**No. 13-0053**

IN THE SUPREME COURT OF TEXAS
Austin, Texas

**THE STATE OF TEXAS,**
*Petitioner*,

v.

**CLEAR CHANNEL OUTDOOR, INC.,**
*Respondent.*

ON PETITION FOR REVIEW FROM THE FIRST COURT OF APPEALS IN HOUSTON
CAUSE NO. 01-11-00197-CV

# BRIEF AMICI CURIAE OF NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND OWNERS' COUNSEL OF AMERICA

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## STATEMENT REGARDING SOURCE FEE

The fee for preparation of this *Amici Curiae* Brief is being paid by the National Federation of Independent Business Small Business Legal Center and Owners' Counsel of America.

## TABLE OF CONTENTS

*Page*

## INDEX OF AUTHORITIES

*Page*

**SUPREME COURT OF THE UNITED STATES**

**FEDERAL COURTS**



**STATE COURTS OF APPEALS**

**STATUTORY AUTHORITY & RULES**

**SECONDARY AUTHORITY**

## ***AMICI'S* INTEREST IN THIS PROCEEDING**

Pursuant to Rule 11 of the Texas Rules of Appellate Procedure, *Amici curiae* National Federation of Independent Business Small Business Legal Center ("NFIB Legal Center") and Owners' Counsel of America ("OCA") respectfully submit this brief *amici curiae* in support of Appellee, Clear Channel Outdoor, Inc.

## I. IDENTITY OF *AMICI*

The NFIB Legal Center is a nonprofit, public interest law firm established to provide legal resources and be the voice for small business in the nation's courts through representation on issues of public interest affecting small business. The National Federation of Independent Business (NFIB) is the nation's leading small business association representing members in Washington, D.C., and all 50 state capitols. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the rights of its members to own, operate and grow their businesses.

NFIB represents 350,000 member businesses nationwide—including over 24,000 in Texas. NFIB's membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no

standard definition of a "small business," the typical NFIB member employees 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

The OCA is an invitation-only national network of the most experienced eminent domain and property rights attorneys. They have joined together to advance, preserve and defend the rights of private property owners. In doing so, OCA furthers the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (2d ed. 1998). As the lawyers on the front line of property law and property rights, OCA members understand the importance of the issues in this case.

## II. INTEREST OF *AMICI*

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files *amicus* briefs in cases that will impact the small business community. NFIB Legal Center has particular expertise in the area of property rights, and is actively working to defend private property rights throughout the country through

*amicus* filings. *See e.g.*, *Arkansas Game & Fish Comm. v. United States*, 133 S.Ct. 511 (2012) (rejecting the argument that government can evade takings liability by limiting the duration of a government-induced flood); *Koontz v. St. Johns River Mgmt. Dist.*, 133 S.Ct. 2586 (2013) (holding that the nexus and rough proportionality tests apply to monetary exactions, and that government cannot evade takings liability by denying a permit where a landowner refuses to waive constitutionally protected rights); *White Trust v. City of Elk River*, 840 N.W.2d 43 (2013) (holding that acceptance of a conditional use permit does not constitute waiver of constitutionally protected grandfather rights). NFIB Legal Center is especially concerned with protecting small business interests in eminent domain proceedings because small business owners invest substantial personal assets into acquisition of real property in the furtherance of their entrepreneurial enterprises. *See e.g.*, *Ilagan v. Ungacta*, U.S. Sup. Ct., No. 12-723 (2013) (challenging the constitutionality of a taking that transferred title from a small business owner to a politically connected family); *Main Street LLC v. City of Hackensack*, Sup. Ct. N.J., No. 072699 (2013) (defending the constitutional principle that a blight

designation must be based on more than unsubstantiated assertions). As such, when a condemning authority chooses to exercise the power of eminent domain, these owners are placed in a vulnerable position; if they are undercompensated, they will be forced to carry public burdens, which in all fairness and justice should be borne by the whole community. Accordingly, NFIB Legal Center has filed in numerous eminent domain valuation cases. *See City of Perris v. Stamper*, Sup. Ct. Cal. No. S213468 (2014) (arguing the project influence rule prevents a condemning authority from devaluing a property on the theory that the highest and best use would require dedication of the very land the authority seeks to obtain); *City of Westerville v. Taylor*, Oh. Tenth Cir. Ct. of Appeal, No. 13-AP-00806 (2014) (defending the principle that the condemning authority must pay severance damages for lost value to the residuary parcel). NFIB Legal Center is specifically interested in this case because—although the Respondent-Appellee is a major corporation—the resolution of this case will affect small business owners in future valuation cases. To be sure, many billboards are owned by small businesses.

