No. _____

In The
Supreme Court of the United States

CESAR ROMERO and
TATANA SPICAKOVA ROMERO,

Petitioners,

v.

LI-CHUAN SHIH, et al.,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California, Second Appellate District

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a court order that excludes land owners from their real property and allows other private parties to physically invade and occupy the owners' land either effects a taking in violation of the Fifth Amendment to the U.S. Constitution and/or violates the land owners' due process rights under the Fourteenth Amendment to the U.S. Constitution?

2. Whether a judicially created "equitable" doctrine that gives Landowner A the exclusive use of Landowner B's property under the guise of an "easement" either effects a taking in violation of the Fifth Amendment to the U.S. Constitution and/or violates Landowner B's due process rights under the Fourteenth Amendment to the U.S. Constitution?

PARTIES TO THE PROCEEDINGS

The following were parties before the Court of Appeal of the State of California, Second Appellate District and are parties before the Supreme Court of California:

Cesar Romero and Tatana 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.

STATEMENT OF RELATED CASES

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. Order denying Romeros' motion for rehearing entered May 25, 2022.

Romero v. Shih, B310069, 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.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

PETITION FOR A WRIT OF CERTIORARI

INTRODUCTION

In 2014, Cesar and Tatana Spicakova Romero (the "Romeros") bought a roughly ten-thousand square-foot tract of developed real property in Sierra Madre, California. App. 7–8. Roughly a year later, the Romeros discovered that their neighbors were trespassing over thirteen percent of their land because a brick wall separating the two properties was not constructed on the legal boundary line. App. 9. After their neighbors refused to stop the trespass, litigation ensued. App. 8–10. And although there is no dispute that the Romeros are correct about the legal boundary line between the two properties, the California court system has refused to honor *any* strand in the bundle of fundamental rights that the Romeros possess in their real property. *See* App. 45–57.

Instead, the California courts created a new doctrine—an equitable *exclusive* easement. *See* App. 45–57. In the California judiciary's view, it has the discretion to take land from its rightful owner and grant de facto fee title to someone who never owned it, upon a discretionary determination that "equity" demands it. *See* App. 45–57. But instead of standing for fairness, the California judiciary's power grab represents an attack on a principle this Court has recognized for well over a century—that "private property cannot be taken by the Government, National or state, except for purposes which are of a public character." *Madisonville*

Traction Co. v. St. Bernard Mining Co., 196 U.S. 239, 251 (1905).

Fewer than two 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*, 141 S. Ct. 2063, 2072 (2021) (quoting 2 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1766)). Not only has the California Court System 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 allowed their neighbors, who have no legal claim to that property at all, to use their right to exclude *against them*. To describe the effect of California's judicially created equitable exclusive easement in any other way bucks 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). Although the California Court of Appeal claimed it was merely creating an "easement" based on the equities in the case, *see* App. 45–57, the fact remains that the Romeros have no ability to use their property whatsoever. This sort of infringement 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 Court of Appeal.

OPINION BELOW

The California Court of Appeal's opinion is reported at *Romero v. Shih*, 78 Cal. App. 5th 326 (Cal. 2d Ct. App. 2022). It is also reproduced at App. 1–57.

The California Supreme Court's order, which declined to consider the equitable-easement issue giving rise to this petition for certiorari, is reported at *Romero v. Shih*, 296 Cal. Rptr. 3d 648 (Cal. 2022), and reproduced at App. 99–100.

JURISDICTION

The Court of Appeal's judgment was entered on May 5, 2022, *see* App. 1–57, 66, and the California Supreme Court's order declining to address the equitable-easement issue giving rise to this petition for certiorari was entered on August 10, 2022, *see* App. 99–100.

[1] Adding insult to injury, the Romeros have to continue to pay taxes on the property they own but cannot use because their neighbors have exclusive use of it. *See* App. 9, 25.

Accordingly, this Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

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

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." U.S. CONST. amend. XIV.

