

No. 15-0146

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**IN THE  
SUPREME COURT OF TEXAS**

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DORIS FORTE, O.D., ON BEHALF OF HERSELF AND ALL  
OTHER SIMILARLY SITUATED PERSONS; BRIDGET  
LEESANG, O.D.; DAVID WIGGINS, O.D.; JOHN BOLDAN,  
O.D.,

*Appellees,*

v.

WAL-MART STORES, INCORPORATED,

*Appellant.*

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ON CERTIFIED QUESTION FROM THE UNITED STATES  
COURT OF APPEALS FOR THE FIFTH CIRCUIT,  
CASE NO. 12-40854

**AMICI CURIAE BRIEF OF THE CHAMBER OF  
COMMERCE OF THE UNITED STATES AND THE TEXAS  
ASSOCIATION OF BUSINESS**

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Office of the Texas Attorney General	“AG”
Chamber of Commerce of the United States	“Chamber”
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Texas Association of Business	“TAB”
Texas Civil Practice and Remedies Code Chapter 41	“Chapter 41”
Texas Optometry Act	“TOA”
Wal-Mart Stores, Incorporated	“Wal-Mart”



**STATEMENT OF INTEREST OF**  
**THE CHAMBER OF COMMERCE OF THE UNITED STATES AND THE**  
**TEXAS ASSOCIATION OF BUSINESS**

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, from every region of the country. The Chamber advocates its members' interests before Congress, the Executive Branch, and the courts, and regularly files amicus briefs in cases raising issues of concern to the nation's business community. The Texas Association of Business is a bipartisan trade association with an over 85-year history of representing more than 3,000 Texas businesses and 200 local chambers of commerce in Texas.

The Chamber, the TAB and their members have a substantial interest in ensuring that Texas business owners retain the ability to engage in common, private and legal commercial leasing practices without being subject to huge sums of money in civil penalties, and that the public policy of Texas is accurately and properly applied to continue to facilitate the most robust economy in the nation while thwarting this new and creative attempt to reintroduce the runaway windfalls into the legal system that have been reigned in over recent decades.

No counsel for a party in this case authored this brief in whole or in part. No person or entity—other than amici, their members, or their counsel—made monetary contributions specifically for the preparation or submission of this brief.

### **STATEMENT OF THE CASE**

The Chamber and the TAB adopt and incorporate by reference the Statement of the Case of Wal-Mart Stores, Incorporated.

### **ISSUES PRESENTED**

The U.S. Court of Appeals for the Fifth Circuit certified the following questions to this Court:

1. Whether an action for a “civil penalty” under the Texas Optometry Act is an “action in which a claimant seeks damages relating to a cause of action” within the meaning of Chapter 41 of the Texas Civil Practice and Remedies Code. In other words, are civil penalties awarded under Tex. Occ. Code § 351.605 “damages” as that term is used in Tex. Civ. Prac. & Rem. Code § 41.002(a).
2. If civil penalties awarded under the Texas Optometry Act are “damages” as that term is used in Tex. Civ. Prac. & Rem. Code § 41.002(a), whether they are “exemplary damages” such that Tex. Civ. Prac. & Rem. Code § 41.004(a) precludes their recovery in any case where a plaintiff does not receive damages other than nominal damages.

The Circuit disclaimed any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the questions certified.

*Forte v. Wal-Mart Stores, Inc.*, 780 F.3d 272, 283 (5th Cir. 2015).

## **STATEMENT OF FACTS**

The Chamber and the TAB adopt and incorporate by reference the Statement of Facts recited by Wal-Mart in its Brief of Appellant.