OCA seeks to file in this case because valuation issues are of

central concern to OCA's mission of protecting property rights under the Fifth Amendment and similar provisions in state constitutions. OCA frequently files *amicus* briefs in eminent domain, land use, and regulatory takings cases in both federal and state courts. *See Marvin M. Brandt Revocable Trust v. United States*, 134 S.Ct. 1257 (2014); *Stop the Beach Renourishment, Inc. v. Fl. Dep't Envtl. Prot.*, 130 S. Ct. 2592 (2010); *Arkansas Game & Fish Comm. v. United States*, 133 S.Ct. 511 (2012); *Ilagan v. Ungacta*, U.S. Sup. Ct., No. 12-723 (2013); *Koontz v. St. Johns River Mgmt. Dist.*, 133 S.Ct. 2586 (2013). OCA has been especially vigilant of property rights in eminent domain valuation cases. *See River Center LLC v. Dormitory Auth. of the State of New York*, U.S. Sup. Ct., No. 11-922 (cert. denied April 30, 2012); *Dillard Land Investments, LLC v. Fulton County*, No. S13G1583 (Ga. July 11, 2014). As with these cases, OCA seeks to file here because the question presented requires the Court to consider fundamental principles applicable in all valuation cases, and because the issue is of concern not only to all commercial billboard owners in Texas, but all property owners in the state.

## SUMMARY OF THE ARGUMENT

Billboards are not designed to be moved. And the most valuable part of a billboard is not steel, concrete, and wood—but it's potential to generate income. In view of this reality, *Amici* stress two points in this filing.

First, the Court of Appeals was correct in holding that the State must compensate the owner when it orders a billboard removed if the billboard was previously affixed to the ground, or if removal results in damage or destruction of the billboard. Second, the income capitalization approach is required by the Just Compensation Clause—especially where, as is often the case in billboard valuation cases, there is a dearth of data to determine comparable sales.[1] The U.S. Supreme Court has recognized that the Just Compensation Clause requires the "full and perfect equivalent" of the property taken, which means that where the taken property generates income, the compensation awarded must account for future income.

[1] *Amici* observe that—in the present case—there are comparable sales in the record supporting the condemnation award; however, *amici* are concerned that a rule barring the income capitalization approach would be especially problematic in future billboard valuation cases.

## ARGUMENT & AUTHORITIES

### I. THE STATE OWES JUST COMPENSATION WHEN IT TAKES A BILLBOARD

#### A. An Order Resulting in Damage or Destruction of Property is a Taking

The State did not merely order Respondent, Clear Channel Outdoor, Inc. ("Owner"), to "remove" the billboard from the land on which it was erected, but to destroy it. *See* Br. of Respondent, at 4 ("The State ordered Clear Channel to tear down its sign structures."). That is a taking in any sense of the word. The State's "no taking" theory is premised on its assertion that the billboard could be removed, and thus the Owner did not lose anything when the State condemned the land to which it was attached. This overlooks the fact that the State's removal order required the Owner to disassemble the billboard in an intensive process, which included a crew of skilled laborers—presumably with experience in construction—literally cutting through the base of the structure with a blow torch. *Id.* at 33-34. Additionally, the crew had to split the surface of the billboard into separate segments—a process that the Owner contends destroyed the structural integrity of the billboard. *Id.* As a result, the Owner maintains that the billboard

could not be reassembled. *Id.* Thus, even if there was another comparable location to permanently relocate the billboard, the Owner would have had to erect a *new sign*, as the old was ruined. In other words, the Owner rightly contends that the State's order to "remove" the billboard amounted to a mandate to *destroy the existing sign*. On these facts, the State's "removal" order was a physical taking—which unequivocally requires payment of just compensation. *Tarrant Reg'l Water Dist. v. Gragg*, 151 S.W.3d 546, 555 (Tex. 2004) (holding that government incurs takings liability when it proceeds with an act knowing it will cause "identifiable harm or knows that the harm is substantially certain to result.").

As a baseline principle of federal law, the government cannot avoid its obligation to pay compensation, under the Fifth Amendment, when it invades, destroys, or physically appropriates private property. This is true regardless of the severity of the invasion or damage. In *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 434-35 (1982), the Court held that a municipal law requiring an owner to allow installation of a small cable TV box amounted to a physical taking. This rule is all the more compelling here, where the government's removal order did not merely result in

minimal economic impact as in *Loretto*, but had a devastating impact on the usability of the billboard. *See Arkansas Game and Fish Commn. v. United States*, 133 S. Ct. 511 (2012) (flooding resulted in destruction of timber). Accordingly, an enforceable order requiring destruction of private property triggers a "self-executing" duty for the government to pay just compensation to the owner. *City of Dallas v. Stewart*, 361 S.W.3d 562, 568 (Tex. 2012).

