No. 23-1153

IN THE

Supreme Court of the United States

CESAR ROMERO, *et al.*,

Petitioners,

v.

LI-CHUAN SHIH, *et al.*,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

Petitioners Cesar Romero and Tatana Spicakova Romero's (the "Romeros") Petition for Writ of Certiorari ("Petition") seeks review of the interlocutory decision[1] of the Supreme Court of California in *Romero v. Shih,* 15 Cal.5th 680 (2024) ("Decision") which held that an implied easement for exclusive use is permissible if there is clear evidence that the parties intended for a preexisting use to continue after separation of title. *Id.* at 687. The Romeros argue that the California Supreme Court's Decision constitutes a taking of the Romero Property in violation of the Fifth and Fourteenth Amendments of the United States Constitution. Respondents Li-Chaun Shih and Tun-Jen Ko ("Shih-Ko") respectfully request that this Court deny the Petition for the primary reason that a judicial decision that applies well-established state law and merely recognizes the creation of an implied easement by a common owner does not divest subsequent owners of a property right they never had, and therefore it could never constitute a taking.

This is a case involving a dispute arising from the creation of an implied easement by common owners of two (2) parcels of real estate several decades before the current owners acquired their interests. The Romeros

1. The California Supreme Court remanded the case back to the State of California, Second Appellate District, Division Eight ("Court of Appeal") to decide whether substantial evidence supports the Superior Court for the County of Los Angeles (the "Trial Court") finding that an implied easement existed under the circumstances of this case. *Id.* at 688. As a result this Court lacks jurisdiction. 28 U.S.C. § 1257(a).

and the Shih-Kos purchased their respective properties[2] in 2014 more than thirty (30) years after a driveway, planter, and block wall ("Improvements") were built by the common owners (Edwin and Ann Cutler) on an approximate eight (8) foot strip of the Romero Property ("Disputed Area") for the benefit of the Shih-Ko Property. The Improvements were still in existence in 2014 when the Romeros and Shih-Kos bought their properties. Therefore, the Romero Property was already encumbered by the implied easement at the time of their purchase.

The California Supreme Court's Decision is entirely consistent with long-standing California law. California has codified the doctrine of implied easements in Civil Code section 1104, which has remained unchanged since its 1872 enactment. California courts have repeatedly interpreted Civil Code section 1104 as allowing implied easements for exclusive uses. Thus, the Petition seeks to challenge the California Supreme Court's Decision that is based on one hundred and fifty (150) years of California jurisprudence.

Setting aside the fact that there is no binding precedent that recognizes a judicial-takings theory, there can be no taking in this case where the Trial Court did not create a new property right in favor of the Shih-Kos, but only recognized the existence of an implied easement created by the Cutlers over thirty (30) years before the Romeros and the Shih-Kos bought their properties. As a

2. The Romeros own the property commonly known as 651 West Alegria Avenue, Sierra Madre, California 91024 (the "Romero Property") The Shih-Kos own the adjoining property commonly known as 643 West Alegria Avenue, Sierra Madre, California 91024 (the "Shih-Ko Property").

result, the Romeros never had an existing property right that was taken away by a judicial decision because the implied easement encumbering the Romero Property was created decades before they purchased it in 2014.

The California Supreme Court's Decision does not conflict, but in fact relies upon and is consistent with this Court's precedents. The cases cited by the Romeros concern instances where the government allegedly takes private property for itself or a third party or imposes regulations restricting an owner's ability to use his own property. None of these cases concern a judicial decision giving effect to the intent of the parties to create an easement.

Further, the Petition does not present a single question of exceptional importance. California has long recognized implied easements for exclusive uses in very limited circumstances where there is clear evidence that common owners of property intended certain uses to continue after the division of title. In other words, implied easements are rare. There is no evidence that the existence of implied easements in California has led to one hundred and fifty (150) years of widespread real estate fraud or has created uncertainty in the real estate markets, as the Romeros so dramatically suggest.

Lastly, the Romeros have confused the procedural history in this case to divert attention to significant procedural defects which warrant the denial of the Petition. The Petition contains numerous misleading citations to the record in an effort to make it appear that the Romeros raised their taking argument to the Court of Appeal when they unequivocally did not. As a result,

the California Supreme Court correctly determined the Romeros forfeited this objection. The Petition also fails to mention that the California Supreme Court remanded the case back to the Court of Appeal for further proceedings, which means that this Court lacks jurisdiction to review under 28 U.S.C. § 1257(a).