## **SUMMARY OF THE ARGUMENT**

For over 25 years now, the Legislature has sought to “accomplish needed civil justice reform, while preserving the basic rights of injured persons to obtain appropriate relief through civil actions under the laws of this state.” S.B. 5 § 1.01(a)(6) (1987) (App. B to Brief of Appellant). Despite admitting that they are not injured, Plaintiffs now attempt to circumvent the Legislature’s tireless efforts to halt the very situation the Court faces today. Under Plaintiffs’ statutory construction, Texas businesses face the threat of exorbitant and untethered exemplary damages based on lawful actions that undisputedly caused no actual harm. An examination of the relevant statutes persuades that the Legislature’s near thirty-year efforts have not been in vain. Thankfully, there is a statutory framework in place to prevent uninjured private litigants like Plaintiffs from receiving multi-million dollar windfalls based on a strained reading of the TOA and a refusal to acknowledge the language and intent of Chapter 41.

Although not expressly certified to this Court, the Chamber and the TAB are very concerned about the liability holding in this case. If voluntary execution of a contract and choice of one’s hours of work constitute control or an attempt to

control the Plaintiffs, then freedom of contract has been re-defined in Texas. Business amici believe that, as a matter of law, Wal-Mart did not assert “control” over Plaintiffs’ “professional judgment or practice” in violation of the TOA but instead permitted the optometrists in a free market to voluntarily execute a property lease and gave optometrists the right to select their hours of work. However, if the Court decides it should not address this threshold issue, Plaintiffs cannot recover because the answer to both questions the Court has been asked to address is a resounding “yes.” The plain language of the relevant statutes read in conjunction with their purpose, history, and policy yields a simple conclusion: private litigants may not enforce civil penalties under the TOA untethered to any actual harm.

## **ARGUMENT**

### **I. The Plain Language Of Chapter 41 And The TOA Bars Plaintiffs’ Recovery Absent Actual Damages.**

The ultimate purpose in construing a statute is to discover and give effect to the Legislature’s intent in enacting it. *In re Canales*, 52 S.W.3d 698, 702 (Tex. 2001). If a statute is clear and unambiguous, one need not rely on the rules of construction to construe it. *Id.*

**A. *The plain language of Chapter 41 commands broad application, with no exception for the TOA.***

Certainly few would disagree that subjecting a business to potentially hundreds of millions of dollars in “civil penalties” based on lawful actions is an inequitable result. By merely starting at the beginning of the statutory analysis and examining the plain language of the relevant provisions, such a result can easily be avoided.

Chapter 41 of the Texas Civil Practice and Remedies Code “applies to *any* action in which a claimant seeks damages relating to a cause of action.” TEX. CIV. PRAC. & REM. CODE § 41.002(a) (emphasis added). The Legislature provided that Chapter 41 is dominant. When “this chapter applies, the provisions of this chapter prevail over all other law to the extent of any conflict.” *Id.* at § 41.002(c). The Legislature clearly intended to avoid allowing statutory oversights or any uncertainty in subsequent enactments from infringing its limitations on non-compensatory and exemplary awards in Chapter 41. Further, the Legislature explained that “[t]his chapter establishes the maximum damages that may be awarded in an action subject to this chapter, including an action for which damages are awarded under another law of this state.”<sup>1</sup> *Id.* at § 41.002(b).

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<sup>1</sup> Section 41.002(b) also explains that “[t]his chapter does not apply to the extent another law establishes a lower maximum amount of damages for a particular claim.” TEX. CIV. PRAC. & REM. CODE § 41.002(b). This does not apply here. While the TOA provides a maximum amount that may be recovered per day, the statute is deafeningly silent on the limits of the penalty. *See* TEX. OCC. CODE § 351.603(b).

Having established Chapter 41's broad application, the Legislature considered and excluded four statutory schemes from the reach of Chapter 41. *See id.* at § 41.002(d) (expressly stating that “this chapter does not apply to” four statutory means of recovery). The four excluded provisions are: (1) Texas Free Enterprise and Antitrust Act of 1983; (2) an action brought under the Deceptive Trade Practices-Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) except as specifically provided in Section 17.50 of that Act; (3) an action brought under Chapter 36 of the Human Resources Code; and (4) an action brought under chapter 21 of the Insurance Code. *Id.* at § 41.002(d)(1)-(4). The TOA is not one of the statutes the Legislature chose to exclude. One “cannot presume . . . that the drafters of Chapter 41 forgot about statutory fines like the one here; but even if they did, that would not authorize us to edit their draft.” *Flores v. Millennium Interests, Ltd.*, 185 S.W.3d 427, 439 (Tex. 2005) (J. Brister, dissent) (citation omitted).