STATEMENT OF THE CASE

In 2014, the Romeros bought a tract of developed land in Sierra Madre, California, for use as their primary residence. App. 7–8, 186. As advertised, the lot totaled roughly 10,000 square feet, App. 8, and the grant deed confirms that it is sixty-three feet wide by one hundred-fifty-seven feet deep and unencumbered by any easement, App. 186, 188, 190. The lot's size played a fundamental role in their decision to purchase it; given their desire for privacy, they would not have bought it if they believed it to be smaller than roughly ten-thousand square feet. App. 24, 190.

That same year, the Shih-Kos purchased the lot directly next to the Romeros' property. App. 7. They

have since used it as a rental property. App. 192–93. The legal description of the property owned by the Shih-Kos describes it as 7,853 square feet, App. 22, fifty-feet wide by one hundred-fifty-seven feet deep, App. 186, 189. When each of the neighbors bought their tracts, a brick garden bed and a brick wall appeared to delineate the boundary line. App. 9.

Based on an observation while doing yard improvements that their lot seemed smaller than advertised, the Romeros hired a surveyor in 2015. App. 9, 190. The survey proved that the true boundary line between the two properties was 8.25 feet closer to the Shih-Kos's home than the Romeros had realized. App. 9. In other words, the brick garden bed and brick wall was located entirely on the Romeros' land. App. 9. In total, the brick wall in its current location cost the Romeros 1,296 square feet (roughly 13 percent of the property they had purchased), App. 9, none of which they have ever been able to use, App. 41–43.

Critically, the land owned by the Romeros but occupied by the Shih-Kos has no encroaching buildings. *See* App. 15–16, 191–92. The area fenced off by the brick wall and occupied by the Shih-Kos includes a back yard with no improvements, a side yard with a concrete slab, a front yard with flower planters, and a sliver of the Shih-Kos' driveway. *See* App. 15–16, 191–92.

Upon discovering the trespass over their land, the Romeros contacted the Shih-Kos' property manager and offered to split the cost of having the brick wall

removed from their land and rebuilt on the true boundary line. App. 192–93. The property manager and Shih-Kos declined their offer. App. 193. After attempts to amicably resolve the dispute failed, App. 193, the Romeros sued the Shih-Kos on February 10, 2016 in the California Superior Court, Los Angeles Division, App. 8. Their operative complaint advanced causes of action for wrongful occupation of real property, quiet title, trespass, private nuisance, wrongful disparagement of title and permanent injunction. App. 8. The Shih-Kos counterclaimed, alleging claims for equitable easement, implied easement, quiet title and declaratory relief. App. 10. At trial, the Romeros argued that granting the Shih-Kos an exclusive easement would flout the United States Constitution.[2]

After protracted litigation, a five-day bench trial began 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

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[2] *See*, *e.g.*, App. 26 ("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."); App. 26 ("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. 88 ("Mrs. Romero likewise testified that essentially the primary harm to her was the violation of her constitutional property rights.").

> 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. 11–12. 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 more than a tenth of their real property. App. 12. And although the Romeros asked the trial court to explain why the judicial creation of exclusive easement would not violate the U.S. Constitution, the trial court declined to do so.[3]

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[3] *See*, *e.g.*, App. 103 ("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. 104 (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]

Despite Mr. Romero's insistence during the trial that "it's our land, and I believe in property rights," App. 26, and Ms. Romero's plea that she "believe[s] in [the] constitutionally protected property rights [they] have bought, paid for, and legally own," App. 26, their assertion of their rights fell on deaf ears. On September 28, 2020, the Superior Court concluded that the Shih-Kos, and all 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 $69,000 in compensation). App. 27. The effect of the court order was that the Romeros' land was reduced by 13 percent (from 9,815 square feet to 8,519 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, increasing their land by 17 percent (from 7,853 square feet to 9,149 square feet). App. 22, 41.

