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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.

FINAL REPLY BRIEF OF APPELLANT

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INTRODUCTION

SCOPA confuses the issues. This case is not about whether patients sometimes need full eye-health exams. Of course they do. This case is not about whether doctors should be allowed to prescribe corrective lenses online when patients are due for those exams. The Telemedicine Act already forbids that. *See* S.C. Code Ann. § 40-47-37(C)(8) (allowing prescriptions online except when "an in-person physical examination is necessary"). This case is about something different: Given that full eye-health exams are "not *always* necessary for a doctor . . . to prescribe corrective lenses" (SCOPA Br. 19), how could it possibly be rational to ban doctors from prescribing *lenses* online while allowing doctors to prescribe *anything else* online? Why is there a Lens Exception to the Telemedicine Act?

SCOPA's answers to that question fail in three key ways. ***First***, SCOPA's factual assertions flout the record at every turn. Hidden diseases are not a risk unique to lenses, full eye-health exams are often unnecessary, and nobody is confused about Opternative. Testimony from SCOPA's own witnesses proves it. ***Second***, SCOPA thinks it can make baseless assertions because it assumes the Court will apply a tepid version of the federal rational basis test. But that is not South Carolina's test. Facts matter under Article I, Section 3 of the South Carolina Constitution, and they matter here. ***Third***, this case is on all fours with *Joseph v. South Carolina Department of Labor, Licensing & Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016) (plurality), which struck down a law that banned doctors from hiring physical therapists even though hiring other healthcare professionals could pose the same risks. Here, there is no reason "why [lenses] are so different from other health care . . . that they must be singled out and provided disparate treatment." *Id.* at 452, 790 S.E.2d at 771.

The decision below should be reversed.

ARGUMENT

I. SCOPA contradicts the factual record.

The central question, under South Carolina's equal protection and due process clauses, is whether corrective lenses are "*so different* from other health care [prescriptions] that they must be singled out and provided disparate treatment for [telemedicine] purposes." *Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 452, 790 S.E.2d 763, 771 (2016) (plurality) (emphasis added). SCOPA's answers to that question are divorced from the factual record. Some invoke "identifiable risks," "well-documented" risks, and "risks to eye health and safety" (*e.g.*, SCOPA Br. 9, 21, 26), without citing the record at all. Others are more specific—SCOPA worries that patients may have hidden diseases, need full eye-health exams, or be confused about Opternative—but fail on closer inspection. On this record, it's irrational to treat lenses differently than everything else doctors are trusted to safely prescribe under the Telemedicine Act.

A. Hidden diseases are not a problem unique to lenses.

SCOPA first asserts that the need for "in-person eye exams" to screen for "undiagnosed [eye] diseases, such as glaucoma, cataracts, and diabetic retinopathy" is a problem "unique[ly] . . . associated with online lens prescriptions." SCOPA Br. 27–28. It's not unique. The Telemedicine Act empowers doctors to prescribe countless treatments, including eye drops, online. (*See* R. p. 940, 2d O'Brien Aff. ¶ 4). Patients who are prescribed eye drops online, SCOPA's expert agreed, face the same concern SCOPA raises about lenses:

> 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.

(R. p. 964, Robinson Dep. 83:17–22). And the same is true for *any* patient who receives *any* treatment online. Could they all have hidden diseases? "Yes. I think they could." (R. p. 964, *id.* at 82:25–83:4). Could they all benefit from in-person screenings? "[T]he principle is the same, yes." (R. p. 964, *id.* at 82:16–24). Are those screenings any more important for patients who seek lenses than, say, patients who seek skincare online? "I wouldn't think so." (R. p. 964, *id.* at 82:11–15). In short, SCOPA's claim that hidden diseases are a problem unique to lenses is a fantasy that its own expert rejects. This Court should too.

