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 First Court of Appeals in Houston

PETITIONER'S REPLY BRIEF

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JONATHAN F. MITCHELL
Solicitor General

MICHAEL P. MURPHY
Assistant Solicitor General
State Bar No. 24051097

SUSAN DESMARAIS BONNEN
Assistant Attorney General
State Bar No. 05776725

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

COUNSEL FOR PETITIONER

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INTRODUCTION

This inverse-condemnation case addresses the compensability and valuation of Clear Channel's billboards. The court of appeals erred by rejecting the well-established fixture test and concluding that the billboards were taken, as part of the real estate, when the State condemned the land on which they stood. The court of appeals further erred when it allowed consideration of billboard advertising revenue and sign permits in valuing the billboards. These errors were harmful because they allowed the jury to consider these noncompensable interests in calculating the condemnation damages award pursuant to a broad-form instruction.

Clear Channel silently concedes that it cannot prevail under established law by advocating in its response for a rewrite of longstanding fixture and condemnation law. Addressing whether the billboards remain personalty, Clear Channel all but admits the error of the court of appeals's blanket holding that the fixture test "does not apply to condemnation claims." *State v. Clear Channel Outdoor, Inc.*, No. 01-11-00197-CV, 2012 WL 4465338 at *4 (Tex. App.—Houston [1st Dist.] Sept. 27, 2012, pet filed) (mem. op.). Clear Channel argues

instead that the Court should adopt a modified fixture test that prohibits consideration of a tenant's contractual right to relocate its property expressed in a lease with the landowner. Resp. at 29. That argument is unreasonable and unnecessary and the Court should reject Clear Channel's attempt to rewrite the established fixture test.

On the issue of valuing the billboards according to advertising revenue, Clear Channel doesn't even mention, much less defend, the court of appeals's flawed reasoning. Instead, Clear Channel tries to avoid this Court's command that courts "should not allow evidence of valuation based on advertising income," *State v. Cent. Expressway Sign Assocs.*, 302 S.W.3d 866, 874 (Tex. 2009) (hereinafter *CESA*), by erroneously cabining and distinguishing *CESA*. The Court should not accept Clear Channel's arguments.

REPLY TO CLEAR CHANNEL'S STATEMENT OF FACTS

Clear Channel's response includes two factual errors that deserve correction. First, Clear Channel contends that the State ordered it to destroy the billboards, and second, Clear Channel asserts that the State originally attempted to condemn the billboards as realty. Neither assertion is correct.

A. The State Never Ordered Clear Channel to Tear Down The Billboards.

Clear Channel claims in its statement of facts and throughout its brief that "[t]he State ordered Clear Channel to tear down its sign structures." Resp. at 4; *see also* Resp. at 13, 18, 57, 58. It even argues that by this "order" the "State 'took' Clear Channel's sign structures." Resp. at 57. That is false. The only basis for Clear Channel's assertion is a February 2005 letter—one year *before* the State filed petitions for condemnation for the two parcels—that "advised" Clear Channel that the billboards "would have to be removed from the Property." 1.CR.147. That advisory letter was not an "order" to "tear down" the billboards. Regardless, the State would have lacked authority to issue any such order because it had not yet condemned the land.

B. The State Never Attempted to Condemn Clear Channel's Billboards.

Perhaps to distract from the fact that Clear Channel originally agreed to relocate its billboards, Clear Channel asserts that the State initially "attempt[ed] to condemn Clear Channel's sign structures as realty," based solely on the fact that the survey attached to the petition for condemnation showed the location of the billboard. Resp. at 4; *see*

also 1.CR.9, (Sterling survey), 2.CR.636 (Murphy survey). Clear Channel is incorrect.

By each petition, the State sought to condemn only the real estate "described in Exhibit 'A,'" which was a written "property description" and a survey (map) of the property created by a third party. 1.CR.4, 7-9; 2.CR.631, 634-36. Nowhere did the State purport to take everything depicted in the survey and the "property description" made no mention of the billboards. 1.CR.3, 2.CR.630.

ARGUMENT

I. THE TRADITIONAL FIXTURE TEST APPLIES IN CONDEMNATION CASES AND ITS APPLICATION CONFIRMS THAT THE BILLBOARDS ARE CLEAR CHANNEL'S PERSONAL PROPERTY.

Texas courts have long considered three factors in determining whether personalty has become part of the realty: "(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." *Logan v. Mullis*, 686 S.W.2d 605, 607 (Tex. 1985); *see also, e.g.*, *Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475, 479 (Tex. 1995); *O'Neil v. Quilter*, 234 S.W. 528, 529 (Tex. 1921); *Hutchins v. Masterson & Street*, 46 Tex. 551, 554 (1877). The court of appeals erroneously held that "*Logan* does not apply to condemnation claims." 2012 WL 4465338 at *4.

