Case No. S275023

IN THE SUPREME COURT OF CALIFORNIA

CESAR ROMERO and TATIANA SPICAKOVA ROMERO

Plaintiffs and Appellants,

v.

LI-CHUAN SHIH and TUN-JEN KO

Defendants and Respondents,

US BANK NATIONAL ASSOCIATION,

Cross-Defendant and Respondent.

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

After an Appeal from the Los Angeles County Superior Court, Case No. EC064933

ANSWER BRIEF ON THE MERITS

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STATUTES

I.
INTRODUCTION

Absent finding an easement is de minimis or necessary for public health or safety, court ordered *exclusive* prescriptive easements 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. The Court of Appeal Opinion, therefore, should be affirmed.

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 Appellants Cesar Romero and Tatiana Spicakova Romero ("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 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. Finding to the contrary would also violate the Due Process Clause and/or Takings Clause of the United States Constitution. In light of this finding, the Court of Appeal did not address whether the trial court's finding of an implied easement was supported by substantial evidence.

In their Opening Brief on the Merits, Respondents and Petitioners herein Li-Chuan Shih and Tun-Jen Ko (collectively the "Shih-Kos") do not challenge the Court of Appeal's conclusion that the easement was exclusive and do not address whether the Court of Appeal correctly concluded exclusive implied easements which are not de minimis or necessary for public health or safety are not permitted as a matter of law. Instead, the sole focus of their brief is on the substantial evidence issue the Court of Appeal did not

address. As such, the Romeros will now have no opportunity to respond in writing to any arguments the Shih-Kos make in their Reply Brief on this critical and dispositive issue.

To the extent this Court disagrees with the Court of Appeal's conclusion about exclusive implied easements, the Opinion should still be affirmed because the record does not contain substantial evidence to support finding an implied easement given (1) the standard that the law disfavors implied easements and prohibits exclusive easements in the absence of a written instrument, (2) the standard that requires the creation of an easement to be construed against Edwin Cutler, and (3) the requirement of *clear evidence* of intent. In their Opening Brief on the Merits, the Shih-Kos ignore those standards and requirements and do not cite to evidence of Edwin Cutler's intent that is credible and of solid value.

There is also no substantial evidence to support a finding that the purported easement is reasonably necessary for the use and benefit of the 643 property. The Shih-Kos do not point to any evidence as to how Edwin Cutler previously used the purported easement area or how the Shih-Kos have used the area. Without answers to those dispositive questions, there is no substantial evidence to support the court's finding.

There is also no evidence in this record to support a finding that, e.g., the flower planters, backyard (the 23 feet between where the garage building ends and the back property line is located) is somehow necessary for the Shih/Kos. Neither the trial court nor the Court of Appeal explained why the Shih-Kos "need" all of that area. In fact, the Court of Appeal stated in its tentative ruling that "most of the 1,296 square foot equitable easement has nothing to do with respondents' 'reasonably necessary interest' to reasonable ingress/egress and is far too encompassing in scope."

II.
STATEMENT OF 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 Alegria Avenue ("651 Property") and 643 West Alegria Avenue ("643 Property") in Sierra Madre, California. (2AA/303.)

The Romeros have owned the 651 Property since April 2014, and 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

The Cutlers purchased the 643 Property in October 1941. They built the house and garage in 1942 entirely on the 643 Property *before* they purchased the 651 Property in September 1943. (AA/156.) The garage on the 643 Property, like other properties in the City of Sierra Madre, was built near the property line with no setback. (AA/338; RT/297.) The Cutlers lived in the home on the 643 Property and the 651 Property was a vacant lot. (RT/146-147.) The chain of title for the 643 Property always referenced the property as 50 feet wide and 157 feet deep. (See, e.g., 2AA/351-353.) The chain of title for the 651 Property always referenced the property as 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 abandoned, a home is built on the 651 Property

In mid-1985, after 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 without verifying it 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, and the Shih-Kos acquired title only to the 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 and acquired title to the entire 63 foot wide land. (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