B. Lenses do not always require full eye-health exams.

SCOPA next asserts it's always "inadequate" for doctors to prescribe lenses without a full eye-health exam. SCOPA Br. 9, 13, 23–29. Not so. To be clear, SCOPA does not argue that the strength of a lens prescription depends on the full battery of tests that comes with an eye-health exam. Nor could it. Lens prescriptions don't reflect a patient's total eye health. (R. p. 362, O'Brien Aff. ¶ 21). They merely reflect a patient's visual acuity, which eye doctors can test by asking the patient to look at a chart and report what they see. (R. p. 358, *id.* ¶¶ 5–6. If a patient has glasses, for example, all they need to do is look at an eye chart while wearing them and a doctor can assess "how well that person is able to see with their current prescription." (R. p. 808, Shipp Dep. 44:4–22). That's how Opternative works: It offers an online, FDA-cleared eye chart that doctors can use to test whether patients are seeing well with their current prescription. (R. pp. 290, 304, 311, Foley Aff. ¶ 20 & Ex. 2 (P00420, 427)).[1]

[1] Indeed, SCOPA concedes as much by continuing to insist "[t]here is no bar from using Opternative's Technology in the course of treating a patient." SCOPA Br. 24. Never mind that the parties spent four years litigating that very issue and this Court finally ended it by affirming "the court of appeals' determination that Opternative, Inc. has standing" to challenge S.C. Code Ann.

SCOPA's concern that online lens prescriptions will be "inadequate" has less to do with accuracy, it seems,[2] and more to do with the fact that full eye-health exams are "beneficial" and patients might miss that benefit if they get care "through remote methods." SCOPA Br. 23. Of course, the same could be said for any other eye care (like drops) doctors can prescribe under the Telemedicine Act. Even setting that aside, though, SCOPA's use of the word "beneficial" belies how eye doctors—including its own witnesses—actually practice. The fact is, "comprehensive eye health exams are not always medically necessary." (R. p. 362, O'Brien Aff. ¶ 21). Instead, because eye diseases are rare before age 40, patients need full eye-health exams *once* by age 40 and then *once* every few years after that. (R. pp. 363, 385–86, *id.* ¶ 23 & Ex. 3). SCOPA's ophthalmology expert agreed that eye doctors who follow this standard "aren't doing anything wrong medically." (R. p. 953, Robinson Dep. 39:16–23). SCOPA's optometry expert, too, called the standard "consistent with what I understand to be reasonable." (R. p. 814, Shipp Dep. 68:5–69:14).

Because full eye-health exams are often unnecessary, eye doctors often allow patients to opt-out of those exams to focus on a more specific issue. (R. p. 806, *id.* at 37:20–24). For example, SCOPA's optometry expert, Dr. Shipp, testified that if a patient had recently had a full exam and later came to his office concerned about pink eye, he would not perform another full exam but would instead conduct a more limited "problem-focused exam." (R. p. 813, *id.* at 63:12–64:24). No different for lenses. If a patient had recently had a full exam and later came to his office concerned about her lenses, Dr. Shipp "would not [perform] a comprehensive eye exam . . . . Not for a glasses prescription." (R. p. 809, *id.* at 48:18–49:4). SCOPA's ophthalmology expert, Dr. Robinson, made

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§§ 40-24-10(3), (9), and 40-24-20(B). *Opternative, Inc. v. S.C. Bd. of Med. Exam'rs*, 437 S.C. 258, 260, 878 S.E.2d 861, 862 (2022) (per curiam).

[2] *But see infra* p. 7 (refuting SCOPA's drive-by suggestion that Opternative is inaccurate).

the same point in his deposition. He admitted that he does not always perform a full eye-health exam every time he sees a patient. Instead, whether he performs one depends on the last time a patient had one and the patient's history and symptoms. (R. p. 957, Robinson Dep. 55:14–57:5). So, if a patient recently had a full eye-health exam and came to his office concerned about a specific issue—say, a corneal scratch—he would just treat that issue without performing another full exam. (R. p. 963, *id.* at 80:5–12).

