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 BRIEF ON THE MERITS

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STATEMENT OF THE CASE

Nature of the Case:	This is an inverse-condemnation case regarding the compensability and valuation of billboards standing on land condemned by the State for a highway-expansion project.
Trial Court:	The Honorable Linda Storey, County Civil Court at Law No. 3, Harris County, Texas.
Trial Court Disposition:	The trial court granted partial summary judgments that the billboards were constructively taken and entered a final judgment on the jury verdict of $268,235.27. 8.CR.2765-2810[1] (App. B).
Parties in Court of Appeals:	*Appellant*: State of Texas *Appellee:* Clear Channel Outdoor, Inc.
Court of Appeals:	First Court of Appeals, Houston Texas. Opinion by Justice Higley, joined by Justice Sharp and Justice Huddle.
Court of Appeals's Disposition:	The court of appeals affirmed the trial court's judgment. *State v. Clear Channel Outdoor, Inc.*, No. 01-11-00197-CV, 2012 WL 4465338 (Tex. App.—Houston [1st Dist.] Sept. 27, 2012, pet. filed) (mem. op.) (App. A). The State's motion for en banc reconsideration was denied.

[1] References to the Clerk's Record appear as [volume].CR.[page], and references to the Reporter's Record appear as [volume].RR.[page].

STATEMENT OF JURISDICTION

The Court has jurisdiction in this case because (1) the court of appeals held differently from a prior decision of another court of appeals and of this Court on a question of law material to the outcome of this case, TEX. GOV'T CODE § 22.001(a)(2), and (2) the court of appeals committed an error of law of such importance to the jurisprudence of the State that it requires this Court's review and correction, *id.* § 22.001(a)(6).

ISSUES PRESENTED

1. Since 1877, Texas courts have applied a three-factor test for determining whether personal property has become part of the realty as an improvement or fixture. Was the court of appeals wrong to reject this traditional test in a condemnation case?

2. The court of appeals acknowledged the State's argument that the billboards are personal property, not part of the real estate. Did the court of appeals err in holding that the State took the billboards based on its conclusion that it was undisputed that the billboards are part of the real estate?

3. This Court held in *State v. Central Expressway Sign Associates* that courts "should not allow evidence of valuation based on advertising income." Was it an abuse of discretion for the trial court to admit evidence and testimony of Clear Channel's appraisal expert that estimated the value of the billboards based on advertising revenue?

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PETITIONER'S BRIEF ON THE MERITS

Clear Channel seeks compensation for lost business income from untaken personal property in this inverse-condemnation case. The courts below erroneously sanctioned that objective and required the State to pay Clear Channel for billboards that are its personal property and which were appraised according to advertising revenue. That result not only violates Texas law, it threatens costly consequences in future cases, as landowners may seek condemnation damages for personal property that they refuse to remove from condemned land.

When the State takes private property for public use, the property owner is entitled to "adequate compensation." TEX. CONST. art. I, § 17(a). But Texas taxpayers are not required to pay for untaken and noncompensable interests like personal property and business income. The Court should grant the State's Petition for Review, reverse the court of appeals's judgment, and render a take-nothing judgment for the State.

STATEMENT OF FACTS

I. KATY FREEWAY EXPANSION AND BILLBOARD RELOCATION

In 2006, the State condemned two small, contiguous parcels of land along Interstate 10 in Houston (the Katy Freeway) pursuant to a large highway-expansion project. The properties were identified as Parcel 708 (the Sterling property) and Parcel 709 (the Murphy property). 1.CR.3-9, 2.CR.630-36. Clear Channel Outdoor leased both parcels from the landowners and placed a billboard on each, arranged back-to-back to form what is effectively a single V-shaped billboard. 4.RR.122-23; 10.RR.DX.4A, 4B. Each billboard was constructed of six wooden poles, which held up a 14-foot-tall-by-48-foot-wide illuminated advertising panel. 5.RR.19, 53; 1.CR.76-77.

In the course of the highway project, in February 2005, the State notified Clear Channel and other sign owners along the highway that they would need to remove their signs. *See* 1.CR.147. The State sought to facilitate the relocation of the affected billboards by, among other things, negotiating with the City of Houston to secure more favorable relocation terms within the city. *See* 1.CR.216, 217, 221-22, 225-26, 301-03. The City of Houston had adopted an ordinance banning new off-site billboards, *see* Houston Code, 1.CR.120, but the code permitted existing billboards displaced by a highway project to be relocated with a ten-year sign permit, *id.*; 1.CR.124-27.

Clear Channel initially agreed to remove the billboards and relocate to a new location in Houston with a single, double-faced billboard. 1.CR.306, 8.CR.2619. The deal ultimately fell through because the City of Houston did not agree to Clear Channel's demand for an exemption from the ten-year sign-permit limit. 8.CR.2619-21. Because the terms for relocation in Houston were not acceptable to Clear Channel, it refused to remove the billboards. *Id.*; 1.CR.46; *see also* 1.CR.77 (Clear Channel representative explaining that the

corporation refused to move the signs due lack of attractive "relocation options" in Houston).

II. CLEAR CHANNEL'S BILLBOARD TAKINGS CLAIM

When the State condemned the land on which the billboards stand, the petitions for condemnation included Clear Channel's leasehold interests. 1.CR.3-9, 2.CR.630-36. For the Sterling property, the special commissioners awarded $322,000, of which $183,000 was apportioned to Clear Channel. 1.CR.10-13. The special commissioners awarded $283,000 for the Murphy property without division.[2] 2.CR.642-45.

Clear Channel objected to the special commissioners' awards and filed inverse-condemnation claims for its billboards, leases, permits, and advertising contracts under the United States and Texas constitutions.[3] 1.CR.26-28; 2.CR.652-54. Clear Channel then filed motions for partial

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[2] The parties later agreed to apportion $46,000 to Clear Channel for its leasehold interest and $5,000 to remove the sign. 8.CR.2766. After the other parties' portions were withdrawn, Clear Channel eventually withdrew the remaining $98,000 from the court's registry. 8.CR.2767.

