Nos. 18-3126 and 18-3127

In the
United States Court of Appeals
for the Third Circuit

UGI Sunbury, LLC,

Appellant,

v.

A Permanent Easement for 1.7575 Acres, *et al.*, *Appellees*.

UGI Sunbury, LLC,

Appellant,

v.

A Permanent Easement for 0.4308 Acres, *et al.*,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

OWNERS' COUNSEL OF AMERICA'S MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit L.A.R. 26.1.1, undersigned counsel certifies that to his knowledge, the only interested parties omitted from the certificates of interested persons which have already been submitted are:

1. Owners' Counsel of America (amicus curiae); Owners' Counsel of America has no parent corporation and issues no stock.

2. Robert H. Thomas (counsel for amicus curiae) and Damon Key Leong Kupchak Hastert (law firm of counsel for amicus curiae). The law firm has no parent corporation, and all stock is held by the lawyer/Directors of the firm.

3. Diane E. Feuerherd and Miller, Miller & Canby, Chartered (co-counsel for amicus curiae, and her law firm). The law firm has no parent corporation and all stock is held by the lawyer/shareholders of the firm.

Respectfully submitted,

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Counsel for Amicus Curiae

Honolulu, Hawaii, May 15, 2019.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF OWNERS' COUNSEL OF AMERICA IN SUPPORT OF APPELLEES

Owners' Counsel of America (OCA) respectfully moves, pursuant to Fed. R. App. P. 29(a)(3) and Third Cir. L.A.R. 27, for leave to file the attached brief amicus curiae.

1. Courts routinely permit non-parties to file amicus curiae briefs in support of the parties in appeals before this court and other courts. Motions for leave to file amicus curiae briefs are granted in recognition that they may helpful to the Court in understanding the importance of the issues involved, determining the rules of law applicable to the case, and to point out to the court material issues the parties' briefs do not address in detail.

2. OCA is an invitation-only national network of the most experienced eminent domain and property rights attorneys. Only one member lawyer is admitted from each state. They have joined together to advance, preserve, and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See*

James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA is a non-profit 501(c)(6) organization sustained solely by its members. OCA members, their firms, or their entities have been counsel for a party or amicus in many of the property cases the eminent domain and takings cases the courts nationwide have considered in the past forty years,[1] and OCA members have also authored and edited treatises, books, and law review articles on property law, eminent domain, and property rights.[2]

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1. *See*, *e.g.*, *United States v. 50 Acres of Land*, 469 U.S. 24 (1984). *See also Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1 (1990); *Arkansas Game and Fish Comm'n v. United States*, 133 S. Ct. 511 (2012), and *Koontz v. St. Johns River Water Mgmt Dist.*, 133 S. Ct. 2586 (2013); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 130 S. Ct. 2592 (2010); *Winter v. Natural Resources Def. Council*, 555 U.S. 7 (2008); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323 (2005); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Yee v. City of Escondido*, 503 U.S. 519 (1992); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987); *First English Evangelical Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987); *Agins v. City of Tiburon*, 447 U.S. 255 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

2. *See*, *e.g.*, Michael M. Berger, Taking Sides on Takings Issues (Am. Bar Ass'n 2002) (chapter on *What's "Normal" About Planning Delay?*); Michael M. Berger, *Supreme Bait & Switch: The Ripeness Ruse in Regulatory*

3. OCA's lawyer members represent property owners in eminent domain and takings cases in state and federal courts nationwide. Accordingly, they have a keen interest in the issue presented by the pending appeals, namely the continued viability of "stigma" damages, or "claims for severance damages based on the likelihood that prospective buyers would fear hazards arising from the Government's use of condemned property,"[3] which courts around the country have identified and awarded for over half a century. This is an issue of pressing national importance.