The history of § 41.002(d) confirms that the Legislature did not “forget” to exclude the TOA, but instead made the decision in 1995 to broaden the scope of Chapter 41's application. The original codification of Chapter 41 in 1987 included a laundry list of exempted statutes and applied to “*an* action in which a claimant seeks exemplary damages relating to a cause of action [as defined].” Act of June 2, 1987, 70th Leg., 1st C.S., ch. 2, § 2.12, 1987 Tex. Gen. Laws 37, 44, *amended*

by Act of Apr. 20, 1995, 74th Leg., R.S., ch. 19, § 1, 1995 Tex. Gen. Laws 108 (emphasis added). In 1995, the Legislature expanded the reach of Chapter 41 in two ways: by changing its applicability to “*any* action in which a claimant seeks damages relating to a cause of action,” and dramatically shortening the list of exempt provisions from fifteen to four.<sup>2</sup> TEX. CIV. PRAC. & REM. CODE § 41.002(a), (d) (emphasis added).

The Legislature knows how to exempt certain claims from the scope of Chapter 41, and it did not exempt the TOA.

**B. *Chapter 41 and the TOA are easily applied in conjunction with each other.***

With the understanding that Chapter 41 does not exclude the TOA but instead governs “any action in which a claimant seeks damages,” we turn to the interplay between the TOA and Chapter 41. Chapter 41 defines exemplary damages as “any damages awarded as a *penalty* or by way of punishment but not

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<sup>2</sup>As evidenced by the statutory provisions carved out of Chapter 41, the Legislature is capable of providing circumstances for private citizens to pursue civil penalties without being governed by Chapter 41. However, in doing so, the Legislature places reasonable limits on the recovery of a private citizen to avoid the type of abuse seen here. For example, Human Resources Code Chapter 36, Texas’s *qui tam* provision, allows a private party to file an action for Medicaid fraud without the state choosing to intervene and is expressly exempt from Chapter 41. TEX. CIV. PRAC. & REM. CODE § 41.002(d); HUMAN RES. CODE, Title 2, Subtitle C, Chapter 36, Subchapter C, “Action by Private Persons.” However, awards to private persons are limited: “If the state does not proceed with an action under this subchapter, the person bringing the action is entitled, except as provided by Subsection (b), to receive at least 25 percent but not more than 30 percent of the proceeds of the action. . . .” HUMAN RES. CODE § 36.110(a-1). Additionally, the state is provided ample opportunity to intervene or receive access to all filings and transcripts. See *id.* § 36.104(a), (b-1). Thus, the Legislature has created a system, exempted from Chapter 41, which allows private citizens to enforce statutory penalties, but in a limited capacity with the opportunity for the Attorney General to remain involved.

for compensatory purposes.” TEX. CIV. PRAC. & REM. CODE § 41.001(5) (emphasis added). Plaintiffs’ verdict was based on TOA § 351.603, titled “Civil *Penalty*” and the section’s text defines the optometrists’ recovery here as a “penalty.” TEX. OCC. CODE § 351.603 (emphasis added); § 351.605. Thus, according to Chapter 41’s sweeping provisions, when a penalty is awarded to a private litigant under the TOA, Chapter 41’s provisions applying to “any damages awarded as a penalty” govern the case.

