FILED
13-0053
SUPREME COURT OF TEXAS
AUSTIN, TEXAS
4/28/2014 10:41:56 AM
BLAKE HAWTHORNE
CLERK

No. 13-0053

In The
Supreme Court of Texas

State of Texas,
Petitioner,

v.

Clear Channel Outdoor, Inc.,
Respondent.

On Petition for Review from the Court of Appeals for the
First District of Texas, Houston
01-11-00197-CV

Clear Channel's Response to the Amicus Brief of City of Houston et al.

Richard Rothfelder
State Bar No. 17318100
rrothfelder@swbell.net
Sydney N. Floyd
State Bar No. 07186500
sfloyd@swbell.net
ROTHFELDER & FALICK, LLP
1201 Louisiana, Suite 550
Houston, Texas 77002
Telephone: (713) 220-2288
Facsimile: (713) 658-8211

Marie R. Yeates
State Bar No. 22150700
myeates@velaw.com
H. Dixon Montague
State Bar No. 14277700
dmontague@velaw.com
Michael A. Heidler
State Bar No. 24059921
mheidler@velaw.com
VINSON & ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, Texas 77002-6760
Telephone: (713) 757-4576
Facsimile: (713) 758-2346

Attorneys for Respondent Clear Channel Outdoor, Inc.

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. Amici Erroneously Want This Court To Use Landlord-Tenant Law To Decide What Constitutes the Condemned Realty. 6

A. This Court and the U.S. Supreme Court Have Rejected Use of Landlord-Tenant Law To Decide What Constitutes the Compensable Realty in Condemnation. 6

B. Amici Fail in Their Attempt To Distinguish *Adkisson* and *Almota*. 8

II. Amici Wrongly Say That Property Attached to Realty Must Be Moved (if It Can Be Moved) Rather Than Requiring the Condemnor To Compensate for That Property as Part of the Condemned Realty. 12

III. Amici Want To Focus on How Easily an Improvement Can Be Removed, but the *Logan* Test Already Takes That Into Account. 13

IV. Amici's Argument That There Is a Fact Issue Here Is Beside the Point and Wrong. 14

V. Even if Landlord-Tenant Trade-Fixture Law Applied (and It Does Not), the Amici Would Still Be Wrong in Arguing That the Sign Structures Were Not Part of the Realty. 15

VI. Amici Make Unfounded Arguments About Clear Channel's Chart on Billboard Cases From Texas Courts of Appeals (Br. Resp. 30–31). 17

VII. Amici Misread This Court's *Central Expressway* Decision. 19

VIII. Amici Fail To Acknowledge That Clear Channel's Expert in This Case Did Exactly What *Central Expressway* Requires. 23

IX. Amici Ignore the Fact That Dr. Aguilar's Valuation Opinions Were Cumulative of Other Record Evidence. 25

CONCLUSION 26

CERTIFICATE OF COMPLIANCE 29

CERTIFICATE OF SERVICE 30

TABLE OF AUTHORITIES

CASES

Almota Farmers Elevator & Warehouse Co. v. United States,
409 U.S. 470 (1973) 3, 7, 8, 9

Brazos River Conservation & Reclamation District v. Adkisson,
173 S.W.2d 294 (Tex. Civ. App.—Eastland 1943, writ ref'd) 3, 6, 7, 10

City of Argyle v. Pierce,
258 S.W.3d 674 (Tex. App.—Fort Worth 2008, pet. dism'd) 17, 19

City of Harlingen v. Estate of Sharboneau,
48 S.W.3d 177 (Tex. 2001) 21

Connelly v. Art & Gary, Inc.,
630 S.W.2d 514 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) 15

Enbridge Pipelines (East Texas) L.P. v. Avinger Timber, LLC,
386 S.W.3d 256 (Tex. 2012) 21, 22

Granberry v. Texas Public Service Co.,
171 S.W.2d 184 (Tex. Civ. App.—Amarillo 1943, no writ) 11

Harris County Flood Control District v. Roberts,
252 S.W.3d 667 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).. 11, 17, 18

Logan v. Mullis,
686 S.W.2d 605 (Tex. 1985) 6, 13, 14

State v. Central Expressway Sign Associates,
302 S.W.3d 866 (Tex. 2009) 19, 20, 22, 23

State v. Clear Channel Outdoor, Inc.,
274 S.W.3d 162 (Tex. App.—Houston [1st Dist.] 2008, no pet.) 7, 14, 18

State v. Miller,
92 S.W.2d 1073 (Tex. Civ. App.—Waco 1936, no writ) 12

State v. Moore Outdoor Properties., L.P.,
416 S.W.3d 237 (Tex. App.—El Paso 2013, pet. filed) 17, 18

State v. Schmidt,
867 S.W.2d 769 (Tex. 1993) 22

Van Valkenburgh v. Ford,
207 S.W. 405 (Tex. Civ. App.—Galveston 1918) 16

OTHER AUTHORITIES

4 P. Nichols, Eminent Domain § 13.121(2) 8

CONSTITUTIONAL PROVISIONS

Tex. Const. art. I, § 17 1

ARGUMENT

The brief of *amici curiae* City of Houston et al. ("Amici") is loaded with matters irrelevant to this appeal, misstatements concerning the facts in this record, and errors of law with respect to the principles of property law and the law of condemnation that apply here. While Clear Channel hesitates to burden the Court with more briefing, Clear Channel is compelled to respond to the erroneous statements in Amici's brief.