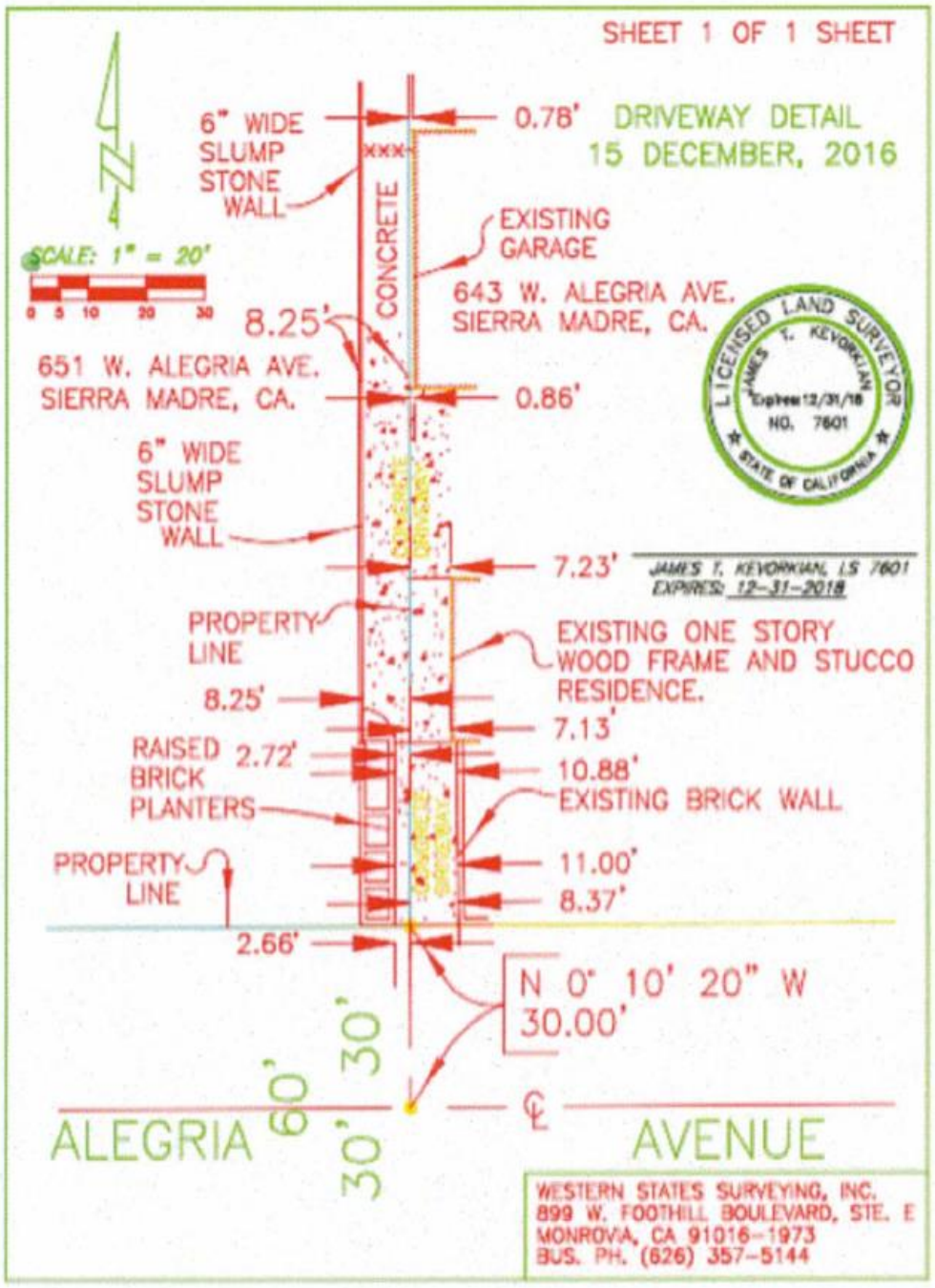
In 2015, while Mr. Romero was working on some yard improvements and taking some measurements, the measurements seemed inconsistent with a lot size of 9,900 square feet. (RT/663-664.) As a result, the Romeros hired a surveyor, James Kevorkian, to conduct a survey of their property. (RT/662.) Mr. Kevorkian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

Easement area.
Yellow tape marks
approximate property
boundary.

(4AA/537)



Survey of Encroachments

(4AA/534)

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 trespass, 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 and the Shih-Kos instructed the City of Sierra Madre not to issue a building permit to allow the Romeros to construct a new wall on the boundary line. (AA/118.)

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. In light of the Court's conclusion about exclusive implied easements, the Court found moot the Romeros' argument that the implied easement was not supported by substantial evidence. (Opinion, at 39.)

III.
LEGAL ARGUMENT

A. The Court of Appeal correctly concluded 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.

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, supra,* 116 Cal.App.4th at 1092, citing *Silacci v. Abramson, supra,* 45 Cal.App.4th at 564. Permitting an exclusive implied easement does the same thing, it would permit the trespasser (the Shih-Kos and all future owners) to have exclusive use and possession of land the trespasser does not own, to the complete exclusion of the fee title holder (the Romeros and all future owners), thus perverting "the classical distinction in real property law between ownership and use."