[3] The State paid Clear Channel to remove the billboards without waiving Clear Channel's takings claim or the State's compensability arguments. 2.CR.578. This brief refers to the billboards in the present tense because they were standing in place on the land as of the dates of the purported takings, September 14, 2006 (Sterling property) and December 28, 2006 (Murphy property). *See* 8.CR.2765-67 (describing the condemnation proceedings).

summary judgment, arguing that the State took its billboards by requiring their removal. 1.CR.45; 3.CR.661. In response, the State filed pleas to the jurisdiction, arguing that the billboards are personal property and therefore were not taken by the condemnation of the land. 2.CR.322; 8.CR.2819. In the Murphy-property case, the trial court granted partial summary judgment, concluding that the billboard was taken. 5.CR.1283. In the Sterling-property case, the trial court initially denied Clear Channel's motion, 2.CR.575, but it later granted partial summary judgment that the State's condemnation of the land resulted in a compensable taking of the billboard. 5.CR.1521; 8.CR.2826-27. The State's pleas to the jurisdiction were denied, 2.CR.573-74; 8.CR.2824-25, and the State appealed.

On interlocutory appeal, the courts of appeals affirmed on the ground that Clear Channel had sufficiently pled an inverse-condemnation claim. *State v. Clear Channel Outdoor, Inc.*, 274 S.W.3d 162, 166 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (Murphy property); *State v. Clear Channel Outdoor, Inc.*, No. 14-07-00369-CV, 2008 WL 2986392, at *6 (Tex. App.—Houston [14th Dist.] July 31, 2008, no pet.) (mem. op.) (Sterling property).

III. TRIAL ON BILLBOARD VALUATION

On remand, the cases were consolidated. 2.CR.627; 8.CR.2768. Because the courts had already ruled that the billboards were taken and all other matters had been settled, the case proceeded to a jury trial to determine only the value of the signs. 2.RR.8-11.

The State's appraisal expert, Gerald Teel, estimated the replacement value of both billboards was $50,600 total. 6.RR.72. The trial court prohibited Teel from testifying that the billboards could be relocated. 8.CR.2714.

Clear Channel alleged that the value of the billboards included the value of the sign permit as well as the "the present value of the rentals of the billboard." 2.RR.20. Clear Channel's expert appraiser, Rodolfo Aguilar, used four valuation methods. First, Aguilar estimated the replacement value of the two billboards totaled $30,000. 10.RR.DX.14-F at 10. Second, Aguilar used the income approach based on Clear Channel's business income from the billboards (advertising revenue less business expenses) to reach an estimated value of $692,600 for both billboards. 5.RR.59-66; 10.RR.DX.14-F at 1, 11.

The third and fourth methods Aguilar used were purported versions of the "sales comparison" approach—gross rent multiplier and value-per-square-foot. With these, too, Aguilar incorporated advertising revenue in the appraisal. Aguilar's gross rent multiplier estimate, which relied on Clear Channel's business income from the billboards, yielded an estimated value of $767,700 for both billboards, 5.RR.68-69, 78; 10.RR.DX.14-F at 1, 12. Aguilar's square-footage calculation, which is based on location and business-competition-driven inflation, resulted in a total valuation of $712,300 for the billboards, 5.RR.83-84, 89; 10.RR.DX.14-F at 1, 13. In calculating the sales-comparison appraisals, Aguilar also relied on comparable sales that included advertising revenue from other billboards, sign permits, and advertising contracts. 5.RR.74, 76. Aguilar then used a weighted average to reach a final estimated value for both billboards of $722,600, approximately 24 times more than his estimate for the signs' replacement value. 5.RR.90-92; 10.RR.DX.14-F at 14.

Before trial, the State moved to exclude Aguilar's testimony and appraisal report because all of his appraisal methods improperly incorporated untaken personal property (the billboards) and incorrectly

appraised the billboards based on non-compensable interests, including business income, sign permits, and advertising contracts. 6.CR.1643-58; 8.CR.2693. The trial court denied the State's motion. 8.CR.2715; 2.RR.90-93. The trial court also denied the State's motion in limine to prohibit evidence or testimony about the business value of the billboards. 8.CR.2728-29. After the trial, the jury returned a verdict of $268,235.27 total for both billboards. 8.CR.2746-47. The trial court entered final judgment on the verdict and denied the State's motion for new trial. 8.CR.2765, 2811.

IV. COURT OF APPEALS'S OPINION

The First Court of Appeals affirmed the trial court's judgment. *State v. Clear Channel Outdoor, Inc.*, No. 01–11–00197–CV, 2012 WL 4465338 (Tex. App.—Houston [1st Dist.] Sept. 27, 2012, pet. filed) (mem. op.). On appeal, the State argued that the trial court erred by (1) ruling that the billboards were taken, and (2) allowing Aguilar's expert appraisal testimony based on advertising income. The court of appeals rejected both arguments.

On the takings question, the court refused to apply the traditional improvement test for determining whether the billboards were

permanently annexed to the real estate. *Id.* at *4. The court provided no alternative for determining whether personalty had become part of the realty in cases alleging a taking, but it avoided that difficulty with its holding that "[i]t is undisputed that the billboards are improvements," and as "part of the realty," the State must pay for the billboards. *Id.* (internal quotation marks omitted); *see also id.* at *5 (concluding that even if the improvement test applied, the State must pay for the billboards due to "the State's characterization of the Billboards as fixtures"). That was a surprising holding given the court of appeals's acknowledgment that "[t]he State argues that the billboards are personalty," *id.* at *3, and its recognition that the State asserted "that the billboards are, in fact, personal property and not part of the realty," *id.* at *4. The court made no attempt to reconcile these contradictory statements.

The court of appeals also rejected the State's challenge to Clear Channel's expert appraisal evidence. *Id.* at *8. The court disagreed with the State's argument that it was improper for Aguilar to base his appraisal on advertising revenue because it noted that this Court had approved the income method—which "values a property according to

the income that it generates"—"as a proper valuation method in certain circumstances." *Id.* at *7. The court did not address whether billboard valuation is one of those "certain circumstances" nor did it consider whether advertising revenue was properly included in the income method. *See id.*[4] The court also did not explain how the trial court's approval of using advertising income to appraise the billboards was compatible with this Court's instruction in *State v. Central Expressway Sign Associates* that "the trial court should not allow evidence of valuation based on [billboard] advertising income." 302 S.W.3d 866, 874 (Tex. 2009) (hereinafter *CESA*)

The State's motion for en banc reconsideration was denied and the State timely filed a petition for review.

SUMMARY OF THE ARGUMENT

The court of appeals required the State to pay for Clear Channel's untaken billboards based on a valuation that relied on advertising revenue. Texas law prohibits such compensation.

[4] The court of appeals also did not resolve whether the trial court abused its discretion in allowing Aguilar's advertising-revenue-based sales-comparison appraisal. *Id.* at *7.