The principles of law governing this appeal are provided by the Texas Legislature, the Texas Constitution, and this Court's precedents implementing and construing the Texas constitutional requirement that condemning authorities must pay "adequate compensation" for private property that a condemning authority "take[s], damage[s], or destroy[s]." Tex. Const. art. I, § 17. And as shown herein, Amici have those principles wrong.

Condemning authorities are authorized by the government to take the private citizen's property, but when such a taking occurs, the private citizen is entitled to adequate compensation that is not impacted by any evaluation of the intrinsic merit of the type of property taken, here, billboards. Thus, Amici improperly laden their brief with criticisms of billboards in general. Br. Amici 4–5, 36–37. Whether Amici think billboards have social value is irrelevant to this appeal, which must be decided based on settled principles of law—not based on prejudice against

billboards. Moreover, Amici's attack on billboards misses the important role that billboards play in informing the public about all manner of subjects—from notifying the public about the latest museum exhibits, to advising the public about the approaching hurricane season, to alerting the public about missing children and elderly, to informing the public about electoral candidates, to apprising the public of the FBI's search for fugitives. But more importantly, the Amici's views concerning the social value of billboards have no place in a brief to this Court.

Amici claim that Clear Channel is looking for special treatment, but just the opposite is true. Clear Channel wants this Court to decide this case based on the settled principles of law as articulated by the U.S. Supreme Court and this Court—principles of law that apply equally to all property owners. It is Amici who ask this Court to make a special rule for billboards because, according to Amici, highway projects will be too expensive if condemning authorities must pay adequate compensation when they take, damage, or destroy a billboard. There is nothing new about the tension between *private* property interests and the *public's* interest in growth and expansion. When the public interest necessitates it, the Constitution allows the condemning authority to take, damage, or destroy Clear Channel's private property—but the Constitution also requires the condemning authority to pay Clear Channel adequate compensation for doing so.

Amici's brief is chock-full of legal errors of condemnation law and misstatements about the record in this case. For example, Amici's core legal argument—that condemning authorities need not pay adequate compensation for taking, damaging, or destroying property labeled a "trade fixture" by landlord-tenant law—has already been rejected by both this Court and the U.S. Supreme Court. *Brazos River Conservation & Reclamation Dist. v. Adkisson*, 173 S.W.2d 294, 298–301 (Tex. Civ. App.—Eastland 1943, writ ref'd); *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 477 n.5 (1973).

And Amici's factual contention that the sign structures in this case could be easily moved to a new location reveals Amici's significant misunderstandings about the record. Clear Channel's sign structures each feature a sign face measuring 14 feet by 48 feet. Br. Resp. 32–33. The sign face is supported by six poles affixed to the ground by being deeply buried sometimes 20 feet or more and secured in the subsurface. *Id.* Indeed, to tear down the billboard, one would need either (1) to cut the poles off at the surface level, leaving parts of the poles in the ground; or (2) to use heavy equipment to dig to poles out of the earth. *Id.* The fact that these billboards have stood over 30 years, repeatedly enduring hurricane-force winds, vividly demonstrates the great effort that would be required to sever these sign structures from the land. *Id.* To detach and dismantle these sign structures, Clear Channel would be required to use a crew of workers and heavy machinery.

Id. The sign structures cannot simply be picked up and moved to another site but, rather, must be dismantled, and the poles must be cut into sections. *Id.* Dismantling the sign structure destroys its structural integrity, such that the original sign structure can never be reconstructed or reassembled at a different site. *Id.* Removal means destruction of the sign structure.

Apart from the physical aspects that show how the structures are annexed to the realty and are not easily torn down, there are also legal implications with respect to any attempt to relocate the billboards. Whether these particular billboards could be relocated was not a matter of choice by Clear Channel. At trial, the court excluded evidence concerning whether the billboards could be relocated to another location. 8CR2714. But the summary judgment record shows that the billboards could not be moved. These billboards are non-conforming under the City of Houston's Sign Code, such that these precise billboards could not be re-built at another location. 3CR736; Br. Resp. 5–6. Also, the City's spacing rules and other limitations imposed on billboards would not allow Clear Channel to rebuild its billboards somewhere else. Br. Resp. 5–6. When Amici tell this Court that "Clear Channel chose not to relocate these billboards, not because it ***couldn't*** but because it ***wouldn't***," Amici just reveal their lack of knowledge of this record. Br. Amici 16. Amici are misinformed. Regardless, whether Clear Channel "chose" to relocate or to accept compensation should not be relevant to this analysis.

Amici attempt to support their argument that Clear Channel could have relocated these billboards by contending that the rent that Clear Channel paid the landowner was, according to Amici, so "low" as to indicate that the landowner knew that Clear Channel could relocate the billboards. Amici Br. 15–16. Of course, Amici's statement is pure speculation without any record cite. Moreover, it is undisputed that, outside of condemnation, the City of Houston's sign code categorically forbids Clear Channel to construct a new billboard at an alternative location. Both Clear Channel and the landlord knew that Clear Channel had no option—physical or legal—of "moving" these structures somewhere else. While the City of Houston Sign Code includes a provision stating that, when a billboard is condemned, the billboard owner can relocate his billboard, such relocation is possible only if a location can be found that meets all of the City of Houston's regulatory requirements for spacing etc. Br. Resp. 4–5.[1] And there is no evidence here that such a new location was available.