As such, given that fee title property rights are fundamental rights grounded in the United States and California Constitutions, 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 in their petition for review do not support a finding that exclusive implied easements which are not de minimis or necessary for public health or safety are permissible

Although the Shih-Kos chose not to address in their Opening Brief on the Merits the Court of Appeal's dispositive holding on exclusive implied easements, they did address the holding in their petition for review. 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 asserted 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.)

d. There is no dispute that the implied easement ordered by the trial court is exclusive

During trial the court and the parties agreed that, given the nature of the easement, if an easement was awarded to the Shih-Kos, the easement would be for the exclusive use of the Shih-Kos to the exclusion of the Romeros. (RT/442-443.) In the Statement of Decision, the court appeared to back-track a little, stating the awarded easement "is not necessarily

'exclusive'" because "various subsurface uses (e.g., running underground pipes or cables) are available to the 651 Property." (2AA/308.)

The fact that, theoretically, the Romeros could possibly run a pipe under the easement does not render the easement non-exclusive. The only evidence about use in this case is that the parties desire to use the surface, not the subsurface. The only evidence about what may be underneath the surface of the easement came from one of the Shih-Kos' experts, who testified: "I don't know if there's anything underneath the soil that is being used by the 651 property, but from the naked eye, looking at it, it looks like it's, you know exclusively used, at this point in time, by the 643 property." (RT/540.)

In order to prevent the use from being considered exclusive, the Romeros must have use for a "practical purpose." (See *Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1034.) How can the Romeros use the air above the 1,296 square foot area for any practical purpose? Similarly, how can the Romeros use the area below the ground of the 1,296 square foot area for any practical purpose? The Shih-Kos put on no evidence of how the Romeros can use the air above or subsurface below for any practical purpose, and the court in its statement of decision does not so explain. The Romeros are unaware of any practical use of the air and subsurface.

3. To the extent the implied easement is exclusive and completely precludes the Romeros' use of that portion of their property, the trial court's judgment contravenes the fundamental maxim that equity must follow the law

The Legislature has declared there is only one way to obtain title to property by adversely possessing the property: satisfying the requirements of Code of Civil Procedure section 325, which includes payment of taxes on the property for five years. (Code Civ. Proc. § 325.) An order from a court that effectively grants an exclusive use and possessory easement to the exclusion of the true property owner contravenes the fundamental maxim of jurisprudence that equity must follow the law.

"[E]quity does not have the power to disregard or set aside the express terms of legislation." (*Armstrong v. Picquelle* (1984) 157 Cal.App.3d 122, 129, citing *Marsh v. Edelstein* (1970) 9 Cal.App.3d 132, 140-141.) Equitable power "cannot intrude in matters that are plain and fully covered by positive statute, nor will a court of equity lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly." (*Marsh v. Edelstein* (1970) 9 Cal.App.3d 132, 140-141. See also *Bjorndal v. Superior Court* (2012) 211 Cal.App.4th 1100, 1110-1111 [declining "to extend the doctrine of equitable tolling in a manner that

would render moot an administrative remedy expressly created by the Legislature."].)

In *Marsh,* a quiet title action involving an undeveloped parcel of property being administered through a probate proceeding, Marsh claimed title via a claim of equitable conversion, arguing he had paid the taxes on the property for many years, thus saving the property from being sold to the state. (9 Cal.App.3d at 140.) Both the trial court and appellate court found against Marsh. The appellate court stated: "For a court of equity to decree title in Marsh upon the theory of equitable conversion, under the circumstances here shown, would constitute a new remedy which would directly contravene the law relating to, and requiring the probate of estates of deceased persons." (*Ibid.*) The court went on: "While equitable relief is flexible and expanding, its power cannot be intruded in matters that are plain and fully covered by positive statute, nor will a court of equity lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly." (*Id.* at 140-141.)

