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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM RICHLAND COUNTY
Kristi F. Curtis, Circuit Court Judge

Appellate Case No. 2024-001321
Civil Action No. 2016-CP-40-06276

OPTERNATIVE, INC.,
Appellant,

v.

SOUTH CAROLINA BOARD OF MEDICAL EXAMINERS AND SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING, AND REGULATION,
Respondents,

and

SOUTH CAROLINA OPTOMETRIC PHYSICIANS ASSOCIATION,
Respondent-Intervenor.

INITIAL BRIEF OF APPELLANT

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ISSUE ON APPEAL

The Telemedicine Act allows doctors to prescribe treatments based on information they collect online. *See* S.C. Code Ann. § 40-47-37. But there is a narrow exception that bans doctors from prescribing corrective lenses—and only lenses—based on information they collect online. *See Id.* §§ 40-24-10, 40-24-20. The undisputed facts show there is no meaningful health or safety difference between lenses and anything else a doctor might prescribe using telemedicine. Instead, the only reason lenses are singled out is that a group of optometrists drafted the Lens Exception to destroy Appellant Opternative's business.[1]

The sole issue on appeal is:

1. Does the Lens Exception violate "equal protection" or "due process" under Article I, Section 3 of the South Carolina Constitution because it fails to rationally further any goal beyond mere economic protectionism?

[1] In 2018, while this case was pending, Opternative changed its named to Visibly. To avoid confusion, Appellant will use the name Opternative throughout this brief.

INTRODUCTION

Is it rational for the legislature to ban doctors from using telemedicine to prescribe *lenses* while allowing doctors to use telemedicine to prescribe *anything else*? If we asked that question about a law that forbade doctors from hiring physical therapists—but no other healthcare staff—the answer would be no. *See Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 451–52, 790 S.E.2d 763, 771 (2016) (plurality). If we asked it about a law that capped liability for charity hospitals—but no other charity care providers—the answer would be no. *See Hanvey v. Oconee Mem'l Hosp.*, 308 S.C. 1, 5, 416 S.E.2d 623, 625–26 (1992). If we asked it about a law that foreclosed liability for architects, engineers, and contractors—but no other home improvement entities—the answer would be no. *See Broome v. Truluck*, 270 S.C. 227, 230–31, 241 S.E.2d 739, 740 (1978). And if we asked it about a law that criminalized breach of contract for farm employees—but not farm employers—the answer would be no. *See Ex parte Hollman*, 79 S.C. 9, 60 S.E. 19, 25 (1908). If all these cases went the same way, why did the trial court declare the Lens Exception "rational"?

Because it misapplied Article I, Section 3 of the South Carolina Constitution. The court saw "no discernable difference" between this Court's rational basis test and the federal test. Order at 10. Worse, it applied a toothless, fact-free version of the federal test—one that requires courts to uphold laws when they can imagine any "conceivable basis which might support [them]." *Id.* (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993)). But this Court's test is different. It takes facts seriously. It requires courts to ask whether a law that applies *only* to one slice of an industry does so because that slice *actually* poses a greater threat to the public. If the answer is no—as it was in *Joseph*, *Hanvey*, *Broome*, and *Hollman*—that's irrational. The trial court broke from that approach. It ignored undisputed evidence showing that there is no real health or safety difference

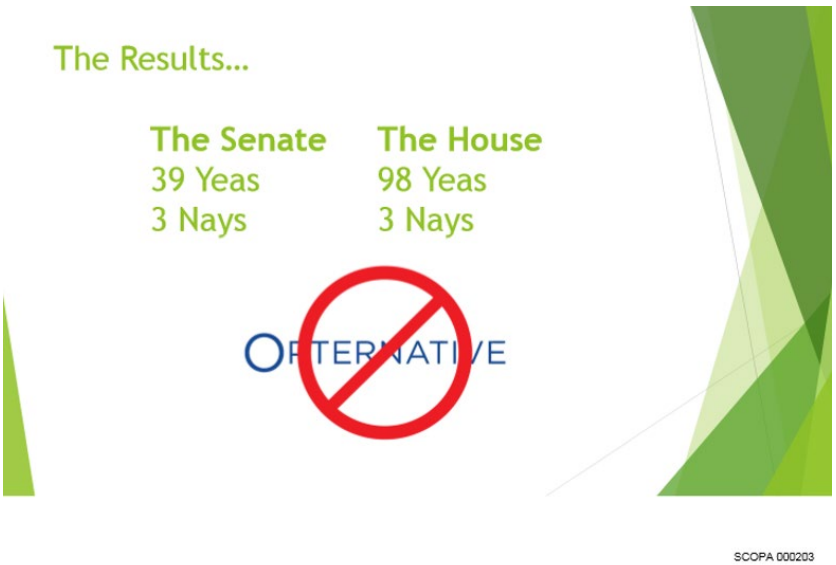
between lenses and anything else doctors may prescribe under the Telemedicine Act. That was error, and correcting it starts with the test.

First, then, Opternative shows that South Carolina's rational basis test, while deferential, is a real test that allows plaintiffs to use *evidence* to meet their burden and requires courts to *engage* with that evidence. This reality-oriented test—unlike the trial court's "conceivability" test—flows directly from the historical context in which Article I, Section 3 was adopted. In 1895, it was widely held that the right to enjoy "liberty" with "equal protection" and "due process of law" included the right to be free from arbitrary and protectionist uses of the police power. This Court, in turn, has long applied a fact-based test to ensure that laws serve public—rather than purely private—ends. And sister courts have done the same. In the last decade alone, the North Carolina, Georgia, Pennsylvania, and Texas high courts have all reaffirmed a fact-based rational basis test under their own constitutions. The trial court's approach, then, would require both abandoning this Court's precedents and departing from how sister courts review the police power. Neither is warranted.

Second, Opternative shows that the Lens Exception fails South Carolina's rational basis test. Opternative's equal protection and due process claims make a simple point: There is no real safety difference between eye doctors who prescribe *lenses* online (banned) and those who prescribe *anything else* online (allowed). All eye doctors treat the same people, the same body part, and the same diseases. The trial court held it was rational to exclude lenses from the Telemedicine Act on the premise that eye care is always "inadequate" unless it flows from an "in-person comprehensive eye examination" for "undiagnosed" diseases. Order at 10–12. But that premise contradicts the record. Every single eye doctor who testified in this case—on both sides—agreed that patients only need eye health exams every so often and has personally prescribed lenses in between those exams.

On this record, it's simply irrational to pretend that hidden diseases are a threat *only* when eye doctors prescribe lenses but not when they prescribe *any other* care online.

Stripped of public health rhetoric, the only explanation for the Lens Exception supported by the record is pure "economic protectionism." *Retail Servs. & Sys., Inc. v. S.C. Dep't of Rev.*, 419 S.C. 469, 474, 799 S.E.2d 665, 667 (2017) (plurality). Respondent-Intervenor the South Carolina Optometric Physicians' Association (SCOPA) is composed of optometrists who make their money selling glasses in their shops. Opternative, which offers a way to renew lens prescriptions online, threatens that business model. So, immediately after the Telemedicine Act passed, SCOPA pushed the Lens Exception to shield its members from online competition. While lobbying, SCOPA carefully avoided mentioning Opternative or its members' economic interests. But after the Lens Exception passed, SCOPA openly cheered Opternative's demise with messages like "Good-bye Opternative!" and this presentation slide:



Because "there [is] no indication in this record that [this law] exist[s] for any other reason than economic protectionism," *Retail Servs. & Sys., Inc.*, 419 S.C. at 474, 799 S.E.2d at 667, the Court should reverse and remand with instructions to enter summary judgment for Opternative.

STATEMENT OF CASE

Appellant Opternative challenges the Lens Exception, S.C. Code Ann. §§ 40-24-10, 40-24-20, under Article I, Section 3 of the South Carolina Constitution. Opternative filed this case on October 20, 2016, in the Richland County Court of Common Pleas. The original defendants were the South Carolina Board of Medical Examiners and the South Carolina Department of Labor, Licensing and Regulation (the "State"), the entities charged with enforcing the Lens Exception. SCOPA, which drafted and lobbied for the Lens Exception, joined the case as defendant-intervenor.

