No. 13-0053

IN THE SUPREME COURT OF TEXAS

STATE OF TEXAS

v.

CLEAR CHANNEL OUTDOOR, INC.

On Petition for Review from the First Court of Appeals in Houston

BRIEF OF AMICI CURIAE

Scott A. Brister
State Bar No. 00000024
ANDREWS KURTH LLP
111 Congress Ave., Suite 1700
Austin, Texas 78701
Phone: 512.320.9200
Fax: 512.320.9292
sbrister@andrewskurth.com

ATTORNEYS FOR AMICI CURIAE

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AMICIS' INTEREST IN THIS PROCEEDING

The Amici Curiae cities, counties, tollway and regional mobility authorities, and scenic organizations believe the court of appeals' opinion revolutionizes the law of eminent domain, grants special compensation and relocation rights to billboard companies that others do not get, and threatens to impose costs on infrastructure in Texas that taxpayers cannot and should not bear. Amici have paid all fees and expenses incurred in the filing of this Brief.

Amici include the City of Houston, Harris County, and organizations representing other governmental units whose responsibilities include expanding the roadway infrastructure in Texas needed to support a burgeoning population and economy. By state law, such governmental entities exercise powers of eminent domain, a power that often implicates billboards. Accordingly, Amici are directly affected by the issues in this appeal, and join with the State in urging the Court to grant review and reverse the judgments below.

The Texas Municipal League is a non-profit association of over 1,090 incorporated Texas cities. The Texas City Attorneys Association, an affiliate of the Texas Municipal League, is an organization of over 400 attorneys who represent Texas cities and city officials in the performance of their duties. Among other activities, these organizations represent the interests of cities before governmental bodies, including appearing as amici in court proceedings.

The Texas Association of Counties is a non-profit corporation of Texas counties. The Association works for the betterment of county government and the benefit of all county officials.

The Texas Conference of Urban Counties is a non-profit organization of 34 urban and suburban counties representing nearly 80 percent of the people of Texas. These counties are involved in many road and highway projects, including condemnation proceedings.

The Alamo, Central Texas, North East Texas, and North Texas Regional Mobility Authorities are political subdivisions formed and operating pursuant to Chapters 366 or 370 of the Texas Transportation

Code. They are charged with developing multi-modal transportation projects, including tolled and non-tolled roadways, and exercise powers of eminent domain for that purpose

Scenic Texas, Inc. is a Texas nonprofit corporation dedicated to the preservation and enhancement of the state's visual environment, particularly as seen by the traveling public. It has chapters in Houston, Dallas, Fort Worth, San Antonio, and Austin, and promotes policies that preserve, protect, and enhance scenic beauty in Texas.

The opinion in this case threatens to vastly inflate the cost of acquiring land for public projects. It flouts long-standing precedent and the express holdings of this Court in a unanimous 2009 opinion. Amici urge the Court to grant the State's Petition for Review and reinstate the traditional principles governing such acquisitions.

INTRODUCTION & SUMMARY OF ARGUMENT

A change in technology — automobiles — created the demand for off-premise billboards, as people no longer had to shop where they

lived.[1] A newer change in technology — smartphones — has reduced the need for billboards, supplying much more information in a much smaller space.

But unlike smartphones, drivers cannot turn off a billboard. "[T]he billboard inflicts itself unbidden upon all but the blind or the recluse."[2] As William F. Buckley, Jr. wrote, billboards are "acts of aggression" against which "the public is entitled, as a matter of privacy, to be protected."[3] With over 35,000 billboards in Texas,[4] it is impossible for residents to avoid them. This Court has recognized the

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[1] Jacob Loshin, *Property in the Horizon: The Theory and Practice of Sign and Billboard Regulation*, 30 ENVIRONS ENVTL. L. & POL'Y J. 101, 114-15 (2006).

[2] Howard Luck Gossage, IS THERE ANY HOPE FOR ADVERTISING?, at 113 (Kim Rotzoll, Jarlath Graham and Barrows Mussey eds., Univ. of Illinois Press 1986).

[3] William F. Buckley, Jr., *The Politics of Beauty*, ESQUIRE, July 1966, at 53.

[4] *See* Caroline L. Nowlin, *"Hey! Look At Me!": A Glance at Texas's Billboard Regulation and Why All Roads Lead to Compromise*, 44 TEX. TECH L. REV. 429, 435 (2012).

public's interest in "stemming visual clutter on the landscape . . . and promoting travel safety."[5]

The Court has never addressed the first issue in this appeal: whether billboards are personal or real property. Condemnors do not have to pay for personality; if a residence is taken, the public does not have to pay for the furniture or drapes. Clear Channel considered moving these billboards, but decided against it as other locations were less profitable. Nobody else gets compensation in eminent domain for property they could move but choose to abandon.