The Romeros appealed to the California Court of Appeal, arguing, among other things, that "the awarding of an equitable easement 'is in tension with the general constitutional prohibition against the taking of private property.'" App. 212. They also maintained

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Romeros' entire piece of land . . . amounts to an unconstitutional taking in violation of state and federal law") (emphasis omitted); App. 106–07 (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?").

that "there is a general constitutional prohibition against the taking of private property." App. 212. The California Court of Appeal reversed in part and affirmed in part. *See* App. 1–57.

In so doing, the California Court of Appeal first recognized that exclusive easements are largely disfavored. App. 34. 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. 35 (citations omitted). And, then, the court concluded that because (1) the Shih-Ko's encroachment and trespass on roughly 1,300 square feet of the Romeros' land could not be considered "de minimis," and (2) an easement of this magnitude was unnecessary to protect the public or to ensure essential utility services, App. 41, the California Court of Appeal held that the Superior Court erred by granting the Shih-Kos an exclusive implied easement on the Romeros' property. App. 45.[4]

Notwithstanding everything it had just said about exclusive *implied* easements (e.g., their propriety only in rare circumstances, none of which applied to the Romero/Shih-Ko dispute), *see* App. 33–45, the Court of Appeal affirmed the Superior Court's grant of an

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[4] *See also* App. 43 ("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.").

exclusive *equitable* easement (which had the same rights-stripping effect of an exclusive *implied* easement), *see* App. 45–57. 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. 46 (citations omitted).

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. 46. 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.

In so doing, the California 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. 47 (citation omitted). And it expressly acknowledged that "[s]uch a right is in tension with the general constitutional prohibition against the taking of private

property." App. 47–48 (citing U.S. CONST. amend. V).[5] This brazen de facto taking, however, did not appear to trouble it any further.

Instead, the California Court of Appeal affirmed without hesitation the Superior Court's decision to grant an *exclusive equitable* easement to the Shih-Kos (upon payment of $69,000) after concluding that the Shih-Kos had acted innocently, App. 48–50, that the Romeros would not be irreparably injured by the grant, App. 50–51, 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 (and all their successors in interest) to perpetuate their trespass, App. 51–53. The Romeros petitioned for rehearing, again asserting their rights under the U.S. Constitution. *See* App. 108–18.[6] The California Court of Appeal summarily denied it. App. 66.

Shortly after, both the Shih-Kos and the Romeros filed petitions for review with the California Supreme Court. *See* App. 119–61, 162–76; *see also* 177–210. The

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[5] *See also* App. 48 ("This is why courts approach the issuance of equitable easements with 'an abundance of caution[,]' . . . and resolve all doubts against issuance. . . . To allow a court to reassign property rights on a lesser showing is to dilute the sanctity of property rights enshrined in our Constitutions." (citations omitted)).

[6] *See* App. 114 ("[T]he awarding of an equitable easement 'is in tension with the general constitutional prohibition against the taking of private property.' " (quoting *Shoen v. Zacarias*, 237 Cal. App. 4th 16, 19–20 (Cal. 2d Ct. App. 2015)).

Shih-Kos argued that the Court of Appeal erred by rejecting their exclusive implied easement argument. *See* App. 165–66. The Romeros, in turn, asserted that "[r]eal property ownership is a fundamental right protected by the United States Constitution," App. 183 (citing U.S. CONST. amend. V), and 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. 183.[7]

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. 209. 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 in a residential

[7] *See also* App. 185 (the California Supreme Court "should review whether any court[-]ordered exclusive easement which deprives the property owner of all practical use of the property and gives it to another private party is void and in violation of the Takings Clause").

boundary dispute is void and in violation of the Takings Clause." App. 210.[8]

On August 10, 2022, the California Supreme Court granted the Shih-Kos' petition but denied the Romeros' request that it take up the U.S. Constitutional issue. *See* App. 99. 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*, 296 Cal. Rptr. 3d 648 (Cal. 2022); App. 99.