That fact—that patients can safely opt-out of a full eye-health exam unless they're due for one—is why both Dr. Robinson and SCOPA's lobbying director, Dr. Zolman, have felt comfortable prescribing lenses for patients without a full eye-health exam in the past. Dr. Zolman admitted he had prescribed lenses for a patient who was not able to visit his office because it "improve[d] her quality of life." (R. p. 687, Zolman Dep. 32:8–33:1). Dr. Robinson admitted he had renewed a patient's lens prescription without a full eye-health exam because he trusted that she would "get a complete eye exam when [she was] due." (R. p. 950, Robinson Dep. 27:16–28:5). That last part is what really matters. None of the eye doctors who testified in this case believe that patients need a full eye-health exam every time they interact with an eye doctor. "[T]he key," Dr. Robinson testified, is merely that patients "get a dilated, complete eye exam *when they're supposed to get one*." (R. p. 950, *id.* at 29:1–9 (emphasis added)). Nothing in the record suggests that eye doctors are incapable of following that standard when prescribing lenses via telemedicine. (*Cf.* R. p. 360, O'Brien Aff. ¶ 12 ("Ophthalmologists are just as qualified as medical doctors in other specialties to incorporate telemedical tools into their practices safely, responsibly, and consistent with the applicable standard of care.")).

But what about contact lenses? SCOPA argues that contact lenses, "[u]nlike some other medical prescriptions," directly touch the eye and can cause harm if they have a poor fit. SCOPA Br. 25. A proper fitting, SCOPA notes, requires in-person measurements. *Id.* at 4. That's true, but it doesn't justify excluding lenses from the Telemedicine Act. For one, a concern about contact lenses (which touch the eye) would not apply to lenses in frames (which do not touch the eye). For another, Dr. Robinson testified that eyes rarely change shape, so if a patient has already had a lens fitting, then "presumably the fit is already correct" if the patient later seeks to renew her contact lenses online. (R. pp. 965–66, Robinson Dep. 89:1–91:11).[3] At most, then, SCOPA's concern would support a law that required doctors to confirm a patient had already had an in-person fitting before prescribing contacts lenses online. But that law already exists: It's called the Telemedicine Act. *See* S.C. Code Ann. § 40-47-37(C)(8) (empowering doctors to prescribe via telemedicine unless "an in-person physical examination is necessary for diagnosis").

C. Nobody (but SCOPA) is confused about Opternative.

SCOPA last asserts that patients who use Opternative "may mistakenly believe they have received a comprehensive eye examination." SCOPA Br. 5. This is pure speculation. Opternative's FDA clearance—which allows it to market to the public—makes clear that Opternative "does not provide screening or diagnosis of eye health or other disease, nor is it intended to replace an in-person eye exam." (R. pp. 290, 303–04, Foley Aff. ¶ 20 & Ex. 2 (P00419–20)). Opternative, in turn,

[3] Opternative, recall, only offers doctors a way to *renew* a patient's lens prescription online. (R. pp. 287, 289–90, Foley Aff. ¶¶ 4, 14–19). Indeed, patients can't even take Opternative's online vision test unless they have previously had a full eye-health exam and lens prescription. (R. p. 287, *id.* ¶¶ 4–6). If patients' answers to Opternative's screening questions suggest they are due for a full eye-health exam, doctors cannot and will not renew the patient's prescription. (*See* R. pp. 289–90, *id.* ¶¶ 16–19).

posts a disclaimer on its website that it "does not perform or replace a comprehensive eye examination, nor does it assess eye health." (R. pp. 288, 298, *id.* ¶ 8 & Ex. 1 (P00414) (full text of disclaimer)). There's nothing unusual about this kind of disclaimer. SCOPA's experts both testified that when a patient wants to opt-out of a full eye-health exam, they inform the patient that they are not performing a full exam and trust the patient to get one later "when they're supposed to." (R. pp. 950–51, Robinson Dep. 27:16–31:1; *see also* R. pp. 806–07, Shipp Dep. 37:20–38:25 (similar)). SCOPA can't plausibly argue that patients will be confused when they see the very sort of disclaimer the FDA and SCOPA's own experts endorse.