The Court *has* already decided the second issue: how to value billboards in condemnation cases. Justice O'Neill wrote for a unanimous Court that in such cases trial courts "should not allow evidence of valuation based on advertising income." *State v. Central Expressway Sign Assocs.*, 302 S.W.3d 866, 874 (Tex. 2009). Yet that is precisely what occurred here, and the court of appeals did nothing

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[5] *Texas Dep't of Transp. v. Barber*, 111 S.W.3d 86, 100 (Tex. 2003); *see also id.* at 112 (Owen, J., dissenting) ("Preserving scenic beauty and promoting public safety are legitimate aims").

about it. Nobody else gets compensation in eminent domain for lost business income.

In sum, because Clear Channel couldn't profit quite as much if these billboards were relocated, it chose to abandon them and demand compensation for all profits they ever would have earned in the future. That is not the law. Billboard companies do not pay the travelling public for the right to impose advertising on them, and should not have to be compensated by the travelling public when the public interest requires them to relocate to a less congested area.

I. THE IMPORTANCE & FINANCIAL IMPACT OF THIS CASE

Companies like Clear Channel naturally construct billboards as close to major highways as possible. But expanding populations need expanding roadways, and widening a highway inevitably involves condemning strips of land on which many billboards are located.

The opinion below could make such projects prohibitively expensive. At this one spot on Interstate 10 near downtown Houston, the trial court ordered the State to pay Clear Channel virtually the

same amount for its billboards ($268,235.27) as it had to pay the landowners for their real estate ($273,000). The back-to-back billboards condemned were by no means fancy or high-tech, as Clear Channel's own photos show:

See 10RR13 (DX 4-A); 10RR15 (DX4-B).

Moreover, the judgment here pales in comparison to what lies ahead if the court of appeals' opinion correctly states Texas law. For example, in Minnesota where a state statute requires condemnors to pay the "going concern" value of a business, including lost rental income,[6] Clear Channel recently recovered $4.3 million for a single digital billboard.[7] The court of appeals applied that same standard here, even though it is inconsistent with Texas law. If the cost of new highways includes buying billboards that could be relocated and reimbursing all the advertising income they ever might have earned, far fewer Texas highways will be built.

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[6] *See* MINN. STAT. § 117.186; *State v. Weber-Connelly, Naegele, Inc.*, 448 N.W.2d 380, 383 (Minn. Ct. App. 1989).

[7] Brian Johnson, *MnDOT's cost to remove digital billboard: $4.3M*, FINANCE & COMMERCE, Feb. 5, 2014, at 1A.

II. BILLBOARDS ARE PERSONAL PROPERTY

The courts below held that billboards are improvements as a matter of law.[8] Amici agree with the State that billboards are personal property, and add the following as further explanation.

A. Billboards are trade fixtures, not real property

Billboards are trade fixtures, a category that straddles the divide between improvements and personal property. The courts below erred by relying solely on cases involving immovable trade fixtures. As the evidence here reflects, billboards are not immovable.

Trade fixtures include anything a tenant affixes to land for a trade or business *and* that can be removed without material or permanent injury to the realty.[9] Tenants will invest in fewer improvements if they must forfeit them at the end of a lease, so this

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8 Opinion at * 11; 5CR1521; 8CR2765-2767.

9 *Sonnier v. Chisholm-Ryder Co., Inc.*, 909 S.W.2d 475, 479 (Tex. 1995); *C.W. 100 Louis Henna, Ltd. v. El Chico Restaurants of Tex., L.P.*, 295 S.W.3d 748, 754-55 (Tex. App.—Austin 2009, no pet.); *Ashford.Com, Inc. v. Crescent Real Estate Funding III, LP*, No. 14–04–00605–CV, 2005 WL 2787014, *9 (Tex. App. —Houston [14th Dist.] Oct. 27, 2005, no pet.); *Boyett v. Boegner*, 746 S.W.2d 25, 27 (Tex. App.—Houston [1st Dist.] 1988, no writ).

Court and others long ago adopted a broad definition of trade fixtures.[10] They include:

- furniture;[11]
- equipment;[12]
- counters, desks, and light fixtures;[13]
- rose bushes and cranberry plants;[14]
- houses and railroad tracks;[15]
- bank vaults;[16] and
- producing oil wells.[17]

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10 *See Hutchins v. Masterson & St.*, 46 Tex. 551, 555 (1877) (noting Texas law uses a "much more liberal rule" of trade fixtures "owing to the greater relative importance and value now attached to chattels than formerly, and, in the interest of manufacture and commerce").

11 *See, e.g., Prytania Park Hotel, Ltd. v. Gen. Star Indem. Co.*, 179 F.3d 169, 177 (5th Cir. 1999).

12 *See, e.g., C.W. 100 Louis Henna, Ltd. v. El Chico Restaurants of Texas, L.P.*, 295 S.W.3d 748, 755 (Tex. App.—Austin 2009, no pet.).

13 *See First Nat. Bank of Portland v. Marion County*, 130 P.2d 9, 10 (1942).

14 *See First Wisconsin National Bank of Milwaukee v. Federal Land Bank of St. Paul*, 849 F.2d 284 (7th Cir. 1988), *In re Flores De New Mexico, Inc.*, 151 B.R. 571, 582 (Bankr. D.N.M. 1993).