Takings, 3 Wash. U.J.L. & Policy 99 (2000); Michael M. Berger & Gideon Kanner, *Thoughts on the White River Junction Manifesto: A Reply to the "Gang of Five's" Views on Just Compensation for Regulatory Taking of Property*, 9 Loy. L.A.L. Rev. 685 (1986); William G. Blake, The Law of Eminent Domain—A Fifty State Survey (Am. Bar Ass'n 2012) (editor); Leslie A. Fields, Colorado Eminent Domain Practice (2008); John Hamilton, Kansas Real Estate Practice And Procedure Handbook (2009) (chapter on *Eminent Domain Practice and Procedure*); John Hamilton & David M. Rapp, Law and Procedure of Eminent Domain in the 50 States (Am. Bar Ass'n 2010) (Kansas chapter); Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective of Penn Central Transportation Co. v. City of New York*, 13 Wm. & Mary Bill of Rts. J. 679 (2005); Dwight H. Merriam, Eminent Domain Use and Abuse: *Kelo* in Context (Am. Bar Ass'n 2006) (coeditor); Michael Rikon, *Moving the Cat into the Hat: The Pursuit of Fairness in Condemnation, or, Whatever Happened to Creating a "Partnership of Planning?"*, 4 Alb. Gov't L. Rev. 154 (2011); Randall A. Smith, *Eminent Domain After Kelo and Katrina*, 53 La. Bar J. 363 (2006); (chapters on *Prelitigation Process* and *Flooding and Erosion*).

3. *United States v. 14.38 Acres of Land, More or Less Situated in Leflore County, State of Miss.*, 80 F.3d 1074, 1079 (5th Cir. 1996).

The attached proposed amicus brief of OCA sets forth our arguments on this issue.

4. Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amicus certifies that no party's counsel authored the attached proposed brief in whole or in part; no party or party's counsel contributed money intended to fund the brief's preparation or submission; and no person other than amicus, its counsel, and its members contributed money intended to fund the brief's preparation or submission.

5. This motion and proposed brief are timely because they are being filed within the time set forth in Fed. R. App. P. 29(a)(6). The proposed brief complies with Fed. R. App. P. 29(a)(5), because it contains 3,431 words.

6. All parties to this appeal have been notified of our intention to file the proposed brief. Counsel for the Appellant, and counsel for the Appellees consented.

7. Given amicus's substantial interest in this case and its belief that the attached proposed brief will aid the court in its analysis and disposition of the appeal, OCA respectfully moves for leave to file the attached proposed brief as amicus curiae.

Respectfully submitted,

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Counsel for Amicus Curiae

Honolulu, Hawaii, May 15, 2019.

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure Rule 32(g), I certify that this motion complies with the length limitations set forth in Fed. R. App. P. 27(d)(2)(A) because it contains 1,010 words, as counted by Microsoft Word, excluding the items that may be excluded under Fed. R. App. P. 27(a)(2)(B).

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CERTIFICATE OF SERVICE

I certify that on May 15, 2019, I served the foregoing motion upon all counsel of record through the CM/ECF system.

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3. Diane E. Feuerherd and Miller, Miller & Canby, Chartered (co-counsel for amicus curiae and her law firm). The law firm has no parent corporation and all stock is held by the lawyer/shareholders of the firm.

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Honolulu, Hawaii, _____, 2019.

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IDENTITY AND INTEREST OF AMICUS

Owners' Counsel of America (OCA) is an invitation-only national association of the most experienced eminent domain and property rights attorneys.[1] They have joined to advance, preserve, and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA is a 501(c)(6) organization sustained solely by its members. OCA members, their firms, and their legal organizations have been counsel for a party or amicus in many of the property, eminent domain, and takings cases the courts nationwide have considered in the past forty years, including the defense of Suzette Kelo in the landmark U.S. Supreme Court case *Kelo v. City of New London*, 545 U.S. 469 (2005). OCA

1. All parties been notified of our intention to file. Counsel for the Appellants and counsel for the Appellees consented. In accordance with Fed. R. App. P. 29(a)(4)(E), amicus states that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and no person other than amicus curiae and its counsel and members, contributed money that was intended to fund preparing or submitting this brief.

members have also authored and edited treatises, books, and law review articles on property law, eminent domain, and property rights. OCA's members represent property owners in eminent domain and takings cases in state and federal courts nationwide, including takings cases under the Natural Gas Act.

OCA thus has a keen interest in the issue presented by the pending appeal, namely the continued viability of "stigma" damages, or "claims for severance damages based on the likelihood that prospective buyers would fear hazards arising from the Government's use of condemned property,"[2] which courts from around the country have identified and awarded for over half a century.

ARGUMENT

UGI Sunbury, LLC ("UGI") condemned portions of privately-owned land to build its natural gas pipeline. Natural gas pipelines have made headlines nationwide recently due to safety concerns.[3] In takings such

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2. *United States v. 14.38 Acres of Land, More or Less Situated in Leflore County, State of Miss.*, 80 F.3d 1074, 1079 (5th Cir. 1996).