Therefore, the Petition should be denied.

STATEMENT OF THE CASE

I. Trial Court

On September 28, 2020, the Trial Court issued its final Statement of Decision finding that the Shih-Kos possess an implied easement over the Disputed Area which was created in 1986 when the common owners of both properties sold the Romero Property. The Trial Court held that when the Romeros acquired their property in 2014, it was subject to this implied easement that had been in existence for nearly 30 years. *Romero v. Shih,* 15 Cal. 5th at 690. The Trial Court further found that, if there was no implied easement, an equitable easement would arise entitling the Romeros to compensation of $69,000. *Id.* at 691.

II. The Court of Appeal

The Romeros appealed the Trial Court's judgment to the Court of Appeal but not on the ground that the judgment had violated the Fifth and Fourteenth Amendments to the United States Constitution. This is never mentioned in any of the Romeros' briefs to the Court of Appeal.

On May 5, 2022, the Court of Appeal filed its opinion, which reversed on the implied easement issue and affirmed the Trial Court's imposition of an equitable easement and upheld the award of $69,000 in damages to the Romeros. *Id.* at 692. Having concluded there could be no implied easement over the Disputed Area, the Court of Appeal did not address the Romeros' alternative argument that the implied easement finding was not supported by substantial evidence. *Id.*

III. Petitions for Review to California Supreme Court

Both the Romeros and the Shih-Kos submitted Petitions for Review to the California Supreme Court. *Id.* On August 10, 2022, the Shih-Kos' Petition regarding the implied easement claim was granted, and the Romeros' Petition with respect to the equitable easement claim was denied.

IV. California Supreme Court Decision

On February 1, 2024, the California Supreme Court reversed, holding that "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." *Id.* at 687. The California Supreme Court then remanded the case back to 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. *Id.* at 704. Therefore, this case remains pending before the Court of Appeal and no final decision has been rendered.

V. The Romeros' First Petition for a Writ of Certiorari to This Court

After the California Supreme Court declined to review the Romeros' Petition for Review with respect to the equitable easement claim, the Romeros filed their first Petition for a Writ Of Certiorari to this Court on November 8, 2022 ("First Petition"). On January 17, 2023, the Romeros' First Petition was denied by this Court.[3]

REASONS FOR DENYING THE PETITION

I. The California Supreme Court's Decision Is Consistent With Over 150 Years Of Legal Precedent

The Romeros repeatedly argue that the California Supreme Court "created a new doctrine – 'implied exclusive easement'" - that never existed before. Petition pp. 1 & 18. This is incorrect. The California Supreme Court's Decision is based on well-established California statutory and common law. California Civil Code section 1104, which the Romeros fail to cite, codified the doctrine of implied easements in 1872:

> The transfer of real property passes all easements attached thereto, and creates in favor

3. The Court should decline the Romeros' invitation to review the Court of Appeal decision granting the Shih-Kos an equitable easement. Petition p. 10 fn. 5. The Romeros' First Petition regarding the granting of an equitable easement has been denied by this Court. Further, this Court should decline to review the equitable easement claim for all the reasons set forth in this Brief in Opposition, as well as the fact that the Romeros were awarded $69,000 in compensation for the equitable easement.

> 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.

The California Supreme Court has long recognized implied easement for uses that were exclusive. *See, e.g. Quinlan v. Noble,* 75 Cal. 250 (1888) (recognized implied easement to maintain a water ditch); *Rubio Canon Land & Water Ass'n v. Everett,* 154 Cal. 29 (1908) (recognized an implied easement for a water distribution system); *Jersey Farm Co. v. Atlanta Realty Co.,* 164 Cal. 412 (1912) (recognized an implied easement for a water reclamation system).

In its Decision, the California Supreme Court cited more recent cases where a particular use was made of the surface area that excluded the servient owner from making use of that same surface area. For example, the California Supreme Court cited to *Zeller v. Browne,* 143 Cal.App.2d 194-95 (1956) where 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. The California Supreme Court also cited to *Dixon v. Eastown Realty Co.,* 105 Cal.App.2d 260 (1951) where 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.