15 *See Wright v. Macdonell*, 30 S.W. 907, 910 (Tex. 1895).

16 *See Moody & Jemison v. Aiken*, 50 Tex. 65, 67-68 (1878).

It is hard to imagine a tenant actually removing some of these items. But the law defines all trade fixtures as removable personal property, as Black's Law Dictionary notes:

> ***trade fixtures***: Removable personal property that a tenant attaches to leased land for business purposes, such as a display counter. • Despite its name, a trade fixture is not usu. treated as a fixture — that is, as irremovable.[18]

Billboards fit every element of the definition of trade fixtures. Yes, they are firmly attached to land to reduce the danger of flying debris. But they are usually built on leases by a tenant, and the leases usually say they remain the tenant's personal property.[19] Removal will not damage the land if the lease states (as Clear Channel's do) that

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17 *See Brazos River Conservation & Reclamation Dist. v. Adkisson*, 173 S.W.2d 294, 298 (Tex. Civ. App.—Eastland 1943, writ ref'd).

18 *See* BLACK'S LAW DICTIONARY 713 (9th ed. 2009).

19 *See* Charles F. Floyd, *The Takings Issue in Billboard Control*, 3 WASH. U. J. L. & POL'Y 357, 359 (2000) ("Outdoor advertising firms normally do not own the land under their billboards but lease the ground. . . . Billboard ground leases commonly state that signs located on the property are personal property trade fixtures.").

"only the above-ground portions of the Structures need be removed."[20]

The court of appeals went off the rails by forgetting about trade fixtures. The opinion says it is "undisputed" that billboards are improvements that "are part of the realty";[21] but this Court has said trade fixtures are *not* improvements and are *not* part of the realty.[22] The opinion says property affixed by a tenant must be treated like property affixed by the owner;[23] but trade fixtures are treated differently precisely because they are ***not*** affixed by the owner but by a tenant.[24] The court of appeals erred by treating trade fixtures as improvements.

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20 *See* 8RR30, State's Ex. 9 (¶ 5); 8RR34, State's Ex. 10 (¶ 5).

21 Opinion at *9.

22 *See Sonnier*, 909 S.W.2d at 479 ("An improvement includes all additions to the freehold except for trade fixtures which can be removed without injury to the property.").

23 Opinion at *12.

24 *See* BLACK'S LAW DICTIONARY 713 (9th ed. 2009).

B. These billboards were removable as a matter of law

The court of appeals relied on cases holding that fixtures are part of the realty a condemnor must take and pay for. But those cases all involved fixtures that could not be feasibly or economically removed; they do not state a blanket rule that condemnors must take and pay for trade fixtures that can be feasibly and economically relocated.

In *Almota*, the U.S. Supreme Court held 5-to-4 that a condemnor of land had to condemn the grain elevators a tenant had built on it.[25] The issue was whether the government had to pay for grain elevators that were almost 50 years old and probably would have been used much longer, though the tenant had no guaranteed right to renew the lease.[26] The opinion never says condemnors must buy trade fixtures that are smaller and more portable than a grain elevator.

Nor has this Court ever adopted such a rule, even in the 1943 writ-refused opinion from the Eastland court of appeals. In *Adkisson*,

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[25] *See Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973).

[26] *Id*. at 473-75.

the Court held a condemnor whose lake flooded 12 producing oil wells had to pay for trade fixtures like casing, pipes, and equipment above and below ground,[27] citing cases involving a gas station,[28] a two-story farmhouse,[29] and a warehouse.[30] Like all those cases, a wellbore cannot economically be relocated. *Adkisson* never says that condemnors must take and pay for trade fixtures that can be relocated.

Unlike grain elevators and wellbores, billboards are regularly moved from one location to another, as shown in the State's brief.[31] Removing a grain elevator or wellbore is not economically feasible.[32] By contrast, removing both billboards and building new ones would

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27 *See Brazos River Conservation and Reclamation District v. Adkisson*, 173 S.W.2d 294, 300 (Tex. Civ. App.—Eastland 1943, writ ref'd).

28 *Id*. at 299 (citing *United States v. Seagren*, 50 F.2d 333 (D.C. Cir. 1931)).

29 *Id*. (citing *State v. Miller*, 92 S.W.2d 1073 (Tex. Civ. App.—Waco 1936, no writ).

30 *Id*. at 300 (citing *Jackson v. State*, 213 N.Y. 34, 106 N.E. 758 (1914)).

31 *See* State's Br. at 27-30.

32 *See Almota*, 409 U.S. at 471 (1973) (noting the "scant salvage value" of a deconstructed grain elevator); *Adkisson*, 173 S.W.2d at 300 (noting that pulling casing out of the wellbore would have forfeited the lease for nonproduction).

cost less than $45,000,[33] about half their annual revenues.[34] As a matter of law, relocation was economically feasible.