The Fifth District Court of Appeal recently addressed this maxim in the context of a lienholder "purporting to equitably exercise the power of sale in the senior deed of trust to foreclose the junior lienholder's equity of redemption." (*Robin v. Crowell* (2020) 55 Cal.App.5th 727, 753.) The *Robin* court stated: "Civil Code section 2911 bars use of the court's

power to enforce the lien of a deed of trust after the statute of limitations has expired on the debt. A quiet title proceeding in court that has the effect of foreclosing against the omitted junior lienholder is a court proceeding barred by that statute." (*Ibid.*)

"The court cannot ignore the limitations period prescribed by the Legislature for judicial actions to foreclose against a trustor and junior lienholders, and equitably substitute in its place the limitations period prescribed for the trustee's exercise of the power of sale in the deed of trust." (*Ibid.*) *Robin* went on to state:

> "A fundamental maxim of jurisprudence is that equity must follow the law. [Citation.] Equity is bound by rules of law; it is not above the law and cannot controvert the law. [Citation.] Equity penetrates beyond the form to the substance of a controversy, but is nonetheless bound by the prescriptions and requirements of the law. [Citation.] While equitable relief is flexible and expanding, its power cannot be intruded in matters that are plain and fully covered by positive statute. A court of equity will not lend its aid to accomplish by indirect action what the law or its clearly defined policy forbids to be done directly."

(*Ibid.*)

Here, providing a remedy of an exclusive easement which precludes the true property owner of use of the property, violates the maxim of jurisprudence that equity must follow the law. The Legislature has spoken that the only way to obtain exclusive possessory use of real property, outside of a grant of title, is through adverse possession. Courts have made it clear that the grant of an exclusive easement is akin to a grant of title through adverse possession. (See, e.g., *Hansen v. Sandridge Partners, L.P.* (2018) 22 Cal.App.5th 1020, 1033; *Kapner v. Meadowlark Ranch Ass'n* (2004) 116 Cal.App.4th 1182, 1187.)

Thus, the only way to obtain such a grant is through meeting the statutory requirements of adverse possession, which requires proof that the owner of the dominant tenement paid the taxes on the disputed land for at least five years. It is undisputed that the Shih-Kos presented no such evidence. The only evidence presented on the issue was that the Romeros had been paying the property taxes. (RT/715.) Therefore, the Shih-Kos cannot meet the statutory requirements of a claim for adverse possession, and cannot masquerade a claim for adverse possession under the guise of "easement."

B. Substantial Evidence does not support the trial court's finding of an implied easement

1. There is a heightened standard of review for the intent element

There is no dispute that "[a]n easement by implication will not be found absent *clear evidence* that it was intended by the parties." (*Thorstrom v. Thorstrom* (2011) 196 Cal.App.4th 1406, 1420, citing *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 141-142, italics added.) One of the reasons clear evidence of intent is required is because "implied easements are not favored by the law" (*Horowitz v. Noble* (1978) 79 Cal.App.3d 120, 131) and are to be "construed against the grantor" (*Thorstrom, supra,* 196 Cal.App.4th at 1420).

Because the courts addressing implied easements have stressed the requirement of *clear evidence*, that requirement must mean something more than a preponderance of the evidence; otherwise, courts would not describe the intent element as requiring clear evidence. And, because clear evidence must mean something more than a preponderance of the evidence, under this Court's decision in *Conservatorship of O.B.* (2020) 9 Cal.5th 989, 1005, reviewing courts "must make an appropriate adjustment to its analysis." In other words, the analysis is whether there is substantial evidence to support a finding of intent by clear evidence?

The Shih-Kos argued below that *Conservatorship of O.B.* has nothing to do with the standard of review for implied easement cases but, rather, only applies to conservatorship cases. A fair reading of the case, however, is that it applies to any case where there is a heightened evidentiary requirement at the trial level. This Court did not limit the heightened standard to any particular types of cases.

The Shih-Kos also argued that *Conservatorship of O.B.* is not applicable because the "clear and convincing standard of proof does not apply to implied easement cases." It is unclear whether "clear evidence" is synonymous with "clear and convincing" evidence. In *Tusher v. Gabrielsen* (1998) 68 Cal.App.4th 131, 141-142, n.13, the court stated in a footnote that "the need for 'clear' evidence of intent does not create a 'clear and convincing' standard of proof." The *Tusher* court also stated, however, that "if the use of 'clear' and 'clearly' do have some legal significance, it is obvious to us from the context of the usage that the trial judge was referring to the *quality* of the evidence she thought was necessary to prove intent, rather than to the quantity or weight of the evidence." (*Id.* at 146.) In that regard, the trial court "sought clear evidence of the intent of the parties, which she found in considering the facts and circumstances existing at the time the property was conveyed …." (*Ibid.*).

Based on the requirement of "clear evidence", it is the position of the Romeros that a heightened standard applies such that this Court must determine whether substantial evidence supports a finding that there is clear evidence that when Edwin Cutler conveyed the 651 property in 1986, he intended to reserve an easement over the 1,296 square foot area in favor of the 643 property. Not only that, but the evidence at trial about whether Edwin Cutler intended to create an easement was to be construed against the grantor, Edwin Cutler. In their Opening Brief on the Merits, the Shih-Kos did not analyze the intent element under this heightened standard.