Application of the well-established improvement test articulated in *Logan v. Mullis*, 686 S.W.2d 605 (Tex. 1985) reveals that the billboards remain Clear Channel's personal property; they are not permanent parts of the real estate. The court of appeals erred by rejecting the improvement test and thereby deepening a split among Texas courts on this issue.

The court also erroneously held that the billboards were taken by the State. That conclusion was based solely on the court's erroneous statement that the State agreed that the billboards are improvements.

Finally, the trial court abused its discretion by permitting Clear Channel's expert to testify on the value of the billboards based on their advertising income, and the court of appeals erred by sanctioning that practice pursuant to the "income method" of appraisal. That approach—erroneously sanctioned by the court of appeals—contravenes this Court's express command in *CESA* that valuation estimates should not be based on advertising income. 302 S.W.3d at 874.

The Court should grant the State's petition for review, clarify the law on these important issues, reverse the court of appeals's judgment, and render judgment for the State.

ARGUMENT

Enshrined in the constitutions of the United States and Texas is the guarantee that private property will not be taken for public use without just and adequate compensation. U.S. CONST. amend. V; TEX. CONST. art. I, § 17. Equally important, as steward of the public treasury, the State should not spend taxpayers' money on untaken property or pay compensation for "profits generated by a business located on condemned land." *CESA*, 302 S.W.3d at 869. The courts below erred when they required the State to pay for Clear Channel's untaken personal property that was valued according to noncompensable interests.

I. THE STATE DID NOT TAKE THE BILLBOARDS BECAUSE THEY ARE CLEAR CHANNEL'S PERSONAL PROPERTY.

To prevail in this case, Clear Channel bears the burden of establishing that the State intentionally took its billboards for public use. *Gen. Servs. Comm'n v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 (Tex. 2001). It has failed to do so for the following reasons.

Texas law limits the State's eminent-domain authority in highway construction projects to condemning only real property. TEX. TRANSP. CODE §§ 203.051-.052; *Cont'l Foods, Inc. v. State*, No. 05-09-01249-CV,

2011 WL 258999, at *3 (Tex. App.—Dallas Jan. 27, 2011, no pet.) (mem. op.). Pursuant to that limited authority, the State condemned only "land and improvements" on the Sterling and Murphy parcels. 1.CR.4; 2.CR.631. It is undisputed that the State never took physical possession of the billboards. Thus, whether the State took Clear Channel's signs—a question of law, *City of Austin v. Travis Cnty. Landfill Co.*, 73 S.W.3d 234, 241 (Tex. 2002)—turns on the character of the billboards. The State owes compensation for the billboards only if Clear Channel proves that the signs were permanently annexed to the real estate.[5] Clear Channel failed to do so. To the contrary, established law and the record confirm that the billboards are Clear Channel's personal property.

A. The Court of Appeals's Confusion Regarding the Billboards' Classification as Improvements, Fixtures, or Personal Property Led to Its Erroneous Conclusion That the Billboards Were Taken.

Proper resolution of this case depends on the correct classification of the billboards as real or personal property, a matter that confused

[5] The State does not dispute that personal property is compensable if taken in condemnation. However, the State never took physical possession of the billboards, and it is undisputed that the mere condemnation of the land would not effect a taking of the personal property thereon. Thus, only if the billboards are part of the realty could they have been taken by the State.

the court of appeals and led it to an erroneous conclusion that the billboards were taken. The court of appeals held that it was undisputed that the billboards are "improvements," 2012 WL 4465338, at *4, and held that the State characterized the billboards as "fixtures," *id.* at *5, but it also noted the State's argument that the billboards are "personalty," *id.* at *3, and "personal property . . . not part of the realty," *id.* at *4. Based on its erroneous belief that the State agreed the billboards are improvements or fixtures, the court concluded the billboards were taken when the State condemned the land on which they stood. *Id.* at *4. The court was wrong. The State has never agreed that the billboards are improvements or fixtures, and the billboards cannot be both personal property and improvements because those classifications are inherently at odds with each other.

Personal property is anything that is not a permanent part of the land. It "include[s] everything that is subject to ownership not falling under the definition of real estate." *San Antonio Area Found. v. Lang*, 35 S.W.3d 636, 640 (Tex. 2000).

Improvements and fixtures, on the other hand, are part of the real estate. They are personal property that has been annexed—i.e.,

permanently attached—to the land. *Sonnier v. Chisholm-Ryder Co.*, 909 S.W.2d 475, 479 (Tex. 1995) (improvements); *Logan*, 686 S.W.2d at 607, (fixtures); *Reames v. Hawthorne-Seving, Inc.*, 949 S.W.2d 758, 761 (Tex. App.—Dallas 1997, pet. denied) (improvements). Although the class of improvements is "broader than that of fixtures," *Reames*, 949 S.W.2d at 761, "improvements" and "fixtures" refer to the same thing for purposes of this case because "any fixture, unless it is a trade fixture, is considered an improvement." *Id.*[6]

Given the State's arguments and the fundamental difference between personal property and improvements, the court of appeals was wrong to conclude that the billboards are "undisputed[ly]" improvements. Whether the signs are improvements turns on whether Clear Channel annexed them to the land because "only upon annexation does the personalty lose its characteristics as personal

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[6] Trade fixtures are personalty. *Sonnier*, 909 S.W.2d at 479. "A trade fixture is an item, which can be removed without material or permanent injury to the freehold, that a tenant annexes to realty to enable the tenant to carry on its business." *Reames*, 949 S.W.2d at 761. The key distinction between an improvement and a trade fixture is that an improvement is intended to "enhance the value of the estate, and to be permanent" but a trade fixture is "temporary and made for purposes of [the tenant's] trade." *Jim Walter Window Components v. Turnpike Disribution Ctr.*, 642 S.W.2d 3, 5 (Tex. App.—Dallas 1982, writ ref'd n.r.e.) (citation and internal quotation marks omitted); *C.W. 100 Louis Henna, Ltd. v. El Chico Rests. of Tex., L.P.*, 295 S.W.3d 748, 755 (Tex. App.—Austin 2009, writ dism'd) (same).

property and become viewed as an improvement." *Sonnier*, 909 S.W.2d at 479. And the court's mistaken determination was not harmless error; it was the sole basis for its holding that the billboards were taken when the State condemned the land on which they stood. *Clear Channel*, 2012 WL 4465338 at *4. The Court should reject that flawed conclusion.