SCOPA also briefly mentions an Illinois Attorney General inquiry that, it claims, "raised concerns about unsubstantiated claims made by [Opternative] regarding the accuracy and safety of its online tests, including that it was as accurate as an in-person exam." SCOPA Br. 5. That is nonsense. The Illinois investigation was about whether it was accurate for Opternative to describe itself as FDA "registered" (which it was) when customers might think that meant FDA "cleared" or "approved." (R. p. 1016, Stonedale Dep. 45:15–48:15 (Opternative's entity witness)). That issue became moot after Opternative was FDA cleared in 2022, so Opternative entered into a settlement whose terms "were largely redundant . . . with the law" requiring it to correctly describe its FDA status. (*Id.*) As for SCOPA's claim that Opternative's test is not accurate, SCOPA offers no evidence for it—and the FDA rejected it after a review of "performance data" proved Opternative is "safe and effective." (R. pp. 304, 311, Foley Aff., Ex. 2 (P00420, 427); *see also* R. p. 363, O'Brien Aff. ¶ 22 (ophthalmologist who has used Opternative testifying he has seen "no significant medical

difference" between Opternative and a traditional vision test)).[4] SCOPA's worry that people might be confused about Opternative—like every other reason it gives for the Lens Exception—flouts the record.

II. SCOPA misconstrues South Carolina law.

The reason SCOPA's defenses of the Lens Exception are so detached from the record is that SCOPA assumes this Court will ignore the record. As SCOPA tells it, *South Carolina* courts applying Article I, Section 3 of the *South Carolina* Constitution must follow the most tepid version of the *federal* rational basis test described in a *federal* case. *See* SCOPA Br. 16–17 (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307 (1993)). That test, taken literally, requires courts to uphold laws based on "speculation" about what lawmakers might have "conceived." *Beach*, 508 U.S. at 315. But that is not South Carolina's test. SCOPA does not dispute that the original meaning of Article I, Section 3 requires a fact-based test to ensure that exercises of the police power serve the public. Instead, SCOPA offers two reasons why a South Carolina provision adopted in 1895 must lockstep with a federal decision handed down 98 years later: one, this Court has sometimes cited *Beach*, and two, many of this Court's decisions applying a fact-based rational basis test involved ordinances rather than statutes. Both points fail. This Court should apply its settled test.

[4] Unlike Dr. O'Brien, the experts SCOPA asked to defend the Lens Exception have never used Opternative and have no personal knowledge of how it works. (*See* R. pp. 817–18, Shipp Dep. 93:24–94:4("I don't know exactly how it operates."); Robinson Dep. 77:1–23 ("I don't know exactly what they do.")). That's particularly striking given that the Lens Exception was an adapted version of a bill written to hit "the Opternative issue." Opternative Br. 12–14 (collecting evidence); (*see also* R. pp. 691–92, Zolman Dep. 53:23–54:12 (SCOPA's lobbying director admitting that he had Opternative in mind when he wrote the initial email proposing that SCOPA push the bill)).

A. SCOPA offers no evidence on original meaning.

Before we turn to SCOPA's two arguments for a fact-free test, note what SCOPA does *not* argue. State constitutional interpretation turns on the original meaning of the text. *See Richardson v. Town of Mount Pleasant*, 350 S.C. 291, 294–98, 566 S.E.2d 523, 525–27 (2002) (analyzing original meaning of terms in 1895 Constitution and 1988 amendment). That inquiry may 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). That's how other state high courts, in recent decisions, have analyzed their own constitutions in challenges to economic regulations. *See, e.g.*, *Raffensperger v. Jackson*, 888 S.E.2d 483, 489–90 (Ga. 2023) (analyzing how original meaning of Georgia's due process clause protects the right "to pursue a lawful occupation"); *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 82–87 (Tex. 2015) (analyzing how original meaning of Texas's due course of law clause restricts "regulation of economic interests").