On January 26, 2018, the trial court—without reaching the merits—granted summary judgment for the State on the ground that Opternative lacked standing to challenge the Lens Exception. *Opternative, Inc. v. S.C. Bd. of Med. Exam'rs*, No. 2016CP4006276, 2018 WL 4367908 (S.C. Com. Pl. Jan. 26, 2018). Opternative appealed. On May 5, 2021, the Court of Appeals held that "the trial court erred in finding Opternative lacked standing." *Opternative, Inc. v. S.C. Bd. of Med. Exam'rs*, 433 S.C. 405, 418, 859 S.E.2d 263, 270 (Ct. App. 2021). SCOPA petitioned for rehearing, which was denied, and then sought certiorari. On August 24, 2022, this Court granted certiorari and affirmed "the court of appeals' determination that Opternative, Inc. has standing" to challenge the Lens Exception. *Opternative, Inc. v. S.C. Bd. of Med. Exam'rs*, 437 S.C. 258, 260, 878 S.E.2d 861, 862 (2022) (per curiam).

The case returned to the trial court, where Opternative and SCOPA filed cross-motions for summary judgment. On July 18, 2024, the trial court granted summary judgment for SCOPA on the ground that Opternative failed to show the Lens Exception violates equal protection or due process under Article I, Section 3 of the South Carolina Constitution. Order at 17. Opternative appealed and served notice of that appeal on August 15, 2024. The case is back before this Court

because the trial court issued a "final judgment involving a challenge on state . . . grounds to the constitutionality of a state law" and "the principal issue is one of the constitutionality of the law." Rule 203(d)(1)(A)(ii), SCACR.

STATEMENT OF FACTS

I. Opternative enables eye doctors to renew lens prescriptions online.

Picture a young, healthy woman who wants a new pair of glasses. She's had her glasses for a year and liked them—until her toddler stomped on them and cracked the lenses. She knows her vision hasn't changed, but because lens prescriptions expire after a year, S.C. Code Ann. § 40-24-20(B), she'll need to get a fresh prescription if she wants new lenses. For her, that's not so easy. She lives in a rural area without ready access to an eye doctor. And carving out time to visit one, between work and childcare, will be tough. She'll likely just keep her cracked lenses. And she's not alone. The fact is, healthy people who like their lenses but need to replace them (for whatever reason) often delay because they don't have time to visit an eye doctor. O'Brien Aff. ¶¶ 9–10, 18.[2]

Enter Opternative. Before the internet, a person who wanted to renew her prescription had to visit an eye doctor's office, wear her lenses, and answer questions about images on a chart to confirm her vision had not changed. *Id.* ¶¶ 5–7. Some doctors run this test themselves; others have an assistant run it. *Id.* ¶ 8. Either way, the test tells a doctor "how well that person is able to see with their current prescription." Shipp Dep. 44:4–22.[3] Opternative invented an *online version* of this test: It "allows customers with prior corrective lens prescriptions to take an online vision test and have their results sent to a licensed eye doctor (an ophthalmologist or optometrist), who can

[2] Dr. Chris O'Brien is a licensed ophthalmologist. O'Brien Aff. ¶ 2.

[3] Dr. Melvin Shipp is a licensed optometrist. Shipp. Aff. ¶ 1.

then use that information to help determine whether it is appropriate to renew the customer's prescription." Foley Aff. ¶¶ 2, 4, 20.[4]

The core features of Opternative's vision test mirror the traditional in-person test. Where a person taking the traditional test visits an office and fills out a form with her medical history and symptoms, a person taking Opternative's test visits its website and fills out a form with the same information. *Id.* ¶ 5. Where a person taking the traditional test looks at images on a wall while an assistant records her responses, a person taking Opternative's test looks at images on a computer screen and uses her phone to record her responses. *Id.* ¶¶ 9–10. And where a doctor who reviews the results of a traditional test uses his judgment to decide whether to renew a lens prescription, a doctor who reviews the results of Opternative's test does the same. *Id.* ¶¶ 12, 18–20.

Both the FDA and doctors who have used Opternative agree that it's materially identical to a traditional vision test. The FDA has cleared Opternative as an online "Visual Acuity Chart" that is "substantially equivalent" to an in-person chart. *Id.*, Ex. 2 (P00420, 427). The FDA did so because "performance data demonstrate that" Opternative is a "safe and effective" alternative to the traditional test. *Id.*, Ex. 2 (P00427). And Dr. O'Brien, who has tested thousands of people's vision using Opternative, has found "no significant medical difference between" Opternative and the traditional test. O'Brien Aff. ¶¶ 17, 22. Given these similarities, "ophthalmologists are already using [Opternative's] software in dozens of states." *Id.* ¶ 28.

II. The Telemedicine Act allows doctors to prescribe treatments online.

Opternative used to operate in South Carolina. From 2014 to 2016 (when this lawsuit was filed), doctors used Opternative's "online vision test to collect information from [South Carolina]

[4] Paul Foley is Opternative's COO and CFO. Foley Aff. ¶ 2.

patients remotely and to prescribe corrective lenses for patients based on that information." Foley Aff. ¶ 30. Back then, as now, doctors were generally "free to choose . . . the environment in which to provide medical services" as long as they honored their duty to "provid[e] competent medical service." S.C. Code Ann. Regs. 81-60(A), (F). The South Carolina doctors who tried Opternative during this period found that it was a valuable tool for expanding access to care. Bodde Aff. ¶ 11.[5] One doctor, for example, wrote that Opternative's online vision test "provides meaningful access to personalized refractive care for appropriately selected patients." Chaum Aff. ¶ 4.[6]

Opternative was at the forefront of an innovation that became commonplace during the recent COVID-19 pandemic: telemedicine. "Telemedicine [is] the use of online technologies to connect doctors with patients, whether via synchronous or asynchronous means." O'Brien Aff. ¶ 11; *see also* Centers for Disease Control and Prevention, *Telemedicine Use Among Adults: United States, 2021*, https://tinyurl.com/5bwj6uve (similar definition). During the pandemic, over a third of all adults received medical care online. *Id.* at 5. That was possible because, in the decade prior, states across the country adopted laws embracing telemedicine and clarifying its proper use.

South Carolina was one of those states. In March 2016, it adopted the Telemedicine Act. *See* S.C. Code Ann. § 40-47-37. The Act confirmed that doctors could treat patients using online tools that sent information "between a licensee in one location and a patient in another location" if they met "the same standard of care as in-person medical care." *Id.* §§ 40-47-37(A)(1), 40-47-20(53). It confirmed doctors could "prescribe for a patient whom the licensee has not personally examined" if they obtained "threshold information necessary to make an accurate diagnosis." *Id.*

[5] Daniel Bodde is Opternative's former Chief Marketing Officer. Bodde Aff. ¶ 2.

[6] Dr. Edward Chaum is a licensed ophthalmologist. Chaum Aff. ¶ 2.

§§ 40-47-37(A)(1), (C)(7)(a). And it confirmed doctors could not prescribe online "when an in-person physical examination is necessary for diagnosis." *Id.* § 40-47-37(C)(8).

More simply, the Telemedicine Act empowers doctors to collect information from patients online and to prescribe care—as long as accepted medical standards do not require an in-person exam. The Act, with narrow exceptions not relevant here,[7] does not draw lines between medical specialties or treatments. It treats all doctors the same no matter what they prescribe. Right now, for example, eye doctors are using a tool called SkinSolutions.MD to collect information online, including photos of people's eyes, that they can use to decide whether to prescribe eye drops and serums. Second O'Brien Aff. ¶ 4. These eye doctors must follow the same standards that would apply in-person. S.C. Code Ann. § 40-47-37(A)(1). And one standard that all eye doctors must consider is whether a patient is due for a full eye-health exam. Shipp Aff. ¶ 22.

Full eye-health exams use a battery of tests—a tonometer to gauge eye pressure, a dilation to look inside the eye, a slit lamp to examine the retina, an ophthalmoscope to examine the optic nerve—to detect diseases. *Id.* ¶ 21. These probing exams, while useful, are not "always medically necessary for otherwise-healthy patients." O'Brien Aff. ¶ 21. Whether a person needs one, like most things in medicine, depends on the circumstances. Shipp Dep. 100:7–25; *see also id.* at 99:11–18 ("clinical care is not cookie cutter"). The American Academy of Ophthalmology—which helps set the standard of care for eye doctors—writes that because eye diseases are rare before age 40, people need a full exam *once* "at age 40 if they have not previously had one," and then *once* every few years after that depending on their age and medical history. O'Brien Aff. ¶ 23 & Ex. 3. It's

[7] The Telemedicine Act forbids doctors from prescribing abortion-inducing drugs online and limits doctors' ability to prescribe Schedule II and III drugs to certain narrow circumstances. S.C. Code Ann. § 40-47-37(C)(7)(b)–(c).

undisputed this is a correct statement of the standard for when people need full exams. Shipp Dep. 68:5–69:14; Robinson Dep. 39:16–23.[8] Thus, when an eye doctor is deciding whether to prescribe eye drops or serums using a tool like SkinSolutions.MD under the Telemedicine Act, he must consider the last time the person had a full exam. Sometimes a prescription will be proper, sometimes not. The Telemedicine Act trusts doctors to tell the difference.