B. The Court of Appeals Erroneously Rejected the Traditional Test for Improvements and Fixtures Articulated in *Logan*.

For nearly 150 years, Texas courts have considered three factors for determining whether personal property has become a permanent part of the real estate: "(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*, 686 S.W.2d at 607 (addressing fixtures); *see also, e.g.*, *Sonnier*, 909 S.W.2d at 479 (applying the standard to improvements); *Hutchins v. Masterson & Street*, 46 Tex. 551, 554 (1877) (adopting a substantively identical three-factor test for "determining whether a chattel has become an immovable fixture"); *O'Neil v. Quilter*, 234 S.W. 528, 529 (Tex. 1921) (same).

The court of appeals nevertheless rejected this standard, holding that it does not apply in condemnation cases. 2012 WL 4465338, at *4. Not only was that ruling wrong, it deepened the First Court's divide from other Texas appellate courts on this issue.

1. The court of appeals's rejection of the improvement test exacerbated the legal rift it created with other Texas courts.

The court of appeals widened its split from every other Texas appellate district to address the issue—most notably the Fourteenth Court of Appeals in Houston—when it erroneously held that *Logan* does not apply in condemnation cases. At least four Texas appellate courts have relied on *Logan* in inverse-condemnation cases, including cases involving billboards. The Fort Worth Court of Appeals recently applied *Logan* in an inverse-condemnation case concerning a billboard. *City of Argyle v. Pierce*, 258 S.W.3d 674, 684 (Tex. App.—Fort Worth 2008, pet. dism'd). In *Pierce*, Clear Channel and the landowner sued the city for inverse-condemnation of an illegally constructed billboard. *Id.* at 679. On appeal from the denial of the city's plea to the jurisdiction, the Fort Worth Court of Appeals looked to *Logan* and rejected Clear Channel's argument that the billboard was a fixture. *Id.* at 684.

The El Paso Court of Appeals likewise applied *Logan* in another recent billboard inverse-condemnation case. In *State v. Moore Outdoor Props., L.P.*, No. 08–12–00034–CV, 2013 WL 6002035 (Tex. App.—El Paso Nov. 13, 2013, no pet. h.), a case transferred to El Paso from Fort Worth for docket-equalization purposes, the court applied *Logan* to determine whether a billboard was taken by the State's condemnation of the land on which the sign stood for a highway project, *id.* at *4.

The Beaumont Court of Appeals has also looked to the traditional fixture analysis to determine whether a taking occurred. *Gawerc v. Montgomery Cnty.*, 47 S.W.3d 840, 842 (Tex. App.—Beaumont 2001, pet. denied) (majority citing *Reames*, 949 S.W.2d at 761, which restated the fixture test from *Logan* and *Sonnier*); *id.* at 845 (dissent agreeing with the majority that the fixture test articulated in *Reames*, *Sonnier*, and *Logan* applies).

Finally, the Fourteenth Court of Appeals in Houston has invoked *Logan* in a billboard inverse-condemnation case. *Harris Cnty. Flood*

Control Dist. v. Roberts, 252 S.W.3d 667, 670 (Tex. App.—Houston [14th Dist.] 2008, no pet.).[7]

Contrary to those decisions, the court of appeals held that *Logan* does not apply in condemnation cases, following its earlier interlocutory decision in this case. 2012 WL 4465338, at *4 (citing *Clear Channel*, 274 S.W.3d at 165). In so doing, the First Court of Appeals is an outlier among Texas appellate courts. More troubling, the court's holding means that the law to be applied to cases within the jurisdiction of the two Houston appellate courts is inherently unclear and resolution of this issue on appeal amounts to legal roulette.

2. The court of appeals's reasons for rejecting the traditional improvement test lack merit.

The court did not dispute that Clear Channel intended that the billboards remain personal property, as evidenced in its ground leases, but the court concluded that such evidence is irrelevant in condemnation cases. 2012 WL 4465338, at *4-5. The court reasoned

[7] In a later, unpublished memorandum opinion, the Fourteenth Court held that *Logan* does not apply. *Harris Cnty. v. Clear Channel Outdoor, Inc.*, No. 14-07-00226-CV, 2008 WL 1892744, at *4 n.3 (Tex. App.—Houston [14th Dist.] April 29, 2008, no pet) (mem. op.). However, that decision does not overrule the earlier decision since there was no intervening change in the law by the Legislature, this Court, or the court of appeals sitting en banc. *In re C.M.C.,* 2012 WL 3871359, at *4 (Tex. App.—Houston [14th Dist.] Aug. 30, 2012, no pet.) (mem. op.).

that rights to remove property in a lease "'exist[] entirely for the protection of the tenant, and cannot be invoked by the condemnor.'" *Id.* at *4 (quoting *Almota Farmers Elevator & Warehouse Co. v. United States*, 409 U.S. 470, 478 n.5 (1973), and citing *Brazos River Conservation & Reclamation Dist. v. Adkisson*, 173 S.W.2d 294, 300 (Tex. Civ. App.—Eastland 1943, writ ref'd)). The court of appeals then held that "'[i]f personalty would be a fixture if attached to the land by the fee owner of the land, then a condemning authority must pay for such property as real estate in a condemnation action.'" *Id.* at *5 (quoting *Roberts*, 252 S.W.3d at 670). There are several problems with the court's analysis.

First, the court of appeals's reasoning conflates classification with compensability. In the interlocutory appeal, the court of appeals rejected *Logan* on the ground that an "owner's characterization of its property" should not determine "whether it constitutes a compensable property interest." C*lear Channel*, 274 S.W.3d at 165; *see also* 2012 WL 4465338, at *4-5 (relying on the court's interlocutory decision). But that misses the point. The classification of property as either personalty or part of the realty as an improvement or fixture simply honors the

owner's intent; it does not, standing alone, affect compensability. The State has never disputed that personalty is compensable if it was taken in condemnation. The test articulated in *Logan* simply serves as a tool for determining whether the property is personalty or realty. Once that is established, the question of whether the property was taken can be easily resolved.

Second, the court of appeals misinterpreted the case law. As an initial matter, the *Roberts* case, from which the court of appeals drew its holding that the billboards are compensable improvements, expressly invoked *Logan*. *See Roberts*, 252 S.W.3d at 670 (citing *Logan*, 686 S.W.2d at 607, for the proposition that "[t]hree factors are relevant in determining whether personalty has become a fixture, that is, a permanent part of the realty to which it is affixed").

Additionally, the two cases the court relied on for its conclusion that *Logan* doesn't apply are simply irrelevant to the property-classification inquiry. Neither *Almota* nor *Adkisson* held that private agreements cannot inform whether property is a fixture in condemnation. Rather, *Almota* and *Adkisson* addressed the *valuation* of tenant-owned fixtures and other improvements (property that was

undisputedly part of the realty), not the antecedent question—and the relevant inquiry here—whether the property is permanently annexed to the land.