2. There is no substantial evidence that, when Edwin Cutler conveyed the 651 property, he intended to reserve an easement over the 1,296 square foot area in favor of the 643 property

Before an easement can be created through a court order, there must be clear evidence that *both* the grantor (Edwin Cutler) and the grantee (Bevon Cutler and David Shewmake) intended to create an easement at the time of the conveyance. (See *Thorstrom, supra,* 196 Cal.App.4th at 1420, citing *Tusher, supra,* 68 Cal.App.4th at 141-142.) The Romeros' appeal focused on the intent of the grantor, Edwin Cutler. Given the standards that the law disfavors easements by implication and easements are to be construed against the

grantor, along with the high probability of intent requirement, there is no substantial evidence to support the court's finding that, in 1986, Edwin Cutler intended to reserve an easement for the 643 Property.

There is no documentary evidence surrounding the building of the home on the 651 Property or the conveyance of the 651 Property from Edwin Cutler and then from Bevon and David to the Leongs suggesting that, in 1986, Edwin Cutler intended to convey or create an easement regarding the 1,296 square foot area. In fact, even though John Abbel had already prepared new legal descriptions for the two properties (2AA/359), the legal descriptions contained in the Notice of Completion and the deeds show Edwin Cutler did not use the new legal descriptions but, instead, intended to convey the full 63 foot wide lot, with no reservation for an easement. (2AA/366, 369, 371.)

On pages 32-34 of their Opening Brief on the Merits, the Shih-Kos cite to only four sets of facts in support of their contention that there is substantial evidence to support a finding of clear intent on the part of Edwin Cutler. First, they state Mr. Shewmake testified "that the intent of the parties was for the improvements to remain" and that there was no intent "to tear out the driveway and the garden planter on the 643 Property." The cited testimony, however, does not answer the question about whether *Edwin Cutler* intended to reserve

an easement for the 643 property when, in 1986, he conveyed the 651 property. Mr. Shewmake was never asked about Edwin Cutler's intent and Mr. Shewmake's actions and intent are irrelevant to what Edwin Cutler intended.

Second, the Shih-Kos contend the lot line documentation shows that Mr. Cutler intended "'8 feet be transferred' from the 651 Property to the 643 Property." Given the state of the evidence, however, the only thing this shows is that in early 1985 Edwin Cutler began a process to adjust the lot line. That, however, is not *clear* evidence of what Edwin Cutler's intent was a year later, in 1986. The lot line variance application was made in February 1985. (2AA/346-353.) Mr. Abbel prepared a survey and new legal description for the properties in May 1985, a year before Edwin Cutler conveyed the 651 property. (2AA/358-359, 371-372; RT/187-189.)

Yet, it is undisputed that (1) the survey and legal description were never recorded, (2) no deed for a lot line adjustment was ever recorded, (3) a certificate of compliance was never signed, issued or recorded, and (4) Edwin Cutler never paid Mr. Abbel for his work. (2AA/358-361; RT/189-191, 218-222, 351-354.) There is also no evidence the city engineer ever saw or reviewed the documents prepared by Mr. Abbel. (RT/190.) And, even though a new legal description had been prepared a year earlier, the 1986 grant deed for the 651 property executed by Edwin Cutler contained the original

legal description and no reference to any easement. (2AA/365-366.) The 1985 lot line adjustment documents are not clear evidence that, in 1986, Edwin Cutler intended to create an easement in favor of the 643 property.

The Shih-Kos also add that the testimony from Mr. Gonzalez that "there was no indication [the lot line variance request] was withdrawn or abandoned" supports a finding that Edwin Cutler intended in 1986 to create an easement. That testimony, however, is meaningless given the above cited undisputed evidence that Edwin Cutler never completed the process. It is nonsensical to conclude in the abstract that there is no indication of abandonment. The fact that Edwin Cutler did not pay Mr. Abbel or complete the process is certainly evidence of abandonment.

Third, the Shih-Kos contend the long continued use of the driveway is evidence of Edwin Cutler's intent to convey an easement. The Shih-Kos do not, however, explain how actions taken by others is relevant *to what Edwin Cutler intended in 1986*, when he conveyed the 651 property to his son and Mr. Shewmake. This is far from *clear* evidence of Edwin Cutler's intent given the evidence as a whole.