III. The Lens Exception forbids doctors from prescribing lenses online.

But doctors who want to use Opternative to prescribe lenses—unlike doctors who want to prescribe anything else online—are excluded from the Telemedicine Act. In May 2016, just two months after the Telemedicine Act passed, the legislature banned doctors from prescribing lenses based on information collected through telemedicine. *See* S.C. Code Ann. §§ 40-24-10, 40-24-20. Here's how the Lens Exception works: A doctor prescribing lenses "must take into consideration medical findings made and refractive error discovered during [an] eye examination." *Id.* § 40-24-20(B). The exam must include a "visual status." *Id.* § 40-24-10(3). And a visual status "must not be based solely on . . . information generated by an automated testing device" (telemedicine). *Id.* § 40-24-10(9). Because Opternative is an automated testing device—in the sense that it collects information from people without human involvement—the law "prohibits Opternative's current business model." *Opternative, Inc. v. S.C. Bd. of Med. Exam'rs*, 433 S.C. 405, 418, 859 S.E.2d 263, 270 (Ct. App. 2021), *aff'd*, 437 S.C. 258 (2022) (per curiam).

The Lens Exception does not require doctors to perform a full eye-health exam before prescribing lenses. As the State's designee conceded at deposition, the law imposes "no explicit [testing] requirement," "doesn't say how the eye examination is to be conducted," "doesn't

[8] Dr. Mark Robinson is a licensed ophthalmologist. Robinson Aff. ¶ 1.

identify diagnostic methodologies that have to be employed in order to develop the medical findings," and doesn't "specify what those medical findings must be." Coleman Dep. 64:16–66:17.[9] In other words, the Lens Exception adds nothing to the Telemedicine Act's pre-existing standard for full eye-health exams: Perform them when patients need them. S.C. Code. Ann. § 40-47-37(C)(8). All the Lens Exception actually requires is "some type of human involvement" in collecting the information on which a prescription is based, even if that human is just an "unlicensed professional[]." Coleman Dep. 67:3–68:2. The result is bizarre: A doctor can prescribe lenses based on responses to an eye chart recorded by an unlicensed human with a clipboard—but not based on the same responses recorded by an FDA-cleared online tool like Opternative.

IV. The Lens Exception protects SCOPA's members from competition.

It's natural to wonder if there's something unique about lenses that would explain why they are excluded from the Telemedicine Act. What makes the difference? It can't be the type of doctor involved: South Carolina eye doctors lawfully prescribe other things, like eye drops and serums, using telemedicine. Second O'Brien Aff. ¶ 4. It can't be the part of the body involved: Eye doctors who prescribe drops, serums, and lenses all treat the same body part—eyes. *See id*. It can't be the diseases eye doctors might catch during full exams: Those exams check for the same diseases (cataracts, glaucoma, diabetic retinopathy, etc.) whether a doctor later prescribes lenses, drops, serums, or anything else. Shipp Aff. ¶¶ 17–23. And it can't be how often people need full exams: Again, it's undisputed that people need them once by age 40 and then every few years after that. O'Brien Aff. ¶ 23 & Ex. 3; *see also* Shipp Dep. 68:5–69:14 (calling this standard "reasonable");

[9] Darra Coleman is the State's 30(b)(6) designee. Coleman Dep. 6:1–7:12.

Robinson Dep. 39:16–23 (agreeing that doctors who follow this standard "aren't doing anything wrong medically").

Indeed, every eye doctor who testified in this case *agreed* that it's sometimes beneficial to prescribe lenses in between full eye-health exams. Eye doctors with experience using Opternative testified that doing so safely expands access to care. O'Brien Aff. ¶¶ 17–18 (patients "benefitted from increased access to vision care"); Chaum Aff. ¶ 4 (similar). And SCOPA's own witnesses testified that they have personally prescribed lenses for patients without also performing a full eye-health exam that same day. Robinson Dep. 27:16–28:5 (renewed a relative's lens prescription without a full eye-health exam and instructed her to "get a complete eye exam when you're due"); Zolman Dep. 32:8–33:1[10] (renewed a lens prescription without a full eye-health exam when a person could not visit his office because it "improve[d] her quality of life"); *see also* Shipp Dep. 47:24–48:24, 50:8–18 (conceding that if a person had recently had a full eye-health exam and wanted lenses, he "would not [perform] a comprehensive eye exam").

There is, however, another explanation for the Lens Exception. It starts with an advocacy group called the American Optometric Association (AOA). Optometrists, unlike ophthalmologists (who are physicians), are limited eye-health professionals who make much of their money prescribing lenses and selling frames in their shops. Zolman Dep. 9:2–11:5, 65:5–66:15; Rivers Dep. 28:20–22.[11] Opternative, which offers a way to renew lenses online, threatens that model. Zolman Dep. 66:16–67:9; *see also* SCOPA Ans. ¶ 20 (admitting Compl. ¶ 48 (alleging that many

[10] Dr. Michael Zolman is an optometrist who leads SCOPA's lobbying efforts. Zolman Dep. 17:11–18:16, 20:18–21:5.

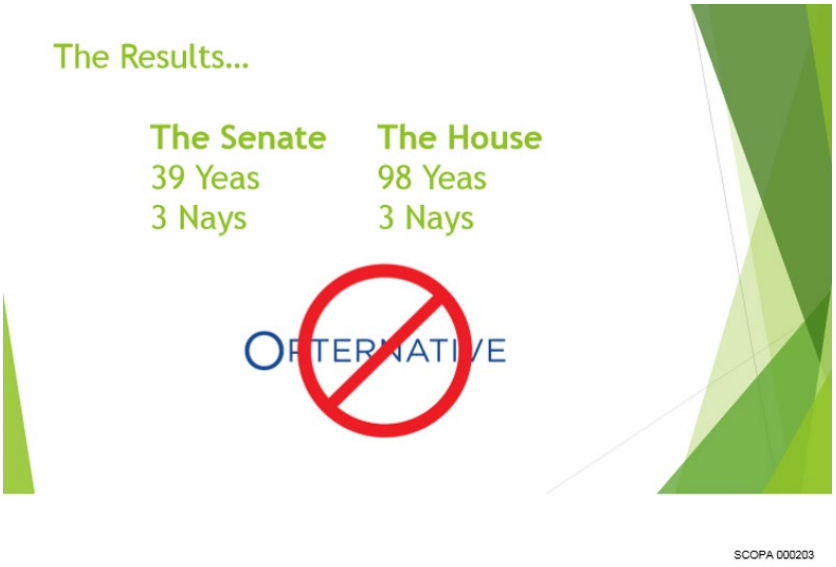
[11] Jackie Rivers is SCOPA's executive director and helps SCOPA's lobbying efforts. Rivers Dep. 9:25–10:2, 16:15–17:9.

optometrists make most of their money by "selling expensive frames in their brick-and-mortar offices")). So, when Opternative hit the market in 2014, the AOA launched a nationwide campaign to address "the Opternative issue." SCOPA000501. The next year, the AOA hosted a webinar for local affiliates about how online tools would impact the optometry business. SCOPA000181–93. The webinar explained that the AOA had drafted a bill that state affiliates could use to "Fight" online vision care. SCOPA000178–79.

SCOPA answered the call. After the webinar, Michael Zolman—who directed SCOPA's lobbying efforts at the time—warned SCOPA that online vision care would pose "a huge threat to our profession" and impact the "business side" of optometry. SCOPA000153–54; Zolman Dep. 51:3–5, 53:23–12. He urged SCOPA to "address [the issue] quickly and attack aggressively," noting the "AOA is on the ball and recently drafted a bill that can be modified on a state-by-state basis to prevent this . . . [which] is something we definitely want to do." SCOPA000153. SCOPA took his advice. Over the next several months, SCOPA adapted the AOA's bill and lobbied for its passage. SCOPA000152; Rivers Dep. 23:13–15; 34:17–35:2 (admitting it was "a bill that SCOPA passed"). In the lobbying process, SCOPA carefully avoided mentioning Opternative because "[l]egislators frown upon legislation that singles out and restricts a specific business." SCOPA001258; *see also* Rivers Dep. 55:16–22, 56:6–11 (admitting there were "internal discussions at SCOPA about the importance of discussing the [bill] as if it were not an effort to ban Opternative"). That strategy worked—the bill went to the Governor's desk.