## **II. Civil Penalties Sought By Plaintiffs Are A Type Of Exemplary Damage.**

Plaintiffs have taken the broad stance that no civil penalty can ever constitute an exemplary damage. Pet. For Reh’g En Banc at 4. In so doing, they cited the Attorney General’s briefing in an unrelated proceeding. *See* AG Brief of Appellees at 16, *Norra v. Harris County*, No. 14-05-01211-CV (Tex. App.—Houston [14th Dist.] Mar. 4, 2008, no pet.), 2007 WL 2402584 (“AG Brief”). However, the AG’s opinions in *Norra* were inapposite. The AG brief explained that civil penalties enforced by the government cannot be governed by Chapter 41. The Chamber and the TAB wholeheartedly agree, in this context. However, the same policy arguments expounded in *Norra* do not apply. The issue here is not whether the government’s recovery is controlled by Chapter 41, but whether a *private* litigant seeking to enforce civil penalties is exempt from Chapter 41.



“Generally, a statutory penalty or fine is not payable to a private litigant.” *Brown v. De La Cruz*, 156 S.W.3d 560, 564 (Tex. 2004). However, when a private litigant seeks to recover statutory penalties, such as under the TOA, “a statute which imposes a penalty must be strictly construed.” *Id.* (quoting *Agey v. Am. Liberty Pipe Line Co.*, 172 S.W.2d 972, 974 (Tex. 1943)).

The Court need not make a bright-line determination whether all civil penalties constitute exemplary damages under Chapter 41. Instead, the Court is being asked if private litigants seeking to enforce penalties under the TOA are governed by the umbrella of Chapter 41. As this Court acknowledged, “Chapter 41 generally limits the award of exemplary damages, which it broadly defines as any damages that are ‘awarded as a penalty or by way of punishment.’” *Flores*, 185 S.W.3d at 434 (quoting TEX. CIV. PRAC. & REM. CODE § 41.001(5)). In so acknowledging, this Court held that “liquidated damages” provided in the Texas Property Code are actually penal in nature. *Id.*

Two appellate courts cited *Flores* in support of their opinions, and took it one step further, holding that based on Chapter 41’s plain language, the same penal provisions addressed in *Flores* must be accompanied by actual damages for a private litigant to recover in accordance with Chapter 41. *See Henderson v. Love*, 181 S.W.3d 810, 816 (Tex. App.—Texarkana 2005, no pet.); *Smith v. Davis*, No. 12-14-00007-cv, 2015 WL 1825071, at \*6-7 (Tex. App.—Tyler Apr. 22, 2015, pet.

filed).<sup>3</sup> The Court faces a similar situation today: a private litigant is seeking to enforce civil penalties absent any actual damages.

Chapter 41 dictates that exemplary damages may only be awarded if damages other than nominal damages are awarded. TEX. CIV. PRAC. & REM. CODE § 41.004(a). This provision of Chapter 41 is easily applied to Plaintiffs without nullifying any portion of the TOA.<sup>4</sup> The TOA provides that “[a] person injured as a result of a violation of Section 351.408 . . . is entitled to the remedies in Sections 351.602(c)(2), 351.603(b), *and* 351.604(3).” TEX. OCC. CODE § 351.605 (emphasis added). Plaintiffs only sought recovery for alleged infringement of § 351.408 under § 351.603(b). Section 351.603(b) only provides a remedy in the form of a civil penalty or injunction. However, Plaintiffs fatally failed to seek recovery under § 351.602(c)(2)’s actual damages provision. Section 351.602(c)(2) titled “Injunction; Damages” provides for “damages plus court costs and reasonable attorney’s fees if the person is injured by another person who violates . . . Section 351.408.” *Id.* at § 351.602(c)(2). The TOA does not limit

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<sup>3</sup> *Henderson* and *Smith* acknowledged that this Court has not yet expressly ruled on whether Chapter 41 applies to § 5.077 of the Texas Property Code. However, they did not address *Flores*’ holding that the liquidated damages in the Property Code did not require actual damages. *Flores*, 185 S.W.3d at 434. Even if the Court finds that *Henderson* and *Smith* incorrectly interpreted *Flores*, it is distinguishable from the case at hand. Unlike Property Code § 5.077, the TOA provides a means for private litigants to recover compensatory damages in addition to civil penalties, harmonizing both Chapter 41 and recovery under the TOA. *See* TEX. OCC. CODE § 351.602(c)(2).