3. *See* Tim McLaughlin, *Massachusetts gas explosions shine spotlight on century-old pipelines* (Sep. 14, 2018) https://www.reuters.com/article/us-massachusetts-explosions-pipeline/massachusetts-gas-explosions-shine-spotlight-on-century-old-pipelines-idUSKCN1LU2KK; *Enbridge gas*

as these, where only a portion of a parcel is condemned, severance damages are a fundamental component of just compensation, awarded for the injury posed to the remainder of the landowner's property as a result of the taking of a portion of it.

As a particular form of severance damages, stigma is based on the likelihood that the condemnor's use of the property taken—here, as a pipeline transporting explosive natural gas through the landowner's property—will "create in the general public fears which make the property less desirable and thus diminish the market value of the [landowner's] property." *United States v. Robertson*, 354 F.2d 877, 881 (5th Cir. 1966). Specifically, stigma "has been recognized in a number of cases that the construction of a high pressure gas pipeline across a tract of land

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pipeline explosion causes fireball in Ohio (Jan. 21, 2019) https://www.reuters.com/article/us-enbridge-gas/enbridge-gas-pipeline-explosion-causes-fireball-in-ohio-idUSKCN1PF23Q; Emily Hopkins and Sarah Bowman, *'They lose what they call home': Danger of natural gas explosions lurks just beneath surface* (Oct. 17, 2018) https://eu.indystar.com/story/news/environment/2018/10/17/massachusetts-indiana-pipeline-explosions-could-happen/1455017002/; Ken Silverstein, *Natural Gas Explosions Rock Boston Area. Will It Awaken Industry To Safety Risks* (Sep. 14, 2018) https://www.forbes.com/sites/kensilverstein/2018/09/14/natural-gas-pipeline-explosions-rock-boston-area-will-it-awaken-the-industry/. *See also* Nat. Trans. Safety Bd., *Pipeline Accident Reports* https://www.ntsb.gov/investigations/AccidentReports/Pages/pipeline.aspx.

may have the effect of diminishing the market value of that portion of the remaining property which lies in close proximity to that pipeline, because of the dangerous potentialities of such line and the fear which prospective purchasers may have of such danger."[4]

Here, neither party used a sales comparison approach to calculate the post-taking value of the properties, which would include market stigma. *See* JA14 (Don Shearer, the landowners' expert, could not locate comparable properties to compare to the condemned properties); JA 16 (UGI's expert agreed: "Once again, like Mr. Shearer, [UGI's] Mr. Gillooly could not find comparable post-taking properties."). Lacking comparable properties by which to measure the market, both parties employed other valuation methods. Thus, the district court admitted and credited Mr. Shearer, who opined based upon his experience in appraising properties, together with his "damaged goods" theory, that the value of the remainder properties decreased as a result of the market stigma created by UGI's pipeline.[5]

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4. *Louisiana Resources v. Langlinas*, 383 So.2d 1356, 1361-62 (La. App. 1980).

5. JA14.

UGI and its amici (Interstate National Gas Association of America (INGAA) and Marcellus Shale Coalition (MSC) assert that a calculation of stigma damages is admissible only if based upon a sales comparison analysis—more specifically, a paired sales analysis.[6] They ask this Court to prohibit the trier of fact from considering the diminution in value brought on by the market's reaction to an adjacent gas pipeline, where comparable sales data is not available. As will be demonstrate herein, this stunning new rule is not only needlessly harsh, but stands in stark contrast to the host of jurisdictions which routinely consider evidence of stigma, as well as to this Court's own recognition that "[e]xpert opinion testimony acquires special significance . . . where the sole issue is the value of condemned property."[7]

I. Stigma damages are defined by the real estate market, not the pipeline's safety regulations.

Initially, Appellant's amici argue that stigma damages are not recoverable at all, because "[n]atural gas pipelines are among the most

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6. *See, e.g.*, Brief of INGAA, at 18; Brief of MSC, at 9-10.