SCOPA's efforts hit a snag when the Governor vetoed the bill for "us[ing] health practice mandates to stifle competition for the benefit of a single industry . . . . putting us on the leading edge of protectionism, not innovation." S.C. State Library (Digital Collections), *Veto of R.178,*

S.1016, https://tinyurl.com/a7w4kfdy (emphasis omitted). But SCOPA rallied to override the veto, and when the bill passed, sent emails openly cheering Opternative's demise. SCOPA000116 ("[T]ake that Opternative!!!!!!"), SCOPA000129 (notifying members "with the utmost pleasure . . . that Opternative and 'eye exam' kiosks are now PROHIBITED BY LAW"), *id.* ("Good-bye Opternative!"). With Opternative out of the way, SCOPA's members could resume "mak[ing] majority of their revenue from selling expensive frames in their brick-and-mortar offices" without any online competition. SCOPA Ans. ¶ 20 (admitting Compl. ¶ 48); *see also* Zolman Dep. 66:5–15 (agreeing he tries to sell frames in his office "most of the time"); Rivers Dep. 28:20–22 (similar). Months later, when the AOA asked SCOPA to show other state affiliates what it had achieved, SCOPA put it this way:



SCOPA000203.[12]

[12] This was not SCOPA's only time lobbying against innovation to protect its members' bottom lines. *See* Editorial Staff, *Editorial: SC claims it's too dangerous to take an online vision test for contacts or glasses*, The Post & Courrier (Sept. 3, 2024), https://tinyurl.com/5xy59xpb (describing how SCOPA "fought for years to prevent a national nonprofit from providing free eyeglasses to poor kids in Charleston").

SCOPA's fight for the Lens Exception has continued throughout this eight-year litigation. When Opternative sued to challenge the deliberate destruction of its business, SCOPA promptly intervened. Order at 2. It was SCOPA, not the State, that tracked down doctors willing to defend the Lens Exception (though it failed to find any who had not prescribed lenses without a full eye-health exam). *Supra* p 12. It was SCOPA, not the State, that moved for summary judgment. Order at 1. And it was SCOPA, not the State, that drafted the order (at the trial court's request) holding there is "no discernable difference" between the South Carolina rational basis test and the most tepid form of federal rational basis review. *See* Statement of Judgment (June 19, 2024) (instructing SCOPA to prepare final order); Order at 10. This appeal followed.

STANDARD OF REVIEW

This Court reviews summary judgment decisions de novo, applying the standard the trial court should have applied under Rule 56, SCRCP. *Ferguson Fire & Fabrication, Inc. v. Preferred Fire Prot., LLC*, 409 S.C. 331, 339, 762 S.E.2d 561, 565 (2014). Thus, the Court asks "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." *Id.* at 339, 762 S.E.2d at 565 (quoting Rule 56(c), SCRCP). A party who challenges a statute must prove that "its repugnance to the constitution is clear and beyond a reasonable doubt." *Powell v. Keel*, 433 S.C. 457, 461–62, 860 S.E.2d 344, 346 (2021) (cleaned up). The Court decides whether the challenging party has met its burden "without any deference to the court below." *Id.* at 462, 860 S.E.2d at 346 (cleaned up).

ARGUMENT

The trial court erred in two ways. First, it applied a fact-free version of the federal rational basis test rather than the fact-based state test this Court has long used to ensure the police power serves the public. Second, because it applied the wrong test, the trial court ignored the undisputed facts showing that the Lens Exception does not meaningfully serve the public—it merely protects SCOPA's members from competition. Taking those facts seriously, the Lens Exception violates Article I, Section 3 of the South Carolina Constitution.

I. Article I, Section 3 requires a meaningful test to ensure the police power serves public, rather than purely private, interests.

The trial court did not engage with the undisputed evidence showing that lenses are not meaningfully different than anything else doctors may prescribe under the Telemedicine Act. It failed to do so because it applied the most toothless form of federal rational basis review, which requires a court to uphold laws if they can imagine any "conceivable basis" for them. Order at 9 (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993)). But Article I, Section 3 of the South Carolina Constitution requires more. It was adopted at a time when its operative terms—"equal protection" and "due process of law"—were widely known to forbid arbitrary and protectionist laws. (Part A, *infra*). This Court, in turn, has long applied a fact-based rational basis test to ensure the police power serves public, rather than purely private, interests. (Part B, *infra*). Nor is that odd. In the last decade alone, the North Carolina, Georgia, Pennsylvania, and Texas high courts have all reaffirmed fact-based tests under their constitutions. Applying the trial court's "conceivability" test here, therefore, would mark a stark departure from how this Court and sister courts review exercises of the police power. The Court should apply its settled test.

A. The Constitution of 1895 enshrined pre-existing protections against arbitrary and protectionist uses of the police power.

This Court "can interpret" the South Carolina Constitution "in such a way as to provide greater protections than the federal Constitution." *State v. Forrester*, 343 S.C. 637, 644, 541 S.E.2d 837, 840 (2001). The Court starts with the original public meaning of the text. *Richardson v. Town of Mount Pleasant*, 350 S.C. 291, 294, 566 S.E.2d 523, 525 (2002). Because the Constitution often speaks in broad terms, the Court's reading may also be informed by the meaning of similar text in earlier constitutions, *Owens v. Stirling*, 443 S.C. 246, 269–70, 904 S.E.2d 580, 592 (2024), *reh'g denied* (Aug. 16, 2024), by historical context, *Knight v. Hollings*, 242 S.C. 1, 4, 129 S.E.2d 746, 747 (1963), and by the presumed intent to preserve common law rights, *State v. Rector*, 158 S.C. 212, 155 S.E. 385, 395 (1930), *overruled on other grounds by Evans v. State*, 363 S.C. 495, 611 S.E.2d 510 (2005). Applying these tools here, Article I, Section 3 enshrined pre-existing protections against arbitrary and protectionist uses of the police power.

Begin with the text. Article I, Section 3—adopted in 1895—states: "nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." This phrasing modernized earlier text that, back through 1778, had forbade deprivations of "life, liberty, or property, but . . . by the law of the land." S.C. Const. (1778), § XLI. Records from the 1895 convention reveal no intent to change the meaning of these earlier clauses. And the public, it seems, didn't expect a substantive shift either. *See The Constitution at Work*, The Manning Times (Sept. 25, 1895), https://tinyurl.com/585eth7e ("committee on the declaration of rights submitted an ordinance embodying the declaration of rights, which does not materially alter that now existing"); *The Law of the Land*, The Times & Democrat (Sept. 11, 1895), https://tinyurl.com/bdcsy62f (omitting law of the land clause from a list of edits "expected to

engage the attention of the Convention"). So the law of the land clause's pre-existing meaning provides helpful context here.

In 1778, the term "liberty" meant freedom of action. *See* T. Dyche & W. Pardon, *A New General English Dictionary* (1781), https://tinyurl.com/2bjarek9 ("in *common Speech*, *Liberty* is a freedom of doing any thing that is agreeable to a person's disposition, without the controul of another"). That definition was plenty broad enough to include the liberty at issue here: the right to pursue a business. Indeed, it was deeply rooted in English common law. Timothy Sandefur, *The Right to Earn a Living*, 6 Chap. L. Rev. 207, 207–17 (2003). English monarchs had a taste for granting "exclusive rights to trade" that shielded favored businesses from competition. *Id.* at 209. But the people resisted, both in parliament and in the courts, until it was settled that restraints on lawful trade were against the "fundamental laws of this kingdom." E. Coke, *The Third Part of the Institutes of the Laws of England* 181 (1669), https://tinyurl.com/55k8hdy7. By the American founding, there was no question that liberty included the "common law [right of] every man [to] use what trade he pleased." 1 Blackstone, *Commentaries*, *427.

The phrase "law of the land," likewise, had roots in English common law. It was a term of art that encompassed the procedures *and* substantive norms of the common law. Randy Barnett & Evan Bernick, *No Arbitrary Power: An Originalist Theory of the Due Process of Law*, 60 Wm. & Mary L. Rev. 1599, 1608 (2019). One of those norms, again, was that people had a right to engage in business free from monopolies—restraints that served only private interests. Steven Calabresi & Larissa Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 991–93 (2013). "English courts," therefore, "protected the right to pursue one's occupation against arbitrary government restraint." *Golden Glow Tanning Salon, Inc. v. City of*

Columbus, 52 F.4th 974, 982 (5th Cir. 2022) (Ho, J., concurring) (collecting pre-founding English cases striking down monopolies), *cert. denied*, 143 S. Ct. 1085 (2023).