The Texas Constitution provides a property owner even more protection than does the Fifth Amendment, and explicitly requires the State to pay when it "damages" or "destroys" property. Tex. Const. Art. 1, § 17 ("No person's property shall be taken, damaged, or destroyed… without adequate compensation…). Texas courts have applied this rule without exception in a broad range of cases where public works projects have resulted in damage to private property. *Skeen*, 550 S.W.2d at 715 (holding government liable for damage resulting from a public works project); *see also Steele v. City of Houston*, 603 S.W.2d 786, 791-92 (Tex. 1980) (allowing an inverse condemnation claim to proceed where homeowners alleged the City of Houston destroyed their home and personal belongings in an attempt to apprehend criminals). This constitutional principle

is not diminished simply because property is damaged or destroyed as a result of the government's order. *See Severance v. Patterson*, 370 S.W.3d 705, 713 (Tex. 2012) (observing that "constitutional protections for property rights fortif[ied]" this Court's decision allowing a takings suit to proceed where the State had ordered an owner to remove her home).

### B. Billboards Are Like Any Other Permanent Structure

*Amici* observe that the process of erecting a billboard is akin to any other building project in that it requires skilled laborers to set a foundation, upon which the billboard will stand. Br. of Respondent, No. 13-0053, p. 33 (2014) ("Because a sign structure must withstand significant wind pressures, a sign structure's support poles… are buried and secured by concrete, sand, and/or dirt."). For this reason land use authorities generally treat billboards the same as any other development project.[2] To be sure, local zoning

[2] The City of San Antonio requires applicants for a billboard permit to demonstrate "compliance with Chapter 28, Signs and Billboards of the City Code, the current edition of the International Building Code, and the Unified Development Code." Information Bulletin 191, Sign Permit Application Process, City San Antonio Development Services Department (Sept. 13, 2012), *available* online at:
https://webapps1.sanantonio.gov/dsddocumentcentral/upload/IB191.pdf.
And to ensure billboards are designed in accordance with these standards, many cities require professional engineers or architects to sign-off on the plans. For example, New York City requires a "licensed professional engineer [] or a

codes usually require individuals to obtain a building permit—as would be required for any commercial development—before construction. *See e.g.*, City of Fort Worth, TX, Zoning Code § 6.405 (prohibiting signs except those meeting City Building Code requirements); *see also* City of New Orleans, LA, Comprehensive Zoning Code § 12.2.1 (providing that permits are required for "structural and safety" reasons, and that the design plan must conform with the Building Code); City of Chicago, IL, Municipal Code § 13-20-680 (providing that any sign over 24 feet in height requires a permit, which must be submitted to the City building commissioner); City of Santa Clara, CA, Zoning Code § 18.80.090 ("Signs and sign structures shall be designed and constructed to resist wind and seismic forces as specified in the latest edition of the Uniform Building Code…").

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registered architect" to submit "construction plans to obtain a permit" for new signs. NYC Buildings, Applications and Permits, Office of the Mayor, NYC Resources, *available* at http://www.nyc.gov/html/dob/html/development/applications_and_permits.shtml (last visited on 7/11/14). Likewise the County of Miami-Dade Florida requires permit applicants to submit "structural sign construction details, data and dimensions[,]" along with "a registered engineer's seal." Signs and Permit Procedures, Zoning Library, County of Miami Dade, *available* online at http://www.miamidade.gov/zoning/library/forms/sign-permit-procedures.pdf (last visited on 7/11/14).

### C. Forced Removal of Any Structure Affixed to the Ground Requires an Exercise of Eminent Domain and Payment of Just Compensation

Like most jurisdictions, Texas recognizes that landowners have grandfathered rights to maintain existing structures when newly enacted land use restrictions would disallow such uses. *City of Corpus Christi v. Allen*, 254 S.W.2d 759, 761 (Tex. 1953) (citing 62 C.J.S., Municipal Corporations, § 226(6)h, p. 440.); *see also White Trust v. City of Elk River*, 840 N.W.2d 43, 49-50 (Minn. 2013) ("[W]e have repeatedly acknowledged that although a 'zoning ordinance may constitutionally prohibit the creation of uses which are nonconforming,' existing nonconforming uses must be permitted to remain.") (internal citations omitted); *Taylor v. Zoning Bd. Of Appeals Of Town Of Wallingford*, 783 A.2d 526, 532 (Conn. App. 2001) ("Once a nonconforming use is established, the only way it can be lost is through abandonment."). Accordingly, the State's police powers—which generally justify most land use restrictions as a prospective matter—cannot be applied to require removal of an already existing structure unless it constitutes a nuisance. *Swain v. Bd. of Adjustment of City of Univ. Park*, 433 S.W.2d 727, 734 (Tex. Civ. App. 1968). If the State wishes to forcibly remove existing

structures, it must generally exercise its eminent domain powers; however, this requires payment of just compensation. *See Allen*, 254 S.W.2d at 761; *Swain*, 433 S.W.2d at 734.