[1] Furthermore, under the Houston Sign Code, a sign can be "relocated" for only ten years. And, if the owner accepts the relocation option, then the owner must (1) waive his right to compensation from the condemning authority for the period, after ten years, that the sign structure could have remained on the condemned land; and (2) remove the "relocated" sign at his own expense after ten years. 3CR737–38 (Sign Code § 4617(a)(10)). The Houston Sign Code makes clear that the relocation option is not to be construed as abrogating the sign owner's right to seek compensation in condemnation. *Id.* at 739–40 (Sign Code § 4617(b)).

Amici's whole brief is premised on the notion that these billboards are easily removable to another location. The entire premise of Amici's brief is wrong on the facts. Moreover, Amici are wrong on the law.

I. Amici Erroneously Want This Court To Use Landlord-Tenant Law To Decide What Constitutes the Condemned Realty.

A. This Court and the U.S. Supreme Court Have Rejected Use of Landlord-Tenant Law To Decide What Constitutes the Compensable Realty in Condemnation.

In *Logan v. Mullis*, 686 S.W.2d 605 (Tex. 1985), the Court dealt with whether a tank car embedded in the earth and used as a culvert became an improvement to the realty such that, in a transfer of an interest in the realty, the tank car would have been transferred as part of the realty. *Logan* holds that "[t]hree factors are relevant in determining whether personalty has become . . . a permanent part of the realty to which it is affixed: (1) the mode and sufficiency of annexation, either real or constructive; (2) the adaptation of the article to the use or purpose of the realty; and (3) the intention of the party who annexed the chattel to the realty." *Id.* at 607.

Logan is not a condemnation case, but in *Adkisson*, this Court held, in a condemnation case, that the condemned realty includes property (1) "of such a character that if put in by the owner, [the property] would constitute a part of the real estate" and would therefore (2) "pass with the title [to the land] in an ordinary conveyance." *Adkisson*, 173 S.W.2d at 298–99. Because the condemnation law

looks to property law to decide what becomes part of the real estate (*i.e.*, what would pass if title to the real estate were conveyed), this Court's decisions in *Adkisson* and *Logan*, taken together, provide the test for when property annexed to realty is part of the realty when the realty is condemned. When the Court of Appeals here said that *Logan* does not apply in condemnation, what that Court meant was that, in condemnation, the *Logan* test is constrained by the principles of *Adkisson—i.e.*, in condemnation, a court will not look to the tenant's right, vis-à-vis his landlord, to remove the annexed property.

As the First Court of Appeals recognized in this case, this Court in *Adkisson*, and the U.S. Supreme Court in *Almota*, have made clear that the characterization, as between landlord and tenant, of the annexed property as personalty or realty is not determinative of whether the annexed property constitutes a compensable part of the realty when the realty is taken in condemnation. *Adkisson*, 173 S.W.2d at 300; *Almota*, 409 U.S. at 477 n.5; *State v. Clear Channel Outdoor, Inc.*, 274 S.W.3d 162, 165 (Tex. App.—Houston [1st Dist.] 2008, no pet.). But Amici want this Court to disregard *Adkisson* and *Almota*; Amici erroneously ask this Court to use landlord-tenant law to determine whether the billboards here constitute part of the condemned realty. Amici are wrong.

B. Amici Fail in Their Attempt To Distinguish *Adkisson* and *Almota.*

In *Almota*, the U.S. Supreme Court recognized that a condemnor may not characterize a fixture as personalty (in order to avoid paying compensation for the fixture as part of the realty when the realty is condemned) by looking to a tenant's rights, vis-à-vis his landlord, to remove the fixture. *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973). Amici argue that *Almota* "says no such thing" (Br. Amici 17), but the Supreme Court stated in *Almota*:

> It frequently happens in the case of a lease for a long term of years that the tenant erects buildings or puts fixtures into the buildings for his own use. Even if the buildings or fixtures are attached to the real estate and would pass with a conveyance of the land, as between landlord and tenant they remain personal property. In the absence of a special agreement to the contrary, such buildings or fixtures may be removed by the tenant at any time during the continuation of the lease, provided such removal may be made without injury to the freehold. ***This rule, however, exists entirely for the protection of the tenant, and cannot be invoked by the condemnor***.

Id. at 477 n.5 (quoting 4 P. Nichols, Eminent Domain § 13.121(2) (3d rev. ed. 1971)) (emphasis added). Amici concede that courts all around the country follow the rule, stated in this passage from *Almota*, that landlord-tenant law does not control whether improvements are part of the realty for purposes of condemnation. Br. Amici 17; Br. Resp. 23–24 (chart of cases). Amici argue that these courts "are reading too much" into the U.S. Supreme Court's *Almota* decision. Br. Amici 17. But *Almota* says what it says.

Amici wrongly argue that, because lease agreements are considered in allocating condemnation awards as between landlord and tenant, those agreements should also be considered in deciding what property, annexed to realty, becomes part of the realty for which the condemning authority owes compensation when the realty is taken. Br. Amici 18. In fact, *Almota* says just the opposite. Thus, *Almota* states:

> [I]f fixtures are attached to the real estate, they must be treated as real estate in *determining the total [condemnation] award*. But in *apportioning* the award, [the fixtures] are treated as personal property and credited to the tenant.