Early South Carolina decisions reflected these twin ideas: that liberty includes the right to pursue a business, and that laws must serve public—not purely private—ends. Not long after the founding, for example, this Court rejected the government's power to take land from one person and give it to another as "against common right." *Bowman v. Middleton*, 1 S.C.L. 252, 252 (1792). The "law of the land," the Court later held, "operate[s] as a check upon the exercise of arbitrary power. Our Constitution[] is based upon certain known and recognized principles of common law and common justice," including that "[a]ny act of partial legislation, which operates oppressively upon one individual, in which the community has no interest, is not the *law of the land*." *Dunn v. City Council of Charleston*, 16 S.C.L. 189, 199–200 (1824). And regulations on economic activity, though allowed, had to "be proper to prevent any nuisance or inconvenience" and could not seek pure "suppression of a trade." *State ex rel. Heise v. Town Council of Columbia*, 40 S.C.L. 404, 415 (1853).

Closer to 1895, courts began referring to the limited power to issue this sort of appropriate regulation as the "police power." As this Court explained: "The limit to the exercise of the *police* power is this: The regulations must have reference to the safety, comfort or welfare of society; they must be, in fact, *police regulations*." *State v. Hayne*, 4 S.C. 403, 409 (1873) (citing, in part, T. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* (1871), 201, 576, 578)). The cite to Cooley was no accident. Cooley was "the most influential constitutional writer of the late nineteenth century." James Ely Jr., *The Oxymoron Reconsidered: Myth and Reality in the Origins of Substantive Due Process*, 16 Const. Comment. 315,

342 (1999). His treatise made two points relevant here: First, we all have a "right to follow a lawful calling." Cooley, *supra*, at 283. Second, the police power must address a "public necessity" in an evenhanded way. *Id.* at 637. The power to ban "dangerous occupations," for example, wouldn't justify a law that "should permit one person to carry on such an occupation and prohibit another, who had an equal right, from pursuing [it]." *Id.* at 213.

None of this was especially controversial. Indeed, the U.S. Supreme Court agreed with all of it just one year before the Constitution of 1895 was adopted:

> To justify the state in thus interposing its [police power] authority in behalf of the public, it must appear—First, that the interests of the public generally, as distinguished from those of a particular class, require such interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individuals. The legislature may not, under the guise of protecting the public interests, arbitrarily interfere with private business, or impose unusual and unnecessary restrictions upon lawful occupations; in other words, its determination as to what is a proper exercise of its police powers is not final or conclusive, but is subject to the supervision of the courts.

Lawton v. Steele, 152 U.S. 133, 137 (1894). That was a Fourteenth Amendment case. The very next year, South Carolina updated its law of the land clause with language mirroring the Fourteenth Amendment's equal protection and due process clauses.

B. This Court has long applied a fact-based test to ensure the police power serves public, rather than purely private, interests.

Since 1895, this Court has "policed" the police power to ensure that laws serve the public. And the Court has done so with a reality-oriented test—one that focuses on how laws impact real people. In one early case, the Court noted the rule, "sustained by much authority," that "courts must be able to see . . . some clear, real, and substantial connection between the assumed purpose of the [police] enactment and the actual provisions thereof, and that the latter do in some plain, appreciable, and appropriate manner tend towards the accomplishment of [its] object." *Aetna Fire*

Ins. Co. v. Jones, 78 S.C. 445, 59 S.E. 148, 150 (1907) (quoting 22 Am. & Eng. Encyc. of Law 938). "The police power," the Court added, "cannot be used as a cloak for the invasion of personal rights or private property, neither can it be exercised for private purposes, or for the exclusive benefit of particular individuals or classes." *Id.* (quoting 22 Am. & Eng. Encyc. of Law 938). Hewing to the facts allows courts to look behind the "cloak" at what a law really achieves.

Take a few examples. In *City of Orangeburg v. Farmer*, this Court held that an ordinance declaring home solicitation a "nuisance" exceeded the police power. 181 S.C. 143, 186 S.E. 783, 785 (1936). The Court based its decision on "considerable testimony" that (1) "solicitation is not a nuisance," was "not a menace to the public health," and many people "made a livelihood in this fashion," and (2) the ordinance was adopted "at the request of the Retail Merchants Association of that city, and not by reason of the complaint of householders." *Id.* Plus, even if there had been evidence of harm, the ordinance would have been an irrational way to prevent it because it did "not attempt to differentiate between salesmen who conduct themselves properly and those who do not"—it merely "declare[d] a lawful occupation a nuisance." *Id.* That was unconstitutional.

Then, in *Fincher v. City of Union*, the Court struck down an ordinance that banned a BBQ stand from operating in a residential area at night under the state and federal due process clauses. 186 S.C. 232, 245, 196 S.E. 1, 6 (1958). The Court, having "carefully read the pleadings and affidavits, and not[ing] the exhibits in the record," saw only one basis for the ordinance: The BBQ stand's patrons spoke loudly and honked their horns at night, which disturbed the immediate neighbors (but nobody else). *Id.* at 239, 244, 196 S.E. at 3, 5. The Court, while "sympathetic" to the neighbors, declared the ordinance unreasonable because the city's existing noise ordinances—

if enforced—would "remedy most of the evils sought to be reached by the present ordinance" without destroying a "lawful business enterprise." *Id.* at 239–44, 196 S.E. at 4–6.

The Court again applied a fact-based test in *McCoy v. Town of York*, which struck down an ordinance that banned the delivery of gas on trucks with tanks over 1,250 gallons. 193 S.C. 390, 392, 8 S.E.2d 905, 906 (1940). The city argued that transporting gas was dangerous—trucks could explode, after all—and so the ordinance was necessary to protect the public. *Id.* 392–93, 8 S.E.2d at 906. But the "actual provisions of the ordinance" were strange; they would have let untrained drivers move gas around in uninspected trucks as long as the tanks were small enough. *Id.* at 396, 8 S.E. at 908. So "the effect of the ordinance, and its professed object, [were] not in harmony." *Id.* at 397, 8 S.E. at 908. There was, though, another obvious effect in "[t]he record": The law impacted only *one* gas station, "causing him to increase the price of his gasoline to the resultant benefit of his competitors." *Id.*, 8 S.E.2d at 907–08. Because the law's "inevitable and evidently intended effect" was to hamper a "lawful business," the Court struck it down. *Id.*, 8 S.E.2d at 908.

This Court had a chance to abandon its fact-based test after the United States Supreme Court's decision in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483 (1955). That was an equal protection and due process challenge to a law that forbade opticians from fitting prescribed lenses into new frames unless the wearer got a second prescription. *Id.* at 485. The district court there saw no evidence that the law served the public health—if anything, it seemed to give eye doctors "control" over their "competitors." *Lee Optical of Okla., Inc. v. Williamson*, 120 F. Supp. 128, 134–42 & n.20 (W.D. Okla. 1954). But the Supreme Court reversed. In doing so, it applied a test that dispensed with the facts entirely: A law must be upheld if the state can name "an evil" and "it might be thought that the particular legislative measure was a rational way to correct it." *Lee*

Optical, 348 U.S. at 488. Since the Court could imagine reasons lawmakers might have passed the law, the law was "rational." *Id.* at 487–88 (discussion of what "[t]he Legislature might have concluded").[13]

But where *Lee Optical* veered, this Court kept straight. Two years later, in *Painter v. Town of Forest Acres*, the Court held that an ordinance forcing drive-in restaurants to close at midnight violated the state due process clause. 231 S.C. 56, 60–61, 97 S.E.2d 71, 73 (1957). Rather than apply *Lee Optical*, the Court applied South Carolina precedent that the government can't treat a "lawful business[]" as "a nuisance by merely declaring it to be such." *Id.* (citing *Morrison v. Rawlinson*, 193 25, 7 S.E.2d 635 (1940)). And rather than overlooking the law's protectionist effects, as *Lee Optical* did, the Court relied on testimony that the ordinance would destroy over half of the respondent's business and "appears to be directed at respondent with this purpose in mind." *Id.* at 60–61, 97 S.E.2d at 72–73 (citing, in part, *City of Orangeburg*, 181 S.C. 143, 186 S.E. 783).