In accordance with this principle, Texas adheres to the long-established rule that property affixed to the ground constitutes real property for which just compensation must be paid in an eminent domain action. *McGee Irrigating Ditch Co. v. Hudson*, 22 S.W. 967, 968 (Tex. 1893) ("The word 'land' includes, not only the soil, but everything attached to it, whether attached by the course of nature… or by the hand of man, as buildings and fences."); *State v. Carpenter*, 89 S.W. 2d 979, 980 (Tex. 1936); *Harris Cnty. Flood Control Dist. v. Roberts*, 252 S.W.3d 667, 670 (Tex. App. 2008) ("If 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."). Indeed, the State would be powerless to require the removal of any existing structure without invoking its eminent domain powers. This rule applies without exception to billboards. *See e.g.*, *State v. Clear Channel Outdoor, Inc.*, 274 S.W.3d 162 (Tex. App. 2008) (holding

sign structure part of condemned realty); *City of Argyle v. Pierce*, 258 S.W.3d 674 (Tex. App. 2008) (same).

### D. The U.S. and Texas Constitutions Protect All Property, Both Real and Personal

The State and her *amicus*, however, assert that it owes no compensation even though it ordered the physical destruction of the Owner's billboard, because billboards are *personal* property, and in the State's view, the Takings Clauses of the U.S. and Texas Constitutions protect only *real* property from uncompensated acquisition.[3] Yet, even if this Court were to accept the State's characterization of a billboard, which is permanently attached to the land, as "personal" property because it could be removed (with great effort and in a process resulting in its destruction), the State would still have the obligation to pay just compensation because the Takings Clauses protect *all* "private property," regardless of whether it can be categorized as "real property" or "personal property." *See, e.g.*, *City of New Braunfels v. Carowest Land, Ltd.*, 03-11-00699-CV, 2014 WL 1774535 (Tex. App. Apr. 30, 2014) (noting that a "compensable taking[] may involve both [real or

[3] For the reasons stated *supra*, billboards—once erected and fixed in place—must be treated the same as any other standing structure, as part of the real property.

personal] [] property.") (citing *City of Dallas v. VSC, LLC,* 347 S.W.3d 231, 234–36 (Tex. 2011) (takings claim predicated on seizure of automobiles); *Steele v. City of Houston,* 603 S.W.2d 786, 789 (Tex. 1980) (takings claim predicated in part on destruction of personal belongings)).

Illustrating the point, the federal courts—and courts in other jurisdictions—recognize that privately owned tangible objects are protected by the Takings Clause on equal footing with real property. *See Johnson v. King*, 85 So. 3d 307, 310 (Miss. Ct. App. 2012) (invoking federal Fifth Amendment takings cases in holding that the Takings Clause of the Mississippi Constitution protected an inmate from an uncompensated seizure of his *drinking mug*); *Warner/Elektra/Atl. Corp. v. Cnty. of DuPage,* 771 F. Supp. 911, 914 (N.D. Ill. 1991) (holding the Fifth Amendment's Takings Clause requires compensation where a public works project results in destruction of personal property), *aff'd sub nom. Warner/Elektra/Atl. Corp. v. Cnty. of DuPage*, 991 F.2d 1280 (7th Cir. 1993); *Hillsborough County v. Gutierrez,* 433 So.2d 1337, 1340 (Fla. Ct. App. 1983) (same). The U.S. Supreme Court recently reaffirmed that the protections of the Takings Clause extend beyond

real property. *Koontz v. St. Johns River Water Mgmt. Dist.*, 133 S. Ct. 2586 (2013) (money is property); *see e.g.*, *Hamilton & Buffalo Navigation Co.*, 338 U.S. 396 (1949) (addressing valuation of a condemned vessel under the Takings Clause). This Court similarly recognizes the principle, and rejects the false dichotomy the State urges here. *Steele v. City of Houston*, 603 S.W.2d 786, 791 (Tex. 1980) ("The Constitution … authorize[es] … compensation for the destruction of property…"); *see also Skeen v. State*, 550 S.W.2d 713, 715 (Tex. Civ. App. 1977) (requiring compensation for both real and personal property after a public works project caused flooding). Accordingly, an order to remove a billboard amounts to a taking requiring just compensation if the order results in physical appropriation or destruction of the billboard.