Clear Channel does not agree with the court of appeals's wholesale rejection of *Logan*, but instead advances a different approach, arguing that *Logan* should be revised. Resp. at 29. The Court should reject that argument and confirm that the fixture test articulated in *Logan* applies in condemnation cases. Application of the *Logan* test confirms that Clear Channel's billboards are it personal property.

A. Clear Channel's Attempt to Rewrite *Logan* Is Unreasonable and Unnecessary.

Implicitly recognizing the error of the court of appeals's flat rejection of the fixture test, Clear Channel tries a different approach in its response. It now argues that *Logan* should be rewritten to exclude any consideration of a tenant's contractual prerogative to remove its property in condemnation cases. Resp. at 27-29. The Court should reject this radical strategy.

1. *Almota* and *Adkisson* do not prohibit consideration of any Evidence of an owner's intent for its property and they do not foreclose application of the fixture test in condemnation.

Clear Channel's only support for its argument to modify *Logan* is a misinterpretation of *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470 (1973), and *Brazos River Conservation & Reclamation District v. Adkisson*, 173 S.W.2d 294, 300 (Tex. Civ. App.—Eastland 1943, writ ref'd). Relying on *Almota* and *Adkisson*, Clear Channel argues that courts may not even consider a tenant's negotiated rights to remove its property if they are expressed in a lease agreement with the landowner. Resp. at 18-20. That argument is flawed because

neither case forbids consideration of a tenant's intent for its property in making a fixture determination.

a. *Almota* did not prohibit consideration of an owner's intent regarding the character of the property.

Like the court of appeals, Clear Channel misunderstands the holding and the reach of *Almota*. Although it correctly notes that *Almota* concerned fixtures, Resp. at 20-21, Clear Channel fails to acknowledge that this case addresses the antecedent question: are the billboards fixtures?

Contrary to Clear Channel's contention, *Almota* did not hold that "a condemnor may not rely on the rights of a tenant vis-à-vis [a] landlord." Resp. at 21. Rather, the U.S. Supreme Court held that a condemnor cannot avoid paying compensation for taken property by relying on a fixture owner's right to remove the fixture. *See* 409 U.S. at 478 & n.5. The *Almota* court had no reason to address whether a tenant's right to remove its property may be considered in determining whether property is a fixture in the first place.

Almota's reasoning, which concerns the constitutional right to just compensation for taken property, does not extend to the fixture test,

which concerns whether a person's property has become a permanent part of the realty. *See Logan*, 686 S.W.2d at 607.

b. *Adkisson* does not prevent consideration of lease terms to determine owner intent.

Adkisson is inapplicable because it dealt with a fundamentally different scenario. In that case, a water district destroyed an oil and gas company's well, well casings, and other production equipment by flooding the land to create a reservoir. *Adkisson*, 173 S.W.2d at 297. The district tried to avoid compensating the oil and gas company for the fixtures that had been "permanently submerged," but the court sensibly held that the condemnor must pay for what it destroyed. *Id.* at 301. It was in that context that the court prohibited the district's reliance on the company's right to remove its well casings and equipment as a basis for avoiding condemnation damages.

Adkisson differs from this case in a number of important respects. Unlike the district in *Adkisson*, for example, the State did not destroy the property at issue. Also, unlike the mineral lease in *Adkisson*, which was a determinable fee simple in the minerals and would continue as long as oil and gas production persisted, *id.* at 298, the leases here had limited terms and do not convey any fee simple rights to Clear Channel.

See 10.RR.DX.11-A (Murphy lease); 10.RR.DX.11-B (Sterling lease). Furthermore, the well casings and related equipment at issue in *Adkisson* were inextricably tied to the lease and could not be removed without terminating the lease. *Id.* at 300-01. Not so here. Clear Channel's leases did not hinge on the billboards' presence on the land, nor did the leases require uninterrupted billboard advertising. *See* 10.RR.DX.11-A (Murphy lease); 10.RR.DX.11-B (Sterling lease).

2. Texas courts are divided about the fixture test and *Almota* and *Adkisson*'s application.

Texas courts are split over the proper interaction of fixture and condemnation law in addressing billboards. *See* Petr's Br. at 17. Clear Channel declares that the three Texas courts that have considered the issue have ruled that *Almota* and *Adkisson* prohibit consideration of a tenant's removal rights in condemnation. Resp. at 22-23. But Clear Channel fails to mention that those cases are split on whether *Almota* and *Adkisson* bar application of the fixture test. *Compare, e.g.*, *State v. Moore Outdoor Props., L.P.*, 416 S.W.3d 237 (Tex. App.—El Paso 2013, pet. filed) (the fixture test applies); *Harris Cnty. Flood Control Dist. v. Roberts*, 252 S.W.3d 667 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (same), *with Clear Channel*, 2012 WL 4465338; *State v. Clear Channel*

Outdoor, Inc., 274 S.W.3d 162, 166 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (interlocutory decision) (same); *Harris Cnty. v. Clear Channel Outdoor, Inc.*, No. 14-07-00226-CV, 2008 WL 1892744 (Tex. App.—Houston [14th Dist.] April 29, 2008, no pet.) (mem. op.) (same).