<sup>4</sup> Though the provisions do not conflict, the broad language in Chapter 41 commands that “the provisions of this chapter prevail over all other law to the extent of any conflict.” TEX. CIV. PRAC. & REM. CODE § 41.002.

“damages” as used in § 351.602(c)(2). Meanwhile, § 41.001 defines multiple types of damages other than exemplary which could be encompassed in § 351.602(c)(2):

- (4) “Economic damages” means compensatory damages intended to compensate a claimant for actual economic or pecuniary loss; the term does not include exemplary damages or noneconomic damages.
- (8) “Compensatory damages” means economic and noneconomic damages. The term does not include exemplary damages.
- (9) “Future damages” means damages that are incurred after the date of the judgment. Future damages do not include exemplary damages.
- (12) “Noneconomic damages” means damages awarded for the purpose of compensating a claimant for physical pain and suffering, mental or emotional pain or anguish, loss of consortium, disfigurement, physical impairment, loss of companionship and society, inconvenience, loss of enjoyment of life, injury to reputation, and all other nonpecuniary losses of any kind other than exemplary damages.

TEX. CIV. PRAC. & REM. CODE § 41.001(4), (8), (9), (12). The TOA thus allows a private litigant to recover compensatory damages under § 351.602 and civil penalties (*i.e.* exemplary damages) under § 351.603. In other words, the TOA provides for recovery of non-exemplary damages and is consistent with Chapter 41. A private litigant can recover civil statutory penalties under the TOA while satisfying the requirements of Chapter 41 if the private litigant obtains

compensatory damages as provided by § 351.602(c)(2). But Plaintiffs have failed to do so.

### **III. Plaintiffs Cannot Use Civil Penalties To Circumvent Statutory Brakes On Runaway Verdicts.**

Plaintiffs admit they had no compensable damages in this case. They only employed § 351.603's penal provision of the TOA. The results yielded exactly what the Legislature prohibited in Chapter 41: uninjured private litigants receiving multi-million dollar windfalls, based on common and acceptable commercial lease practices. The purposes of Chapter 41 and the TOA confirm that Plaintiffs' claims for damages under the TOA are exemplary damages that may not be recovered by a private litigant absent compensatory damages.

Chapter 41 was enacted under an omnibus motion that would enable businesses and health care providers to serve their clients and patients without the undue burden of facing countless frivolous lawsuits and runaway verdicts that create windfalls in the absence of any actual damages. *See* Tex. S.B. 5 § 1.01 (1987) (App. B to Brief of Appellant). When the Legislature enacted Chapter 41, one of the specifically enumerated goals was to “accomplish needed civil justice reform, while preserving the basic rights of injured persons to obtain appropriate relief through civil actions under the laws of this state.” *Id.* § 1.01(a)(6). With these purposes in mind, the Legislature struck a careful balance between limiting

windfalls for uninjured plaintiffs while preserving avenues for recovery on meritorious claims.

In 1995, Chapter 41 was amended to withdraw eleven of the fifteen previously exempted statutes from its application.<sup>5</sup> Supporters of the amendments explained that “[m]any business are denied their day in court because of punitive damages. The threat of large punitive damage awards is so great that many prudent business owners agree to settle a case that they would rather take to court.” S.B. 25 (1995) House Research Org. Report, at 5. The Legislature acted again in 2003, implementing sweeping tort reform including the strengthening of Chapter 41 to add more requirements to receive exemplary damages. *See* H.B. 4 § 13.03-.05 (2003). Commentators consistently proffer that the Legislature’s actions yielded positive results for Texas health care,<sup>6</sup> insurance availability,<sup>7</sup> and business

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<sup>5</sup> For further discussion of the relevant amendments, see *supra* at Section I.A.

<sup>6</sup> *See, e.g.,* Diya Gullapalli, *Medical-Malpractice Claims to Fall—State Laws, Self-Insurance Help Lead to Fewer Suit Against Doctors, Study Says*, WALL STREET J., Oct. 18, 2005; Doug Brunk, *Texas Tort Reform Boosts Physician Count 19%*, 10 CARDIOLOGY NEWS 6, 36 (2012).