Opternative listened. It showed that the right to pursue a lawful business is a historically rooted "liberty" that dates to English common law; that the terms "equal protection" and "due process of law" in the 1895 Constitution derived from the term "law of the land" in the original 1778 Constitution; that when they were adopted, these phrases were widely understood to forbid arbitrary and protectionist uses of the police power; and that this Court, in turn, has long applied a fact-based test to ensure the police power serves constitutionally proper ends. Opternative Br. 17–25. In response, SCOPA offers a single line: That is all "spill[ed] ink." SCOPA Br. 16. SCOPA is

profoundly mistaken. This Court has offered clear guidance about how to interpret the South Carolina Constitution. Other state high courts have given recent examples of what that looks like in similar cases. And there is growing national respect for the role that state constitutions play in our federalist system. *Cf. Am. Legion v. Am. Humanist Ass'n*, 588 U.S. 29, 72 (2019) (Kavanaugh, J., concurring) (citing Jeffrey Sutton, *51 Imperfect Solutions: State Constitutions and the Making of American Constitutional Law* (2018), and William Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489 (1977)). SCOPA's failure to brief the issue, against that backdrop, suggests the obvious: Opternative's account of Article I, Section 3's original meaning is correct.[5]

B. The *Beach* conceivability test does not apply here.

Even setting aside original meaning and turning to modern cases, SCOPA still comes up short. To be clear, SCOPA gets one point right: The South Carolina rational basis test is, indeed, "similar" to the federal test in that it presumes economic laws are constitutional and places the burden on the plaintiff to rebut that presumption. SCOPA Br. 16–17. But "similar" does not mean identical. And that's where SCOPA runs into trouble. For starters, the federal test is not a fixed standard. It has, instead, waxed and waned over the past century—especially on "whether courts should . . . simply 'hypothesize' the existence of legitimate government ends, even when they are demonstrably absent." Clark Neily, *Litigation Without Adjudication: Why the Modern Rational Basis*

[5] One would think Respondents—the agencies charged with enforcing the Lens Exception—would have an interest in helping this Court get Article I, Section 3's original meaning right. But Respondents see themselves as "kind of the third wheel here." (R. p. 628, Robinson Dep. 92:6–7 (comment by Respondents' counsel)). So, as they have throughout this case, Respondents have punted the responsibility of defending the law to SCOPA. *See* Opternative Br. 15 (discussing Respondents' history of deferring strategic decisions and briefing to SCOPA).

Test Is Unconstitutional, 14 Geo. J.L. & Pub. Pol'y 537, 538–43 (2016); *see also Cent. State Univ. v. Am. Ass'n of Univ. Professors*, 526 U.S. 124, 132 (1999) (Stevens, J., dissenting) ("Cases applying the rational-basis test have described that standard in various ways.").

One version of the federal test—the version courts applied when South Carolina's 1895 Constitution was adopted and sometimes still today—allows plaintiffs to use record evidence to refute the asserted justifications for a law. *See, e.g.*, *United States v. Carolene Prods. Co.*, 304 U.S. 144, 153–54 (1938) (holding plaintiffs can meet their burden "by proof of facts tending to show" a law "is without support in reason"); *St. Joseph Abbey v. Castille*, 712 F.3d 215, 223 (5th Cir. 2013) (holding "plaintiffs may . . . negate a seemingly plausible basis for the law by adducing evidence of irrationality" because a rational basis "cannot be fantasy"); Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 Geo. J.L. & Pub. Pol'y 373, 378–92 (2016) (collecting more cases).

Another version of the federal test—the version SCOPA wants this Court to apply under Article I, Section 3—requires courts to uphold laws based on pure "speculation" about what lawmakers may have "conceived." *Beach*, 508 U.S. at 315. That is the version several state high courts recently rejected under their own constitutions. *See Jackson*, 888 S.E.2d at 490–92 (holding plaintiffs can use evidence to rebut asserted rational bases for a law under Georgia Constitution); *Patel*, 469 S.W.3d at 87, 91 (same under Texas Constitution); *Ladd v. Real Estate Comm'n*, 230 A.3d 1096, 1108–09 (Pa. 2020) (same under Pennsylvania Constitution); *Kinsley v. Ace Speedway Racing, Ltd.*, 904 S.E.2d 720, 727 (N.C. 2024) (same under North Carolina Constitution). And it's not hard to see why. Conceivability review—a test that calls on judges to imagine bases for a law—"is tantamount to no review at all." *Beach*, 508 U.S. at 323 n.3 (Stevens, J., concurring).