This Court has never looked back. Even in cases upholding uses of the police power, the Court does not rubberstamp laws based on pure conjecture. It follows the facts. *See Denene, Inc. v. City of Charleston*, 359 S.C. 85, 90–94, 596 S.E.2d 917, 920–22 (2004) (upholding ordinance forcing bars to close in early morning where "[t]he record," including testimony about disturbances near

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[13] *Lee Optical* broke from earlier precedent applying a fact-based test and appears to be out of step with modern federal decisions. *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153 (1938) (holding that "[w]here the existence of a rational basis for legislation . . . depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry"); *Craigmiles v. Giles*, 312 F.3d 220, 224–26, 229 (6th Cir. 2002) (facts proven at trial established that a restriction on casket sales "was nothing more than an attempt to prevent economic competition"); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223–27 (5th Cir. 2013) (reaching same result in similar case and clarifying that, while the rational basis test articulated in cases like *Lee Optical* and *Beach Communications* is deferential, "plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality," and "hypothesized facts" can't defeat record evidence).

bars, showed the ordinance would "alleviate problems caused by intoxicated people"); *Hall v. Bates*, 247 S.C. 511, 519–20, 148 S.E.2d 345, 349–50 (1966) (upholding city's decision to place fluoride in water where "the record" showed it was "reasonably necessary to the public health"). Nor is the Court cowed by the gravity of the government's asserted interest. It follows the facts. *See Powell v. Keel*, 433 S.C. 457, 464–67, 860 S.E.2d 334, 348–49 (2021) (striking down lifetime sex-offender registry where there "there [was] no evidence in the record that current statistics indicate all sex offenders generally pose a high risk of re-offending").

And, to this day, this Court still refuses to allow the police power to be twisted for private ends. In 2016, the Court struck down a law that forbade doctors from employing and referring patients to physical therapists—but no other healthcare professionals—supposedly to prevent "conflicts of interest." *Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 451–52, 790 S.E.2d 763, 771 (2016) (plurality). The law failed the rational basis test (state and federal) because the state had given no "plausible reason as to why PTs are so different from other health care professionals that they must be singled out and provided disparate treatment for self-referral purposes." *Id.* at 452, 790 S.E.2d at 771. So far as the Court could tell, the law appeared "merely to be anti-competitive protectionist legislation intended to protect personal financial interests, which is driven by reimbursement purposes, rather than actual benefits to patients." *Id.* at 452–53, 790 S.E.2d at 771.[14] And the Court didn't stop there.

The next year, the Court struck down a law that capped how many permits a liquor store could obtain because "[t]he record does not contain any evidence of the alleged safety concerns

[14] *Joseph* was a plurality, but one Justice dissented only on standing grounds, calling "the majority's decision" otherwise "laudable." *Joseph*, 417 S.C. at 466, 790 S.E.2d at 779 (Beatty, J., dissenting).

incumbent in regulating liquor sales this way." *Retail Servs. & Sys., Inc. v. S.C. Dep't of Rev.*, 419 S.C. 469, 474, 799 S.E.2d 665, 667 (2017) (plurality). Here too, there was "no indication in this record that these provisions exist for any other purpose than economic protectionism," which was "not a constitutionally sound basis for regulating liquor sales." *Id.* at 474–75, 799 S.E.2d at 667–68. The lead opinion applied the South Carolina Constitution's limits on "the scope of the General Assembly's police powers," *id.* at 473, 799 S.E.2d at 667—limits this Court has enforced since the founding.[15]

C. The highest courts of North Carolina, Georgia, Pennsylvania, and Texas have long applied a fact-based test too.

It should come as no surprise, given the history discussed above, that sister courts apply a fact-based rational basis test under their constitutions too—including in challenges to economic laws. In the last decade alone, the North Carolina, Georgia, Pennsylvania, and Texas high courts have all rejected "conceivability" review and reaffirmed precedents applying a more engaged test. The trend started in Texas. In *Patel v. Texas Department of Licensing & Regulation*, the court held that a law forcing eyebrow threaders to complete largely irrelevant training violated the Texas due course of law clause. 469 S.W.3d 69, 87–90 (Tex. 2015). The court traced its doctrine back to the clause's adoption in 1875 and held that Texas's test is more protective than the federal test. *Id.* at 82–87. A key feature of Texas's test, the court stressed, was that courts must "consider the entire record, including the evidence offered by the parties." *Id.* at 87.

[15] *Retail Services* was a plurality, but one Justice dissented in part because he disagreed with the lead opinion's read of the record. "If [that read] were true," he wrote, "I might be inclined to join the majority." *Retail Servs.*, 419 S.C. at 479, 799 S.E.2d at 670 (Kittredge, J., dissenting).

Pennsylvania followed suit. In *Ladd v. Real Estate Commission*, the Pennsylvania Supreme Court held that a property manager stated a colorable claim that requiring her to get a real-estate license violated Pennsylvania's due process clause. 230 A.3d 1096, 1116 (Pa. 2020). The Court reviewed its doctrine and confirmed that "[t]he rational basis test under Pennsylvania law is less deferential to the legislature than its federal counterpart." *Id.* at 1108. The test demands a "real and substantial" connection—not a hypothetical connection—to a legitimate purpose. *Id.* at 1109 (cite omitted). So the court had to engage with Ladd's factual allegations. *Id.* at 1110. On remand, the case went to trial and "[t]he evidence presented" proved that forcing Ladd to get the license failed Pennsylvania's more engaged test. *Ladd v. Real Estate Comm'n*, No. 321 M.D. 2017, 2022 WL 19332047, at *17 (Pa. Commw. Ct. Oct. 31, 2022).

Then came Georgia. In *Raffensperger v. Jackson*, the Georgia Supreme Court unanimously held that requiring a license to work as a lactation consultant (a healthcare position) violated the state's due process clause. 888 S.E.2d 483, 497 (Ga. 2023). The Court followed its cases back to the clause's initial adoption in 1861 and held that Georgia's rational basis test is more protective than the federal "conceivability" test. *Id.* at 490–92 (rejecting *Beach Commc'ns*, 508 U.S. 307). Georgia's test allows a plaintiff to use evidence to prove irrationality and requires courts to take that evidence seriously. And in *Raffensperger*, the record was clear: There was no health or safety basis for forcing lactation consultants to get a license. *See, e.g.*, *id.* at 494 ("undisputed evidence establishes"), 495 ("the evidence shows"), 496 ("there is no evidence of harm"), 497 (rejecting "speculation, in the face of substantial evidence").

North Carolina, too, has joined the fold. In *Kinsley v. Ace Speedway Racing, Ltd.*, the North Carolina Supreme Court unanimously held that a racetrack stated colorable claims that a COVID

shutdown order violated the state inalienable rights and equal protection clauses. 904 S.E.2d 720, 726–29 (N.C. 2024). The Court surveyed its cases and confirmed that North Carolina's rational basis test demands a "fact-intensive analysis" of a law's asserted ends and means—one that gives plaintiffs a chance to "rebut [the state's] assertion[s] with evidence." *Id.* at 726–28. That was key because, while the state asserted the shutdown order was based on COVID data, the racetrack's *factual allegations* were that the order had nothing to do with public health and everything to do with punishing it for speaking out against the state's COVID policy. *Id.* at 728. The Court denied the motion to dismiss.

In light of all this, the trial court's decision here was a stark departure from the norm. The court began by citing the federal "conceivability" test and proceeded to ignore all the undisputed facts that—as shown below—prove the Lens Exception's arbitrary and protectionist effects. This Court, however, has long applied a reality-oriented test under the South Carolina Constitution. And a growing number of sister courts have not only done the same; they have squarely rejected the most tepid form of federal review in the process. In truth, these states are all just catching up to where this Court has always been. The Court should apply its settled test.[16]

II. The Lens Exception violates Article I, Section 3 because, on this record, it does not rationally protect the public—it merely protects SCOPA from competition.

On this record, the Lens Exception violates Article I, Section 3. To show the law violates equal protection, Opternative must prove that it (1) "treats similarly situated entities differently" and (2) lacks a "rational basis for the disparate treatment." *Joseph*, 417 S.C. at 451, 790 S.E.2d at 771 (citing, in part, *Ed Robinson Laundry & Dry Cleaning, Inc. v. S.C. Dep't of Rev.*, 356 S.C. 120,

[16] Opternative does not rely on the old "affected with a public interest" cases overruled in *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 476–78, 527 S.E.2d 763, 764–65 (2000).

124, 588 S.E.2d 97, 99 (2003)). The law violates due process, too, if it lacks a "reasonable relationship to any legitimate interest of government." *R.L. Jordan Co.*, 338 S.C. at 477–78, 527 S.E.2d at 765. Because these tests overlap, Opternative will brief the equal protection prongs.[17] The Lens Exception treats similar groups—doctors who want to prescribe treatment online—differently by excluding doctors who want to prescribe lenses from the Telemedicine Act. (Part A, *infra*). And that's irrational because the record shows there's no meaningful health or safety difference between doctors who prescribe lenses and doctors who prescribe anything else using telemedicine. (Part B, *infra*). In reality, the Lens Exception serves only to protect SCOPA's members from competition—which is exactly why SCOPA wrote the law in the first place. (Part C, *infra*). That's unconstitutional.