<sup>7</sup> *See, e.g.,* Ralph Blumenthal, *More Doctors in Texas After Malpractice Caps*, THE NEW YORK TIMES, Oct. 5, 2007 ([http://www.nytimes.com/2007/10/05/us/05doctors.html?oref=slogin&\\_r=0](http://www.nytimes.com/2007/10/05/us/05doctors.html?oref=slogin&_r=0)) (explaining that the application for physicians has risen dramatically while insurance rates have dropped following H.B. 4 (2003)); *10 Years of Tort Reform in Texas Bring Fewer Suits, Lower Payouts*, TEX. INS. J. (Sept. 3, 2013) (<http://www.insurancejournal.com/news/southcentral/2013/09/03/303718.htm>) (citing executive director of Texas Alliance for Patient Access for the proposition that “since 2003, average malpractice insurance premiums have fallen 46 percent”).

growth.<sup>8</sup> Despite this, Plaintiffs now attempt to use “civil penalties” as a way to circumvent the effective statutory brakes on runaway exemplary damages. Their efforts should not be condoned.

Just as Chapter 41 addresses runaway verdicts and the resulting unpredictability for businesses, the history of the TOA reveals that it was never intended to create a windfall provision for optometrists signing standard commercial lease agreements. The TOA explains that it governs the establishment of an optometrist’s office in an effort to:

safeguard the visual welfare of the public and the doctor-patient relationship, assign professional responsibility, establish standards of professional surroundings, more nearly secure to the patient the optometrist’s or therapeutic optometrist’s undivided loyalty and service, and carry out the prohibitions of this chapter against placing an optometric or therapeutic optometric license in the service or at the disposal of an unlicensed person.

TEX. OCC. CODE § 351.363(a). Nowhere in the TOA’s history is there any indication that the Legislature intended for optometrists to enjoy broader rights than other private parties in negotiating and entering commercial leases. Similarly, there is no indication the Legislature intended for optometrists to circumvent Chapter 41’s broad-reaching provisions in order to receive windfall damages that

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<sup>8</sup> See, e.g., Joseph Nixon, *Ten Years of Tort Reform in Texas: A Review*, THE HERITAGE FOUNDATION BACKGROUNDER #2830 (<http://www.heritage.org/research/reports/2013/07/ten-years-of-tort-reform-in-texas-a-review>) (explaining that since the passing of H.B. 4 (2003) there has been a major influx of doctors, hospital innovation, and job creation in Texas).

in no way bolster the Legislature’s attempt to “safeguard the visual welfare of the public.”

#### **IV. The Court Should Reject Plaintiffs’ Overly Broad Theory of Control.**

The Fifth Circuit determined that there was sufficient evidence to affirm a finding that Wal-Mart asserted control over Plaintiffs as defined in the TOA. However, in certifying questions to the Texas Supreme Court, the Fifth Circuit “disclaim[ed] any intention or desire that the Supreme Court of Texas confine its reply to the precise form or scope of the questions certified.” *Forte*, 780 F.3d at 283. *See also Fairfield Ins. Co. v. Stephens Martin Paving, LP*, 246 S.W.3d 653, 660, 671 (Tex. 2008) (In addressing a certified question from the Fifth Circuit, the majority and concurrence relied on the broad framing of the certified question and the Fifth Circuit’s inclusion of the disclaimer language to address policy implications despite acknowledging that the inquiry could have ended without having done so.) (J. Hecht, concurring).

Business amici respectfully contend that as a matter of law there was insufficient evidence for the determination that Wal-Mart asserted control of Plaintiffs. In Texas, parties have a right to contract as they see fit as long as their agreement does not violate the law or public policy. *GMYN-N-I Playgrounds, Inc. v. Snider*, 220 S.W.3d 905, 912 (Tex. 2007). In fact, this Court has “long recognized Texas’ strong public policy in favor of preserving freedom of contract.”