Clear Channel also argues that the court of appeals's split with other Texas appellate courts—including the Fourteenth Court in Houston—over *Logan*'s application and applicability in condemnation cases is mere "semantics." Resp. at 30-31. Not so. Texas courts are not of one mind regarding *Logan*. Petr's Br. at 17-18.

In an attempt to show uniformity among the appellate courts on the application of *Logan*, Clear Channel erroneously claims that the Second Court of Appeals in *City of Argyle v. Pierce*, 258 S.W.3d 674 (Tex. App.—Fort Worth 2008, pet. dism'd), held that the billboard in that case was "part of the condemned realty" and "reject[ed] attempts by condemnors to use lease language to show that a condemnee intended for property to be personalty." Resp. at 30-31. That is not true.

The *Pierce* court did *not* hold that the billboard was part of the land and it did *not* reject use of lease language. Rather, it invoked

Logan, held that the billboard owner had not met its evidentiary burden, and concluded that "the sign is *not* a property interest compensable as a result of inverse condemnation." 258 S.W.3d at 684 (emphasis added).

Furthermore, Clear Channel's answer for the rift among Texas appellate courts regarding the applicability of *Logan* in condemnation cases falls short. *See* Petr's Br. at 17-19. Clear Channel attempts to paper over the split among courts on this issue by arguing that the results in those cases were the same. Resp. at 30-31. That is false, as *Pierce* shows, and it is also irrelevant. The conflict at issue in this case is over the proper legal standard, not particular outcomes. The split among Texas courts confirms the need for this Court's intervention.

3. Courts in other states are also split regarding how to determine the character of billboards in condemnation.

Like Texas, courts across the country are divided about the proper standard for determining the character of billboards in condemnation. *See* Petr's Br. at 33-35. Clear Channel's litany of cases from other

states that it argues have adopted *Almota's* reasoning, Resp. at 23-24, is unhelpful; at most it verifies that this issue is unsettled.[1]

Most of the cases in Clear Channel's list address what are undisputed fixtures or improvements, and they do not engage the antecedent issue—relevant here—about the property's character. For example, *United States v. Seagren* concerned the government's condemnation of land on which the leaseholder had constructed two houses, a workshop, and underground storage tanks. 50 F.2d 333, 334 (D.C. Cir. 1931). The government conceded that the structures were part of the realty, but it sought to avoid payment because the lease authorized the lessee to remove the structures upon termination of the lease. *Id.* at 335. The court held that the government could not rely on the lease provision to "change the essential character of structures from realty, which it must pay for, to personalty, which it may order removed without payment . . . ." *Id.*[2]

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[1] Notably, none of the cases in Clear Channel's list cites *Almota.*

[2] Clear Channel's other cited cases, Resp. at 23-24, are similar. *See Lumbermens Mut. Ins. Co. v. Cantex Mfg. Co.*, 262 F.2d 63, 65 (5th Cir. 1958) (an insurance case concerning items the court held "ha[d] been annexed to the realty"); *Gilbert v. State*, 338 P.2d 787, 788-89 (Az. 1959) (addressing compensation for permanent buildings constructed on leased property that were undisputedly improvements and therefore were "in the nature of 'real estate'"); *Ark. State Highway Comm'n v. Humble Oil Co.*,

At most, the cases from other jurisdictions cited by Clear Channel stand for the uncontroversial idea that a tenant's contractual right to remove its property is not *dispositive* of the property's character. The State has never argued otherwise.

4. Exclusion of the lease terms would not improve fixture or condemnation law.

Exclusion of the right-to-removal lease provisions would harm, not advance, proper application of the fixture test, which has as its primary focus the intent of the property's owner. *See Logan*, 686 S.W.2d at 607. Clear Channel does not really dispute that the lease terms it seeks to

