No. 23-1153

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

REPLY BRIEF

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It remains a fundamental tenet of Americana that landowners "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 Romeros had that expectation when they bought their roughly 10,000 square foot Sierra Madre property. They did so, because the U.S. Constitution guarantees, in no uncertain terms, that their property is secure from unconstitutional takings, in whatever form they come.

Through the Romeros' efforts to prevent the taking of the property they bought, the California Court system has not only trampled their constitutional rights, but has also claimed for itself a profoundly dangerous, unconstitutionally expansive authority to divvy up privately owned real property as it sees fit. Through the facade of creating an "exclusive easement" (first equitable, now implied), the California Courts adorned themselves with the ability to transfer private property from the landowner to any other private party. And to be certain, the California Courts have indeed transferred the Romeros' property in every sense of the word. By giving the Shih-Kos the right to exclude the Romeros from their own land, the California Courts have given the Shih-Kos the "sine qua non" of property ownership. Thomas W. Merrill, Property and the Right to Exclude, 77 Neb. L. Rev. 730, 752 (1998).

The importance of this question cannot be overstated. Since the time of James Madison, our Nation has believed that,"[i]n a word, as a man is said to have a right to his property, he may be equally said

to have a property in his rights." James Madison, Property (Mar. 29, 1792), reprinted in 1 The Founders' Constitution 598, 598 (Philip B. Kurland & Ralph Lerner eds., 1987). In other words, the most fundamental of our rights are at issue here, and no court in California has shown any interest in protecting (or even really acknowledging) the stakes. California is the most populated State in the Union, and many other states follow their lead, meaning that unless this Court steps in, tens of millions of Americans will begin to expect that their property might in fact "be actually occupied or taken away." *Horne*, 576 U.S. at 361.

I. THE ROMEROS' PETITION HAS NO VEHICLE PROBLEM.

According to the Shih-Kos, the Romeros' petition "fails on procedural grounds," BIO at 14, because (1) the California Supreme Court remanded the case for further factfinding, and (2) the Romeros purportedly forfeited their Fifth and Fourteenth Amendment challenges to the California Courts' respective exclusive-easement holdings. Both arguments are mistaken. And neither affects this Court's ability to address these crucial constitutional issues.

First, the California Court of Appeal has issued the opinion on remand to which the Shih-Kos point. Specifically, on August 13, 2024, California's Second Appellate District held that "[t]he judgment is affirmed as to the cause of action for implied easement." *Romero v. Shih*, No. B310069 (Cal. Ct. App. 2024). Even if there were an impediment before (and because the California Supreme Court's earlier

opinion conclusively established the *legal rule* forming the basis of the Romero's petition, there was no such impediment), the Shih-Kos' first procedural challenge fails.

Second, the Shih-Kos argue that "the Romeros never raised a taking argument anywhere in any of their briefs to the Court of Appeal," BIO at 14, and this Court "will not consider a petitioner's federal claims unless it was addressed by or properly presented to the California Supreme Court." BIO at 15. Fatal to this argument, however, is that the Romeros *did* raise this issue to the California Supreme Court (the court that issued the opinion from which the Romeros petitioned for certiorari), *see* App. 251-55, and—critically—the California Supreme Court addressed it.[1] Even if the California Supreme Court could have, under California law, rested its

[1] Even though the Shih-Kos and the California Supreme Court (mistakenly) concluded that the Romeros failed to raise this issue to the California Court of Appeals, there is no dispute that they raised it at the earliest juncture to the California Supreme Court, the tribunal that issued the opinion from which this petition for certiorari flows. See, e.g., App. 182-83 (the Romero's Petition for Review to the California Supreme Court); App. 245 (the Romero's Answer Brief in Opposition to the Shih-Kos Petition for Review to the California Supreme Court); App. 251 (the Romero's Answer Brief on the Merits at the California Supreme Court).

decision on forfeiture,[2] it nonetheless held that the Romeros' constitutional "argument is without merit in any event." App. 33-34. Because "'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 an occasion to consider*," App. 15 (quoting *Webb v. Webb*, 415 U.S. 493, 501 (1981) (emphasis added)), the California Supreme Court's decision to address this federal constitutional question tees it up for this Court's review.

Third, the constitutional question *was* always in play at the California Court of Appeals. In the Romeros' Opening and Reply Briefs at the California Court of Appeals, the Romeros argued, without equivocation, that:

> "There is a general constitutional prohibition against the taking of private property . . . ."
>
> * * *
>
> Because the awarding of an . . . 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. . . . All

[2] See App. 33 ("The Romeros did not raise this issue below and therefore have forfeited the objection.").

> doubts are to be resolved in the Romeros' favor.
>
> * * *
>
> The Shih-Kos also downplay the significance of the Romeros losing 13% of the property they paid for . . . and, in doing so, they also completely ignore that there is a general constitutional prohibition against the taking of private property.

App. 248.[3] And again, most critically, the Court of Appeals acknowledged the constitutional concerns at issue in its dual exclusive-easement ruling. As for exclusive equitable easements, it noted that:

> Equitable easements give the trespasser what is, in effect, the right of eminent domain by permitting him to occupy property owned by another. . . . 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

[3] The Romeros also pressed the constitutional issue in their attempt to seek rehearing of the California Appellate Court's opinion: "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." App. 150 (citation and internal quotation marks omitted).

> be taken for public use, without just compensation] . . . . To allow a court to reassign property rights on a lesser showing is to dilute the sanctity of property rights enshrined in our Constitutions).