Almota, 409 U.S. at 477 n.5 (emphasis added). Amici are just on the wrong side of the law from the U.S. Supreme Court and from this Court. This Court's trade-fixtures principles operate as a shield to protect the tenant vis-à-vis the landlord. Those principles cannot be used against the tenant as a sword by the condemning authority, where the latter seeks to avoid paying the tenant compensation for property that, but-for protection afforded the tenant vis-à-vis the landlord, would be considered part of the realty.

Texas law says the same thing as *Almota*. This Court made clear in *Adkisson* that the condemnor must pay compensation for property the tenant annexes to the leased premises regardless of whether, in a dispute between landlord and tenant, that property would be a "trade fixture" that, vis-à-vis the lessor/landlord, the

lessee/tenant would be entitled to remove. *Adkisson*, 173 S.W.2d at 298–99. *Adkisson* holds that condemned realty includes property (1) "of such a character that if put in by the owner, [the property] would constitute a part of the real estate" and would therefore (2) "pass with the title [to the land] in an ordinary conveyance." *Id.*

In *Adkisson*, the so-called "trade fixtures" that had become part of the realty included "the casing and tubing in the producing oil wells, the engines, power house, tanks, flow lines, etc."—all of which had been annexed to the realty in such a manner as to make them become part of the realty. *Adkisson*, 173 S.W.2d at 296. Amici erroneously contend that *Adkisson* was just talking about a "wellbore." Br. Amici 13–14. But there was no dispute in *Adkisson* about whether the wellbore (essentially a hole in the ground) was part of the condemned realty. Rather, *Adkisson* holds that property *annexed to the realty—i.e.*, "the casing and tubing in the producing oil wells, the engines, power house, tanks, flow lines, etc."—had become part of the realty for which the condemning authority was required to pay compensation when the realty was taken. *Adkisson*, 173 S.W.2d at 296 (emphasis added).

And the Court held in *Adkisson* that the annexed property was part of the realty in condemnation regardless of whether, as between lessee/tenant and lessor/landlord, the lessee/tenant had the right to remove those annexed items. *Id.*

at 298–301; *see Harris County Flood Control Dist. v. Roberts*, 252 S.W.3d 667, 672–73 n.8 (Tex. App.—Houston [14th Dist.] 2008, pet. denied) (recognizing that *Adkisson* precludes argument that trade fixtures not compensable in condemnation). *Adkisson* holds that, for purposes of condemnation, a court will not consider the fact that the tenant is entitled, vis-à-vis the landlord, to remove the attached items (such as the casing, tubing, engines, etc.). Landlord-tenant law does not control what constitutes the realty for purposes of determining what property is taken, and thus compensable, in condemnation.

Amici erroneously want to force the legal issue in this case into the trade-fixture construct, but the trade-fixtures construct is used to resolve competing claims "between a landlord and his tenant," where landlord and tenant both claim ownership of a fixture that the tenant annexed to the leased premises to use in the tenant's trade or business. *Granberry v. Tex. Pub. Serv. Co.*, 171 S.W.2d 184, 186 (Tex. Civ. App.—Amarillo 1943, no writ). As the U.S. Supreme Court said in *Almota*, the trade-fixture construct might be important in deciding how to divide up a condemnation award, but it does not have any relevance to the inquiry whether property annexed to realty has become part of the realty, such that the condemning authority must compensate for the annexed property as part of the condemned realty. Amici tell this Court that "[t]he court of appeals went off the rails by forgetting about trade fixtures," but it is Amici that have gone "off the rails" by

disregarding (or purportedly distinguishing) the U.S. Supreme Court's decision in *Almota* and this Court's decisions in *Adkisson* and *Logan*. Br. Amici 12.

II. Amici Wrongly Say That Property Attached to Realty Must Be Moved (if It Can Be Moved) Rather Than Requiring the Condemnor To Compensate for That Property as Part of the Condemned Realty.

Amici say that property attached to the realty "that *can* be removed *must* be removed" so that the condemning authority does not have to pay compensation for that property. Br. Amici 15. But once again, Amici are wrong. A house *can* be moved, but a landowner is not required to move his house rather than receive compensation for the house when the land is condemned. Indeed, precisely such an argument was rejected by the court in *State v. Miller*, 92 S.W.2d 1073, 1074–75 (Tex. Civ. App.—Waco 1936, no writ), where the court held that the landowner is not required to "strip the improvements" from his land so as to allow the condemning authority to avoid paying compensation for those improvements. *Id.* Rather, the condemning authority must pay adequate compensation for improvements that "would pass with the title [to the land] in an ordinary conveyance." *Id.* at 1075; *accord Adkisson*, 173 S.W.2d at 298–99. When Amici say that fixtures "that *can* be removed *must* be removed," Amici have stepped outside the principles of Texas condemnation law. Br. Amici 15.

III. Amici Want To Focus on How Easily an Improvement Can Be Removed, but the *Logan* Test Already Takes That Into Account.