7. *United States v. 68.94 Acres of Land, More or Less, Situate in Kent County, State of Delaware*, 918 F.2d 389, 393 (3rd Cir. 1990).

stringently-regulated industrial sectors in the United States."[8] Government regulations and industry studies, they contend, should have compelled the district court to conclude that the remainder properties cannot be stigmatized by adjacent natural gas pipeline.[9] Putting aside the question of whether these studies—which are not included in the record and were not introduced by UGI below—should be considered, whether natural gas pipelines are actually dangerous or not is not controlling, and UGI and its amici misunderstand the nature of stigma damages.

Focusing on the perception of safety in the industry—rather than in the real estate market—has been correctly rejected by courts, because it is buyers' *perception* of the dangers of natural gas pipelines which is important. In *United States ex. rel. TVA v. Easement and Right of Way*, 405 F.2d 305 (6th Cir. 1968) ("*TVA*"), a condemnation action for electric

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8. Brief of Amicus Curiae INGAA, at 8; *see also* Brief of Amicus Curiae Mercellus, at 16. INGAA and Mercellus each seek to introduce "existing studies and market research" not made a part of the district court record to rebut the court's determination that the pipeline negatively impacted the value of the remaining portions of the property. Brief of INGAA, at 9; Brief of MSC, at 17.

9. Brief of MSC, at 16. Yet, amici MSC also acknowledges gas pipelines do *rupture*, and when they do "media outlets provide wide-spread coverage," but that it is not consistent with the industry's statistics of safer operations.

power lines and supporting towers, the Sixth Circuit concluded that buyers would "remain apprehensive of these high voltage lines," even though the condemnor presented studies to the contrary, reasoning that it is the buyers' attitudes, not safety studies, that control the measure of stigma damages:

> TVA has presented us with the results of studies conducted in urban areas such as Memphis, Nashville, and Knoxville to establish that power lines do not reduce adjacent land values. Although these studies are creditable, we are not prepared to hold that the presence of electric power lines and towers has no effect on the value of the land adjacent to these structures. To so hold would be to disregard such variants as supply and demand and the peculiar buyer attitudes which frequently influence the salability of land. We have consistently allowed incidental damages to be considered in this type case. *United States ex rel. Tennessee Valley Authority v. An Easement, etc., in Logan County, Ky.*, 336 F.2d 76 (6th Cir.1964); *Hicks v. United States, for Use of Tennessee Valley Authority*, 266 F.2d 515 (6th Cir. 1959).
>
> TVA forcefully challenges the following statement in *Hicks* at page 521:
>
> 'The apprehension of injuries to person or property by the presence of power lines on the property is founded on practical experience and may be taken into consideration in so far as the lines and towers affect the market value of the land.'
>
> Since the *Hicks* case was decided, nearly ten years ago, TVA has conducted numerous safety studies and has concluded from them that apprehension of injuries is not founded on practical experience and should not be considered in awarding incidental damages. The TVA studies conducted on this issue are also creditable. However, *in final analysis, we*

> *are concerned only with market value. Although these studies may show objectively the complete safety of these structures, we are not convinced that certain segments of the buying public may not remain apprehensive of these high voltage lines, and therefore might be unwilling to pay as much for the property as they otherwise would.* On this record, allowance of incidental damages of 50 per cent of market value to the triangular tract and for a width of 100 feet on each side of the outer boundary of the remainder of the easements appears to us reasonable and proper.

TVA, 405 F.2d at 308-09 (emphasis added).

Thus, stigma damages are a measure of the real estate market's *reaction* to the public utility and perceived dangers of gas pipelines, a reality which exists regardless of the natural gas industry's safety studies and regulations. Natural gas pipelines may or may not be dangerous. But for purposes of calculating just compensation, what is actually true does not matter; rather market perception is the controlling and tantamount issue.

The *TVA* case is also compelling because the Sixth Circuit referenced prior cases in its determination that the power lines did negatively impact the market value and necessitated stigma damages to be awarded. 405 F.2d at 309 ("We have consistently allowed incidental damages to be considered in this type of case . . . .") This rationale is akin to

the district court's Memorandum Opinions in the cases now under review, which cited *United States v. 14.38 Acres of Land, More or Less Situated in Leflore County, State of Miss.*, 80 F.3d 1074, 1079 (5th Cir. 1996), among other authorities, in support of the finding that "there was an overall decrease to the value of the property as a whole, which decrease is, at least in part, due to the 'stigma' of being located so close to a natural gas pipeline." JA34 n.40; *see also* JA19 n.39.