## II. THE FULL AND PERFECT EQUIVALENT OF WHAT IS TAKEN IS MEASURED BY INCOME CAPITALIZATION

### A. The Just Compensation Clause Requires Payment for the Objective Value of What is Taken, Which Includes Consideration of Income Generating Potential

Billboards are valuable because they generate income. To be sure, a willing buyer considering purchasing a billboard does not only evaluate the cost of the steel, concrete, and wood of which

billboards are constructed. The fair market value of a billboard also includes its most valuable attribute: its ability to generate income.

The Fifth Amendment requires that "just compensation" must be paid when property is taken. *Miller*, 317 U.S. at 374. This moral precept has been understood as rule in equity. *See Olson v. United States,* 292 U.S. 246, 255 (1934) (purpose of the Just Compensation Clause is to put the condemnee "in as good a position pecuniarily as if his property had not been taken"). As the U.S. Supreme Court explained in a seminal case illustrating the principle, the landowner must receive the "full and perfect equivalent" of what has been taken. *Monongahela Navigation Co. v. United States*, 148 U.S. 312 (1893).

As in other jurisdictions, Texas courts hold that eminent domain valuations must be based on the fair market value of the property taken. *Exxon Pipeline Co. v. Zwahr*, 88 S.W.3d 623, 627 (Tex. 2002). Throughout the country, courts adhere to the principle that "fair market value" is "what a willing buyer would pay a willing seller." *United States v. Miller,* 317 U.S. 369, 374 (1943); *Religious of Sacred Heart of Texas v. City of Houston*, 836 S.W.2d 606, 622 (Tex. 1992) ("[T]he term 'market value is the price which the property

would bring when it is offered for sale by one who desires but is not obliged to sell, and is bought by one who is under no necessity of buying, taking into consideration all of the uses to which it is reasonably adaptable and for which it either is or in all reasonable probability will become available within the reasonable future.").

But the concept of "fair market value" has always been understood merely as a *proxy* for "the full and perfect equivalent" of what has been taken. As emphasized in early takings cases,[4] and cogently restated in *Armstrong v. United States*, the purpose of the Takings Clause is to prevent government from forcing some individuals to bear more than their fair share of public burdens. 364 U.S. 40, 49 (1960).

Bearing in mind this overarching principle of takings law, it is essential to remember that the condemnee already contributes—along with every other taxpayer—to the public treasury, from which funds are used to facilitate public works projects in the community. And when a landowner's property is targeted for condemnation in

[4] *Monongahela Navigation Co.* explained that the Takings Clause "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when [an individual] surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him." 148 U.S. at 325.

eminent domain to facilitate a public project, the owner is forced to make a *further* contribution—above and beyond what is demanded of other citizens in the community. *See Gallatin Valley Elec. Ry. v. Neible*, 186 P. 689, 692 (Mont. 1919) (emphasizing that an improper deduction in valuation forced the landowner "by judicial mandate to donate such sum" to the public); *City of St. Louis Park v. Engell*, 314-315 (Minn. 1969) (same). Indeed, in an eminent domain taking, the owner is forced to surrender the value of his or her property for the good of the public. Accordingly, to compensate the owner fully, the award must include "all elements" bearing on the objective value of the condemned property because any other approach will force the condemnee to sacrifice elements of value, giving a financial windfall to the condemning authority. *Olson*, 292 U.S. at 255.

### B. The Value of a Commercial Property is Tied to its Income Generating Potential

Commercial properties such as billboards are valuable in large part because of their potential for generating income to the owner. "Their value necessarily depends on their productiveness." *Monongahela Navigation Co.*, 148 U.S. at 329 (quoting *Montgomery Co. v. Schuylkill Bridge Co.*, 110 Pa. St. 54, 58, 20 Atl. Rep. 407

(1885)).)[5] In *Monongahela Navigation Co.*, a case which illustrates the principle, the federal government condemned a lock and dam owned by the Monongahela Navigation Company. *Id.* at 324. At the behest of the Commonwealth of Pennsylvania, the Monongahela Company had built the lock and dam system to transform the Monongahela from a wild river to a highway of commerce. *Id.* To encourage the company to carry out the project, Pennsylvania's legislature enacted a bill giving the company the right to construct the dam, which provided that the completed dam would be recognized as property of the Monongahela Company. *Id.* at 328-29. The Act further provided that the company would maintain an exclusive franchise—as owner of the lock and dam—to charge tolls for travelers and barges passing through. *Id.* Thus when the federal government condemned the lock and dam through its eminent domain powers, the question arose as to whether the Just Compensation Clause required an award based solely on the value

[5] "If they yield no money in return over expenditures, they would possess little, if any, present value. If, however, they yield revenue over and above expenses, they possess a present value, the amount of which depends, in a measure, upon the excess of revenue." *Monongahela Navigation Co.*, 148 U.S. at 329 (quoting *Schuylkill Bridge Co.*, 110 Pa. St. 54, 58, 20 Atl. Rep. 407).

of the physical structure taken, or whether it should also include the revenue that the lock and dam was contemplated to generate.