The Romeros wrongly conclude that an easement for an exclusive use is equivalent to fee ownership. The implied easement recognized by the Trial Court is limited in scope. Though an easement may be broadly exclusive, it is nonetheless necessarily limited in scope.[4] "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." *Romero v. Shih,* 15 Cal. 5th at 487. As the California Supreme Court recognized, the implied easement recognized by the Trial Court "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." *Id.* at 488.

The California Supreme Court correctly concluded that "[t]he 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. *Id.* at 492.

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4. 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. *See e.g., Gray v. McCormick*, 167 Cal.App.4th 1019, 1029 (2008) (exclusive use express easement for a driveway, wall and landscaping is not prohibited under California law); *see also Blackmore v. Powell*, 150 Cal.App.4th 1593, 1599–1601 (2007) (court construed an express easement as providing for exclusive use of a garage)

II. There Is No Taking

A. There is No Binding Precedent That A Judicial Decision Could Constitute a Taking

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, provides: "[N]or shall private property be taken for public use, without just compensation." The Romeros mainly rely on this Court's plurality opinion in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection,* 560 U.S. 702 (2009) for the proposition that a decision by a state court can constitute a taking. *Stop the Beach* involved a claim regarding an alleged taking of private beachfront property by the State of Florida as the result of a Florida state court's decision regarding application of a Florida statute. *Id.* at 712. In a unanimous decision, this Court rejected this challenge, reasoning that whether the judicial takings doctrine exists, no taking took place because the Florida court's decision was supported by prior Florida case law. *Id.* at 731.

However, this Court was split on whether it should recognize a judicial takings concept in the first place. *Id.* at 733-745. As noted in *Pavlock v. Holcomb,* 35 F.4th 581, 586 (7th Cir. 2022), neither this Court "nor any of our fellow circuits have recognized a judicial-takings claim." *Id.* at 586. A plurality opinion does not constitute binding precedent. *Texas v. Brown,* 460 U.S. 730, 737 (1983).

Like *Stop the Beach*, regardless of whether the judicial takings doctrine exists, there was no judicial taking in this case because the California Supreme Court's Decision

was supported by over one hundred and fifty (150) years of law recognizing implied easement for exclusive uses.

B. The California Supreme Court's Decision Did Not Take Away An Existing Property Right of the Romeros

Even if this Court were to establish a judicial takings doctrine, the facts of this case clearly demonstrate that there has been no taking of private property. The Romeros purchased their 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.

Under our federal system, the sovereign states determine their own property laws. *Phillips v. Washington Legal Foundation,* 524 U.S. 156, 164 (1998). It is the role of "the state court ... to define rights in land located within the states." *Fox River Paper Co. v. R.R. Comm'n of Wis.*, 274 U.S. 651, 657, (1927) (adding that "the Fourteenth Amendment, in the absence of an attempt to forestall our review of the constitutional question, affords no protection to supposed rights of property which the state courts determine to be nonexistent")

Applying the test for a judicial taking set forth in the plurality opinion in *Stop the Beach*, the Romeros would be required to show that the California Supreme Court declared they had a property right that no longer exists. Justice Scalia's opinion proposed a new test for identifying when a judicial taking occurs: "[i]f 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." *Stop the Beach*, 560 U.S. at 715.

The Romero's never had an existing property right to use the surface of the Disputed Area. As the California Supreme Court clearly explained, the Trial Court's decision recognizing the existence of an implied easement did not deprive the Romeros of an established property right:

> 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.

Romero v. Shih, 15 Cal.5th at 704

Given that the Trial Court did nothing more than recognize the respective property rights of the Romeros and Shih-Kos, this judicial decision does not constitute a taking as a matter of law. *Stop the Beach*, 560 U.S. at 715. "And insofar as courts merely clarify and elaborate property entitlements that were previously unclear, they

cannot be said to have taken on established property right." *Id.* at 727.

III. The California Supreme Court's Decision Does Not Conflict With Any Of This Court's Precedents

The Romeros argue that the California Supreme Court's Decision "cannot be squared with this Court's precedents." Petition p. 15. Not so. The Romeros fail to cite to any decision by this Court that conflicts with the California Supreme Court's Decision recognizing the right of a common property owner to create an implied easement for an exclusive use intended to continue after the separation of title.

