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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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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

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

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.

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

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

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-

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.)

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

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

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.

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

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

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 dispositive 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 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.

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

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

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

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

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

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.*)

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:

> 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

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

> [ ] 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

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.

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

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.)

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:

> 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

private boundary dispute between private parties is void and in violation of the Takings Clause.

Dated: July 5, 2022

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By: */s/ Scott M. Reddie*

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WORD COUNT CERTIFICATE

I certify that the foregoing Answer to Petition for Review contains 6,205 words (not including the cover, the Table of Contents, the Table of Authorities, the signature block, and this certificate). In preparing this certificate, I relied on the word count of Microsoft Office Word 2016, the computer program used to prepare the Petition.

Dated: July 5, 2022

McCORMICK, BARSTOW,
SHEPPARD,
WAYTE & CARRUTH LLP

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF FRESNO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of Fresno, State of California. My business address is 7647 North Fresno Street, Fresno, CA 93720.

On July 5, 2022, I served true copies of the following document(s) described as **ANSWER TO PETITION FOR REVIEW** on the interested parties in this action as follows:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on July 5, 2022, at Fresno, California.

/s/ Mary M. Souders

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **ROMERO v. SHIH (U.S. BANK NATIONAL ASSOCIATION)**
Case Number: **S275023**
Lower Court Case Number: **B310069**

1. At the time of service I was at least 18 years of age and not a party to this legal action.

2. My email address used to e-serve: **scott.reddie@mccormickbarstow.com**

3. I served by email a copy of the following document(s) indicated below:

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

7/5/2022
Date

/s/Scott Reddie
Signature

Reddie, Scott (173756)

Last Name, First Name (PNum)

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