The Court observed that the lock and dam system was valuable precisely because the Monongahela Company had the right to charge tolls, and noted that the company had indeed profited substantially from operation of the lock system before the taking.[6] Further, in light of burgeoning commercial ventures in the river basin, there were good reasons to think that the owner would have soon commanded even greater toll revenues.[7] The Court deemed all of this relevant. *Id.* at 328 ("The value of property, generally speaking, is determined by its productiveness,-the profits which its use brings to the owner."). Indeed, the Court held that a property's capacity to generate revenue bears on its objective value. *Id.* at 329 ("[B]efore this property can be taken away from its owners, the whole value must be paid; and that value depends largely upon the

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[6] *Id.* at 328 ("A precisely similar property in a stream where commerce is light, would naturally be of less value, for the demand for the use would be less. The value, therefore is not determined by the mere cost of construction, but more by *what the completed structure brings in the way of earnings* to its owner.") (emphasis added).

[7] "[T]he actual toll receipts of lock and dam No. 7 for several years past have exceeded $2,800 per annum, and [] a very large increase of such toll receipts at lock and dam No. 7 will certainly take place in a short time by the development of coal mines naturally tributary to said lock and dam."). *Id.* at 625.

productiveness of the property, the franchise to take tolls.").

Thus, a prospective buyer would have considered the Monongahela Navigation Company's lock and dam system to be a valuable potential investment because ownership would entail the right to collect tolls from travelers and barges. *Monongahela Navigation Co.*, 148 U.S. at 329. To be sure, fair-market value necessarily reflects the fact that other potential buyers will make competitive offers to obtain income-generating investments. *Travis Cent. Appraisal Dist. v. FM Properties Operating Co.*, 947 S.W.2d 724, 730 (Tex. App. 1997) ("The supreme court has stated that the income approach to valuation 'proceeds on the premise that a buyer of income-producing property is primarily interested in the income which his property will generate.'") (quoting *Polk Cnty. v. Tenneco, Inc.*, 554 S.W.2d 918, 921 (Tex. 1977)).

These principles apply all the same with commercial real estate today. Values often rise throughout commercial districts in urban centers when business is booming because the demand for commercial real estate rises in tandem with economic growth. *See Monongahela Navigation Co.*, 148 U.S. at 328 (("Neighborhood to the centers of business and population largely affects value, for that

property which is near the center of a large city may command high rent, while property of the same character, remote therefrom, is wanted by but few, and commands but a small rental."). To be sure, if a business is looking to open a new retail store, a restaurant, or a cocktail bar, it will have to pay a premium to acquire real estate in the heart of an already booming district. The reason is manifest—simple economics. A potential seller can command a higher asking price because the supply of vacant properties is limited within the district, and because the demand for such property is high, in light of its potential for generating future income.[8] To be sure, in a free market, the final selling price is agreed upon in light of the buyer's assessment of the potential for a return on investment.

### C. In the Real World, Investors Always Consider Potential for Income Generation

A prudent individual will consider the value proposition of any potential investment before committing to a deal. In the finance world, individuals make calculated decisions in consideration of many factors—but the ultimate question is how great of a return

[8] *See* William K. Jaeger, *The Effects of Land-Use Regulations on Property Values*, 36 Envtl. L. 105, 109 (2006) (observing that land use restrictions may raise land values by limiting the supply of properties suitable for restricted uses, while lowering values for other properties where the supply remains high).

can I expect on an investment of my capital? Leigh H. Martin, *Deregulatory Takings: Stranded Investments and the Regulatory Compact in A Deregulated Electric Utility Industry*, 31 Ga. L. Rev. 1183, 1216 (1997) (noting that "[i]nvestors in competitive markets make investment decisions by evaluating potential losses and gains, investing only when the expected return repays the funds invested 'plus a suitable payment for the risk entailed in the investment.'") (internal citations omitted). In the corporate world, companies buy other businesses all the time—and the selling price is always driven by the buyer's assessment of likely profits to be gained in the acquisition. Stephen I. Glover, *Completing M&A Transactions in Today's Challenging Environment*, Aspatore, 2013 WL 5755373 (2013) ("Strategic buyers acquire businesses because they want to increase revenues or profits and drive growth."). Real estate sales are no different.[9]

[9] "Land values… are driven by the anticipated profit of developing." Joseph B. Nochols, Stephen D. Oliner, and Michael R. Mulhall, *Commercial and Residential Land Prices Across the United States*, Finance and Economics Discussion Series Division of Research & Statistics and Monetary Affairs Federal Reserve Board, Washington D.C., 8 (2010-16), *available* online at http://www.federalreserve.gov/pubs/feds/2010/201016/201016pap.pdf (last visited 07/14/14).