South Carolinians deserve a real test. A test that will place "a check upon the exercise of arbitrary power." *Dunn v. City Council of Charleston*, 16 S.C.L. 189, 199–200 (1824). A test that will ensure the police power—a power delegated by the people to further the public welfare—is used in ways "proper to prevent any nuisance or inconvenience" rather than for "suppression of a trade." *State ex rel. Heise v. Town Council of Columbia*, 40 S.C.L. 404, 415 (1853). A test that gives courts a meaningful way to prevent state power from being "used as a cloak for the invasion of personal rights or private property . . . for the exclusive benefit of particular individuals or classes." *Aetna Fire Ins. Co. v. Jones*, 78 S.C. 445, 59 S.E. 148, 150 (1907) (quoting 22 Am. & Eng. Encyc. of Law 938)). A test that actually protects "liberty." S.C. Const. art. I, § 3.

And that is precisely the kind of test this Court has long applied. Opternative's opening brief surveyed cases from the 1895 Constitution through the present focusing on what the factual record shows rather than on what judges can imagine. Opternative Br. 20–25. Take a recent case involving an economic regulation, *Retail Services*. There, the Court struck down a statute that capped how many permits a liquor store could obtain because "[t]he record does not contain any evidence of the alleged safety concerns incumbent in regulating liquor sales this way." *Retail Servs. & Sys., Inc. v. S.C. Dep't of Revenue*, 419 S.C. 469, 474, 799 S.E.2d 665, 667 (2017) (plurality). Instead, the record showed that the statute did not "exist for any other purpose than economic protectionism." *Id.* at 474–75, 799 S.E.2d at 667–68. Even Justice Kittredge, who dissented, seemed to agree it was proper for the Court to rely on the facts before it. *See id.* at 479, 799 S.E.2d at 670 ("[O]ne does not have to scour the record for long to find other justifications for the Statutes."). *Retail Services*—which turned on "the scope of the General Assembly's police powers," *id.* at 473,

799 S.E.2d at 677 (plurality)—was in line with decades of precedent applying a fact-based test to ensure the police power serves the public.

SCOPA points to three cases that cite *Beach* (SCOPA Br. 17), but none support its hollow view of Article I, Section 3. One does not say whether it was decided under the state or federal constitution, and in any case, cites *Beach* only for the unremarkable point that a law's rationality does not turn on the "motivations of enacting governmental body," *Lee v. S.C. Dep't of Nat. Res.*, 339 S.C. 463, 470 n.4, 530 S.E.2d 112, 115 n.4 (2000), something Opternative does not argue or contest. A second case cites *Beach* for the same point and was decided purely under "the Federal Equal Protection Clause." *Bibco Corp. v. City of Sumter*, 332 S.C. 45, 52, 504 S.E.2d 112, 116 (1998). A third case does not say whether it was decided under the state or federal constitution, but either way, it merely held that "[t]he evidence submitted by the [plaintiffs]" was not strong enough to refute two asserted bases for the law—not that the evidence was irrelevant. *Boiter v. S.C. Dep't of Transp.*, 393 S.C. 123, 131, 712 S.E.2d 401, 405 (2011).

None of SCOPA's cases, moreover, involved the historically rooted right to earn a living, nor the looming specter of economic protectionism that prompted so many of this Court's more fact-oriented decisions. *See* Opternative Br. 36 n.19 (collecting cases). And none of them involved what Opternative asks the Court to conduct here: an independent analysis of Article I, Section 3's original meaning. That original meaning, as Opternative showed in its opening brief, demands a meaningful test that will protect the right to earn a living from arbitrary and protectionist laws—not a tepid version of the federal rational basis test that emerged long after the 1895 Constitution was adopted.