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453 S.W.2d 408, 410 (Ark. 1970) (concerning the compensability of a fixture on condemned land); *People v. Klopstock*, 151 P.2d 641, 644 (Cal. 1944) (concerning the State's "destruction of [an] asphalt plant and appurtenant facilities on the condemned premises"); *Roffman v. Wilmington Hous. Auth.*, 179 A.2d 99, 101 (Del. 1962) (addressing condemnors duty to compensate for fixtures owned by a leaseholder); *Commonwealth, Dept. of Highways v. Polk*, 389 S.W.2d 928, 929 (Ky. 1965) (holding that "buildings and fixtures attached to the real estate must be treated as real property in determining the total [condemnation] award"); *State v. Illinois Cent. R.R. Co.*, 256 So.2d 819, 821 (La. Ct. App. 1972) (addressing the State's requirement to pay for "improvements" including a "masonry service station building with concrete foundations" on condemned land); *City of St. Louis v. Senter Comm'n Co.*, 82 S.W.2d 87, 90 (Mo. 1935) (en banc) (addressing "fixtures which are attached to and become a part of the realty"); *City of Buffalo v. Michael*, 209 N.E.2d 776 (N.Y. 1965) (considering a sign structure fixture that was "[p]ermanently annexed to the roof of [a] building"); *State v. De Lay*, 181 N.E.2d 706, 708 (Ohio Ct. App. 1959) (involving a restaurant building and other improvements); *Lamar Corp. v. Commonwealth, Transp. Comm'r*, 552 S.E.2d 61, 64 (Va. 2001) (treating billboards as inherently part of the realty); *United States v. 19.7 Acres of Land*, 692 P.2d 809, 813 (Wash. 1984) (holding that improvements owned by a tenant are compensable); *Mr. Klean Car Wash, Inc. v. Ritchie*, 244 S.E.2d 553, 557 (W. Va. 1978) (concerning "fixtures and [a] building" owned by the tenant).

exclude are probative of the billboards' character, and its vigorous effort to exclude that evidence confirms their probative value.

The most Clear Channel offers in favor of exclusion is an argument that the right to remove is only to protect the billboards from falling into the hands of a competitor if Clear Channel lost the leases. Resp. at 38. But that argument only suggests that Clear Channel and the landowner consider its billboards to be personalty. After all, if the lease was for a building, it would be absurd to think that Clear Channel would have the right to remove it just to foil a competitor's use of the building.

B. Application of the Fixture Test Demonstrates That the Billboards Are Personal Property.

Applying *Logan*'s three-part test to the billboards in this case, it is evident that the billboards are personal property. *See* Petr's Br. at 25-36. In response, Clear Channel applies a modified test and argues that the billboards are realty because they "are annexed to the condemned realty," they are "adapted to the purpose of the condemned realty," and "Clear Channel had no intention" to remove the billboards. Resp. at 31-32. Clear Channel is wrong regarding each factor of the test, as explained below. Its overarching contention—that the taking occurred

because it had no desirable relocation options—is also incorrect. The necessity of a particular location does not render something part of the real estate or create a taking when the land is condemned. *See CESA*, 302 S.W.3d 871 (explaining that business income cannot be considered even when "the business's location is crucial to its success"); *see also AVM-HOU, Ltd. v. Capital Metro. Transp. Auth.*, 262 S.W.3d 574, 579 (Tex. App.—Austin 2008, no pet.) (rejecting the argument that "the impossibility of relocation transforms the loss of its business" into a taking).

1. Annexation requires purposeful and permanent attachment, not merely a physical connection to the ground.

The first element of *Logan* is the "mode and sufficiency of annexation." 686 S.W.2d at 607. Clear Channel equates annexation with bare physical attachment. Resp. at 32-34. But that is not the standard. Under the fixture test, physical attachment is necessary but it is not sufficient for annexation. *See Sonnier*, 909 S.W.2d at 479 (distinguishing attachment from annexation and noting that "it is the annexation that transforms the personalty into an improvement").

Annexation is the physical joinder of personalty with reality with the intent that it become a permanent part of the realty. *See id.*

Focusing on the physical attachment of the billboards, Clear Channel attempts to turn the Court's attention away from the inconvenient reality that Clear Channel initially agreed to relocate the billboards in this case, *see* Petr's Br. at 28-29, and has argued that its billboards are moveable personal property in another case, *Clear Channel Outdoor, Inc. v. Abdelahad*, No. 05-P-982, 850 N.E.2d 1135 (Mass. App. Ct. July 26, 2006) (mem. op.). As the record shows, Clear Channel refused to move the billboards not because they were part of the realty, but because it concluded that alternative locations were not as desirable. 1.CR.46, 47; 8.CR.2619-21.

Clear Channel's assertion that "relocation" is a misnomer, and that it would have to tear down the billboards to remove them, Resp. at 5-6, simply shows the manner of relocation, it does not speak to the billboards' annexation. Clear Channel's representative stated that the billboards would have to be dismantled and that only parts of the old sign would normally be used to reconstruct a replacement at a new site. 1CR77; 2CR555. But even so, the State pays up to 50% of the billboard

cost for billboard modifications if the owner is unable to use the entire billboard at a new location. 5.CR.1345.

Additionally, billboard relocation is common in Texas. The State "relocates dozens of billboards every year." 5.CR.1345; *see also* 5.CR.1466-69 (listing billboard relocation expenses for fiscal years 2007 and 2008). In fact, between 2007 and 2010, the State spent $3.8 million in relocation benefits for billboards displaced by highway projects. 7.CR.2451; *cf. CESA*, 302 S.W.3d at 869 (noting that "Viacom relocated its billboard to a new location" in the course of a condemnation action).