Almota concerned the valuation of grain elevators, "extensive buildings and other improvements" that the leaseholder had built on land the government condemned. 409 U.S. at 471. There was no dispute that the lessee's property was permanently annexed to the land, and the government admitted its obligation to pay for the improvements. *See id.* at 475 n.2 (explaining that "[t]he only dispute in this case is over how those improvements are to be valued").

The government in *Almota* sought to avoid paying market price for the tenant's improvements because the lease allowed for their removal. *Id.* at 477. In rejecting that argument, the Court quoted a treatise that said a tenant's contractual right to remove improvements during the lease "cannot be invoked by the condemnor." *Id.* at 478 n.5 (quoting 4 P. NICHOLS, EMINENT DOMAIN § 13.121 (2) (3d rev. ed. 1971)) (internal quotation marks omitted). That passage—and *Almota*'s holding—simply forbids the government from reducing compensation for condemned property by valuing improvements that a tenant is

entitled to remove according to the lease term rather than the market value. *Almota* has nothing to say about annexation of a tenant's personalty.[8] The court of appeals simply misread *Almota* to prohibit consideration of a tenant's intent regarding annexation of its personal property. 2012 WL 4465338, at *4.

Similarly, in *Adkisson*, the issue was whether the government had to pay for "fixtures affixed to the leasehold estate" even though as between the lessee and landowner, the lessee "had the privilege of removing such fixtures at the termination of the lease." 173 S.W.2d at 295-96. There was no dispute that the tenant's property were fixtures, and the court reached the uncontroversial conclusion that when the government takes land, it must also pay for the fixtures. *Id*. at 299. Nothing in *Adkisson* prohibits consideration of a tenant's intent for its personal property expressed in a lease with the landowner.

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[8] Other courts have recognized this. *See, e.g., State v. 3M Nat'l Adver. Co.*, 653 A.2d 1092, 1096-97 (N.H. 1995) (in a takings case, distinguishing the "permanent buildings" in *Almota* from billboards, which are "removable trade fixtures"); *United States v. 57.09 Acres of Land*, 757 F.2d 1025, 1028 (9th Cir. 1985) (noting in a condemnation case that unlike *Almota*, "there are no allegations that [the] equipment consisted of fixtures and the government asserts that it was all removable").

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Third, the court of appeals threw the baby out with the bathwater. Even if the court were correct that certain lease provisions couldn't be used to assess an owner's intent in condemnation cases, such a holding does not require a wholesale rejection of the improvement test itself. In rejecting *Logan*'s application in condemnation cases, the court of appeals failed to recognize the difference between the legal standard and the evidence. And as explained in the next section, even without the leases, the record shows that the billboards are Clear Channel's personal property.

The court of appeals also failed to identify an alternative to *Logan* for assessing whether property on a condemned parcel of land remained personalty or had become part of the realty. The court avoided that glaring problem by erroneously concluding that the billboards are undisputedly improvements or fixtures. But the court of appeals provided no guidance to trial courts for resolving that critical question in future cases.

Fourth, it was illogical and counterproductive for the court of appeals to turn a blind eye to Clear Channel's express intent for the billboards in the ground lease; certainly the best evidence regarding the

character of the billboards. As this Court instructed in *Logan*, the ultimate test for whether personal property has become annexed to the land is the owner's intent. 686 S.W.2d at 607. The expression of that intent may take different forms and appear in various contexts, but all evidence of intent is probative.

C. Application of *Logan* Confirms That the Billboards Are Clear Channel's Personal Property.

Application of the well-established improvement test articulated in *Logan* reveals that the billboards are not permanently annexed to the land but remain Clear Channel's personal property. "Three factors are relevant in determining whether personalty has become a fixture, that is, 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." *Logan*, 686 S.W.2d at 607; *see also Sonnier*, 909 S.W.2d at 479 (applying *Logan* to improvements). The intent of the owner "is preeminent" and the other two factors are "evidence of intention." *Logan*, 686 S.W.2d at 607. Notably, it is not simply "attach[ment] to realty" but rather "annexation

that transforms the personalty into an improvement." *Sonnier*, 909 S.W.2d at 479.

Taking the *Logan* factors in reverse order, it is clear that Clear Channel's intent for the billboards has always been that they remain personal property, not fixtures annexed to the land. In both public and private settings, and as between government and private entities, Clear Channel has consistently treated its billboard as personal property. Its intent also comports with the common relocation of billboards and the use of the billboards for off-site advertising.

1. Owner's intent: Clear Channel has always treated its billboards as personal property.

Notwithstanding its current litigation position, the record establishes that Clear Channel's intent for the billboards, the *sine qua non* of the improvement test, has always been that they remain personal property, even in condemnation. That intent is most clearly seen in multiple provisions of its ground leases.

To start, the ground leases were not for an indefinite term. Clear Channel had only a 10-year lease for the Murphy property and a 15-year lease for the Sterling property (both automatically extended by 30 years if the land condemned). 10.RR.DX.11-A (Murphy property);

10.RR.DX.11-B (Sterling property). The leases also provide that Clear Channel remains the owner of the billboards and may remove them "at any time." 10.RR.DX.11-A at § 5, 11-B at § 5.

In case of condemnation, the lease provides that Clear Channel may relocate the billboards. *Id.* at § 8. Clear Channel and the landowner also expressly distinguished the billboards from the landowner's real estate in condemnation cases; agreeing that Clear Channel is entitled to compensation for any taking of the billboards. *Id.*

The leases provide the best indication of Clear Channel's intent that the billboards remain personalty because they directly address the relationship of the billboards to the realty in the context of condemnation. More importantly, Clear Channel presented no evidence—only post-hoc conclusory argument—that the billboards are intended to be fixtures or improvements. *Cf. Pierce*, 258 S.W.3d at 684 (explaining that courts "cannot create evidence where none has been presented, and we cannot assume that the billboard is a fixture").

2. Mode of annexation: billboards are regularly relocated.

Courts also consider the "mode and sufficiency of annexation" in making a fixture determination. *Logan*, 686 S.W.2d at 607. The mere

physical attachment of the billboards to the ground does not establish annexation. This factor also confirms that the billboards are personalty.