C. This Court's test is not limited to local ordinances.

In a final effort to escape the factual record Opternative has built—and its own witnesses' testimony—SCOPA says many of the cases in Opternative's brief are "inapposite" because they challenged "municipal ordinances." SCOPA Br. 17. But it's hard to see why that detail matters. Those cases all applied Article I, Section 3's limits on the police power. *City of Orangeburg v. Farmer*, 181 S.C. 143, 186 S.E. 783, 784 (1936); *Fincher v. City of Union*, 186 S.C. 232, 196 S.E. 1, 3 (1938); *McCoy v. Town of York*, 193 S.C. 390, 8 S.E.2d 905, 907 (1940); *Painter v. Town of Forest Acres*, 231 S.C. 56, 57–58, 97 S.E.2d 71, 71 (1957). "Local governments derive their police powers from the state," *City of N. Charleston v. Harper*, 306 S.C. 153, 156, 410 S.E.2d 569, 571 (1991), so the idea that ordinances might get less deference than statutes is incoherent. They flow from the same police power, and they trigger the same test.

Regardless, Opternative also cited several cases applying a fact-based rational basis test to statutes under Article I, Section 3. *See* Opternative Br. 23–25 (citing *Powell v. Keel*, 433 S.C. 457, 464–67, 860 S.E.2d 334, 348–49 (2021); *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 90–94, 596 S.E.2d 917, 920–22 (2004); *Hall v. Bates*, 247 S.C. 511, 519–20, 148 S.E.2d 345, 349–50 (1966)); *see also Retail Servs.*, 419 S.C. at 474, 799 S.E.2d at 667 (same test for liquor statute under limits on police power). But consider one more case. In *State v. White*, this Court upheld a statute regulating tattoo parlors under the rational basis test. 348 S.C. 532, 536, 560 S.E.2d 420, 422 (2002). While the Court did not say whether it was applying the state test or its view of the federal test, its discussion of the plaintiff's burden of proof is still helpful because it looks nothing like the *Beach*

conceivability test.[6] A plaintiff, the Court explained, can rebut "the presumption of validity . . . by [offering] probative evidence of unreasonableness." *Id.* at 539 n.4, 560 S.E.2d at 424 n.4 (quoting *City Council of Virginia Beach v. Harrell*, 372 S.E.2d 139, 141 (Va. 1988)). The *White* plaintiff failed to carry that burden because he "put forth no evidence other than" testimony that "admitted" unregulated tattooing was a threat to the public. *Id.* at 540, 560 S.E.2d at 424. The same fact-based test applies here—but, as discussed *supra* pp. 2–8, Opternative has built a far stronger record.

SCOPA also tries to distinguish the municipal cases because those ordinances "were not challenged on equal protection grounds." SCOPA Br. 17. Again, it's hard to see why that matters. Opternative brought both equal protection and due process claims. Article I, Section 3's limits on the police power, whether styled as equal protection or due process limits, trace back to South Carolina's original "law of the land" clause, which forbade arbitrary and protectionist laws. *See* Opternative Br. 17–20. And in a case, like this one, that challenges a classification on both equal protection and due process grounds, the question is the same: Is the disparate treatment rational? *See Joseph v. S.C. Dep't of Lab., Licensing & Regul.*, 417 S.C. 436, 452, 790 S.E.2d 763, 771 (2016) (plurality) ("arbitrary" restriction on doctors hiring physical therapists violated equal protection and due process for same reason). The municipal cases are instructive because this Court assessed rationality based on the factual record before it.

III. SCOPA totally fails to distinguish *Joseph*.

With all that said, the Court really only needs one case to see that the Lens Exception is irrational: *Joseph*. There, the Court struck down a law that banned doctors from hiring and referring

[6] Cases applying the federal rational basis test, while not binding, are instructive because they reveal "the floor for individual rights while the state constitution establishes the ceiling." *State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001).

patients to physical therapists. 417 S.C. at 451–52, 790 S.E.2d at 771. The law was allegedly meant to prevent "conflicts of interest" that might arise when doctors referred patients to their own employees, which in turn might harm patients. *Id.* at 452, 790 S.E.2d at 771. But a plurality of the Court concluded the law was irrational.[7] The law treated physical therapists, and the doctors who wanted to hire them, differently than all other healthcare professionals, who remained free to work for doctors. *Id.* And that made no sense, because the same sort of conflict of interest and patient harm could arise in any of those other contexts. *Id.* Because the Court saw no "plausible reason as to why PTs are *so different* from other healthcare professionals that they must be singled out and provided disparate treatment for self-referral purposes," the law violated equal protection and due process (state and federal). *Id.* (emphasis added).