2. The billboards are not adapted to the use of the property.

Clear Channel's adaption argument, Resp. at 34, also falls short. Clear Channel contends that the billboards are adapted for the use of the land because they are in a highly valuable spot for advertising. *Id.* But that misses the aim of the inquiry, which is the item's relationship with the land. *See Logan*, 686 S.W.2d at 607. There is no dispute that the billboards were used exclusively for off-site advertising that had nothing to do with the land on which they stood. *See* Petr's Br. at 30-31.

3. Lack of intent to remove the billboards does not answer the question whether Clear Channel intended them to be part of the real estate.

The "preeminent" element of the fixture test is whether the owner intends the property to be a permanent part of the real estate. *Logan*, 686 S.W.2d at 607. The record establishes that the answer to that question is "yes." *See* Petr's Br. at 26-27.

Clear Channel distorts the inquiry by focusing on its purported *lack of intent* to remove the billboards, Resp. at 35-38, while ignoring probative evidence of its intent for the billboards, such as its right to remove the billboard at any time for any reason, *see* Petr's Br. at 26-27. In making its argument, Clear Channel relies heavily on the inability to secure similarly desirable location for the billboards. Resp. at 35-38. But that is not the test. Under *Logan*, the question is whether the owner intended the item to become a permanent part of the land. 686 S.W.2d at 607. The inability to find a profitable alternative location does not mean that Clear Channel intended the billboards to be a permanent part of the real estate.

4. The State's prior policy regarding billboards is irrelevant to whether Clear Channel's billboards remain its personal property.

Clear Channel argues that the State decided in 2004 to cease complying with its constitutional duty to compensate billboard owners for taking their property. Resp. at 38-40. This false narrative proceeds from the mistaken assumption that the billboards are fixtures that the State has taken. *See* Resp. at 39-40. The relevant issue is whether a billboard is part of the realty such that the State acquires it when it takes the land on which the billboard stands. Clear Channel cites no law that prohibits the State from no longer skipping that initial inquiry. While it may be true that any "right to compensation comes from the Constitution," Resp. at 39, the State explained in its opening brief that Clear Channel is not constitutionally entitled to compensation because the State did not take its billboards. *See* Petr's Br. at 12-13. The State's policy decision simply has no bearing on this case because it does not answer whether the billboards were taken.

C. The State Owes Clear Channel No Compensation for the Billboards as Personal Property.

Clear Channel argues that the State must compensate Clear Channel for the billboards even if they are personalty on the theory that

the State ordered the billboards' destruction. Resp. at 57-58. That argument misstates the record and violates a Rule 11 agreement.

To begin with, Clear Channel's allegation that the State ordered it to tear down the billboards is false. *See supra* at 2-3. And by arguing that removal of the billboards constituted a taking, Resp. at 57, Clear Channel violates the terms of a Rule 11 agreement with the State.

After Clear Channel asserted its takings claim, it entered into an agreement with the State in which, among other things, Clear Channel agreed to remove the billboards for $10,000. 2.CR.578. A key element of the agreement was that removal of the billboards "will not be used by either party . . . to prove or disprove the compensability of Clear Channel's billboards." *Id.* But that is exactly what Clear Channel does here by arguing that the State "reduced Clear Channel's sign structures to a pile of rubble." The Court should disregard Clear Channel's argument on this point.

D. Clear Channel Is Not Entitled to Compensation Under the Highway Beautification or Relocation Statutes.

Clear Channel contends that state and federal highway beautification statutes and a federal relocation statute also establish its right to compensation for the billboards. *See* Resp. at 58-59. Those

claims are meritless because the statutes do not create any privately enforceable rights and they do not establish that the billboards are part of the realty.

1. The federal and state highway beautification statutes are irrelevant and do not create enforceable rights.

The Federal Highway Beautification Act (FHBA), 23 U.S.C. § 131, requires that "just compensation" be paid when the State removes a billboard that is not permitted under the Act. *Id.* § 131(g). However, the FHBA does not create any privately enforceable rights against the State, and therefore Clear Channel has no claim under the FHBA. *Nat'l Adver. Co. v. City of Ashland*, 678 F.2d 106, 109 (9th Cir. 1982) (explaining that the FHBA "creates no federal rights in favor of billboard owners, it creates no private cause of action for their benefit" and it "cannot be the source of a remedy"); *see also Gonzaga Univ. v. Doe*, 536 U.S. 273, 286 (2002) (explaining that "where the text and structure of a statute provide no indication that Congress intends to create new individual rights, there is no basis for a private suit, whether under § 1983 or under an implied right of action").

Even if Clear Channel could enforce the FHBA against the State, however, the statute's compensation requirement is inapplicable here for two reasons. First, the FHBA does not apply to highway construction projects. *Id.* § 131(a). Congress enacted the FHBA to encourage States to restrict the erection of billboards and off-premises signs along interstates and other highways "in order to protect the public investment in such highways, to promote the safety and recreational value of public travel, and to preserve natural beauty." 23 U.S.C. § 131(a). The FHBA achieves these goals by conditioning receipt of a portion of federal highway funds on the adoption of state controls that comport with the FHBA. *Id.* § 131(b).