First and foremost, Clear Channel did not dispute that the billboards could be relocated, and it even agreed to do so, initially. 1.CR.306. The *only* reason it declined the State's request to remove the billboards—even with the State's relocation-assistance offer—was because Clear Channel concluded that the billboards were more valuable at their current location than they would be if relocated somewhere else. *See* 8.CR.2619-21 (noting that the deal to relocate the billboards fell through because the City of Houston did not agree to grant Clear Channel an exemption from the ten-year sign-permit limit); 1.CR.46 (explaining that Clear Channel refused to remove the billboards and instead seek condemnation damages because the terms for relocation in Houston were not appealing); 1.CR.77 (Clear Channel representative explaining that the corporation refused to move the signs due to lack of attractive "relocation options" in Houston).

What's more, Clear Channel has a history of treating its billboards as personal property *because* they can be relocated. In another case,

Clear Channel asserted that billboards are personal property due to the fact that they are easily and regularly relocated. In that case, the court of appeals concluded that the billboard was Clear Channel's personal property—not a fixture—in part because "an affidavit from Clear Channel indicates that the 'billboard easily can be removed without any appreciable damage to the property' and that Clear Channel regularly so removes such billboards." *Clear Channel Outdoor, Inc. v. Abdelahad*, No. 05-P-982, 850 N.E.2d 1135 (Mass. App. Ct. July 26, 2006) (mem. op.).

Additionally, billboard relocation is common in Texas. The State "relocates dozens of billboards every year." 5.CR.1345. 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).

Despite the undisputed ability to relocate the billboards, Clear Channel argued below that its refusal to remove the signs—because it couldn't find a desirable alternative location in Houston—rendered them improvements for which the State must pay compensation. *See*

1.CR.46 (arguing that although it could relocate the sign, it chose condemnation damages instead); *see also* 1.CR.77 (Clear Channel representative explaining that the corporation refused to move the signs due lack of attractive "relocation options" in Houston); 8.CR.2619-21 (explaining that the billboards were not removed because the City of Houston did not approve Clear Channel's terms for relocation). But that is not the law in Texas. *Cf. 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). If Clear Channel were correct, owners could force the State to acquire almost any personal property it refused to remove. Gaming the condemnation process in that manner undermines the purposes of the law, saddles taxpayers with needless acquisitions and expense, and makes highway projects much more costly.

3. Adaptation to the use or purpose of the realty: the purpose of the billboards is off-site advertising, which has no relation to the land.

Not only are the billboards moveable, their sole function—offsite advertising—is not tied to the land. *See CESA*, 302 S.W.3d at 871

(rejecting the argument that "billboard advertising revenue is derived from the intrinsic value of the land"). It is undisputed that these billboards do not advertise the activities or business on the premises, nor are they otherwise used in a way that is specifically adapted to the use or purpose of the land. Moreover, Clear Channel offered no evidence that the structures themselves were specially designed for the Sterling and Murphy parcels. The lack of special connection to the condemned parcels further confirms that the billboards remain Clear Channel's personal property.

* * *

All three factors of the traditional improvement test confirm that the billboards are not part of the real estate and therefore were not taken when the State condemned the underlying fee.

D. Tax Treatment of Billboards Confirms Their Character as Personal Property.

In its interactions with the government for tax purposes, Clear Channel holds out its billboards as personal property, even as it now insists that the State must pay for the signs as real property. Clear Channel can't have it both ways.

It is undisputed that Clear Channel's billboards are classified as personal property for local property-tax purposes. Clear Channel argued in the court of appeals that this classification is irrelevant because the taxing authority designates the billboards as personal property. But Clear Channel enjoys the tax-favorable designation without challenge. To the contrary, Clear Channel once sued the Harris Central Appraisal District (HCAD) over the appraisal of its billboards and rather than challenging the personal-property classification, Clear Channel asserted that the signs must be valued according to "generally accepted appraisal methods and techniques for personal property taxes." 2.CR.530.

Additionally, as a result of successful lawsuits by the outdoor-advertising industry, billboards qualify for federal investment tax credits as personal property. *See, e.g., Whiteco Indus. Inc. v. Comm'r of Internal Revenue*, 65 T.C. 664, 670 (1975) (concluding that billboards are tangible personal property that qualify for federal tax credits); *Nat'l Adver. Co. v. United States*, 507 F.2d 850, 851-52 (Ct. Cl. 1974) (same); *Ala. Displays, Inc. v. United States*, 507 F.2d 844, 846 (Ct. Cl. 1974)

(same); *see also,* Charles F. Floyd, *The Takings Issue in Billboard Control*, 3 WASH. U. J.L. & POL'Y 357, 360 (2000).

The court of appeals held that "how property is characterized for tax purposes" was "not relevant" to its takings inquiry because neither this Court nor the U.S. Supreme Court approved such review. 2012 WL 4465338, at *5. But a court's consideration of evidence regarding annexation does not require preclearance from this Court or the U.S. Supreme Court, and the court of appeals cited no cases prohibiting such consideration.

E. Other States Treat Billboards as Personalty in Condemnation.

The dispute about the character of billboards in condemnation is not limited to Texas. Most courts in other States that have addressed the issue have held that billboards are—or may be—personal property that is not taken when the government condemns the land on which they stand. Although a few States have held that billboards are part of the realty in condemnation, [9] and a few others are required by statute to

[9] *State v. Bishop*, 800 N.E.2d 918, 925 (Ind. 2003); *Lamar Corp. v. Commonwealth Transp. Comm'r of Va.*, 552 S.E.2d 61, 64 (Va. 2001).

compensate billboard owners,[10] courts in Arizona, Connecticut, Florida, Kansas, Massachusetts, Michigan, Minnesota, New Hampshire, New York, North Carolina, Pennsylvania, South Carolina, and Tennessee, have held that billboards are—or may be—personal property in condemnation cases.[11]

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[10] *See, e.g., DOT v. Drury Displays, Inc.*, 327 Ill. App. 3d 881, 887-88 (Ill. App. Ct. 5th Dist. 2002); *Lamar Corp. v. State Highway Comm'n of Miss.*, 684 So. 2d 601, 604 (Miss. 1996) (concluding that billboards meet the statutory definition of "structure" for which a state statute requires compensation).