Amici suggest that the condemning authority should not be required to pay compensation for improvements that are "portable" or can "economically be relocated." Br. Amici 13–14. There is nothing new about Amici's notion of a spectrum, at one end of which sits easily removed items such as dishes, and at the other end of which sits items that are difficult to remove, such as a house or grain elevator. Br. Amici 18–19. This Court's decision in *Logan* expressly deals with the degree to which the item is physically annexed to the land. *Logan*, 686 S.W.2d at 607. Amici are just stating an analysis that is already found in this Court's *Logan* test—*i.e.*, whether the annexed property becomes part of the realty depends on the degree of annexation, which in turn determines how easily the attached property could be removed from the realty.

In *Logan*, this Court held that the defendant wrongly removed a tank car from the land; the defendant's removal of the tank car was wrongful because the tank car had become part of the realty (in which the plaintiff had an interest) given that the tank car had been partially buried in the ground. *Id.* This Court emphasized the "difficulty" that the defendant faced in removing the tank car, noting that the defendant used "several large winch trucks to hoist the tank car out of the creek." *Id.* at 608. *Logan* holds that the fact that the tank car *could be* removed (and indeed *had been* removed) did not prevent the tank car from having been previously made

part of the realty. Likewise, here, dismantling the sign structures would require a crew of workers using heavy machinery and would amount to a demolition project. Br. Resp. 33–34. The Court of Appeals correctly held that Clear Channel's sign structures are annexed to the land under the *Logan* test. *State v. Clear Channel Outdoor, Inc.*, 274 S.W.3d 162, 165 (Tex. App.—Houston [1st Dist. 2008], no pet.) ("[A]pplication of *Logan* . . . supports affirmance of the trial court's decision.").

IV. Amici's Argument That There Is a Fact Issue Here Is Beside the Point and Wrong.

Amici make the conclusory argument that there is some "fact issue for the jury" on whether the two sign structures at issue in this case have been annexed to the realty. Br. Amici 19–20. It is true that whether property has been annexed to the realty can, in some cases, present a fact question; but where, as here (and as in *Logan*), the undisputed facts show that the property is sufficiently annexed to the realty so as to become part of the realty, the annexation issue presents a question of law. *Logan*, 686 S.W.2d at 608.

The undisputed evidence shows that Clear Channel's sign structures stood embedded in the ground for over 30 years and, during that time, withstood all of the major hurricanes and less-major storms to hit the coastal area around Houston. Br. Resp. 2, 33. The undisputed evidence conclusively shows that these sign structures are annexed to the realty. Amici point to cars halfway buried at the

"Cadillac Ranch," noting that such partially buried cars might nevertheless remain personalty. Br. Amici 20. While the realty-versus-personalty status of such cars may be a closer call, the sign structures in this case are clearly part of the realty. There is no competent record evidence from which a reasonable jury could conclude that Clear Channel's sign structures are personal property, as opposed to property that has been annexed to, and made part of, the realty.

V. Even if Landlord-Tenant Trade-Fixture Law Applied (and It Does Not), the Amici Would Still Be Wrong in Arguing That the Sign Structures Were Not Part of the Realty.

Even applying the trade-fixture test of landlord-tenant law, Clear Channel's sign structures cannot be viewed as trade fixtures removable by the tenant. As Amici recognize, the test for whether property constitutes a trade fixture is whether the realty would be damaged if the item were removed. Br. Amici 9. Amici argue that "[r]emoval [of the sign structures] will not damage the land" given that Clear Channel could remove just "the above-ground portions" of the structures, leaving the poles in the ground. Amicus Br. 11–12. But Amici's argument has been rejected by two different courts of appeals in decisions that Amici do not cite.

In *Connelly v. Art & Gary, Inc.*, 630 S.W.2d 514, 515–16 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.), the poles supporting an outdoor advertising sign structure were firmly buried in the ground, but the appellant nevertheless argued that the sign was a "trade fixture" because the top of the sign could be

removed, leaving the "foundation" of the sign—the two 12-foot poles—buried in the ground. The court of appeals rejected that argument, holding:

> Since the sign in question can only be partially removed, and since its removal will leave the iron and concrete foundation in the ground, we hold that the sign cannot be removed without materially injuring the leasehold. We, therefore, hold that the sign in question is not a trade fixture.

Id.

A similar result was reached in *Van Valkenburgh v. Ford*, 207 S.W. 405, 420–21 (Tex. Civ. App.—Galveston 1918), aff'd, 228 S.W. 194 (Tex. Com. App. 1921). There, an engine was bolted to a concrete foundation, and the concrete foundation was buried underground. Although the engine could have been unbolted from the foundation and removed from the leased premises, because the concrete foundation would need to remain buried underground, the court of appeals held that the engine was not a trade fixture because removal of the engine would damage the realty.

Amici are wrong to argue that the land would not be damaged by Clear Channel's leaving foreign objects—twelve billboard support poles—buried deeply in the land. Texas law defeats Amici's argument that Clear Channel's sign structures are trade fixtures.

VI. Amici Make Unfounded Arguments About Clear Channel's Chart on Billboard Cases From Texas Courts of Appeals (Br. Resp. 30–31).

Amici dispute Clear Channel's chart showing the unanimity of the Texas Courts of Appeals that a sign structure, secured to the land like the billboards here, is part of the realty. Br. Amici 20; Br. Resp. 30–31. But once again, Amici's arguments are meritless. For purposes of responding to Amici's arguments, Clear Channel repeats below the chart from its brief of respondent at pp.30–31.