The typical small business owner has limited financial resources and knows that a decision to purchase real estate is going to tie up his or her capital assets for years into the future. Accordingly, small business owners are careful to do their homework. They will usually look at what similar properties have sold for, to the extent such data is available—and to the extent that there are truly comparable properties on the market. But, they will always consider the potential for generating income to be relevant. *Collin Cnty. v. Hixon Family P'ship, Ltd.*, 365 S.W.3d 860, 870 (Tex. App. 2012), review denied (Sept. 14, 2012) (reaffirming that it is appropriate to consider "'all factors … which would reasonably be given weight in negotiations between a seller and a buyer' of property.") (quoting *City of Austin v. Cannizzo*, 267 S.W.2d 808, 814 (Tex. 1954)). Accordingly, the fact that a commercial property has generated substantial income in the past is likely to weigh heavily into the business owners decision, so long as it's reasonable to assume similar potential in the future.

In the same manner, any reasonable businessperson would likely consider the potential for generating income from a billboard before committing to the investment. *State ex rel. Dep't of Transp. v.*

*Lamar Adver. of Oklahoma, Inc.*, 2014 OK 47 (2014) (holding that evidence of income generated from a rental sign was a relevant factor because it would likely "be given weight in the negotiation of a market transaction…"). As with any other real property, the principles of supply and demand affect market value.[10] Thus, a sign's potential to generate income is certainly relevant in determining market value—especially when regulatory conditions limit the available market for signs.

### D. When There are Few Comparable Properties on the Market, the Income Generation Approach Is Required

When available, information on recent sales for comparable properties can shed light on what a willing buyer would likely pay a willing seller for a commercial property. But as the U.S. Supreme Court made clear in *United States v. Toronto Hamilton & Buffalo Navigation Co.* ("*Buffalo Navigation Co.*"), comparable sales are only relevant to the extent the properties are similar enough to draw meaningful comparisons. 338 U.S. 396 (1949). To be sure, evidence

[10] The Court in *Lamar Adver. of Oklahoma, Inc.* recognized that "a willing buyer would likely pay more for a sign on a busy highway than it would for a sign on a remote country road." *Id.* This is because the former sign would most likely generate greater income than the later.

of other sales can only be helpful to the extent they reflect current market conditions. *Id.* at 402-03.

In *Buffalo Navigation Co.*, the United States condemned a car ferry that had been docked for several years in an Ohio port. Faced with a dearth of comparable sales data, the Court concluded that "other means of measuring value may have relevance[,] [to the extent such considerations have] … bearing on what a prospective purchaser would have paid." *Id.* at 402. But the majority was clear in holding that the property's value could not be established by reference to recent sales on the record before the court. Id. at 402-03 ("We hardly think five sales of dissimilar vessels requires a finding that any one of the varying prices would have been repeated…").

Accordingly, it is appropriate to consider other indicia of value—especially in those cases where there are few comparable sales. *Polk Cnty. v. Tenneco, Inc.*, 554 S.W.2d 918, 921 (Tex. 1977) (explaining that the "'comparable sales' method of appraising property is of little use in valuing pipelines" because natural gas pipelines are "rarely sold"). In accordance with this general principle, state courts in many jurisdictions have allowed

introduction of evidence of sales generated from condemned properties as a means of demonstrating objective value. *See e.g.*, *Arkansas State Highway Comm'n v. Cash*, 2590 S.W.2d 676, 678 (Ark. App. 1979); *Nat'l Adver. Co. v. State, Dep't of Transp.*, 993 P.2d 62, 66 (Nev. 2000). Indeed, in light of the reality that buyers consider a property's potential for income generation before committing to the investment, the income capitalization method should be recognized as an accepted—if not the preferred—method of valuation in those cases where the real estate is uniquely situated, such that there are no directly comparable sales data. *Buffalo Navigation Co.*, 338 U.S. at 403 (stating that "past earnings are significant [] when they tend to reflect future returns.") (citing Orgel, Valuation Under Eminent Domain, ch. XIV (1936); 2 Nichols, Eminent Domain, s 446 (2d ed. 1917)).

As such, the income capitalization method of valuation may be particularly appropriate in billboard cases because there is often a dearth of comparable sales data available.[11] *State v. Cent.*

[11] Robert F. Reilly, *Measuring Economic Obsolescence in the Valuation of Special-Purpose Properties*, 26-Sept. Am. Bankr. Inst. J., 36 (2007) (observing that "special-purpose properties do not sell that often in their secondary market… [and that] there is [therefore] a dearth of comparable sale transaction data [for such properties].").