[11] *E.g.*, *City of Scottsdale v. Eller Outdoor Adver. Co.*, 579 P.2d 590, 596 (Ariz. Ct. App. 1978) (concluding that billboards condemned by the city were personal property, as evidenced by the ground lease); *Comm'r of Transp. v. Rocky Mountain, LLC*, 894 A.2d 259, 284 (Conn. 2006) (concluding that a billboard was personal property because it "can be removed from the condemned property and placed on another site"); *Hernando Cnty. v. Anderson*, 737 So.2d 569 (Fla. Dist. Ct. App. 1999) (per curiam) (holding that "billboards are considered personal property rather than realty" because the owners "were entitled to remove them from the realty upon the expiration of their leasehold interest"); *City of Wichita v. Denton*, 294 P.3d 207, 218-19 (Kan. 2013) (per curiam); *Rite Media, Inc. v. Sec'y of the Mass. Highway Dep't*, 712 N.E.2d 60, 62 (Mass. 1999) (holding that a billboard was a trade fixture and therefore was not taken by condemnation of the land); *Outdoor Sys. Adver., Inc. v. Korth*, 607 N.W.2d 729, 732 (Mich. Ct. App. 1999) (concluding that "billboards are properly characterized as trade fixtures and personal property rather than as realty"); *In re Minneapolis Cmty. Dev. Agency*, 417 N.W.2d 127, 131 (Minn. Ct. App. 1987) (concluding that the billboard "is removable personal property" and distinguishing it from *Almota* because "*Almota* involved realty on which admittedly permanent buildings had been erected"); *3M Nat'l Adver. Co.*, 653 A.2d at 1097 (distinguishing billboards from the structures in *Almota* because the billboards "are not permanent buildings, but removable trade fixtures" which the trial court determined were personal property); *Richards-Dowdle, Inc. v. State*, 24 A.D.2d 824 (N.Y. App. Div. 4th Dep't 1965) (recognizing that a billboard on condemned land may be untaken personal property); *Nat'l Adver. Co. v. North Carolina DOT*, 478 S.E.2d 248, 251 (N.C. Ct. App. 1996) (holding that a billboard was personal property, not part of the realty, as evidenced by, among other things, the tax classification, sign permit, and separate ownership); *In re Condemnation by Dep't of Transp.*, 720 A.2d 154, 158-59 (Pa. Commw. Ct. 1998) (concluding that billboards on

For example, in one of the most recently reported cases on the issue, the Kansas Supreme Court held that another billboard owned by Clear Channel, constructed of a steel monopole set in twelve-feet of concrete and located on land condemned by the City of Wichita, was non-compensable personal property. *City of Wichita v. Denton*, 294 P.3d 207 (Kan. 2013) (per curiam). The Kansas Supreme Court applied a fixture test substantively identical to *Logan* and concluded that the "billboard clearly was meant to remain the personal property of Clear Channel, including the right to remove it upon termination of the land lease." *Id*. at 218.

Taken together, the consensus among courts in other States is that, even in condemnation, billboards will be treated as personal property if that is the intent of the owner. The Court should also adopt this well-reasoned approach.

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condemned land were personal property (trade fixtures) and not taken); *Creative Displays, Inc. v. South Carolina Highway Dep't*, 248 S.E.2d 916, 917-18 (S.C. 1978) (looking to the traditional fixture test and concluding that the "sign is personal property"); *State ex rel. Comm'r, Dep't of Transp. v. Teasley*, 913 S.W.2d 175, 177-78 (Tenn. Ct. App. 1995) (holding that a "billboard is a trade fixture as opposed to a fixture," and "[n]either trade fixtures nor any other type of personal property are compensable in eminent domain").

II. THE COURT OF APPEALS CONTRAVENED *CESA* BY HOLDING THAT BUSINESS INCOME MAY BE USED TO APPRAISE THE BILLBOARDS' VALUE.

Compounding the misguided ruling that the billboards were taken was the court of appeals's erroneous conclusion that the trial court did not abuse its discretion in allowing Clear Channel's expert to rely on advertising income in appraising the billboards.

A. Texas Law Prohibits Reliance on Business Income in Condemnation Appraisals.

It is well established in Texas that the appraisal of property may not include the value or revenue of the business operating on the property, including billboards. *See, e.g. CESA*, 302 S.W.3d at 874; *see also Luby v. City of Dallas*, 396 S.W.2d 192, 198 (Tex. Civ. App.—Dallas 1965, writ ref'd n.r.e.) (explaining that it is "well settled" that in appraising the value of a leasehold "no consideration should be given to the value of the business of the tenant . . . or the profits or losses thereof, or the tenant's personal property on the premises, or the expense of moving such personal property"). These things are "immaterial and inadmissible as shedding no light on the value of the real property being condemned." *Luby*, 396 S.W.2d at 198.

An appraisal may not rely on business income because damages to a business are not compensable in condemnation "even when there is evidence that the business's location is crucial to its success." *CESA*, 302 S.W.3d at 871 (collecting cases); *see also Mitchell v. United States*, 267 U.S. 341, 345 (1925) (explaining that there can be no recovery "for a taking of the business"); *State v. Bristol Hotel Asset Co.*, 293 S.W.3d 170, 173 (Tex. 2009) (per curiam); *AVM*, 262 S.W.3d at 579 (rejecting the argument that "the impossibility of relocation transforms the loss of its business" into a taking). This is because in condemnation the State takes only physical property, not the business operated on the property. *CESA*, 302 S.W.3d at 871; *AVM*, 262 S.W.3d at 579; *Herndon v. Hous. Auth. of Dallas*, 261 S.W.2d 221, 223 (Tex. Civ. App.—Dallas 1953, writ ref'd) (explaining that a condemnation did not take the landowner's "grocery and cafe business," which he retains, "though of course he must move them to a new location"); *Reeves v. Dallas*, 195 S.W.2d 575, 581 (Tex. Civ. App.—Dallas 1946, writ ref'd n.r.e.) (holding that condemnation produces only "an appropriation of physical properties").

Billboard businesses like Clear Channel's that operate along highways are no exception. *See, e.g.*, *Moore Outdoor*, 2013 WL 6002035

at *9-11 (holding that advertising revenue from a billboard is noncompensable and should not be included in an appraisal). A business situated along a highway "does not have a vested interest in the traffic that passes in front of [the] property," and therefore it "cannot recover for loss of trade resulting from a highway relocation." *Du Puy v. Waco*, 396 S.W.2d 103, 109 (Tex. 1965). If the State "could never change a street or highway without paying all persons along such thoroughfares for their loss of business, the cost would be prohibitive. The highways primarily are for the benefit of the traveling public, and are only incidentally for the benefit of those who are engaged in business along its way." *State v. Schmidt*, 867 S.W.2d 769, 773 (Tex. 1993) (citation and internal quotation marks omitted).