Perhaps, if the law had banned "referral-for-pay" situations, it would have been a tougher case. *Id.* That, at least, would have targeted the actual problem: "unethical behavior" that could harm patients. *Id.* But the law did not target the actual problem. Instead, it "strictly prohibit[ed] physician-PT employment relationship[s]" on the "assumption" doctors "will act in bad faith or be mired in a conflict of interest." *Id.* The Court refused to make that "assumption concerning our brothers and sisters in the medical profession." *Id.* Instead, the Court recognized the law for what it was: "anti-competitive protectionist legislation intended to protect personal financial interests . . . rather than actual benefits to patients." *Id.* at 452–53, 790 S.E.2d at 771.

This case is *Joseph* in every way that counts. Just as the law in *Joseph* singled out physical therapists as the only medical professionals doctors could not hire, here the Lens Exception singles

[7] While *Joseph* was a plurality, Justice Beatty, joined by Chief Justice Pleicones, dissented only on standing grounds and called "the majority's decision" otherwise "laudable." 417 S.C. at 466, 790 S.E.2d at 779.

out lenses as the only treatments doctors can't prescribe using telemedicine. Just as there was no plausible reason in *Joseph* why conflicts of interest would arise only when doctors hired physical therapists, here there's no plausible reason why hidden diseases or the need for in-person health screenings would be a problem only when doctors prescribe lenses online. Just as it was irrational in *Joseph* to ban a whole category of employment rather than banning financial kickbacks, here it's irrational to ban a whole category of online treatment (lenses) when the Telemedicine Act *already forbids* doctors from using telemedicine when it would violate the "standard of care" or when "an in-person physical examination is necessary." S.C. Code Ann. § 40-47-37(A)(1), (C)(8). And, just as the law in *Joseph* was pushed by a subset of physical therapists to protect their business model, here it's undisputed that the Lens Exception was pushed by a subset of optometrists to protect themselves from online competition. Opternative Br. 13–14.

SCOPA totally fails to distinguish *Joseph*. SCOPA says *Joseph* is different "because the alleged harms applied equally to all referrals, not just the restricted subset." SCOPA Br. 26. But, again, SCOPA's own expert testified that a concern about hidden diseases, including eye diseases, would apply equally when *any* patient receives *any* treatment online. (R. p. 964, Robinson Dep. 82:11–83:22). SCOPA says *Joseph* is different because it did not involve a "risk to patients." But that's false. The law in *Joseph* was allegedly meant to "protect *consumers* . . . from conflicts of interest and potential *misuse of medical services*." 417 S.C. at 451–52, 790 S.E.2d at 771 (emphasis added). Last, SCOPA says this case is different because there is not actually a classification here. The Lens Exception, SCOPA argues, applies to all eye doctors equally and is not an "exception" to the Telemedicine Act because it's codified separately in a part of the Code that applies only to eye doctors. SCOPA Br. 22. But it was the same in *Joseph*: The statute that banned physical

therapists from working for physicians was not technically codified as an "exception" to any general law but rather in a part of the Code that applied only, and equally, to physical therapists. *See* 417 S.C. at 451, 790 S.E.2d at 771 (citing S.C. Code Ann. § 40-45-110(A)(1)—part of "Chapter 45. Physical Therapists"). Yet it was still unconstitutional.

The Lens Exception violates Article I, Section 3's equal protection and due process clauses for every reason the law in *Joseph* violated them. SCOPA has not, and cannot, distinguish it.

CONCLUSION

On this record, the Lens Exception is unconstitutional. The trial court's decision should be reversed and remanded with instructions to enter summary judgment for Opternative.

February 4, 2025.

Respectfully submitted,

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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._

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the Final Reply Brief of Appellant Opternative, Inc. complies with Rule 211(b), SCACR.

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February 4, 2025
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