Second, the State did not "remove[]" the billboards, as required in § 131(g). At the time of the condemnation, the billboards were standing undisturbed on the land. Accordingly, the FHBA provides no recourse for Clear Channel.

The Texas Highway Beautification Act (THBA), enacted to comply with the FHBA, TEX. TRANSP. CODE § 391.002(a), is inapplicable for the same reasons. To begin with, the THBA does not create any privately enforceable rights. And, like the FHBA, the THBA does not apply to

highway construction projects. *Id.* § 391.002(b). Though the statute requires "just compensation" when a billboard is acquired pursuant to the THBA, *id.* §§ 391.033, .181, it does not deem billboards to be part of the real estate and it does not require the State to acquire billboards. To the contrary, the THBA contemplates that billboards are personalty that may be relocated. *See id.* § 391.253 (permitting a billboard owner to relocate signs when highway construction requires their removal). Consequently, Clear Channel cannot force the State to pay for its billboards under the THBA.

2. The Uniform Relocation Act does not create a private right of action and has no bearing on compensability.

Clear Channel's argument that the State took the billboards under the Uniform Relocation Assistance and Real Property Acquisition Policies Act (URA), 42 U.S.C. § 4601 et seq., *see* Resp. at 59-60, is also invalid. Like the FHBA and THBA, the URA does not create privately enforceable rights arising from condemnation proceedings. 42 U.S.C. § 4602(a) ("The provisions of section 4651 of this title create no rights or liabilities and shall not affect the validity of any property acquisitions by purchase or condemnation."); *see also Delancey v. City of Austin*, 570

F.3d 590, 594 (5th Cir. 2009) (holding that "the URA does not create a private right of action for money damages"). Accordingly, Clear Channel cannot enforce the URA against the State.

Moreover, the URA and its related regulations do not support Clear Channel's claim that the State took the billboard. The URA does not classify billboards as either improvements or personalty. Rather, the URA regulations recognize that billboards may be either personalty or improvements. *See* 49 C.F.R. §§ 24.105(a)-(c) (improvement), 24.301(f) (personal property). Thus, the URA offers no support for Clear Channel's assertion that the State took the billboard.

II. THE TRIAL COURT ABUSED ITS DISCRETION BY ALLOWING VALUATION EVIDENCE THAT WAS BASED ON ADVERTISING REVENUE AND OTHER NONCOMPENSABLE INTERESTS.

Time and again, this Court and the United States Supreme Court have held that business damages—including "future loss of profits" and "other like consequential losses"—may not be used in assessing a condemnation-damages award because the State does not take the business when it condemns the real estate. *See, e.g.*, *United States v. Gen. Motors Corp.*, 323 U.S. 373, 379 (1945); *Mitchell v. United States*, 267 U.S. 341, 345 (1925) (explaining that, under the Fifth Amendment,

there can be no recovery "for a taking of the business"); *CESA*, 302 S.W.3d at 871 (explaining that business income is not recoverable in condemnation in part because "only the real estate and not the business has been taken"). Those elements are not compensable in condemnation even though they "would be considered by an owner in determining whether, and at what price, to sell." *Gen. Motors*, 323 U.S. at 379; *see also United States v. 0.073 Acres of Land*, 705 F.3d 540, 546 (5th Cir. 2013) (per curiam) (following *General Motors* in rejecting compensability for loss of ability to collect HOA dues from homes on condemned land).

In *CESA*, this Court applied those well-established principles to billboard advertising. It held that advertising revenue from billboards should not be considered in determining condemnation damages and instructed that courts "should not allow evidence of valuation based on advertising income." 302 S.W.3d at 873-74.

As the State explained in its opening brief, Clear Channel's expert, Rodolfo Aguilar, erroneously considered advertising income, both of Clear Channel's billboards and of comparable billboards, in his appraisal. *See* Petr's Br. at 6-7 (explaining Aguilar's consideration of

advertising revenue in each appraisal method). The trial court therefore abused its discretion in admitting Aguilar's testimony. *Cf. Moore*, 416 S.W.3d at 250 (holding that the trial court abused its discretion by allowing nearly identical appraisal testimony because it was "based specifically on the advertising revenues generated by the billboard"); *City of Wichita v. Denton*, 294 P.3d 207, 260-67 (2013) (concluding that Aguilar's similar valuation approach in appraising another Clear Channel billboard was properly excluded because it relied on advertising revenue). Clear Channel's various attempts to defend the trial court's actions by distinguishing or cabining *CESA*, Resp at 40-53, are unavailing.[3]

A. *CESA* Forbids Consideration of Advertising Revenue in Condemnation Valuations.

In an effort to justify the trial court's erroneous admission of Aguilar's testimony, Clear Channel argues that *CESA* is inapplicable because it concerned only the appraisal of land, not billboards. Resp. at 42-44. The *CESA* court, however, did not limit its holding to land valuation; it addressed the use of billboard advertising revenue in

[3] Because the trial was limited to the value of the billboards, 2.RR.8-11, the Court needs to reach the valuation issue only if it concludes that the billboards were taken as part of the real estate.

condemnation damages calculations generally, concluding that courts "should not allow evidence of valuation based on advertising income." 302 S.W.3d at 874. And that is exactly what the trial court did when it allowed Clear Channel's expert to appraise the billboards based on advertising income.