The most telling evidence here is that Clear Channel considered relocating these billboards, but declined to do so only because alternate locations would be less profitable. ***But if Clear Channel could move them, they are movable***. Trade fixtures that *can* be removed *must* be removed whether or not they would be less profitable somewhere else.

The rent Clear Channel paid is also telling. When a trade fixture is a large building, landlord and tenant both know moving it is not an option. In such cases, landlords can demand higher rents, knowing this will still be cheaper than moving (as with the gas-processing plant in *Enbridge Pipelines*[35]). By contrast, the rents Clear Channel paid were

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[33] *See* 8CR2766; 10RR69; Def. Ex. 14-f, p. 10.

[34] *See* 5RR18.

[35] *See Enbridge Pipelines L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256 (Tex. 2012).

quite low, suggesting both parties knew the billboards could easily be moved and the landlord had little leverage.

In this case, Clear Channel chose not to relocate these billboards, not because it ***couldn't*** but because it ***wouldn't***. Taxpayers should not be forced to buy personal property they don't want or need. Condemnors may have to pay for trade fixtures that can't be moved, but they should not have to pay for those that easily could be.

C. Right-to-remove clauses are relevant in condemnation

For more than a century, the preeminent factor in deciding whether a chattel has become a permanent part of the Texas realty has been the intent of the party annexing it.[36] Surely the best evidence of that is what they said in a contract.

Lease clauses allowing tenants to remove property at the end of the lease arise from the law of trade fixtures. When a clause allows a tenant to remove trade fixtures, then "for reasons of public policy, and

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[36] *See Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475, 479 (Tex. 1995); *Logan v. Mullis*, 686 S.W.2d 605, 607 (Tex. 1985); *Hutchins v. Masterson & St.*, 46 Tex. 551, 553-54 (1877); *Moody & Jemison v. Aiken*, 50 Tex. 65, 73 (1878).

in favor of trade and to encourage industry, it becomes a fixture removable against the will of the owner of the freehold."[37] Like the law of trade fixtures, such clauses have a long history in Texas.[38]

The court of appeals held such clauses "cannot be invoked by a condemnor," citing *Almota*.[39] But *Almota* says no such thing; the quotation is from a treatise author in a footnote cited solely for the proposition that condemnation of leased property "requir[es] proceedings against owners of two interests" (i.e., landlord and tenant).[40] The Supreme Court never stated or endorsed a rule that right-to-remove clauses were irrelevant in condemnation cases; courts reading that into *Almota* are reading too much.

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37 *Moody & Jemison*, 50 Tex. at 73 (internal quotations omitted).

38 *See Wright v. Macdonell*, 30 S.W. 907, 908 (Tex. 1895); *Brazos River Conservation & Reclamation Dist. v. Adkisson*, 173 S.W.2d 294, 298 (Tex. Civ. App.—Eastland 1943, writ ref'd).

39 Opinion at *10.

40 *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 477 (1973).

Nor did this Court adopt such a rule in *Adkisson*. That opinion suggests that right-to-remove clauses are immaterial when property cannot feasibly or economically be removed (as with wellbores and grain elevators), but it never says such clauses are irrelevant when a trade fixture can be readily moved.

Right-to-remove clauses may be immaterial at both ends of the trade-fixture spectrum, either because the property could never be removed (like a grain elevator) or always could be removed (like a dishwasher and drapes). But that does not make them immaterial for trade fixtures that lie in-between.

In practice, such clauses must be considered in eminent domain cases anyway because they often settle who gets paid. Clear Channel's claim for compensation arises directly from the clauses deeming the billboards as personal property. If relevant regarding who should get paid, why not relevant as to whether no one should?

D. Alternatively, this issue is a fact question for the jury

Clear Channel's billboards were personal property as a matter of law, and the State did not have to condemn them. But at the least, the facts raise enough evidence for reasonable jurors to so find.

The line between personal and real property is a continuum, not a chasm. When a residential lot is taken for public use, the house is clearly realty and the dishes are clearly personalty. But in-between items like fences[41] and mobile homes[42] are less clear.

Additionally, different circumstances may dictate different results for the same asset. Cars, for example, are usually personal property, but can be affixed to realty as in the "Cadillac Ranch" exhibit west of Amarillo. Yet "Cadillac Ranch" has already been relocated

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41 *See Albert v. Kimbell, Inc.*, 544 S.W.2d 805, 806 (Tex. Civ. App.—San Antonio 1976, no writ) ("A fence may or may not be part of the realty.").

42 *See In re Coleman*, 392 B.R. 767, 772 (B.A.P. 8th Cir. 2008) ("Under Missouri law, manufactured and mobile homes are generally classified as personal property but may be converted to real property").

once when highway development encroached.[43] Couldn't jurors decide this "improvement" in the Panhandle landscape was personalty the owner had to move rather than realty the State had to buy?

Clear Channel says "[e]very Texas court of appeals to consider the issue" has held that billboards "are part of the realty."[44] Hardly. Of the cases cited, one held a billboard was realty,[45] one held it was not,[46] and two held it was a question for trial.[47] All were decided in the last six years, so there is no consensus.