II. For more than 75 years, federal and state courts have recognized stigma damages to be an integral part of just compensation.

The long history of stigma damages arising from partial takings for public utilities was summarized over 23 years ago by the Fifth Circuit in *United States v. 14.38 Acres of Land, More or Less Situated in Leflore County, State of Miss.*, 80 F.3d 1074, 1079 (5th Cir. 1996). There, based on a case decided in 1966, the court "recognized the viability of claims for severance damages based on the likelihood that prospective buyers would fear hazards arising from the Government's use of condemned property." *Id.* (citing *United States v. Robertson,* 354 F.2d 877 (5th Cir. 1966)).

In *Robertson*, the Fifth Circuit observed: "[c]auses of diminution of market value, the construction of a powerline carrying high voltage electricity across a tract of land which create in the general public fears which

make the property less desirable and thus diminish the market value of the property are proper to be considered, though as a separate item of damage might be too speculative and conjectural to be submitted to the Court." *Robertson* , 354 F.2d at 881 (citations omitted). The Fifth Circuit also noted the general rule:

- *United States v. 33.5 Acres of Land, More or Less, in the County of Okanogan, State of Washington,* 789 F.2d 1396 (9th Cir. 1986) (permitting severance damages based on threatened invasion of knapweed).

- *United States v. 760.807 Acres of Land, More or Less, Situated in the City and County of Honolulu, State of Hawaii,* 731 F.2d 1443, 1447 (9th Cir. 1984) ("if fear of a hazard would affect the price a knowledgeable and prudent buyer would pay to a similarly well-informed seller, diminution in value caused by that fear may be recoverable as part of just compensation.").

- *United States ex rel. TVA v. Easement and Right of Way,* 405 F.2d 305, 309 (6th Cir. 1968) ("In the final analysis, we are concerned only with market value. Although these studies may show objectively the complete safety of these structures, we are not convinced that certain segments of the buying public may not remain apprehensive of these high voltage lines, and therefore might be unwilling to pay as much for the [adjacent] property as they otherwise would.").

- *United States v. 2,877.37 Acres of Land in Harris County, Tex.,* 52 F. Supp. 696, 702 (S.D. Tex. 1943) (testimony to show severance damages based on "mental hazards" arising from fear of harm from dams or levees built by government properly admitted).

- *Florida Power & Light Co. v. Jennings,* 518 So.2d 895, 898 (Fla. 1987) ("[w]e join the majority of jurisdictions who have

considered this issue and hold that the impact of public fear on the market value of property is admissible without independent proof of the reasonableness of the fear.").

- *Ryan v. Kansas Power & Light Co.,* 815 P.2d 528, 533 (1991) (evidence of fear in marketplace admissible regarding value of property without proof of reasonableness of fear).

- *City of Santa Fe v. Komis,* 845 P.2d 753, 756 (N.M. 1992) (same).

- *Criscuola v. Power Authority of the State of New York,* 621 N.E.2d 1195, 1196 (N.Y. 1993) (same).

- *Heddin v. Delhi Gas Pipeline Co.,* 522 S.W.2d 886, 888 (Tex. 1975) (fear in minds of buying public that is based in reason or experience is relevant to proof of damages for depreciation of market value caused by fear).

III. *Daubert* does not limit evidence of stigma damages to paired sales analysis, particularly where both parties agreed that paired sales data was not available.

While stigma damages may be proven by an expert's paired sales analysis, that is not the only method of proof. Any reasonable evidence which shows the effect on the market of the public's fear of a perceived hazard may be considered by the trier of fact. Thus, public opinion polls,[10]

10. *Phillips Pipe Line Co. v. Ashley*, 605 S.W.2d 514, 517 (Mo. Ct. App. 1980) ("Phillips' own expert, Mr. Herman Bailey, testified that, as a direct result of the 1970 explosion a certain percent of people in Franklin County believe that property is worth less if it has a pipeline on it, reducing its market value."); *see also City of Santa Fe v. Komis*, 845 P.2d 753,

surveys of real estate appraisers and other professionals, and even newspapers[11] detailing the stigma have all been admitted to prove market stigma. Real estate appraisers and brokers, when admitted as experts, have also overcome a competing paired sales analysis. For example, in a natural gas pipeline condemnation the Louisiana court of appeals credited brokers and real estate appraisers who testified that "there is substantial buyer resistance to residential properties near a pipeline servitude, due to a fear of explosions," over the paired sales analysis performed on behalf of the pipeline condemnor:

> Plaintiff's experts disagreed. Mr. Hebert submitted an analysis of comparable sales which showed little or no difference in the purchase of certain subdivision lots where a similar servitude existed. While we are impressed with Mr. Hebert's study of this one subdivision, we cannot say his testimony substantially undermined the persuasiveness of defendant's experts.