State v. Moore Outdoor Props., L.P., 416 S.W.3d 237 (Tex. App.—El Paso 2013, pet. filed)	Applies *Logan* in holding that sign structure is part of condemned realty (at 244–45) but refuses "to apply the [*Logan*] test in such a manner that would be contrary to [] the United States Supreme Court or the Texas Supreme Court" in *Almota* and *Adkisson* (at 245).
Harris County Flood Control District v. Roberts, 252 S.W.3d 667 (Tex. App.—Houston [14th Dist.] 2008, no pet.)	Applies *Logan* in affirming finding that sign structure is part of condemned realty but, citing *Adkisson*, rejects State's reliance on "the contractual right to remove the [fixture] at the termination of the lease" (at 672–73 & n.8).
State v. Clear Channel Outdoor, Inc., 274 S.W.3d 162 (Tex. App.—Houston [1st Dist.] 2008, no pet.)	On plea to the jurisdiction in this case, holds that sign structure is part of the condemned realty because it is an improvement attached to realty, but relies on *Adkisson* and *Almota* to hold that, in condemnation cases, courts do not consider "the owner's characterization of its property rights" (at 165).
City of Argyle v. Pierce, 258 S.W.3d 674 (Tex. App.—Fort Worth 2008, pet. dism'd)	Recognizes legal principle that condemned realty will include sign structure that is "most substantial structure very firmly attached to the premises" (at 684 n.7) and, consistent with *Almota* and *Adkisson*, does not examine lease language. Reverses denial of plea to the jurisdiction only because plaintiffs did not adequately

	plead facts to show that sign structure was fixture (at 684).

First, Amici concede that *State v. Moore Outdoor Properties* holds that the billboard is part of the realty, precisely as Clear Channel's chart states. Br. Amici 20. Amici do not challenge Clear Channel's reliance on that case. Br. Amici 20.

Second, Amici point out that, in *Harris County Flood Control District v. Roberts*, a jury determined that the sign structure was sufficiently annexed to the realty so as to become part of the realty. Br. Amici 20. But the Court of Appeals in that case sustained the jury's finding. Thus, *Harris County Flood Control District v. Roberts* supports Clear Channel's argument that the courts of appeals are unanimous in recognizing that a sign structure, secured to the land like the billboards here, is part of the realty.

Third, Amici challenge Clear Channel's reliance on *State v. Clear Channel Outdoor, Inc.*, 274 S.W.3d 162 (Tex. App.—Houston [1st Dist.] 2008, no pet.), presumably because the Court of Appeals in that case was dealing with an appeal on plea to the jurisdiction. Br. Amici 20. Amici say that the Court of Appeals held that a jury needed to address the issue whether the billboard was annexed to the land so as to become part of the realty. *Id.* But the Court of Appeals also recognized that (1) the pleadings alleged that the billboards were firmly embedded in the land, and (2) taking that pleading allegation as true, the billboard would be

part of the realty. *Id.* at 165. This decision supports Clear Channel's argument that the Texas courts of appeals are unanimous in recognizing that a sign structure, secured to the land like the billboards here, is part of the realty.

Fourth, with respect to *City of Argyle v. Pierce*, 258 S.W.3d 674 (Tex. App.—Fort Worth 2008, pet. dism'd), Amici say that the Court of Appeals held a billboard is not part of the realty. Br. Amici 20. But what really happened in the Court of Appeals, as correctly reflected in Clear Channel's chart, is that, on plea to the jurisdiction, the Court of Appeals held that the billboard owner had failed to allege the facts in its pleading sufficient to show the annexation of the billboard to the realty. *Id.* at 684. But the Court of Appeals also pointed out that, if the billboard owner *had alleged* that the billboard was a "most substantial structure very firmly attached to the premises," then the billboard would have become part of the realty. *Id.* at 684 n.7. Once again, *Pierce* supports Clear Channel's position that the Texas courts of appeals are unanimous in recognizing that a sign structure, secured to the land like the billboards here, is part of the realty.

VII. Amici Misread This Court's *Central Expressway* Decision.

Amici argue that the Court of Appeals here violated this Court's decision in *State v. Central Expressway Sign Associates*, 302 S.W.3d 866 (Tex. 2009). But *Central Expressway* dealt only with how to value a leasehold interest—*Central Expressway* did not involve any issue of how to value a sign structure (the

billboard itself). In *Central Expressway*, the billboard owner had settled, and the issue of compensation to the billboard owner was not before this Court. *Id.* at 869. On its face, then, *Central Expressway* is distinguishable from this case; this case deals with valuation of the billboard itself when the billboard itself is taken.

Moreover, Amici's argument challenges this Court's longstanding precedent allowing experts to use the income-capitalization approach to value income-producing property in condemnation. Amici latch onto language in *Central Expressway* stating that the "profits from a billboard advertising business" depend upon "more than just the land," like efforts to lease, light, maintain, and permit the billboard. *Id.* at 873. It is true that Clear Channel leases, lights, maintains, and permits the sign structures, but those activities are no different from a commercial property manager leasing floor space, lighting offices, repairing common areas, and procuring occupancy permits. The State acknowledges that the income approach can be used to value a commercial office building (6RR85:15–86:8), and there is no principled basis for treating a condemned sign structure differently.