Fourth, the Shih-Kos argue the wild deeds are substantial evidence of intent. The evidence regarding the "wild deed" transfers commencing three years later and

ending in 1998, between Edwin and Ann Cutler in their individual capacities and in their capacities as trustees is, at best, inconclusive. (2AA/374-381.) There is no explanation in this record as to why those purported transfers were made. The transfers were all ineffective and transferred nothing because Edwin and Ann Cutler conveyed away the easterly 8 feet of the 651 Property over three years before they executed the first wild deed in November 1989 and they did not retain any easement for the 643 Property. And, most importantly, when the 643 Property was conveyed in June 2014 to the Shih-Kos, that conveyance did not include the easterly 8 feet of the 651 Property which belies the Shih-Kos' argument that the Cutlers behaved as if the lot line adjustment was completed.

The only concrete thing the wild deeds demonstrate is that Edwin Cutler knew that if he wanted to transfer the easterly 8 feet of the 651 Property to the 643 Property, through either a grant or an easement, he needed to do it through a deed when he first conveyed the 651 Property in 1986. That supports a finding that, for whatever reason, Edwin Cutler's intent was not to transfer or convey an easement regarding the easterly 8 feet of the 651 Property.

Furthermore, as the Court of Appeal concluded on page 39 of its Opinion, the evidence only shows Edwin Cutler's intent at one point was to "effectuate a variance/lot line

adjustment between the 643 and 651 Properties," which would result in a change of fee title ownership. According to the Court of Appeal, such evidence does not demonstrate "an intent to create an easement for *use* of a portion of property."

The substantial evidence rule "does not mean [the court of appeal] must blindly seize any evidence in support of the respondent in order to affirm the judgment." (*Kuhn v. Department of General Services* (1994) 22 Cal.App.4th 1627, 1633.) The "substantial" requirement "clearly implies that such evidence must be of ponderable legal significance …. It must be reasonable …, credible, and of solid value …." (*Ibid.*) "[A] lot of extremely weak evidence may" not meet the substantial evidence standard. (*Toyota Motor Sales U.S.A., Inc. v. Superior Court* (1990) 220 Cal.App.3d 864, 871-872.)

Here, given the standards that the law disfavors easements by implication and the creation of an easement is to be construed against Edwin Cutler, and given the Shih-Kos' burden of presenting *clear* evidence that, in 1986, Edwin Cutler intended to create an exclusive easement burdening 13% of the 651 property, the evidence regarding Edwin Cutler's intent in 1986 that is discussed in the Shih-Kos' brief as well as contained in the entire evidentiary record is not credible and of solid value. Therefore, substantial evidence does not support the trial court's finding regarding Edwin Cutler's intent.

3. Substantial evidence does not support a finding that the easement was or is reasonably necessary to the use and benefit of the 643 Property

An easement will not be implied unless, "at the time of conveyance of property … the easement is reasonably necessary to the use and benefit of the quasi-dominant tenement." (*Thorstrom, supra,* 196 Cal.App.4th 1406, 1420.) To satisfy this prong, the Shih-Kos were required to submit evidence that, when the 651 Property was first conveyed by Edwin Cutler in 1986, the 1,296 square foot area was reasonably necessary to the use and benefit of the 643 Property. There is no such evidence in this record.

There is no testimony or evidence that the 1,296 square foot area was reasonably necessary for Edwin Cutler's use and benefit of the 643 Property. There is no evidence that a wider driveway, flower planters, extra land west of the garage and extra land in the back and side yard were reasonably necessary to the use and benefit of the 643 Property in 1986. There is no evidence that the garage was ever used for parking vehicles or that the Cutlers ever wanted or needed to drive any vehicles beyond the first 30 feet of the driveway. In fact, the City of Sierra Madre cited the 643 Property for illegally converting the garage into a living space. (1AA/111-113.) The fact that, in 1986, Edwin Cutler abandoned his effort to obtain a lot-line adjustment suggests just the

opposite; the 1,296 square feet was not reasonably necessary for his use and benefit of the 643 Property.

Even assuming reasonable necessity is to be determined based on current necessity as opposed to reasonable necessity at the time of the initial conveyance, the Shih-Kos only presented evidence from hired experts about costs they will incur to widen their driveway if a wall is placed on the true property line. Yet, it is undisputed that if the wall is moved to the true property line, the only thing that will physically be trespassing on the 651 Property is an air conditioning unit on the side of the garage that can be relocated at a cost of $2,500. (RT/338-339.)