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43 *See* Kerry Curry, *Cars Make 2-Mile Trip to New Site*, AMARILLO GLOBE-NEWS, http://amarillo.com/stories/082197/cars.html (last visited April 21, 2014).

44 Resp. Br. at 30.

45 *See State v. Moore Outdoor Props., L.P.*, 416 S.W.3d 237, 245 (Tex. App.—El Paso 2013, pet. filed).

46 *See City of Argyle v. Pierce*, 258 S.W.3d 674, 684 (Tex. App.—Fort Worth 2008, pet. dism'd).

47 *See State v. Clear Channel Outdoor, Inc.*, 274 S.W.3d 162, 166 (Tex. App.—Houston [1st Dist.] 2008, no pet.); *Harris County Flood Control Dist. v. Roberts*, 252 S.W.3d 667, 672 (Tex. App.—Houston [14th Dist.] 2008, no pet.).

A tenant with no interest in moving a large fixture can always claim it is realty. A government with no interest in owning a large fixture can always claim it is not. Whether personal property has become real property is primarily a question of intent, and intent is a question of fact for the jury unless reasonable minds could not differ regarding the facts presented.[48]

III. BILLBOARD COMPENSATION DOES NOT INCLUDE INCOME

"Adequate compensation does not include profits generated by a business located on condemned land. . . . On remand, the trial court should not allow evidence of valuation based on advertising income."
State v. Central Expressway Sign Assocs., 302 S.W.3d 866, 869, 874 (Tex. 2009)

When the Court wrote these words in 2009, it could not have been clearer: compensation for condemned billboards ***does not include advertising income*** and trial courts ***should not allow evidence of it***. Yet in this case tried less than a year later, the evidence and the judgment were based entirely on Clear Channel's lost advertising income. The

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48 *Logan v. Mullis*, 686 S.W.2d 605, 608 (Tex. 1985).

only excuse proffered by the court of appeals was a single sentence in *Central Expressway* acknowledging that the income approach is appropriate in some cases.[49] But that ignores the whole point of the opinion, which was that it is ***not*** appropriate in billboard cases.[50]

There is a line between distinguishing and disregarding precedent, and the courts below crossed it. Nobody reading *Central Expressway* would think compensation for condemning a billboard includes advertising income. This Court surely meant what it said, and the judgment should be reversed.

A. Advertising income is not compensable

The Court held unanimously in *Central Expressway* that business income cannot be considered in condemnation suits, noting two

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[49] *Central Expressway*, 302 S.W.3d at 871 ("The income approach is appropriate when the property would be priced according to the rental income it generates").

[50] *Id*. at 871-73 ("CESA and Viacom argue that billboard advertising revenue is derived from the intrinsic value of the land, and therefore that revenue should be treated like rental income for purposes of an income-method appraisal. . . . But Texas courts have not recognized the exception alluded to in Herndon for business profits derived from the intrinsic nature of the real estate. . . . We are not inclined to create an exception for land on which a billboard is placed.").

reasons for this long-recognized rule: "first, because profits from a business are speculative and often depend more upon the capital invested, general market conditions, and the business skill of the person conducting it than it does on the business's location; and second, because only the real estate and not the business has been taken and the owner can presumably continue to operate the business at another location."[51]

Clear Channel implies from this sentence that advertising income and the income approach are appropriate if income *does* depend on location and when the business *cannot* be moved elsewhere. But that ignores the very next sentence in the opinion: "Texas courts have refused to consider business income in making condemnation awards even when there is evidence that the business's location is crucial to its success."[52] This Court declined to create an

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51 *Central Expressway*, 302 S.W.3d at 871.

52 *Id*.

exception for billboards, as Texas courts have declined for many years to create exceptions for restaurants, groceries, farms, and mines.[53]

Condemnors pay full value for land and improvements, but don't have to replace income generated by either. Land can be a platform for many businesses, including advertising. When required for public use, the public buys the land without having to buy the businesses that use it. Condemnors take land for public use, not advertising businesses that formerly used it as a platform.

Any other rule would make condemnation too expensive and complex. Advertising can appear almost anywhere: the side of a bus or bus stop, the back of a taxi, or a flier on a pole. Digital advertising flows through cables, wires, antennas, and the ether. The public cannot possibly compensate everyone who claims lost income from such advertising whenever a public project reduces its potential audience.

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[53] *Central Expressway*, 302 S.W.3d at 873.

Of course, assets that can be used for advertising may command a higher market value. If so, the public must pay that price. But unless an asset's market value increases by precisely the same amount as future income (which is never the case), then the income is coming from something other than the asset — such as the design, artwork, production, installation, maintenance, marketing, overhead, and goodwill of the advertising business. The price of taking the advertising platform does not include the price of taking the advertising business.