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757 (N.M. 1992) ("There was no abuse of discretion in admitting the Zia poll. The poll was an effective way of showing public perception and it was relevant evidence . . . . The weight of authority in the United States allows the admission of public-opinion polls when the results of the poll are relevant . . . . The poll showed that this fear was a matter of common knowledge among those persons from whom a purchaser for the property would probably come.").

11. *Phillips Pipe Line Co.*, 605 S.W.2d at 519 (admitting newspaper articles of a pipeline explosion, "not to prove the truth of their contents . . . [r]ather to show the dissemination of the news of the explosion, and, as such they were relevant to show the existence as well as the reasonableness of the fear in the mind of possible purchasers in Franklin County.").

> It has been recognized in a number of cases that the construction of a high pressure gas pipeline across a tract of land may have the effect of diminishing the market value of that portion of the remaining property which lies in close proximity to that pipeline, because of the dangerous potentialities of such line and the fear which prospective purchasers may have of such danger.[12]

Thus, a paired sales analysis is not dispositive of the existence or amount of stigma damages. That is especially true where, as here, neither party's expert could find comparable sales to compare with these takings. Thus, this case is not an "ideal vehicle" to create a new categorical rule prohibiting the fact finder from considering anything but paired sales.[13]

Indeed, that fact cuts in the opposite direction, reinforcing the district court's conclusion that the most appropriate approach is based on the facts and circumstances of each case, ultimately to be weighed by the fact finder.

UGI and its amici nevertheless contend that *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), mandates that a land valuation expert, relying on his broker or appraisal experience in the undisputed absence of comparable sales data, must be excluded as a matter

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12. *Louisiana Resources Co. v. Laginlais*, 383 So.2d 1356, 1361-62 (La. App. 1980).

13. Contrary to INGAA's Brief, at 24.

of law. In so arguing, they misapprehend the district court's gatekeeping function under *Daubert*.

First, this Court has already acknowledged the "critical role" of valuation experts in condemnation cases and instructed "trial courts should proceed cautiously before removing from the jury's consideration expert assessments of value which may prove helpful." *United States v. 68.94 Acres of Land, More or Less, Situate in Kent County, State of Delaware*, 918 F.2d 389, 393 (3rd Cir. 1990). This is, in part, because determining the value of property in a hypothetical market is a "matter of opinion," not capable of absolute conviction:

> The value of property taken by the Government, which is no longer on the market, is largely a matter of opinion. Since there are no infallible means for determining with absolute conviction what a willing buyer would have paid a willing seller for the condemnee's property at the time of taking, eminent domain proceedings commonly pit the Government's evaluation experts against those of the landowner. Thus, the exclusion of one or all of either party's proposed experts can influence substantially the amount of compensation set by the factfinder.

Id.

Second, *Daubert* made clear that the court's gatekeeping function does not replace the adversary system:

> Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the

> traditional and appropriate means of attacking shaky but admissible evidence.

Daubert, 509 U.S. at 596. Instead, this standard admits expert testimony perceived, by the adversary or even the court, as "shaky." *Id.*

Finally, the admissibility of an expert's testimony is based on his or her background and experience, not the absence of market data. Here, the record plainly shows that the district court had alternative factual bases for allowing an opinion on stigma damages.

CONCLUSION

Evidence of stigma damages based on the market's perception of the stigma resulting from the condemnor's use of the land is routinely admitted, and this Circuit should not conclude otherwise. The district court's judgments should be affirmed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 29(b)(4), amicus curiae states that this brief complies with the type and volume limitations because it contains 3,431 words, excluding those parts of the brief exempted by Fed. R. App. P. 32(a)(7)(b)(iii), and this document has been prepared in a proportionally-spaced typeface in font Century Schoolbook, point sized 14.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing documents with the Clerk of the Court of the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system, and that participants in the case who are registered CM/ECF users will be served by the system.

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