*Expressway Sign Associates*, 302 S.W.3d 866, 871 (Tex. 2009) (reaffirming that Texas Courts will consider other methods of valuation where "comparable sales figures are not available…").[12] To be sure, federal, state and local regulations have created a closed market for billboards. *See* Highway Beautification Act of 1965, Pub. L. No. 89-285, 79 Stat. 1028; Texas Beautification Act, Tex. Transp. Code Ann. § 391.036 (West). For example, in the City of Houston, there are only a finite number of existing billboards, and new billboards are generally prohibited. *See* City of Houston Building Code Chapt. 46 § 4612 (b).

In light of the fact that regulations inhibit competitors from erecting new billboards, existing billboards are all the more valuable today. Given that existing billboards will continue to generate income into the future—likely greater revenues as populations increase—owners of these properties have few incentives to sell. For this reason sales on the open market are few and far between.

[12] As set forth already in footnote No. 1, *amici* recognize that the condemnation award was supported by sufficient evidence of comparable sales in this case. But this Court should not disallow the income capitalization approach here because it too provides an appropriate basis for valuing the condemned billboard. And it is important—when stating rules of general applicability in eminent domain proceedings—to remember that evidence of comparable sales will likely be sparse in future cases.

Anthony J. Coyne, Billboard Valuation: Law & Methodology, Eminent Domain and Land Valuation Litigation, American Law Institute, Study Material, 684 (Jan. 23-25, 2014). And because each billboard's unique location matters immensely in determining its potential to generate income, evidence of a selling price for Billboard A has only limited relevance in consideration of what a willing buyer would pay a willing seller for Billboard B. *See Lamar Adver. of Oklahoma, Inc.*, 2014 OK 47. To be sure, for a businessperson—whose bottom-line consideration is *return on investment*—information on the billboard's potential for income generation is the most salient consideration in negotiating a sale. *Monongahela Navigation Co.*, 148 U.S.at 343 ("[W]hen by the taking of the tangible property the owner is actually deprived of the franchise to collect [revenues], just compensation requires payment, not merely of the value of the tangible property itself, but also that of the franchise of which he is deprived.").

### E. Evidence of Income Generation Does Not Speak to Consequential Damages

Despite the fact that the majority of jurisdictions recognize the income capitalization method as an acceptable approach for valuing

billboards, the State protests that this method improperly awards consequential damages for lost business. But the income capitalization approach has nothing to do with lost profits or consequential damages. Income capitalization is simply a method for determining the objective value of what is taken. *See City of Harlingen v. Estate of Sharboneau*, 48 S.W.3d 177, 183 (Tex. 2001) ("By estimating [] future income and applying a capitalization rate, the income approach allows the appraiser to arrive at a *present value* for the income-producing property.") (emphasis added).

To be sure, the income capitalization method does not set valuation in consideration of lost profits. *City of Thibodaux v. Louisiana Power & Light Co.*, 373 F.2d 870, 873 (5th Cir. 1967) (explaining the capitalization approach). Instead, this approach looks—from the prospective of a potential buyer—to the property's history of generating income to determine what a willing buyer would pay a willing seller in cash. *Cloverport Sand & Gravel Co., Inc. v. United States*, 6 Cl. Ct. 178, 189 (1984). Evidence of revenue derived from the property is necessarily relevant because it speaks to the property's potential for future income generation—a

consideration that will affect the price any prudent buyer would agree to. *Lamar Adver. of Oklahoma, Inc.*, 2014 OK 47

To be sure, the owner in *Monongahela Navigation Co.* was not awarded consequential damages. 148 U.S. at 345. There was no compensation for lost profits. The company was compensated solely for the value of what was actually taken. *Id.* ("[J]ust compensation requires *payment for the franchise to take tolls, as well as for the value of the tangible property*…") (emphasis added). The Court simply looked to evidence of the property's income generating potential, as would any buyer in the real world.

## CONCLUSION

For the foregoing reasons, the *amici* respectfully urge this Court to affirm the decision of the Court of Appeals.

Respectfully submitted,

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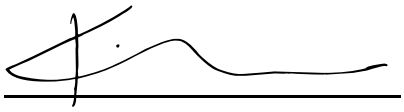
By: 

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## CERTIFICATE OF COMPLIANCE & SERVICE

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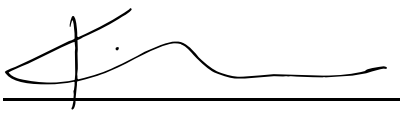

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