This Court drew precisely this distinction in *Central Expressway*: land values may be higher in key billboard locations, but that is compensated by paying for the land rather than the advertising income.[54] As Justice O'Neill noted in her opinion, a wide gap between rental value and income suggests that it is not just the land that is adding value.[55] The gap in this case between roughly $13,000 in land

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54 *Central Expressway,* 302 S.W.3d at 874.

55 *Central Expressway,* 302 S.W.3d at 873.

rental and $90,000 in advertising income shows that something other than the land is responsible for the income.

Clear Channel claims *Central Expressway* applies only to billboard *leases*, not billboard *structures*. But there again is a large gap: Clear Channel's expert calculated that two brand new billboard structures would cost less than $40,000.[56] As the billboards were at least 30 years old, the $90,000 in annual advertising income was earned mostly from billboard services rather than the billboard structures.

B. Clear Channel's case focused solely on advertising income

From start to end, Clear Channel's counsel repeatedly directed the jury's attention to advertising income generated by these signs:

- ***voir dire***: "[T]he advertising contracts in this case generated over $80,000 a year in rent to Clear Channel for the privilege of advertising on that billboard. That is what we're going to ask the jury to determine market value." (*4RR14*);

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[56] *See* 10RR69; Def. Ex. 14-f, p. 10.

- ***voir dire***: "There's going to be undisputed evidence in the case that the advertising revenue for the billboard was over $80,000 per year" (*4RR38*);

- ***opening statement***: "Combined, the advertising revenue from those billboards, the evidence is going to be undisputed, was over $80,000 per year. So when Dr. Aguilar appraises the billboards under an income approach, he is basically looking at the question of what would an investor pay now in cash in order to acquire an income stream that generates over $80,000 per year." (*4RR102-03*);

- ***closing arguments***: "And most importantly, we talked about the advertising contracts." (*7RR11*);

- ***closing arguments***: "[W]hen Clear Channel has to remove its billboard to accommodate that new right-of-way line, its lease is terminated, its permit is terminated and, most importantly, its ability to continue to generate almost $90,000 a year under the advertising rents are terminated as well" (*7RR19*);

- ***closing arguments***: "So, going to the court's charge, I suggest to you that when Judge Storey asks you to value Clear Channel's property interest . . . it mostly means the advertising revenue that is lost forever." (*7RR21-22*).

This blatantly violates what the Court said in *Central Expressway*.

C. Clear Channel's expert focused solely on advertising income

Clear Channel's valuation expert, Dr. Rodolfo Aguilar, purported to use three different approaches for valuing the billboards condemned. All three were based on advertising income.

1. Income approach. In his income approach, Dr. Aguilar started with advertising income, adjusted it downward for vacancies (-5%) and operating expenses (-35%), and then divided by a capitalization rate to calculate market value.[57]

DR. AGUILAR'S "INCOME APPROACH"			
	MURPHY Location 9173	STERLING Location 9174	TOTAL
Annual Gross Revenue	$30,900	$58,800	$89,700
Less 5.00% Vacancy Loss	(1,545)	(2,940)	(4,485)
Annual Net Revenue	$29,400	$55,900	$85,300
Annual Income (65% of Net Revenue)	$19,100	$36,300	$55,400
Capitalization Rate	8.00%	8.00%	8.00%
Market Value (Income ÷ Cap. Rate)	$238,800	$453,800	$692,600

[57] *See* 5RR60-64, 10RR70; Def. Ex. 14-f, p. 11.

The resulting figure estimates what Clear Channel would need to invest to produce the same advertising income (*4RR102-03*). This directly reimburses Clear Channel for lost advertising income — and is directly contrary to *Central Expressway*.

2. Comparable-sales approach. Put to one side the fact that Dr. Aguilar's sales were not comparable — some were for fee ownership of land, some for perpetual leases, and some added restrictions on competition (*see 5RR129-34*). He still started with advertising income of sold billboards, divided that into their sales prices to calculate a "multiplier," and then applied that to the advertising income here.[58]

DR. AGUILAR'S "COMPARABLE SALES APPROACH"			
	Total Sales Prices	Total Ad Income	Multiplier
All Comparable Sales	$4,452,600	$574,108	7.75
	MURPHY Location 9173	STERLING Location 9174	TOTAL
Annual Net Revenue	$29,400	$55,900	$85,300
Rent Multiplier (adj.)	9.00	9.00	9.00
Market Value (Revenue × Multiplier)	$264,600	$503,100	$767,700

[58] *See* 5RR68-78, 10RR71; Def. Ex. 14-f, p. 12.

This again estimates how much buyers would pay for the advertising income stream from these billboards. That simply makes the State pay for lost advertising income.