Moreover, Clear Channel's argument that the billboards are realty, Resp. at 31-40, undermines its attempt to distinguish *CESA* on that basis. *See* Resp. at 42-44. Even if Clear Channel were correct that *CESA* prohibited consideration of advertising revenue only in valuing the real estate, Clear Channel's billboards would still be covered by that prohibition unless the billboards are personalty. Clear Channel cannot have it both ways – realty for takings purposes but personalty for valuation purposes.

Clear Channel also attempts to characterize its billboard advertising revenue as "rental income," separate from income earned in "other business functions." Resp. at 42, 44-45, 53. That argument, however, cannot be squared with *CESA*, which directly rejected the contention that billboard advertising revenue "should be treated like rental income for purposes of an income-method appraisal." 302 S.W.3d

at 871. The Court concluded that billboard advertising revenue is based on business effort and skill, not simply the intrinsic value of the land. *Id.* at 871-73. Accordingly, Clear Channel's attempt to distinguish advertising revenue from its other income for condemnation purposes is pointless because the Court has already determined that advertising revenue *is* business income and should be excluded from consideration. *Id.*

Clear Channel's citation to cases in other States that have allowed evidence of advertising income to assess condemnation damages similarly runs headlong into *CESA*. Resp. at 46-47. The owners in *CESA* made a similar argument, but after a survey of cases in other jurisdictions the Court concluded that Texas law does not allow consideration of billboard advertising revenue in condemnation-damages awards. 302 S.W.3d at 872-73. The Court need not revisit that well-reasoned decision here.

In a final attempt to limit *CESA*, Clear Channel argues that consideration of advertising revenues should be allowed in condemnation when there are no options for relocating the billboard "within the same market area." Resp. at 47. This is essentially a

request for an exception from the general rule in *CESA* that would apply when location is important. But that exception would surely swallow the rule because location is always important to billboard owners and others whose businesses depend on attracting the attention of motorists. Furthermore, Texas courts have long "refused to consider business income in making condemnation awards even when there is evidence that the business's location is crucial to its success." *CESA*, 302 S.W.3d at 871 (collecting cases). The Court should not depart from that well-reasoned position in this case.

B. Clear Channel's Expert Improperly Considered Noncompensable Sign Permits in His Appraisal.

Responding to the State's notation that Aguilar also improperly considered the value of sign permits in his appraisal, Petr's Br. at 39 n.12, Clear Channel asserts that sign permits are compensable and were properly considered. Resp. at 52. That is wrong. Sign permits, like other government-issued permits and licenses are privileges, not compensable property rights. *Moore Outdoor*, 416 S.W.3d at 246; *see Pierce*, 258 S.W.3d at 683 (holding that a sign permit was not a compensable property interest); *see also House of Tobacco, Inc. v. Calvert*, 394 S.W.2d 654, 657 (Tex. 1965) (holding that a license to sell

cigarettes was a privilege, not a constitutional property right); *Jones v. Marsh*, 224 S.W.2d 198, 201 (Tex. 1949) (explaining that a "license or permit to sell beer or other intoxicating liquor is a privilege and not a property right," and collecting cases); *Hallco Tex., Inc. v. McMullen Cnty.*, 94 S.W.3d 735, 738 (Tex. App.—San Antonio 2002) (explaining that "a permit to dispose of waste does not create or constitute a 'property interest' or any other entitlement" because the authorizing statute does not extend any such rights). Aguilar's consideration of the noncompensable sign permits is yet another reason the trial court abused its discretion in admitting his testimony.

III. PERMITTING THE JURY TO CONSIDER NONCOMPENSABLE INTERESTS IN ASSESSING CONDEMNATION DAMAGES WAS REVERSIBLE ERROR.

Clear Channel asserts that any trial court errors were harmless because if one of Aguilar's opinions was inadmissible, one of his other valuation opinions is admissible. Resp. at 54-55. Clear Channel also argues that testimony by its employee, Michelle Costa, is an unchallenged, independent ground for upholding the judgment that renders any inadmissible testimony by Clear Channel's expert "merely cumulative." Resp. at 53-55. Clear Channel is wrong on both accounts.