App. 83-84 (some citations and internal quotations marks omitted).

And regarding exclusive implied easements, it commented that allowing them "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 . . . *and the general constitutional prohibition against the taking of private property* (see U.S. Const., 5th Amend. . .)." App. 81 (emphasis added).[4]

In other words, the California Courts have finished their work. The California Supreme Court addressed the constitutional issue that forms the basis of the Romeros' petition for certiorari. And the Romeros have been insisting, repeatedly and throughout the California Court system, that their U.S.

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[4] The California Court of Appeals also noted that the Romeros had raised the constitutional issues at trial, quoting Ms. Romero's testimony that "I believe in our constitutionally protected property rights I have bought, paid for, and legally own the approximate 10,000-square-foot lot." App. 62.

Constitutional rights are being infringed. There is no procedural impediment to this Court's review.

II. THE CALIFORNIA SUPREME COURT HAS NEVER (BEFORE THIS CASE) ALLOWED FOR JUDICIALLY CREATED EXCLUSIVE EASEMENTS.

The Shih-Kos' primary argument is, essentially, that the California Supreme Court did nothing out of the ordinary when it allowed the State court system to take 13 percent of the Romeros' land and give it to private parties for their exclusive benefit. In the view of the Shih-Kos, the Romeros' "Petition seeks to challenge the California Supreme Court's Decision that is based on one hundred and fifty (150) years of California jurisprudence." BIO at 2. Not so.

If the California Supreme Court was applying settled precedent, that would likely be news to the California Supreme Court. In fact, they stated explicitly that "the parties have not cited, and we have not found, any cases directly addressing the question presented here." App 25. The California Court of Appeals was in accord: "We note this is a case of first impression as we have found no case that permits or prohibits exclusive implied easements." App. 72; see also App. 77 ("[W]e 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" . . . ; or 2) the easement is necessary to protect the health or safety of the public or for essential utility purposes." (emphasis added)).

The only way for the Shih-Kohs to reach this profoundly mistaken conclusion is to misleadingly

downplay the effect of the taking at issue here. And indeed, they do just that, arguing that "[t]he implied easement recognized by the Trial Court is *limited in scope*." BIO at 8 (emphasis added). Lest the Court not already see the absurdity in that suggestion, the parties all concurred (in the words of the trial court) that:

> [I]f . . . 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. In all but legal formality (and tax-liability), property that once belonged to the Romeros now belongs to the Shih-Kohs. To reiterate: the California Courts have given the *Shih-Kohs* authority to exclude the *Romeros* from accessing, using, enjoying, or even walking on the *Romeros'* property. One wonders how an "easement" of this magnitude can honestly be described as "limited." In any event, even the California Courts recognized that an exclusive easement "preclud[ing] a property owner from any

practical use . . . is nearly the equivalent of a fee interest." App. 77.

III. *EXCLUSIVE* EASEMENTS FOISTED ON LANDOWNERS BY A COURT VIOLATE THE FIFTH AND FOURTEENTH AMENDMENTS.

Both the courts below and the Shih-Kos here dance around the fundamental issue that this case presents. Easements are common. *Exclusive* easements are de facto transfers of a fee simple estate, a point that the California Courts have recognized: "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). And exclusive easements that are judicially created from whole cloth over the objection of a landowner violate the U.S. Constitution.

The Court made this point manifest in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, a case in which 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. 702, 717 (2010). Four justices—lead by Justice Scalia—concluded such an action would violate the Takings Clause of the Fifth Amendment. Id. at 715. Two others reasoned that it would violate the Due Process Clause of the Fourteenth Amendment. Id. at 742. Together, a majority agreed that when a court decrees that was once property of A now belongs to B, the United States Constitution steps in as a bulwark against that infringement of A's fundamental property rights.

The California Supreme Court's creation of exclusive easements (whether equitable or implied) conflicts with *Stop the Beach Renourishment*. Similarly, it conflicts with *Cedar Point Nursery v. Hassid*, which reiterated that a property owner has the 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.'" 594 U.S. 139, 149 (2021) (quoting 2 W. Blackstone, Commentaries on the Laws of England 2 (1766)). This power to exclude is one that belongs to the *landowner*. Because the California Supreme Court has adorned itself with the power to take a landowner's right to exclude and give it to an interloper to use *against* the landowner, the California Supreme Court has transgressed this Court's pronouncement regarding our Nation's Charter. Simply put, the California Supreme Court's newly minted power grab cannot exist alongside either the Fifth or Fourteenth Amendments.

To reiterate: this is *not* (as the Shih-Kos would have it) a situation where "[t]he Romeros purchased their property subject to the implied easement." BIO at 10. Both the California Court of Appeals and the California Supreme Court recognized that implied *exclusive* easements were not recognized in California before *this* case. *See* App. 25, 72, 77; *see also supra* at 7-9. Instead, the California Supreme Court created this new doctrine, and then applied it *retroactively* to strip away 13 percent (roughly 1,300 square feet) of the Romeros' real property. In other words, because the California Supreme Court "declare[d] 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 Renourishment*, 560 U.S. at 715.

The purported implied exclusive easement, therefore, manifestly neither "inhere[d] in the title itself" nor was located "in the restrictions that background principles of the State's law of property and nuisance *already place[d] upon land ownership*." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) (emphasis added). It was, in every sense of the phrase, "newly . . . decreed." *Id.* For that reason, it was a taking, and the California Supreme Court's contrary decision cries out for this Court's review.

CONCLUSION

The Court should grant certiorari.

Respectfully submitted,

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