*El Paso Field Servs., L.P. v. MasTec N. Am., Inc.*, 389 S.W.3d 802, 811-12 (Tex. 2012) (citing *Fairfield Ins. Co.*, 246 S.W.3d at 664); *Wood Motor Co. v. Nebel*, 238 S.W.2d 181, 185 (Tex. 1951).

As pointed out by Wal-Mart, there is no evidence of coercion or fraud and the optometrists themselves admit they were not coerced or forced to enter the leases or designate or work set or minimum hours. No conduct by Wal-Mart asserted by Plaintiffs interfered with their “exercise of free will and judgment”, to even rise to the level of duress. *Cf. Dallas County Cmty. College v. Bolton*, 185 S.W.3d 868, 878-79 (Tex. 2005) (concerning tax assessments); *Miga v. Jensen*, 96 S.W.3d 207, 211 (Tex. 2002) (deciding whether a party who has “freely decided” to pay a judgment mooted his appeal). An exercise of the optometrists’ free will to choose their own hours and voluntarily execute a lease with Wal-Mart is inconsistent with control of the optometrist’ professional judgment or practice. In fact, in other contexts, this Court has held that where the facts are undisputed, whether a payment is voluntary or involuntary is a question of law. *See Bolton*, 185 S.W.3d at 880 (citing *Windham v. Alexander, Weston & Poehner*, 887 S.W.2d 182 (Tex. App.—Texarkana [9th Dist.] 1994, no writ) (concerning suit on promissory note executed by client for attorney’s fee debt)).

We do not challenge the facts relating to the optometrists’ execution of the lease and their specifying their own work hours. We do have serious concerns



with the interpretation of these undisputed facts. Reasonable jurors could not conclude that these facts can legitimately be considered control or attempts to control Plaintiffs' practice of optometry, and the question itself, given the undisputed facts in this case, should be a question of law, not fact. *See City of Keller v. Wilson*, 168 S.W.3d 802, 827 (Tex. 2005) ("The final test for legal sufficiency must always be whether the evidence at trial would enable reasonable and fair-minded people to reach the verdict under review.").

Notwithstanding the finding of a violation, Plaintiffs cannot recover civil penalties absent proof of the necessary predicate of compensatory damages. And Plaintiffs disclaimed any actual or compensatory damages in this case.

### **CONCLUSION AND PRAYER**

The Texas economy is "ranked first for both current economic climate and growth prospects"<sup>9</sup> and is considered "the best state to make a living"<sup>10</sup> because it is based on free market principles, aided by guidelines on litigation considered and amended over several decades. The attempt here to use statutory civil penalties to undermine Texas' clear public policies, especially under Chapter 41, is deeply concerning to the Chamber of Commerce of the United States and the Texas Association of Business. Plaintiffs may not use civil penalties as a means of

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<sup>9</sup> *Texas Profile*, FORBES, November 2014 (<http://www.forbes.com/places/tx/>).

<sup>10</sup> Kathryn Dill, *The Best And Worst States To Make A Living In 2015*, FORBES, June 24, 2015 (<http://www.forbes.com/sites/kathryndill/2015/06/24/the-best-and-worst-states-to-make-a-living-in-2015/>).

bypassing the Legislature's enactments to halt inequitable and unfounded punitive awards. The civil penalties sought by Plaintiffs under the TOA are "exemplary damages" governed by Chapter 41, and Plaintiffs may not recover them because they failed to seek or prove compensatory damages.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

Based on a word count run in Microsoft Word, this brief contains 4082 words, excluding the portions of the brief exempt from the word count under Texas Rule of Appellate Procedure 9.4(i)(1).

/s/ Dale Wainwright  
Dale Wainwright

### **CERTIFICATE OF SERVICE**

I certify that on June 24, 2015, a copy of the Chamber of Commerce of the United States' and the Texas Association of Business' Amici Curiae Brief was electronically filed with the Clerk of the Court using the eFile.TxCourts.gov filing system which will send notification to the attorneys of record in this case.

*/s/ Dale Wainwright*

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Dale Wainwright