The California Supreme Court's Decision is consistent with this Court's decision, and in fact relied on *Stop the Beach* in correctly concluding there was no taking. *Romero v. Shih,* 15 Cal.5th at 704. This Court's decisions cited by the Romeros are clearly distinguishable. None of those cases concern whether an easement for an exclusive use is a taking for private use without compensation but rather concern scenarios where the government allegedly appropriated private property for itself or a third party; or imposed regulations restricting an owner's ability to use his own property. [5] These cases are unlike the California

5. *Madisonville Traction Co. v. St. Bernard Mining Co.,* 196 U.S. 239 (1905) was an action for eminent domain to condemn property pursuant to a Kentucky statue. *Cedar Point Nursery v. Hassid,* 594 U.S. 139 (2021), involved a California regulation that granted labor organizations a right to access on agricultural employee's property. *Loretto v. Teleprompter Manhattan CATV Corp.,* 458 U.S. 419 (1982), concerned a New York statute that required landlords to permit installation of cable television facilities

Supreme Court's Decision regarding the scope of an implied easement created by common owners. Thus, the cases cited by the Romeros have no application.

IV. The Petition Does Not Present An Issue Of Exceptional Importance

The Romeros argue that the California Supreme Court's Decision will "wreak havoc on the rights of untold thousands of property owners and open the flood gates to real estate fraud" and will inject instability in the financial markets. Petition 19-20. There is no evidence this has ever happened in the last one hundred and fifty (150) years. Moreover, the Romeros have skipped over the fact that implied easements are rare and arise in very limited situations involving pre-existing use of property under common ownership. Further, any concern is clearly "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." *Romero v. Shih,* 15 Cal.5th at 702.

Regarding the Statutes of Frauds, the Romeros ignore the fact that the doctrine of implied easements is

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on their rental properties. *Lucas v. South Carolina Coastal Council,* 505 U.S. 1003 (1992), addressed the application of a South Carolina statute that deprived property owners of use of beach from property. *Kelo v. City of New London, Conn.,* 545 U.S. 469 (2005) involved a city's exercise of eminent domain through condemnation proceedings to take private properties for alleged public use. *Perry v. Sindermann,* 408 U.S. 593 (1972) concerned a claim by the plaintiff that the government had denied him a benefit on a basis that infringed on his right of free speech.

a settled exception to the Statute of Frauds. "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." *Id. at* 701.

Lastly, the unconstitutional conditions doctrine has no application to this case. The California Supreme Court's Decision did not use conditions or require the Romeros to "surrender a portion of their property as a condition precedent to avoid having all of it taken". Petition p. 21. There has never been a threat to seize all the Romeros' land unless they agreed that a portion of their property is encumbered by an implied easement.

In summary, the Petition does not come close to raising a single issue of exceptional importance. There is no valid reason for this Court to review the California Supreme Court's Decision recognizing an implied easement that arises under rare circumstances.

V. The Petition Fails on Procedural Grounds

A. The Romeros' Failed To Present Their Taking Argument To The Court of Appeal

The Romeros' assertion that they raised their taking arguments to the Court of Appeal is not accurate. Petition, p. 7. It is undisputed that the Romeros never raised a taking argument anywhere in any of their briefs to the Court of Appeal. Thus, the Romeros have failed to carry their burden of showing that the claim they raise here was properly presented to the Court of Appeal.

Ordinarily, this Court will not consider a petitioner's federal claim unless it was addressed by or properly presented to the California Supreme Court. *Adams v. Roberson,* 520 U.S. 83, 86 (1997) (petitioners failed to meet their burden of showing that the issue was properly presented to the highest state court.) Petitioners must establish that the claim was raised " 'at the time and in the manner required by the state law,'" *Bankers Life & Casualty Co. v. Crenshaw,* 486 U.S. 71, 77–78, (1988) (quoting *Webb v. Webb*, 415 U.S. 493, 501 (1981) The discussion of "a federal case, in the midst of an unrelated) argument, is insufficient to inform a state court that it has been presented with a claim." *Board of Directors, Rotary Int'l v. Rotary Club of Duarte,* 481 U.S. 537, 550, fn. 9, (1987) As this court has explained "it would be unseemly in our dual system of government" to disturb the finality of state judgments on a federal ground that the state court did not have occasion to consider. *Webb,* 451 U.S. at 500.