There is no evidence the City of Sierra Madre would require the Shih-Kos to make any modifications to their existing property based on new building codes. Quite the contrary. First, there was no minimum driveway width in 2014 when the Shih-Kos purchased the property. The new building code for a 10 foot wide driveway only applies to new constructions and is irrelevant to this case. Second, officials from the City of Sierra Madre testified that if the wall was moved to the legal boundary line, the 643 Property would be considered "legal non-conforming," which means that the existing structures that were originally built to Code back in 1940s but may not be in compliance with current Code requirements would be grandfathered in and permitted to

remain. (RT/211-212, 301-302, 409). There was no evidence that the City of Sierra Madre was ever going to compel the Shih-Kos, or any other resident, to remove and/or re-configure their existing structures to comply with the new building codes. The City has never ordered any of its residents to do so. (RT/301-302).

If the wall is moved to the property line, the Shih-Kos are not required to demolish or relocate the existing house or garage. Thus, the testimony presented by the Shih-Kos' expert is irrelevant and designed to deflect because it was based on the assumption that the Shih-Kos choose to construct a 10 foot wide driveway and choose to have a 5 foot side yard setback, not because the City compelled them to do so. The Shih-Kos certainly can choose to do so but not at the expense of abrogating all of Romeros' Constitutionally protected fundamental property rights.

Lacking from the evidentiary record is any testimony *from the Shih-Kos*—the owners of the property—that a wider driveway, flower planters, extra land west of the garage and extra land in the back and side yard are reasonably necessary for their use and benefit of the 643 Property, which they use as an income generating rental property. There is no evidence that the garage has ever been used for parking vehicles or that the Shih-Kos ever intend to park vehicles in the garage. There is no evidence from the property owners that they need

or desire to drive any vehicles beyond the first 30 feet of the driveway. There is also no evidence that they would lose any rental income if the wall was built on the true property line.

On the other hand, there is evidence they can park vehicles, including SUVs and trucks, on the first 30 feet of the driveway or on the street. (4AA/593; RT/404, 423.) There is also evidence that smaller vehicles will still be able to traverse the entire driveway to access the garage, and the court also recognized that fact. (2AA/308, 311; 4AA/539; RT/310, 316, 422-423.) The fact that the Shih-Kos would not be able to "turnaround" on their driveway and would have to exit their driveway by backing down (2AA/311) is of no consequence. It is obviously very common for homeowners to pull into their driveways head first and then back-out when leaving the driveway.

Without any evidence whatsoever from the actual property owners that a wider driveway, a brick planter, extra land west of the garage and extra land in the back and side yard, are reasonably necessary for their use and benefit of their property, the Shih-Kos did not meet their burden of establishing their entitlement to an implied easement.

C. Judicially created doctrines such as exclusive easements (whether implied or equitable) can violate the Due Process Clause and/or Takings Clause of the United States Constitution

In *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection* (2009) 560 U.S. 702, 717 (2009), six Justices held if a state court "declares that what was once an established right of private property no longer exists" a constitutional violation has occurred. Four Justices concluded such an action would violate the Takings Clause of the Fifth Amendment:

> If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation.

(*Id.* at 715.) Two Justices concluded such an action would violate the Due Process Clause of the Fourteenth Amendment:

> If a judicial decision, as opposed to an act of the executive or the legislature, eliminates an established property right, the judgment could be set aside as a deprivation of property without due process of law. The Due Process Clause, in both its

> substantive and procedural aspects, is a central limitation upon the exercise of judicial power.

(*Id.* at 735, Kennedy, J., concurring.) "The Takings Clause is an essential part of the constitutional structure, for it protects private property from expropriation without just compensation; and the right to own and hold property is necessary to the exercise and preservation of freedom." (*Id.* at 734, Kennedy, J., concurring.) The takeaway is that if a state court "eliminates an established property right" through a judicial decision, then such court will have violated the United States Constitution.

1. Established property rights and the right to exclude

Ownership of private property comes with a "bundle of rights." These legal rights include: (1) right of possession; (2) right of control; (3) right of exclusion; (4) right of enjoyment; and (5) right of disposition. (*U.S. v. General Motors Corp.* (1945) 323 U.S. 373, 378; accord *Bounds v. Superior Court* (2014) 229 Cal.App.4th 468, 479 ("Case law recognizes that property rights are a complex 'bundle of rights.'").) "That bundle includes the 'rights to possess the property, *to use the property*, to exclude others from the property, and *to dispose of the property by sale or by gift*.'" (*Bounds, supra*, 229

Cal.App.4th at 479.) In a recent case the United States Supreme Court held that:

> The right to exclude is "one of the most treasured" rights of property ownership. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435, 102 S.Ct. 3164, 73 L.Ed.2d 868 (1982). According to Blackstone, the very idea of property entails "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe." 2 W. Blackstone, Commentaries on the Laws of England 2 (1766). In less exuberant terms, we have stated that the right to exclude is "universally held to be a fundamental element of the property right," and is "one of the most essential sticks in the bundle of rights that are commonly characterized as property." *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179-180, 100 S.Ct. 383, 62 L.Ed.2d 332 (1979); see *Dolan v. City of Tigard*, 512 U.S. 374, 384, 393, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831, 107 S.Ct. 3141, 97 L.Ed.2d 677 (1987); see also Merrill, Property and the Right to

> Exclude, 77 Neb. L. Rev. 730 (1998) (calling the right to exclude the "sine qua non" of property).

