479 ("Case law recognizes that property rights are a complex 'bundle of rights.' ").) "That bundle includes the 'rights to possess the property, *to use the property*, to exclude others from the property, and *to dispose of the property by sale or by gift*.' " (*Bounds, supra*, 229 Cal.App.4th at 479.) In a recent case the United States Supreme Court held that:

> The right to exclude is "one of the most treasured" rights of property ownership. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). According to Blackstone, the very idea

> of property entails "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 W. Blackstone, Commentaries on the Laws of England 2 (1766). In less exuberant terms, we have stated that the right to exclude is "universally held to be a fundamental element of the property right," and is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179-180, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); see *Dolan v. City of Tigard*, 512 U.S. 374, 384, 393, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Nollan v. California Coastal Comm n*, 483 U.S. 825, 831, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); see also Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730 (1998) (calling the right to exclude the "sine qua non" of property).

(*Cedar Point Nursery v. Hassin* (2021) 141 S. Ct. 2063, 2072; *Allred v. Harris* (1993) 14 Cal.App.4th 1386, 1391 ("As a general rule, landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership.") (citing *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 435); accord *Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1253-54.)

The right to exclude is not an empty formality, subject to modification at the government's pleasure but rather a "fundamental element of the property

right" that "cannot be balanced away" and one that "the Government cannot take." (*Cedar Point Nursery, supra*, 141 S. Ct. at 2072 and 2077.)

California's judicial recognition and application of its doctrines of implied and equitable exclusive easements sever each strand of the Romeros' "bundle of rights" because the Romeros no longer have the right to: (1) possess the land; (2) control what happens on the land; (3) enjoy the land; (4) exclude third parties from the land; and (5) dispose of the land. The court created doctrines do not "simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." (See *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 435.)

Such an abrogation of the Romeros' established property rights under court created doctrines of exclusive easements would run afoul of their Constitutional rights, and thus this Court should decline to recognize any such doctrines.

2. An exclusive implied easement would eliminate all property rights including the right to exclude

The adoption of a court created "exclusive implied easement" rule would eliminate the Romeros' established property right to exclude and thus run afoul of *Stop the Beach Renourishment*, *supra*, 560 U.S. at 717. Just as the California Legislature could not enact a law

to take the Romeros' right to exclude and give it to an adjoining property owner, nor may a court.

With respect to the notion of the existence of an "exclusive implied easement" doctrine, the Court of Appeal held:

> Based on the foregoing, we hold, in the first instance, that an exclusive implied easement which, for all practical purposes, amounts to fee title cannot be justified or granted unless: 1) the encroachment is "de minimis" (see *McKean, supra*, 200 Cal. at p. 399; see *Rothaermel v. Amerige* (1921) 55 Cal.App. 273, 275–276); or 2) the easement is necessary to protect the health or safety of the public or for essential utility purposes. (*Mehdizadeh, supra*, 46 Cal.App.4th at p. 1306).

(*Id* at 352.) The Court also noted that "this is a case of first impression as we have found no case that permits or prohibits *exclusive* implied easements." (*Id* at 350.)

Accordingly, this Court should decline the Shih-Kos' invitation for this Court to create a doctrine that violates the United States Constitution.[1]

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[1] Although this Court denied review of the exclusive equitable easement and limited review to the exclusive implied easement, with respect to the Constitutional issue, the issue of whether a court can order an exclusive equitable easement is an issue fairly included in the issue upon which this Court granted review. (See Cal. Rule Crt. 8.516(a)(1).) As such, this Court should consider whether both court ordered doctrines are Constitutional.

IV.
CONCLUSION

The Court of Appeal properly concluded the implied easement ordered by the trial court was an exclusive easement, and such exclusive easements which are not de minimis or necessary for public safety are impermissible as a matter of state and federal law. Even if such easements are legally permissible, substantial evidence does not support the trial court's finding of an implied easement. The Court of Appeal Opinion with respect to the implied easement should be affirmed.

Dated: September 27, 2022

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