The case before the California Supreme Court has been fully briefed. In their filings, the Romeros have 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. 215 and they have 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. 216. But because the

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[8] *See also* App. 126 ("Real property ownership is a fundamental right protected by the United States Constitution," and the California Court of Appeal "creat[ed] [a] dangerous new precedent contrary to fundamental real property rights" (citing U.S. CONST. amend. V); App. 127 ("The rationale i[n] awarding such an *exclusive* prescriptive easement would be akin to a taking of property, which is not permitted." (emphasis in original)); App. 153 (the California Court of Appeal's "[o]pinion divests the Romeros of nearly all rights that owners customarily have[,] including access and usage" (citation, internal quotation marks, and alterations omitted)).

California Supreme Court has potentially declined to address the constitutionality of California's exclusive-equitable-easement doctrine, the Romeros file this petition for certiorari to preserve this critical issue for the Court's review.[9]

REASONS FOR GRANTING THE PETITION

Reduced to its essence, the decision of the California Courts is this: the Romeros own property. The Shih-Kos have physically invaded and occupy much of the property that indisputatably belongs to the Romeros. Despite the Romeros' fundamental right to use, access, and exclude others from their property, the California Courts have decreed that the Shih-Kos can exclude *the Romeros* from a portion of the *Romeros' property*, all in the name of "equity."

[9] Mindful of judicial-efficiency concerns, the Romeros have, contemporaneously with this filing, also filed a motion to hold consideration of this petition for certiorari in abeyance, pending the California Supreme Court's resolution of the exclusive implied easement issue. Given that the California Supreme Court may either (1) resolve the U.S. Constitutional issues in favor of the Romeros, thus mooting their need to seek this Court's review; or (2) resolve the U.S. Constitutional issues against the Romeros, thus giving them an additional reason to seek this Court's review, prudence counsels in favor of holding resolution of this petition for certiorari in abeyance until the State Supreme Court acts. But because the California Supreme Court may decline to resolve the U.S. Constitutional issues at all, the Romeros are compelled to file this petition now to avoid forfeiture.

The Constitutional violation arises no matter which varietal of easement the California courts choose to affix to their judicial infringement of the Romeros' fundamental rights. Two remain at issue—an exclusive implied easement, and an exclusive equitable easement. The California Court of Appeal seemed to find a meaningful difference between implied and equitable easements. Its error, however, was ignoring the "exclusive" modifier.[10] 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 based on "equity" or otherwise.

That said, California does employ two different tests for establishing either an implied or an equitable easement. As for the former, "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

[10] *See* App. 200–01 ("Although the elements of the three court-ordered easements are different, the rationale precluding court-ordered *exclusive* [easements] which are not de minimis or necessary for public health or safety is equally applicable to all court-ordered easements, ...").

> 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 (Cal. 1st Ct. App. 2011) (citation omitted). An equitable easement, in turn, arises when a trespasser—i.e., the party trying to obtain a court-ordered easement—demonstrates 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, 237 Cal. App. 4th 16, 19 (Cal. 2d Ct. App. 2015) (citation and internal quotation marks 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 (Cal. 5th Ct. App.

2018) (citing *Guerra v. Packard*, 236 Cal. App. 2d 272, 285 (Cal. 1st Ct. App. 1965); *Silacci v. Abramson*, 45 Cal. App. 4th 558, 564 (Cal. 6th Ct. App. 1996) (internal quotation marks omitted)). In other words, the land owner 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 invade and occupy someone else's land, and then to exclude the landowner from his own property. Naturally, courts have recognized the problem with this arrangement.[11] "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 (Cal. 3d Ct. App. 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,

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[11] *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." (citations omitted)); *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.").

"perverts the classical distinction in real property law between ownership and use." *Harrison v. Welch*, 116 Cal. App. 4th 1084, 1092 (Cal. 3d Ct. App. 2004) (citing *Silacci*, 45 Cal. App. 4th at 564).