Moreover, Clear Channel's expert in this case, Dr. Aguilar, when applying the income-capitalization approach, included only the revenue attributable to renting these billboards, and excluded the revenue attributable to sales and marketing, administration, public affairs, printing advertisements, installing

advertisements, and maintenance. *See* p.23–24, *infra*. Clear Channel followed this Court's dictates in *Central Expressway*. *Id.*

In any event, in a condemnation case, this Court has held that "[a]n appraisal method is only valid if it produces an amount that a willing buyer would actually pay to a willing seller." *City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 183 (Tex. 2001). In other words, the touchstone of the valuation for condemnation is the willing-buyer-willing-seller test. And a willing buyer and willing seller are obviously going to determine the price for a billboard by taking into account the income-capitalization approach. Reading *Central Expressway* to mean that a court cannot consider a billboard's advertising income "runs counter to the notion that fair market value is what a willing buyer will pay a willing seller for the property." *State v. Moore Outdoor Props., L.P.*, 416 S.W.3d at 250.

This Court has repeatedly recognized that a condemnation appraisal may (indeed, *must*) include the value derived from a property's favorable location for doing business. In *Enbridge Pipelines (E. Tex.) L.P. v. Avinger Timber, LLC*, this Court affirmed the exclusion of an appraisal because the appraisal "did not account for all relevant factors affecting valuation," including "the land's location in one of Texas's most productive counties." 386 S.W.3d 256, 264 (Tex. 2012). And in *Central Expressway*, this Court held that the expert's valuation of a strip of land along a major highway may "account[] for the value of the location; a property

better suited to billboard advertising would presumably be able to command a higher rent." *Central Expressway*, 302 S.W.3d at 874.

Disregarding *Central Expressway*, Amici argue that a condemnation appraiser should ignore the fact that a property is located at a prime site for billboard advertising. Br. Amici 34–36. According to Amici, if a condemnation appraisal accounts for the fact that condemned property is located at a prime site for billboard advertising, then an award of damages on that appraisal will impermissibly include damages for loss of visibility to traffic. *Id.* But once again, Amici are confused.

Because no one has a property interest in visibility to traffic, Texas law precludes recovery of condemnation damages for a "taking" of visibility. *See, e.g.*, *State v. Schmidt*, 867 S.W.2d 769, 773 (Tex. 1993). But where, as here, the condemning authority has taken Clear Channel's property—*i.e.*, Clear Channel's billboards—(1) the condemnor must pay the property owner adequate compensation for the taken property, (2) such adequate compensation is based on what a willing buyer would pay to a willing seller for the taken property, and (3) such adequate compensation must "tak[e] into account all relevant factors that affect [the property's] valuation, including the market for [the property's] possible future use"—which would include the location of the property taken. *Enbridge Pipelines*, 386 S.W.3d at 264; *accord Central Expressway*, 302 S.W.3d at 874.

Amici ask this Court to hold that a condemnation appraisal should exclude—from the amount that a willing buyer would pay a willing seller for condemned property—the dollars representing the buyer's payment for the "opportunit[y]" of doing business at the property or the "expectation[]" that the buyer could carry on a profitable business at the property. Br. Amici 31–36. Amici call this expectation of business revenue "consequential losses" that, according to Amici, should not be compensable in condemnation. Br. Amici 33. But Amici do not point to any consequential loss here. In this case, Dr. Aguilar appraised Clear Channel's sign structures by objectively determining what a willing buyer would pay willing seller for those structures.

VIII. Amici Fail To Acknowledge That Clear Channel's Expert in This Case Did Exactly What *Central Expressway* Requires.

Amici say that "the whole point" of *Central Expressway* is a holding that "the income approach" is "not appropriate in billboard cases." Br. Amici 22. But in *Central Expressway*, this Court held that an easement (on which a billboard was erected) *could be valued* according to the income-capitalization approach, where the income received for leasing the easement—and the income that would be capitalized in the income-capitalization approach—was a fixed percentage (25%) of the rental income that the billboard owner received for renting the billboard. *Id.* at 869, 874. Thus, this Court in *Central Expressway* did not impose any categorical bar on using rental income from a billboard to value condemned property. Instead,

the Court held that condemned property can be valued by capitalizing rental income from a billboard as long as the capitalized rental income is the *subset* of the billboard rental income attributable to the condemned property itself, as opposed to business functions of an advertiser.

Amici attack Dr. Aguilar's opinion as allowing damages for "advertising income," but Dr. Aguilar's approach matches the approach that this Court required in *Central Expressway*. Dr. Aguilar did not use income that Clear Channel separately earns from other business functions, such as production, construction, and printing. 5RR59:5–19, 61:12–62:9. Rather, Dr. Aguilar started with the income earned from renting the sign faces and then subtracted 35% of *that* income (from renting the sign faces) to account for various business functions, including sales and marketing, administration, public affairs, printing and installing advertisements, installing advertisements, and maintenance. *Id.*; DX. 14F, at 11. Dr. Aguilar opined that the "income" used in his opinions was the income derived solely from renting the billboard sign faces, excluding any "business component." 5RR66:9–67:1. This is exactly the approach that this Court allowed in *Central Expressway* when the Court authorized the expert to use 25% of the billboard advertising revenue in the income-capitalization approach to value the easement on which the billboard was erected.