A. The Lens Exception treats doctors who want to prescribe lenses differently than doctors who prescribe anything else under the Telemedicine Act.

The Lens Exception "treats similarly situated entities differently." *Joseph*, 417 S.C. at 451 (citing, in part, *Ed Robinson Laundry & Dry Cleaning, Inc.*, 356 S.C. at 124, 588 S.E.2d at 99). Just look at *Joseph*. There, the Court struck down a law that banned doctors from hiring and referring patients to physical therapists, but not any other kind of healthcare worker. *Id.* at 451–52, 790 S.E.2d at 771. The law treated similar groups—doctors who wanted to hire healthcare workers—differently based on the type of worker they wanted to hire. *Id.* at 452, 790 S.E.2d at 771 (noting

[17] As the Georgia Supreme Court recently explained, proving that a law draws an irrational distinction effectively proves a due process violation because "if a similarly situated person is able to pursue the occupation competently, then the burden imposed on the person who is prohibited from pursuing the occupation is likely not reasonably necessary to the State's interest in health and safety." *Raffensperger v. Jackson*, 888 S.E.2d 483, 491 (2023).

"physicians may employ other healthcare professionals such as occupational therapists, speech pathologists, and nurse practitioners, [but] they may not employ PTs").

Joseph was in lockstep with decades of precedent. A law that capped negligence liability for some charity healthcare providers (hospitals) but not others (anybody else) treated similar groups differently. *See Hanvey v. Oconee Mem'l Hosp.*, 308 S.C. 1, 5, 416 S.E.2d 623, 625–26 (1992). A law that shielded some home improvement entities (architects, engineers, contractors) from liability but not others (homeowners, manufacturers) treated similar groups differently. *See Broome v. Truluck*, 270 S.C. 227, 230–31, 241 S.E.2d 739, 740 (1978). A law that made it a crime for some people in the farm industry to breach contracts (workers who had received payment) but not others (employers, workers awaiting payment) treated similar groups differently. *See Ex parte Hollman*, 79 S.C. 9, 60 S.E. 19, 25 (1908). The bottom line is that when groups work in the same field and implicate the same basic regulatory concerns, the state needs a rational basis for treating them differently.

The same is true here. The general rule, under the Telemedicine Act, is that doctors can use online tools to collect information from patients and prescribe care. *See* S.C. Code Ann. § 40-47-37(A)(1). For example, eye doctors can—and currently do—prescribe eye drops and serums using telemedicine. Second O'Brien Aff. ¶ 4. But, under the Lens Exception, those same doctors are banned from prescribing lenses using telemedicine. *See* S.C. Code Ann. §§ 40-24-20(B), 40-24-10(3). That's disparate treatment of similar groups. As in *Joseph*, where doctors' ability to hire healthcare staff turned on who they wanted to hire (physical therapists or anybody else), doctors' ability to use telemedicine turns on what they want to prescribe (lenses or anything else). Because

doctors who prescribe lenses "stand alone" as the only ones excluded from the Telemedicine Act, *Joseph*, 417 S.C. at 442, 790 S.E.2d at 766, the first equal protection prong is met.

The trial court disagreed for two reasons. Neither holds up. First, the court held that the Lens Exception does not treat similar groups *differently* because it treats all doctors who want to prescribe lenses the same. Order at 13. But that's just a truism. Obviously, a law that targets one group will apply equally to members of that group. The problem here, however, isn't that doctors who prescribe lenses are being treated differently from one another. It's that they're being treated differently from doctors who can prescribe anything else under the Telemedicine Act. It was the same in *Joseph*: All doctors who wanted to hire physical therapists were being treated the same—but they were being treated differently from doctors who wanted to hire anyone else. The court's second point fares no better. It held that doctors who prescribe lenses are not *similar* to doctors who prescribe other things. Order at 13. But again, *Joseph* shows otherwise: Doctors who wanted to employ physical therapists were factually different from, but materially similar to, doctors who wanted to employ other workers. So too here. The Telemedicine Act treats all doctors the same regardless of what they prescribe. The core issue here isn't whether these doctors are similar—they are—but why doctors are barred from the Telemedicine Act *only* when they prescribe lenses.

B. The record shows that it's irrational to ban doctors from prescribing lenses while empowering them to prescribe anything else using telemedicine.

That brings us to the heart of the case: Whether there's a "rational basis for the disparate treatment." *Joseph*, 417 S.C. at 451, 790 S.E.2d at 771 (citing *Ed Robinson Laundry & Dry Cleaning, Inc.*, 356 S.C. at 124, 588 S.E.2d at 99). To be clear, the question is not whether in-person exams are a good idea, just as the question in *Joseph* was not whether physician self-referrals were a good idea. The question is whether doctors who prescribe corrective lenses "are so different from other

health care professionals that they must be singled out and provided disparate treatment[.]" *Id.* at 452, 790 S.E.2d at 771. It's whether the government has a good reason for "strictly prohibiting" online lens prescriptions "without considering the resulting ethical implications or patient well-being." *Id.*

So let's start by asking how ethical requirements and patient well-being would be served in a world without the Lens Exception. In that world, eye doctors who wanted to use Opternative to prescribe lenses would be regulated the same way as doctors who wanted to use online tools to prescribe anything else: the Telemedicine Act. Eye doctors could use Opternative to "prescribe [lenses] for a patient . . . [they had] not personally examined" if they collected the "information necessary to make an accurate diagnosis." S.C. Code Ann. § 40-47-37(C)(7)(a). Opternative meets that standard: It's undisputed that eye doctors can use Opternative to collect the same information they would get from a person's responses to an eye chart. O'Brien Aff. ¶¶ 17, 22; Foley Aff. ¶¶ 2–12, 18–20, Ex. 2 (P00420, 427) (FDA declaring Opternative is "substantially equivalent" to the classic "Visual Acuity Chart").

The Telemedicine Act would also require doctors to follow "the same standard of care" that would apply in-person. S.C. Code Ann. § 40-47-37(A)(1). Specifically, doctors wouldn't be allowed to prescribe lenses if they had reason to think "an in-person physical examination [was] necessary for diagnosis." *Id.* § 40-47-37(C)(8). No issues here either. It's undisputed that full eye-health exams—which occur in-person—are not "always medically necessary." O'Brien Aff. ¶ 21. Whether a person needs a full exam, like most things in medicine, depends on her circumstances. Shipp Dep. 100:7–25; *see also* Robinson Dep. 55:14–56:23 (testifying that whether a person needs a full exam depends on the last time she had one). There are, of course, standards doctors must meet:

Healthy people need a full exam at least once by age 40, and then once every few years after that. O'Brien Aff. ¶ 23 & Ex. 3; *see also* Shipp Dep. 68:5–69:14 (agreeing this standard is "consistent with what I understand to be reasonable"); Robinson Dep. 39:16–23 (agreeing that doctors who follow this standard "aren't doing anything wrong medically"). But every eye doctor who testified in this case—including SCOPA's witnesses—agreed it can sometimes be beneficial to prescribe lenses *in between* full eye-health exams.[18]

In other words, none of the eye doctors who testified in this case contend that it's *always* medically proper to prescribe corrective lenses using only an eye chart without first performing a full eye-health exam that day. Opternative itself imposes strict age limits on who can use its service, and doctors using its online vision test can and do decline to renew lens prescriptions for patients when it wouldn't be proper without a full in-person exam (as, for example, when a person's vision has changed significantly from her prior prescription). O'Brien Aff. ¶¶ 17, 26. By the same token, none of the eye doctors who testified in this case contend that it would *never* be proper to prescribe lenses using only an eye chart without first doing a full exam. Again, every one of them—including SCOPA's own witnesses—has done exactly that. *Supra* p 12. The Telemedicine Act reflects that reality: When patients *do not need* in-person exams, doctors can use online tools to prescribe care, and when patients *do need* in-person exams, online tools are off the table.

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[18] *See, e.g.*, Shipp Dep. 47:24–48:24, 50:8–18 (SCOPA's optometrist testifying that if a healthy patient just wanted lenses, the appointment "would not [involve] a comprehensive eye exam" but would instead involve "a very problem-focused exam"); Robinson Dep. 27:16–28:5 (SCOPA's ophthalmologist testifying that he renewed a relative's lens prescription without a full eye-health exam and instructed her to "still get a complete eye exam when you're due"); Zolman Dep. 32:8–33:1 (SCOPA's optometrist—who wrote the Lens Exception—testifying that when a patient was not able to visit his office, he renewed her lens prescription without a full eye-health exam anyway because it "improve[d] her quality of life." Zolman Dep. 32:8–33:1.