The Romeros argue that they properly raised their taking argument, yet the citation to the Appendix does not support this contention. The Romeros claim that they raised an argument to the Trial Court that an exclusive easement would run a foul of the United States Constitution, citing to their own trial testimony set forth in the statement of fact section of the Court of Appeal decision itself. Petition, p. 5, fn. 2. They also cite to their Request for a Statement of Decision requesting the Trial Court to address constitutional arguments. Petition, p. 6, fn. 3. The problem for the Romeros is that they never used any of this as the basis for their appeal to the Court of Appeal. The Romeros did not appeal the Trial Court Judgment on the ground that it was unconstitutional in any respect.

The Romeros' statement that they made a constitutional argument to the Court of Appeal is inaccurate. The Petition states:

> 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.**

Petition, p. 7 (emphasis added).

The Romeros' are not citing to their briefs on appeal, or any document filed with the Court of Appeal prior to the appellate decision. The citation to Appendix pages 182 -183 refers to the Romeros' Petition for Review to the California Supreme Court dated June 14, 2022, regarding the Trial Court's grant of equitable easement, which was denied on August 10, 2022. In addition, the language quoted by the Romeros from their failed Petition for Review does not refer to an argument that the Romeros made concerning implied easements at all. Rather, the Romeros cited a comment made by the court in *Shoen v. Zacarias*, 237 Cal.App.4th at 19, 20 (2015) in discussing the elements of an equitable easement.

Thus, it is undisputed that the Romeros never properly raised their taking argument. The California Supreme Court confirmed that the taking argument had not been properly presented in violation of the California Rules of

Court. Rule 8.500 (c)(1). ("As a policy matter, on petition for review the Supreme Court normally will not consider an issue that the petitioner failed to timely raise in the Court of Appeal.") The California Supreme Court correctly ruled that by not raising their taking argument to the Court of Appeal, the Romeros forfeited their objection:

> 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, 573.)

Romero v. Shih, 15 Cal.5th at 704.

This provides a separate basis for this Court to deny the Petition.

B. This Court Lacks Jurisdiction To Review This Matter

The Romeros' contention that this Court has jurisdiction under 28 U.S.C. § 1257(a) is incorrect. This Court lacks jurisdiction where the California Supreme Court has remanded this case to the Court of Appeal to determine whether the Trial Court had substantial evidence to support an implied easement.

"In general, the final-judgment rule has been interpreted to preclude reviewability where anything further remains to be determined by a State Court, no

matter how dissociated from the only federal issue that has finally been adjudicated by the highest court of the State." *Flynt v. Ohio,* 451 U.S. 619, 620 (1981).

"It is not this Court's usual practice to adjudicate either legal or predicate factual questions in the first instance." *CRST Va. Expedited, Inc. v. EEOC*, 578 U.S. 419, 420 (2016). "Mindful that this is a court of final review and not first view," *Matsushita Elec. Industrial Co. v. Epstein*, 516 U.S. 367, 399 (1996) (GINSBURG, J. concurring in part and dissenting in part). This Court ordinarily "do[es] not decide in the first instance issues not decided below." *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109, (2001) (per curiam) (internal quotation marks omitted). Accordingly, this Court should deny certiorari here.

The Petition failed to disclose that this case has been remanded to the Court of Appeal and remains pending. No final decision in this case has been rendered. The matter remains under submission, and it is expected the Court of Appeal will render its decision by July 1, 2024.

While the Shih-Kos fully expect the Court of Appeal will affirm the Trial Court's decision, there is the possibility the Court of Appeal could reverse, or even remand the case back to the Trial Court for further proceedings. Thus, while very unlikely, there is a possibility that the remaining proceedings in the California state courts could result in a final judgment that renders the issue of whether the implied easement at issue constituted an unconstitutional taking as moot.

Under these circumstances, this Court should deny the Petition because there is no jurisdiction under 28 U.S.C. § 1257(a).

CONCLUSION

The Shih-Kos respectfully request that this Court deny the Petition in all respects.

Respectfully Submitted,

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