3. Non-revenue approach. Finally, Dr. Aguilar presented a "non-revenue" approach that is anything but. This repackaged his comparable-sales approach, creating the multiplier using the square footage of billboards sold rather than their advertising income.[59]

DR. AGUILAR'S "NON-REVENUE APPROACH"			
	Sales Prices	Display Area	Price/sq. ft.
All Comparable Sales	$4,231,600	21,216 sq. ft.	199.45
	MURPHY Location 9173	STERLING Location 9174	TOTAL
Face Area	672 sq. ft.	672 sq. ft.	1,344 sq. ft.
Price/sq. ft. (adj.)	$500	$560	$530
Market Value (Revenues × Multiplier)	$336,000	$376,300	$712,300

Again, put to one side the fact that his "adjustment" to the multiplier almost tripled it, and his concession that this "is not a method that is normally used in valuing signs" (*5RR85*). Dr. Aguilar testified that the

[59] *See* 5RR78-90, 10RR72; Def. Ex. 14-f, p. 13.

underlying sales prices were based on advertising revenues (*5RR57*, *5RR108*), so any conclusion he reached is paying for advertising income indirectly.

D. If markets value billboards by income, shouldn't the courts?

Assuming (as Clear Channel argues) that buyers and sellers price billboards according to advertising income, why shouldn't the State have to pay the same amount? The answer is because businesses buy certain things that condemnors do not have to buy.

1. Condemnors buy land, businesses buy opportunities

The rule excluding advertising income is part of the general rule that business income cannot be considered in condemnation suits, with two exceptions that do not apply to billboards.[60] This rule has plenty of historical support.

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[60] *See State v. Central Expressway Sign Assocs.*, 302 S.W.3d 866, 871 (Tex. 2009) ("Texas law allows income from a business operated on the property to be considered in a condemnation proceeding in two situations: (1) when the taking, damaging, or destruction of property causes a material and substantial interference with access to one's property; and (2) when only a part of the land has been taken, so that lost profits may demonstrate the effect on the market value of the remaining land and improvements," (citations omitted)).

In *Mitchell v. United States*, land taken for the Army's Aberdeen Proving Ground shortly after the U.S. entered World War I included farmland especially suited to grow corn "of a special grade and quality."[61] The owner was unable to find similar land anywhere else, and sought recovery for both the land and the lost income.[62] The United States Supreme Court held that any special value of the land had to be compensated, but "settled rules of law" precluded recovery of consequential damages like the destruction of a business the Army had no intention of taking.[63] Taking land may indirectly take a business if there are no alternative locations, but that is "an unintended incident of the taking of land."[64] Condemnation, of course, requires an intentional taking.[65]

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61 267 U.S. 341, 343 (1925).

62 *Id*. at 344.

63 *Mitchell v. United States*, 267 U.S. at 345.

64 *Id*.

65 *Id*.; *City of Keller v. Wilson*, 168 S.W.3d 802, 808 (Tex. 2005).

Generally, compensation in condemnation suits is measured by market value, defined as what a willing buyer would pay a willing seller.[66] But there are exceptions. As the United States Supreme Court explained, the sovereign does not have to pay for consequential losses even if private buyers in the market generally do:

> The sovereign ordinarily takes the fee. The rule in such a case is that compensation for that interest does not include future loss of profits, the expense of moving removable fixtures and personal property from the premises, the loss of good-will which inheres in the location of the land, or other like consequential losses which would ensue the sale of the property to someone other than the sovereign. *No doubt all these elements would be considered by an owner in determining whether, and at what price, to sell*. No doubt, therefore, if the owner is to be made whole for the loss consequent on the sovereign's seizure of his property, these elements should properly be considered. But the courts have generally held that they are not to be reckoned as part of the compensation for the fee taken by the Government.[67]

In a private sale, Clear Channel could charge whatever it liked for these billboards, including advertising that could not be moved to

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[66] *See Enbridge Pipelines (E. Texas) L.P. v. Avinger Timber, LLC*, 386 S.W.3d 256, 261 (Tex. 2012).

[67] *United States v. Gen. Motors Corp.*, 323 U.S. 373, 379 (1945) (emphasis added).

one of its 2,500 other billboards in the Houston area (*4RR166*). But that is not the standard in eminent domain.[68] "The fact that a seller in the marketplace is free to take advantage of a buyer's circumstances if he can does not justify the same conduct when the buyer is the State."[69] The courts below erred by assuming Clear Channel could make the State pay for everything it would charge a private buyer.

2. Condemnors buy property, businesses buy expectations

It is undisputed that billboard companies value property according to "the number of eyes that see it per day."[70] That is purely a question of highway traffic. The only reason Clear Channel chose

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68 *See City of Houston v. Culmore*, 278 S.W.2d 825, 829 (Tex. 1955) (limiting right to consequential damages to condemnation that takes "a portion, but not all, of their land was taken"); *, accord, AVM-HOU, Ltd. v. Capital Metro. Transp. Auth.*, 262 S.W.3d 574, 585 (Tex. App.—Austin 2008, no pet.); *Reeves v. City of Dallas*, 195 S.W.2d 575, 579-80 (Tex. Civ. App.— Dallas 1946, writ ref'd n.r.e.); *see also* BLACK'S LAW DICTIONARY 445-46 (9th ed. 2009) (defining "consequential damages" as "[l]osses that do not flow directly and immediately from an injurious act but that result indirectly from the act.").