And that tells us something important about the Lens Exception: It added nothing to the Telemedicine Act's pre-existing rule that doctors must forgo online care when people need in-person exams. The only thing the Lens Exception adds is that it bans telemedicine when people *don't need* full exams. When people don't need full exams, it remains perfectly legal to prescribe corrective lenses based on a patient's self-reported responses to an eye chart. It's just that the eye chart (alone among medical tools) can't be online.

The trial court never discussed any of this. But it should have. The South Carolina rational basis test requires courts to examine "the actual provisions" of the challenged law and to assess its actual "effects." *McCoy v. Town of York*, 193 S.C. 390, 8 S.E.2d 905, 908 (1940). In *Fincher*, for example, it was irrational for a city to ban a BBQ stand from operating late at night, out of a concern for noise, when the city's separate noise ordinances squarely addressed that problem. *Fincher v. City of Union*, 186 S.C. 232, 196 S.E. 1, 6 (1958). To truly assess whether the Lens Exception is rational, the Court must assess its actual effect: It bans doctors from prescribing lenses online even when people *don't need* full exams.

Against that backdrop, there is no rational basis for the Lens Exception. The trial court thought it found one: "prevent[ing] citizens from unwittingly putting their eye health at risk by obtaining a prescription for corrective lenses without a comprehensive eye health examination." Order at 10–11. But, again, it's undisputed that people do not *always* need these exams, and when they *do* need them, the Telemedicine Act already forbids doctors from prescribing lenses online. So what's really left of the trial court's justification? A concern, it seems, that *any time* a person receives online eye care they are "unwittingly putting their eye health at risk." But that's just an

objection to telemedicine generally—one the Telemedicine Act rejects by empowering doctors to prescribe care online, according to their professional judgment, in all other contexts.

Take the trial court's worry that some diseases (cataracts, glaucoma, diabetic retinopathy) "may go undiagnosed" if people renew their lenses online. Order at 6, 16. If that's such a serious risk, why would the Telemedicine Act allow the same doctors (eye doctors) to treat the same part of the body (eyes) by prescribing drops and serums online? Second O'Brien Aff. ¶ 4. And if these hidden diseases are such a grave threat, why would doctors *ever* be allowed to use telemedicine in *any* context? A patient who connects with a dermatologist online about a rash might have hidden skin cancer. A patient who connects with a family doctor online about allergies might secretly have high blood pressure that could cause a stroke. The trial court gave no reason—much less a rational one—why "undiagnosed" diseases are a problem *only* when doctors want to prescribe lenses.

The trial court gave no reason for this distinction because the record contains none. Doctors who prescribe lenses are just as qualified as doctors who prescribe anything else (including eye drops and serums) to account for hidden diseases and the occasional need for in-person exams. O'Brien Aff. ¶ 12. And there's no evidence that people who seek lenses present a unique threat. Just the opposite: SCOPA's own expert witness agreed that the concern about hidden diseases that allegedly supports the Lens Exception applies with *equal force* to *all other telemedicine*:

> Q: Would you have the same concern [about undiagnosed diseases] if a patient was getting eye drops through telemedicine?
>
> A: Yes. I would—I would think I would. Anything where you're not getting a comprehensive eye exam, I would be concerned about, yes.

Robinson Dep. 83:14–22. Indeed, when asked whether the need for "comprehensive exams" is "a problem that's just endemic to the practice of medicine" writ large, Dr. Robinson could not have

been clearer: "Yes. I agree." *Id.* at 81:12–17. In other words, the best evidence that there is no reason to single out doctors who prescribe corrective lenses is that SCOPA's own expert witness says so. The objections to online lens prescriptions are objections to *telemedicine*, not reasons to single out lenses. And the legislature, through the Telemedicine Act, has rejected those general objections to telemedicine.

The point is, excluding lenses from the Telemedicine Act is irrational. In *Joseph*, it was irrational to ban doctors from hiring *only* physical therapists when doctors could face the same potential conflicts of interest when hiring anybody else. 417 S.C. at 451–52, 790 S.E.2d at 771–72. In *Hanvey*, it was irrational to cap *only* charity hospitals' negligence liability when other charity care providers could commit medical harm. 308 S.C. at 5, 416 S.E.2d at 626. In *Broome*, it was irrational to immunize *only* architects, engineers, and contractors from liability for damaging homes when other entities could damage homes. 270 S.C. at 230–31, 241 S.E.2d at 740. And in *Hollman*, it was irrational to criminalize breach of contact *only* for farm workers who had received payment when farm employers, and workers awaiting payment, could breach in harmful ways too. 79 S.C. 9, 60 S.E. at 25. Here, it's irrational to ban doctors from prescribing *only* lenses online when the record shows that people who receive *any* care online—including eye care like drops and serums—could have hidden diseases. Far from protecting the public health, the Lens Exception merely "deprives physicians of their right to practice medicine in the best interests of their patients." *Joseph*, 417 S.C. at 452, 790 S.E.2d at 771. That is not a valid use of the police power.

C. The only justification for the Lens Exception supported by the record is pure economic protectionism—and that's unconstitutional.

There's only one basis for the Lens Exception supported by the record: pure "economic protectionism." *Retail Servs. & Sys., Inc. v. S.C. Dep't of Rev.*, 419 S.C. 469, 474, 799 S.E.2d 665,

667 (2017) (plurality). In 2014, the American Optometric Association launched a plan to address "the Opternative issue." SCOPA000501. It hosted a webinar for state affiliates about how online vision care would impact the optometry business. SCOPA000181–193. It urged state affiliates to push a bill to "Fight" online care. SCOPA000178–179; Zolman Dep. 51:3–5, 54:2–12. SCOPA's legislative leader, who attended the webinar, directed SCOPA to "address [the issue] quickly and attack aggressively" by pushing the bill in South Carolina. SCOPA000153. SCOPA did just that. SCOPA000152; Rivers Dep. 23:13–15; 34:17–35:2. When lobbying, SCOPA avoided mentioning Opternative because "[l]egislators frown upon legislation that singles out and restricts a specific business." SCOPA0001258; Rivers Dep. 55:16–22, 56:6–11. But when the Lens Exception passed, SCOPA bragged "with the utmost pleasure" about destroying Opternative. SCOPA000116, 129, 203. The Court has seen SCOPA's slide; we all know what a red circle and strikethrough means.

It's not a complicated story. But it is, sadly, a familiar one. Since the founding, this Court has seen repeated attempts to use public power for private gain. *See, e.g.*, *Bowman v. Middleton*, 1 S.C.L. 252, 252 (1792) (rejecting power to take land from one person and give it to another). And since the founding—from *Orangeburg* to *McCoy* to *Painter* to *Joseph* to *Retail Services*—this Court has firmly rejected those attempts.[19] Federal courts now acknowledge that "[t]he great deference

[19] *See City of Orangeburg v. Farmer*, 181 S.C. 143, 186 S.E. 783, 785 (1936) (striking down anti-soliciting law pushed not by complaints but by local merchants group); *McCoy v. Town of York*, 193 S.C. 390, 8 S.E.2d 905, 908 (1940) (striking down law designed not to ensure safe gas delivery but to harm one gas station); *Painter v. Town of Forest Acres*, 231 S.C. 56, 60, 97 S.E.2d 71, 73 (1957) (striking down law designed to put one restaurant out of business); *Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 451–53, 790 S.E.2d 763, 771 (2016) (plurality) (striking down "protectionist legislation intended to protect personal financial interests . . . rather than actual benefits to patients"); *Retail Servs. & Sys., Inc. v. S.C. Dep't of Rev.*, 419 S.C. 469, 474–75, 799 S.E.2d 665, 667–68 (2017) (plurality) (striking down cap on liquor stores because there was "no indication in this record that these provisions exist for any other purpose than economic protectionism").

due state economic regulation does not demand judicial blindness to the history of a challenged rule or the context of its adoption" when the record cries out: "mere economic protectionism." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 222, 226 (5th Cir. 2013). But federal cases like *St. Joseph Abbey* are merely catching up to where this Court has always been: tough on protectionism. Now is not the time to let up. Not on this record.

CONCLUSION

The Lens Exception violates Article I, Section 3 of the South Carolina Constitution. The Court should reverse and remand with instructions to enter summary judgment for Opternative.

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