IX. Amici Ignore the Fact That Dr. Aguilar's Valuation Opinions Were Cumulative of Other Record Evidence.

Amici ignore the fact that the jury's damages findings in this case were independently supported by lay valuation testimony of Michelle Costa, an employee of Clear Channel (the property owner). Ms. Costa is Group President for Clear Channel's South Region, has oversight of the Houston market for Clear Channel, has been involved in numerous sign structure purchases in the Houston market, and is familiar with the sign structures in this case. 4RR115:19– 17:12, 121:4–25:19. Ms. Costa testified that the sign structures here were worth "[r]oughly $700,000." 5RR33:15–23.

Amici erroneously claim that, in addressing the jury, Clear Channel focused on evidence of billboard rentals at the expense of other evidence of the value of these sign structures. But Amici are wrong. Clear Channel repeatedly urged the jury to rely on Ms. Costa's lay testimony:

- ***Opening Statement***: "Ms. Costa who . . . has decades of experience in the very business that we're appraising [is] going to tell you that this billboard has a fair market value of $700,000." 4RR106–07

- ***Opening Statement***: "[T]he evidence that you're going to see throughout this trial on market value . . . will come from three witnesses[, including] Michelle Costa who is the president of the south region of Clear Channel Outdoor and has been in the business at least 25 years." 4RR99.

- ***Closing Statement***: "[M]ost importantly, for our purposes, [Ms. Costa] said that . . . she had an opinion of value of this billboard of $700,000." 7RR12.

- ***Closing Statement***: "[W]e also have Ms. Costa who testified that . . . her opinion of value was $700,000." 7RR21.

Clear Channel emphasized that the jury should rely on Ms. Costa's testimony that these sign structures are worth approximately $700,000.

In addition to Dr. Aguilar's opinions, the jury had: (1) the opinion of the State's expert that Clear Channel's sign structures are worth $50,624, and (2) Michelle Costa's lay testimony that Clear Channel's sign structures are worth "[r]oughly $700,000." 6RR72:8–11; 5RR33:15–23. Comparing the State's $50,624 figure with Clear Channel's $700,000 figure, the jury easily could have found damages equal to $268,235.27—*i.e.*, the amount of damages actually found by the jury here.

CONCLUSION

Amici's brief improperly appeals to prejudice against billboards as a form of property when this case must be decided based on settled principles of law. As reflected in their brief, Amici fail to understand those principles of law that apply in condemnation. And Amici have got the facts of this case wrong.

The Texas Constitution requires the condemning authority to pay adequate compensation for taking, damaging, or destroying property, making no distinction between "real" or "personal" property. It is true that Texas statutes allow the State to condemn only realty, but in this case, Clear Channel filed an inverse

condemnation action, under the Texas Constitution, seeking adequate compensation for the State's taking of property, regardless of whether Clear Channel's sign structures are characterized as realty or personalty. But in any event, Clear Channel's sign structures are part of the realty under longstanding law from this Court and the U.S. Supreme Court. As part of the realty, the billboards were taken by the State, and thus the State owes adequate compensation for the taking. And that adequate compensation is properly determined based on the income-capitalization approach without running afoul of any prohibitions in this Court's decisions against compensating for business income or visibility.

Respectfully submitted,

/s/ Marie R. Yeates

Richard Rothfelder
State Bar No. 17318100
rrothfelder@swbell.net
Sydney N. Floyd
State Bar No. 07186500
sfloyd@swbell.net
ROTHFELDER & FALICK, LLP
1201 Louisiana, Suite 550
Houston, Texas 77002
Telephone: (713) 220-2288
Facsimile: (713) 658-8211

Marie R. Yeates
State Bar No. 22150700
myeates@velaw.com
H. Dixon Montague
State Bar No. 14277700
dmontague@velaw.com
Michael A. Heidler
State Bar No. 24059921
mheidler@velaw.com
VINSON & ELKINS LLP
1001 Fannin Street, Suite 2500
Houston, Texas 77002-6760
Telephone: (713) 757-4576
Facsimile: (713) 758-2346

Attorneys for Respondent Clear Channel Outdoor, Inc.

CERTIFICATE OF COMPLIANCE

Pursuant to Texas Rule of Appellate Procedure 9.4(i)(3), I hereby certify that this brief contains 6,620 words, excluding the words not included in the word count pursuant to Texas Rule of Appellate Procedure 9.4(i)(1). This is a computer-generated document created in Microsoft Word, using 14-point typeface for all text. In making this certificate of compliance, I am relying on the word count provided by the software used to prepare the document.

/s/ Michael A. Heidler
Michael A. Heidler

CERTIFICATE OF SERVICE

On April 28, 2014, a copy of this document was served on the following counsel by electronic service and e-mail at:

Michael P. Murphy
Susan Desmarais Bonnen
Office of the Attorney General
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
michaelp.murphy@texasattorneygeneral.gov
Counsel for the State of Texas

Scott A. Brister
State Bar No. 00000024
Andrews Kurth LLP
111 Congress Ave., Suite 1700
Austin, Texas 78701
sbrister@andrewskurth.com
***Counsel for Amici Curiae City of Houston* et al.**

Christopher B. Mosley
State Bar No. 00789505
City Of Fort Worth, Texas
1000 Throckmorton Street
Fort Worth, Texas 76102
chris.mosley@fortworthtexas.gov
Counsel for Amicus Curiae City of Fort Worth

/s/ Michael A. Heidler
Michael A. Heidler