B. The Court of Appeals Misunderstood the Income Method.

The court of appeals rejected the State's argument that the trial court abused its discretion in allowing Clear Channel's expert to rely upon and include non-compensable business income and other interests in using the income and comparable-sales methods. 2012 WL 4465338, at *7-8. Addressing the income approach first, the court stated that "this method has been approved by the Supreme Court of Texas as a

proper valuation method in certain instances," and therefore the trial court did not abuse its discretion by admitting Clear Channel's expert testimony regarding the income method. 2012 WL 4465338, at *7.[12]

That conclusion was poorly reasoned and in direct conflict with a decision of this Court. The income appraisal method is appropriate to use when the land would be priced according to the rental income it generates. *CESA*, 302 S.W.3d at 871. But the Court has already rejected the argument that "billboard advertising revenue . . . should be treated like rental income." *Id.* at 871-73. Thus, it was wrong to approve consideration of advertising revenue under the auspices of the income method.

Moreover, the court erroneously equated the income method with evidence of business income. The State never asserted that the income method is *always* improper but rather that Clear Channel's expert wrongly included business income in the appraisal. *See* 2012 WL 4465338, at *7. Nevertheless, the court of appeals held that this Court's approval of the income method in certain circumstances rendered the

[12] Because of this, the court failed to address the State's argument that the court abused its discretion in permitting Clear Channel's expert to testify about the sales-comparison approaches based on business income and other non-compensable interests such as sign permits and business location. 2012 WL 4465338, at *7-8.

State's objection to admission of business-income evidence unfounded. *Id.*

The court also failed to assess whether valuation of billboards is one of the "certain circumstances" in which the income method may be used. If it had, the court of appeals would have been confronted with the well-established rule that just and adequate compensation "does not include profits generated by a business located on condemned land." *CESA*, 302 S.W.3d at 869; *see also Luby*, 396 S.W.2d at 198.

C. It Was an Abuse of Discretion to Allow Aguilar's Testimony and Appraisal Report.

In the face of this established law, the court of appeals erred in concluding that the trial court did not abuse its discretion in admitting expert valuation evidence that included business income. "An expert's opinion, to be admissible, must be relevant and reliable." *CESA*, 302 S.W.3d at 870; TEX. R. EVID. 702. The expert's opinion must be based on facts to be relevant, and it must be based on "sound reasoning and methodology" to be reliable. *CESA*, 302 S.W.3d at 870. A trial court abuses its discretion when it admits irrelevant or unreliable expert opinion. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 631 (Tex. 2002).

In a recent billboard inverse-condemnation case, the El Paso Court of Appeals followed *CESA* and held that the trial court abused its discretion by admitting expert appraisal evidence almost identical to Aguilar's testimony. *Moore Outdoor*, 2013 WL 6002035 at *10-11. The court held that the expert's testimony was not relevant or based on a reliable foundation because it "was based specifically on the advertising revenues generated by the billboard." *Id.*

As already explained, Aguilar's testimony and appraisal report was based on inadmissible and irrelevant advertising revenue. Because the trial court allowed admission of such irrelevant and unreliable expert testimony and evidence, it abused its discretion. The court of appeals conclusion to the contrary violates the Court's holding in *CESA*.

Additionally, what little admissible evidence that was introduced in this case is legally insufficient to support the jury's damages award. "A no evidence point will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite

of the vital fact." *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997). Here, the only valuation evidence offered by Clear Channel that supports the jury's award was Aguilar's inadmissible testimony and appraisal report. The only admissible appraisal evidence was from the State's appraiser, who estimated the billboards' value at $50,600 total, 6.RR.72, a small fraction of the jury's $268,235.27 award, 8.CR.2746-47. Accordingly, the trial court not only abused its discretion in allowing Aguilar to testify, it also erred as a matter of law in entering judgment for Clear Channel.

III. THE TRIAL COURT'S ERRORS AND ABUSE OF DISCRETION WERE HARMFUL.

Allowing the jury to make a damages award based on the untaken billboard and noncompensable advertising revenue was reversible error because it likely resulted in an improper judgment. A trial court's error and abuse of discretion are reversible on appeal if the error "probably caused the rendition of an improper judgment." TEX. R. APP. P. 44.1(a)(1). The State is required to show only that the error "probably" resulted in an improper judgment; it need not prove that "but for" the error "a different judgment would necessarily have resulted." *McCraw v. Maris*, 828 S.W.2d 756, 758 (Tex. 1992).

Here, the trial court's erroneous holding that the State took the billboard resulted in a trial limited to one question: "the fair market value of the Clear Channel's billboard interests taken by the State." 8.CR.2768. The jury charge was broad-form, asking simply "what was the fair market value of Clear Channel Inc.'s property interest" in the Murphy and Sterling properties on the date of the take. 8.CR.2746-47. Over the State's objections, the trial court did not limit the jury's consideration of or reliance on Clear Channel's expert's testimony or appraisal report, all of which were based on advertising revenue. That was reversible error because the jury awarded Clear Channel condemnation damages for untaken property pursuant to expert appraisal evidence that was based on noncompensable business income.

But even if the Court were to conclude that the State took the billboards, the fact that the damages award was based on noncompensable advertising revenue means the State is entitled to a new trial. 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., Bristol Hotel Asset Co., 293 S.W.3d at 175 ("If the damage award is based on evidence of both compensable and noncompensable injuries, the harmed party is entitled to a new trial." (quotation marks omitted)); *Cnty. of Bexar v. Santikos*, 144 S.W.3d at 455 (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."); *State v. Munday Enters.*, 868 S.W.2d 319, 321 (Tex. 1993) ("We agree that the damage award in this case was based upon evidence of both compensable and noncompensable injuries. For this reason, the State is entitled to a new trial.").

In sum, the trial court's erroneous conclusion that the State took the billboards was harmful because the jury awarded damages to Clear Channel for them. Likewise, the trial court's abuse of discretion in admitting expert appraisal evidence and testimony that relied on advertising revenue was harmful error because the damages award was based on that noncompensable interest. *See Interstate Northborough*, 66 S.W.3d at 220; *Bristol Hotel Asset Co.*, 293 S.W.3d at 175; *Santikos*, 144 S.W.3d at 464; *Munday Enters.*, 868 S.W.2d at 321. *Cf. 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 charge "which mixed valid and invalid elements of damages in a single broad-form submission").

PRAYER

The Court should grant the State's petition for review, reverse the court of appeals's judgment, and render a take-nothing judgment or, in the alternative, reverse and remand for a new trial.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

In compliance with Texas Rule of Appellate Procedure 9.4(i)(2), this brief contains 8,903 words, excluding the portions of the brief exempted by Rule 9.4(i)(1).

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