California has historically (and correctly) discouraged the creation of exclusive easements. *See Pasadena v. California-Michigan Land & Water Co.*, 17 Cal. 2d 576, 578–79 (Cal. 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 an 'easement' without having to satisfy the statutorily required tax element" makes no sense and undermines any semblance of property-law stability. *See Mehdizadeh v. Mincer*, 46 Cal. App. 4th 1296, 1305–07 (Cal. 2d. Ct. App. 1996).[12] Traditionally, California law has allowed them only to accommodate utility services, for purposes of public health and safety, or when the intrusion is "de minimis" (e.g., mere inches). *Christensen v. Tucker*, 114 Cal. App. 2d 554, 559 (Cal. 1st Ct. App. 1952).

Given the danger to property rights, the California courts have used equitable easements sparingly. It began using them to prevent a property owner inconvenienced to a "minor degree" by trespass from engaging in "legal extortion" by demanding an exorbitant sum in exchange for not suing to enjoin the trespass. *Shoen v.*

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[12] *See also Silacci*, 45 Cal. App. 4th at 562–64; *Raab*, 51 Cal. App. 3d at 876–77; *Hansen*, 22 Cal. App. 5th 1033–35.

Zacarias, 237 Cal. App. 4th 16, 20 (Cal. 2d Ct. App. 2015). This is why California law provides that an "equitable easement" may not be greater than is reasonably necessary, *Christensen*, 114 Cal. App. 2d at 563, and may be justified only in situations "where expensive structures have been constructed that overhang adjoining property or trespass to a minor degree," *id*. at 560.

Rather than applying the commonsensical property-rights-assuring approach to equity and easements that the law demands, the California Court of Appeal shredded the Romeros' constitutionally protected property rights when it fashioned an exclusive equitable easement in favor of the Shih-Kos. In so doing, the appellate court fabricated a new law that:

(1) no longer bars the creation of exclusive easements that divest the owner of nearly all property rights;

(2) no longer requires satisfying the "de minimis" exception to exclusive easements;

(3) no longer requires satisfying the "public safety or health" exception to exclusive easements;

(4) no longer requires that the duration of an equitable easement terminates when the trespasser either sells or leaves the property;

(5) no longer requires that the scope of an equitable easement must not be greater than reasonably necessary;

(6) no longer requires that the scope of an equitable easement should be narrowly tailored;

(7) adds a new requirement that landowners must present "actual plans" as to how they plan to use their own land if they want to keep it; and

(8) adds a new requirement that landowners must agree to surrender a portion of their land to the trespasser to avoid having all the land taken.

I. THE CALIFORNIA COURT OF APPEAL'S OPINION CANNOT BE SQUARED WITH THIS COURT'S PRECEDENT.

In resolving the Romeros' appeal, the California Court of Appeal correctly held that granting the Shih-Kos an exclusive *implied* easement would constitute a de facto taking and violate the Romeros' fundamental property rights. Inexplicably, however, the same court found no issue at all with trouncing the Romeros' constitutional rights by granting the Shih-Kos an exclusive *equitable* easement. Because "equity" cannot justify a judicial edict that tells a landowner that she may not use property that she owns because someone with no ownership interest in the land has an *exclusive* easement over it, the California Court of Appeal erred profoundly.

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 715. Four justices concluded such an action would violate the Takings Clause of the Fifth Amendment. *Id.* Two others reasoned that it would violate the Due Process Clause of the Fourteenth Amendment. *Id.* at 735–37. Given that a constitutional infringement of a property right can arise by judicial decree, the question here is whether the California Court of Appeal has snatched away "an established" private-property right that would otherwise be enjoyed by the Romeros.

Plainly, it has. Throughout this Court's Taking Clause jurisprudence, the Court 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 U.S. 386, 388 (1798).[13] And a mere two 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

[13] *See also Wilkinson v. Leland*, 27 U.S. 627, 658 (1829); *Vanhorne's Lessee v. Dorrance*, 2 U.S. 304, 311 (C.C.D. Pa. 1795) (Patterson, J.); *Kaukauna Water Power Co. v. Green Bay & Miss. 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.").

of the right of any other individual in the universe.'" *Cedar Point Nursery*, 141 S. Ct. at 2072 (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 (11th Cir. 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* in the name of equity and 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 it anew . . . no matter how weighty the asserted 'public interests' involved." *Lucas v. S.C. 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 Court below rejected the notion that the public has any interest at all in the Romeros' land. And this Court has held that "[a] purely private taking [cannot] withstand the scrutiny of the public use requirement" because "it would serve no legitimate purpose of government and would thus be void." *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 245 (1984).