(*Cedar Point Nursery v. Hassin* (2021) 141 S. Ct. 2063, 2072; *Allred v. Harris* (1993) 14 Cal.App.4th 1386, 1391 ("As a general rule, landowners and tenants have a right to exclude persons from trespassing on private property; the right to exclude persons is a fundamental aspect of private property ownership.") (citing *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 435); accord *Church of Christ in Hollywood v. Superior Court* (2002) 99 Cal.App.4th 1244, 1253-54.)

The right to exclude is not an empty formality, subject to modification at the government's pleasure but rather a "fundamental element of the property right" that "cannot be balanced away" and one that "the Government cannot take." (*Cedar Point Nursery, supra*, 141 S. Ct. at 2072 and 2077.)

California's judicial recognition and application of its doctrines of implied and equitable exclusive easements sever each strand of the Romeros' "bundle of rights" because the Romeros no longer have the right to: (1) possess the land; (2) control what happens on the land; (3) enjoy the land; (4) exclude third parties from the land; and (5) dispose of the land. The court created doctrines do not "simply take a single

'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." (See *Loretto v. Teleprompter Manhattan CATV Corp.* (1982) 458 U.S. 419, 435.)

Such an abrogation of the Romeros' established property rights under court created doctrines of exclusive easements would run afoul of their Constitutional rights, and thus this Court should decline to recognize any such doctrines.

2. An exclusive implied easement would eliminate all property rights including the right to exclude

The adoption of a court created "exclusive implied easement" rule would eliminate the Romeros' established property right to exclude and thus run afoul of *Stop the Beach Renourishment*, *supra,* 560 U.S. at 717. Just as the California Legislature could not enact a law to take the Romeros' right to exclude and give it to an adjoining property owner, nor may a court.

With respect to the notion of the existence of an "exclusive implied easement" doctrine, the Court of Appeal held:

> Based on the foregoing, we hold, in the first instance, that an exclusive implied easement

> which, for all practical purposes, amounts to fee title cannot be justified or granted unless: 1) the encroachment is "de minimis" (see *McKean, supra*, 200 Cal. at p. 399; see *Rothaermel v. Amerige* (1921) 55 Cal.App. 273, 275–276); or 2) the easement is necessary to protect the health or safety of the public or for essential utility purposes. (*Mehdizadeh, supra*, 46 Cal.App.4th at p. 1306).

(*Id* at 352.) The Court also noted that "this is a case of first impression as we have found no case that permits or prohibits *exclusive* implied easements." (*Id* at 350.)

Accordingly, this Court should decline the Shih-Kos' invitation for this Court to create a doctrine that violates the United States Constitution.[1]

[1] Although this Court denied review of the exclusive equitable easement and limited review to the exclusive implied easement, with respect to the Constitutional issue, the issue of whether a court can order an exclusive equitable easement is an issue fairly included in the issue upon which this Court granted review. (See Cal. Rule Crt. 8.516(a)(1).) As such, this Court should consider whether both court ordered doctrines are Constitutional.

IV.
CONCLUSION

The Court of Appeal properly concluded the implied easement ordered by the trial court was an exclusive easement, and such exclusive easements which are not de minimis or necessary for public safety are impermissible as a matter of state and federal law. Even if such easements are legally permissible, substantial evidence does not support the trial court's finding of an implied easement. The Court of Appeal Opinion with respect to the implied easement should be affirmed.

Dated: September 27, 2022

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CERTIFICATE OF WORD COUNT

Pursuant to California Rule of Court 8.204(c)(1), I certify that the foregoing Answer Brief on the Merits contains 11,671 words (not including the cover, the Certificate of Interested Entities or Persons, the Table of Contents, the Table of Authorities, the signature block, and this certificate). In preparing this certificate, I have relied on the word count of Microsoft Office Word 2016, the computer program used to prepare the brief.

Dated: September 27, 2022

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Executed on September 27, 2022, at Fresno, California.

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Supreme Court of California

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