A. Allowing the Jury to Consider Valuation Evidence Based on Advertising Revenue Was Reversible Error.

It is well established that "[w]hen a condemnation-damages award is based on evidence of both compensable and noncompensable injuries, the harmed party is entitled to a new trial." *Interstate Northborough P'ship v. State*, 66 S.W.3d 213, 220 (Tex. 2001); *see also, e.g.*, *State v. Bristol Hotel Asset Co.*, 293 S.W.3d 170, 175 (Tex. 2009) (per curiam) ("If the damage award is based on evidence of both compensable and noncompensable injuries, the harmed party is entitled to a new trial." (citation and quotation marks omitted)); *Cnty. of Bexar v. Santikos*, 144 S.W.3d 455, 464 (Tex. 2004) ("When compensable and noncompensable damages are combined in a condemnation judgment, we must reverse and remand for a new trial that will assess only the former.").

The trial court's abuse of discretion in admitting Aguilar's testimony that relied upon business income and other noncompensable interests was harmful because the broad-form jury charge[4] made it impossible to know whether and to what extent the jury relied on improperly admitted, noncompensable interests including the

[4] The jury charge consisted of one question: "What was the fair market value of Clear Channel Outdoor Inc.'s property interest" on the date of the take? 8.CR.2746-47.

noncompensable billboards, valuation evidence based on inadmissible and noncompensable advertising revenue, and noncompensable sign permits. *See Harris Cnty. v. Smith*, 96 S.W.3d 230, 233-34 (Tex. 2002) (holding that it was harmful error for the trial court to approve a jury charge that "mixed valid and invalid elements of damages in a single broad-form submission" because "it prevented the appellate court from determining 'whether the jury based its verdict on an improperly submitted invalid' element of damage" (quoting *Crown Life Ins. Co. v. Casteel*, 22 S.W.3d 378, 388 (2000))).

When the jury is allowed to consider noncompensable valuation evidence in assessing condemnation damages pursuant to a broad-form charge, it does not matter whether other, alternative legitimate grounds existed for the jury to consider because there is no way to discern whether or by how much the award was influenced by the noncompensable interests. *See Interstate Northborough*, 66 S.W.3d at 220; *Harris Cnty. v. Smith*, 96 S.W.3d at 233-34. Tellingly, Clear Channel has no answer for these cases and does not even attempt to respond.

B. Costa's Testimony Does Not Independently Support the Judgment Because She Relied on Clear Channel's Expert and Considered Noncompensable Interests.

Clear Channel is also wrong that the valuation testimony of Costa provided an unchallenged, independent basis to uphold the jury's damages award free from any reliance on Clear Channel's advertising revenue. Resp. at 53-54. Costa's testimony was not independent—she relied on Aguilar's flawed appraisal—and the State objected to her testimony.

Costa was not independent because, when asked about the billboards' value, Costa stated that she did not have an opinion about the value of the billboards "that varies from Dr. Aguilar's." 5.RR.33. At another point in her testimony, Costa specifically stated that she was deferring to Aguilar on valuation. 4.RR.167.

Costa's testimony also improperly relied on noncompensable interests. For example, Costa stated that the amount Clear Channel sought in condemnation damages included compensation for advertising contracts and permits. 5.RR.19.

Finally, Clear Channel's contention that Costa's testimony was unchallenged is also not true. The State repeatedly objected to her

testimony. For example, the State obtained a running relevance objection to testimony regarding permitting, leasing and sales, 4.RR.120, and the State also objected to the relevance of her testimony regarding the advertising contracts, 4.RR.127. The State also objected to Costa's testimony regarding billboard sales because she stated in a deposition that she didn't have knowledge of the sales. 4.RR.134-35.

Costa's testimony was not independent, and it was not admissible because it included noncompensable interests. Clear Channel is therefore wrong to assert that there is an independent and sufficient basis for the judgment. Resp. at 53-54.[5]

PRAYER

The Court should grant the petition for review, reverse the court of appeals's judgment, and render a take-nothing judgment. Alternatively, the Court should reverse the court of appeals's judgment and remand for a new trial limited to determining the value of Clear Channel's compensable interests.

[5] For the same reasons, Clear Channel is also wrong regarding the sufficiency of the evidence. *See* Resp. at 54. Clear Channel alleges that there is sufficient evidence to support the judgment, but its argument depends on the admissibility of Aguilar's and Costa's testimony. *Id.*

Respectfully submitted.

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JONATHAN F. MITCHELL
Solicitor General

/s/ *Michael P. Murphy*
MICHAEL P. MURPHY
Assistant Solicitor General
State Bar No. 24051097

SUSAN DESMARAIS BONNEN
State Bar No. 05776725
Assistant Attorney General

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

COUNSEL FOR PETITIONER

CERTIFICATE OF SERVICE

On April 7, 2014, this brief was served via *File&Serve Xpress* and/or certified U.S. mail, return receipt requested, and electronic mail on appellate counsel of record in this proceeding.

/s/ *Michael P. Murphy*
Michael P. Murphy

CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), this brief contains 6,689 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

/s/ *Michael P. Murphy*
Michael P. Murphy