Nor can the trammeling of the Romeros' property rights be seen as anything less than a total deprivation. They have been forced, via judicial "equitable" fiat, to consent to physical invasion and occupation of their property, and turn over *every* strand of rights from the bundle that they would otherwise be permitted to exercise: (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.*, 323 U.S. 373, 377–78 (1945); *see also Cedar Point Nursery*, 141 S. Ct. at 2072.

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 slice is now possessed by *other* individuals—the Shih-Kos who have no legal claim to them whatsoever.

Critically, California'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 breaching 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 equitable easement that the Court imposed on the Romeros' property was "newly decreed." Simply put, it did not exist before the California courts "decreed" it in favor of the Shih-Kos. 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 Ass'n*, 15 Cal. 2d 472, 479 (Cal. 1940), and the Romeros' deed indisputably establishes that they have legal title over land that the Shih-Kos have been given authority to exclude them from.

II. THE QUESTIONS PRESENTED ARE EXCEPTIONALLY IMPORTANT.

Allowing a State to divvy up existing property rights in the name of "equity" represents an expansive new threat to the very notion of property ownership. While equitable judicial determinations involve balancing of interests, property rights are both fundamental and zero-sum. Allowing equitable balancing 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 Court of Appeal's newly minted judicial power grab will wreak havoc on the rights of untold thousands of property owners.

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 balanced away by court decree is both anathema to the very idea of property ownership and violative of all notions of federal supremacy. Indeed, the California appellate court's opinion turns the Supremacy Clause on its head by allowing state-court equitable decrees to trounce U.S. Constitutional rights.

Allowing this rule to remain on the books will result in far-reaching litigation that will increase dramatically, as more and more individuals ask a court to encroach on another's property rights and more and more courts become comfortable assessing how to split up property "equitably." And the mayhem 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 judgment) (noting that a drastic change in the law "can destroy the reasonable certainty and security which are the very objects of property ownership").[14] If property rights are subject to sudden and dramatic changes,

[14] *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[.]").

they become less stable. And this instability injects considerable uncertainty into the financial markets while marring the real estate industry, mortgage industry and economy.

Finally, it bears noting that the California court's decisions, if allowed to stand, would also 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) (citation omitted).[15] Here, the California Court of Appeal faulted the Romeros for defending *all* of their property, which in effect punished them for asserting their constitutional rights.[16] This is, similarly, anathema to the beating

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[15] *See also Chavez v. Martinez*, 538 U.S. 760, 769 n.2 (2003) (noting that "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, 592–93 (1926) (invalidating regulation that required the petitioner to give up a constitutional right "as a condition precedent to the enjoyment of a privilege"); *S. Pacific Co. v. Denton*, 146 U.S. 202, 207 (1892) (invalidating statute "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").

[16] *See also* App. 129 ("[T]he Court of Appeal also improperly concluded [that] a fee title holder can lose constitutionally protected real property rights simply because the fee title holder chose not to voluntarily give-up any of his/her property."); App. 158 ("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 [that] the Romeros' refusal to want to give up any portion of their land justified taking from them the entire

heart of our U.S. Constitution. California's new 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. Without 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 property on which their 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 Court of Appeal erred by lending its imprimatur to "tak[ing] property from A. and giv[ing] it to B." *Calder*, 3 U.S. at 388. Doing so violated the U.S. Constitution and will have tremendously adverse consequences on property rights, if it is

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strip of land regardless of necessity." (internal citation omitted)); App. 159 ("[B]y placing this burden on the property owner, the [California Court of Appeal] 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. . . . [T]he 'narrowly tailored' standard can[not] 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.").

not corrected by this Court. For all these reasons, the Court should grant the petition for certiorari.

Respectfully submitted,

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