69 *State v. Schmidt*, 867 S.W.2d 769, 776 (Tex. 1993).

70 *See* 5RR56; *see also* 4RR122, 5RR26, 5RR135-36; Charles F. Floyd, *The Takings Issue in Billboard Control*, 3 WASH. U. J. L. & POL'Y 357, 360 (2000) ("The outdoor advertising industry sells exposure opportunities based on the number of vehicles passing sign locations.").

not to relocate these billboards was because it asserts there were no other locations with the same volume of traffic.

But nobody has a property right to heavy traffic. Landowners cannot recover when a government diverts traffic to a bypass,[71] closes one of two abutting streets,[72] or raises a roadbed 37 feet in the air.[73] The market may pay less for property in such cases, but condemnors do not have to pay compensation for it.[74]

Those who build businesses based on assumptions about highway traffic do so at their own risk.[75] The market price of such properties may be high because potential buyers assume the highway

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71 *State Highway Comm'n v. Humphreys*, 58 S.W.2d 144, 145 (Tex. Civ. App.—San Antonio 1933, writ ref'd).

72 *Archenhold Auto. Supply Co. v. City of Waco*, 396 S.W.2d 111, 114 (Tex. 1965).

73 *State v. Schmidt*, 867 S.W.2d 769, 773 (Tex. 1993).

74 *County of Bexar v. Santikos*, 144 S.W.3d 455, 462 (Tex. 2004) ("[L]essened visibility as perceived by a potential investor . . . [is] noncompensable.").

75 *See State Highway Comm'n v. Humphreys*, 58 S.W.2d 144, 145 (Tex. Civ. App.—San Antonio 1933, writ ref'd) ("The highways primarily are for the benefit of the traveling public, and are only incidentally for the benefit of those who are engaged in business along its way. They build up their businesses knowing that new roads may be built that will largely take away the traveling public. This is a risk they must necessarily assume.").

will not move. But the government does not have to pay if those assumptions prove false because having heavy traffic nearby is not a property right.

Had the State moved Interstate 10 rather than widening it, Clear Channel might have lost all the income detailed by Dr. Aguilar. But the State would not have to pay for it. When the State instead took the land under these billboards, it should not have to pay for the income lost from advertising at that location (even if Clear Channel's competitors would have done so) because the latter are paying for an expectation about the future that is not a property right.

CONCLUSION

A century ago, the Court of Criminal Appeals wrote that billboards were "menaces to the public safety and welfare of the city" as well as "inartistic and unsightly."[76] This Court too has noted that

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[76] *Ex parte Savage*, 141 S.W. 244, 247-48 (Tex. Crim. App. 1911) (quoting *St. Louis Gunning Adver. Co. v. City of St. Louis*, 137 S.W. 929 (1911)).

the Legislature considers billboards "to be a public nuisance."[77] In this context, there is no basis for favoring the industry with a special exception to the long-standing rule against compensation for lost business income.

The state and federal constitutions guarantee property rights, but not hopes, predictions, or expectations that do not rise to that level. Clear Channel would have moved these billboards if that were profitable, so it could also move them when it was not.

Respectfully submitted,

ANDREWS KURTH LLP

By: /s/ Scott A. Brister

Scott A. Brister
State Bar No. 00000024
ANDREWS KURTH LLP
111 Congress Ave., Suite 1700
Austin, Texas 78701
Phone: 512.320.9200
Fax: 512.320.9292
sbrister@andrewskurth.com

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[77] *Texas Dep't of Transp. v. Barber*, 111 S.W.3d 86, 100 (Tex. 2003); *see also id*. at 112 (Owen, J., dissenting) ("Preserving scenic beauty and promoting public safety are legitimate aims").

CERTIFICATE OF COMPLIANCE

I hereby certify that the number of words contained in this *Brief of Amici Curiae* is 6,416.

/s/ Scott A. Brister
Scott A. Brister

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was served on all counsel of record via Electronic service and/or Certified Mail, Return Receipt Requested on this 21st day of April, 2014.

/s/ Scott A. Brister
Scott A. Brister

Service List

Michael P. Murphy
Assistant Solicitor General
State Bar No. 24051097
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-2995
Fax: (512) 474-2697
michaelp.murphy@texasattorneygeneral.gov

Susan Desmarais Bonnen
State Bar No. 05776725
susan.bonnen@texasattorneygeneral.gov
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548
Austin, Texas 78711-2548
Telephone: (512) 436-2004
Facsimile: (512) 472-3855

Sydney N. Floyd
sfloyd@swbell.net
Richard L. Rothfelder
RRothfelder@swbell.net
ROTHFELDER & FALICK, L.L.P.
1201 Louisiana St., Suite 550
Houston, Texas 77002
Telephone: (713) 220-2288
Telecopier: (713) 658-8211

Marie R. Yeates
myeates@velaw.com
H. Dixon Montague
dmontague@velaw.com
Michael A. Heidler
mheidler@velaw.com
VINSON &ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, Texas 77002-6760