THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2018-000326
Civil Action No. 2016-CP-40-06276

Opternative, Inc., ... Appellant,

v.

South Carolina Board of Medical Examiners and the South Carolina Department of Labor, Licensing & Regulation, ... Respondents,

and

South Carolina Optometric Physicians Association, ... Respondent.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE ISSUE ON APPEAL

1. Whether the trial court erred in granting summary judgment for Respondents on the ground that Opternative, the plaintiff below, lacked standing to sue.

STATEMENT OF THE CASE

Appellant Opternative, Inc. ("Opternative"), filed this lawsuit on October 20, 2016, seeking declaratory and injunctive relief against enforcement of the Eye Care Consumer Protection Law (ECCPL), codified at South Carolina Code sections 40-24-10 and 40-24-20. *See* Complaint (R.). Specifically, Opternative sought a declaratory judgment that the ECCPL violates its rights to equal protection and due process of law under Article I, Section 3 of the South Carolina Constitution, and an injunction forbidding Respondents Department of Labor, Licensing and Regulation (LLR), and Board of Medical Examiners (BME), from enforcing the law. *See id.* at ¶¶ 1, 3, 87–97. Respondent South Carolina Optometric Physicians Association (SCOPA), whose leadership drafted and pushed the law through the legislative process, was permitted to intervene (after Opternative conditionally consented) on February 22, 2017. *See* SCOPA Motion to Intervene (R.); Opternative's Conditional Consent to SCOPA's Mot. to Intervene (R.); Order Granting SCOPA's Mot. to Intervene (R.).

On July 10, 2017, Respondents LLR and BME moved for summary judgment arguing, in part, that Opternative lacked standing to sue. *See* LLR and BME's Mot. for Summary Judgment (R.). Opternative filed a cross-motion for summary judgment regarding its constitutional claims on September 6, 2017,[1] and an opposition to Respondents' affirmative motion[2] on September 27, 2017. *See* Opternative's Brief in Opposition to LLR and BME's Mot. for Summ.

[1] Respondents LLR and BME did not file papers in opposition.

[2] SCOPA filed no motion.

J. (R.). Oral argument on the cross-motions was held on October 4, 2017. *See* Transcript of Record (R.). On January 26, 2018, the trial court granted summary judgment for Respondents on the ground that Opternative failed to demonstrate standing, declining to reach Opternative's constitutional arguments. *See* Order Granting LLR and BME's Mot. for Summ. J (R.). Opternative timely served and filed its Notice of Appeal on February 23, 2018.

STATEMENT OF THE FACTS

The record in this case tells a simple, undisputed story. As explained below, Opternative developed innovative software that allowed patients to take an online vision test and have their medical history and results electronically delivered to a licensed ophthalmologist—a medical doctor who could use Opternative's software to review the patient's information and, if appropriate, write a suitable prescription for corrective lenses. But South Carolina optometrists—limited-practice eye-health professionals who also write corrective-lens prescriptions—viewed Opternative's software as a threat to their business model, which relies heavily on selling eyeglass frames to customers who come to their brick-and-mortar stores for vision tests. The optometrists dealt with this threat by drafting the ECCPL, a law specifically designed to outlaw the use of Opternative's online vision-test software. They succeeded: Once the ECCPL became law, the South Carolina-licensed ophthalmologists who had been working with Opternative were forced to stop using the service, and Opternative shut down its business operations in the state. If South Carolina officials were enjoined from enforcing the ECCPL, however, at least some South Carolina-licensed ophthalmologists would resume working with Opternative.

I. Opternative's Online Vision-Test Software.

The traditional model for prescribing and selling corrective lenses has involved an in-person visit to a brick-and-mortar store for each and every prescription (or renewal): Under that model, a patient sits in a chair and views various images through a lens-switching device called a phoropter.[3] As the phoropter cycles through the lenses, the patient self-reports their subjective experience (e.g., whether the lens makes an image "better" or "worse") in an effort to generate what is called the eye's refractive error (i.e., error in how the eye bends light).[4] A doctor can then use this information to write an appropriate corrective-lens prescription.[5] Because most optometrists—including in South Carolina—both conduct these exams and sell eyeglass frames themselves, vision tests have long been paired with the actual retail sale of eyeglass frames.[6]

Opternative has developed online vision-test software that has the potential to break this link between vision tests and retail eyeglass sales. Opternative's software allows qualifying customers to obtain a corrective-lens prescription, from the comfort of their own homes, by using

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[3] SCOPA Answer ¶ 14; *see also* Windham Affidavit, Exhibit 1 at 35:25–36:9, 36:13–37:7, 37:12–38:7 (South Carolina-licensed optometrist Michael Zolman explaining how optometrists use a phoropter to generate a patient's corrective-lens prescription).

[4] SCOPA Ans. ¶ 14; *see also* Windham Aff., Ex. 1 at 34:21–35:3 (Zolman explaining the meaning of "refractive error"), 36:10–36:12, 36:13–36:23, 38:14–38:17 (Zolman explaining how optometrists rely on a patient's subjective responses to projected images to calculate a patient's refractive error).

[5] *See id.* at 34:16–34:20, 39:23–40:6 (Zolman explaining how optometrists use refractive error to generate an appropriate prescription).

[6] *Compare* Complaint ¶ 48 (alleging that "many professional optometrists make the majority of their revenue from selling expensive frames in their brick-and-mortar offices rather than from professional fees earned from conducting traditional in-person eye examinations"), *with* SCOPA Ans. ¶ 20 (admitting on information and belief the allegations of Paragraph 48 of the Complaint); *see also* Windham Aff., Ex. 1 at 9:25–11:3 (Zolman admitting that half of his daily appointments come from patients seeking corrective-lens prescriptions and that his business model is "fairly typical"), 65:5–66:15 (Zolman admitting that optometrists attempt post-appointment eyeglass sales "most of the time").

a smartphone and a computer to connect with a state-licensed ophthalmologist.[7] Customers start by visiting the Opternative website and providing detailed information about their existing prescription and medical history.[8] The software then prompts customers with a series of written and audio questions that guide them through a vision assessment, which includes viewing various images on a computer screen and using a smartphone to self-report subjective responses to what they perceive.[9] The software records all the customer's responses (to both the vision assessment and the medical questions) and sends them to a partnering ophthalmologist, who then uses the software to conduct an independent medical review of the information.[10] If, in his medical judgment, the ophthalmologist determines that a prescription would be appropriate, the ophthalmologist can then use the software to write one and have it sent directly to the customer, who is free to purchase corrective lenses wherever he wants.[11]

The software was a hit. Since its founding in 2012, Opternative has established successful business operations in 39 states.[12] In those states, patients can take Opternative's online vision test and send their medical information to licensed ophthalmologists, and

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[7] *See* Bodde Affidavit at ¶ 3 (Opternative executive Daniel Bodde testifying that this is how the software operates).

[8] *See id.* at ¶ 6.

[9] *See id.*

[10] *See id.*; *see also* Chaum Affidavit at ¶ 2 (South Carolina-licensed ophthalmologist Dr. Edward Chaum testifying that he used the software as described).

[11] *See* Bodde Aff. at ¶ 7. Notably, customers are not guaranteed a prescription. Rather, participating ophthalmologists can and do refuse to issue prescriptions if the customer's responses to the vision test or medical history suggest that further, in-person examination is needed. *See id.* at ¶¶ 7–8. And Opternative's website, itself, screens out some customers from the vision test entirely, based on factors like age, medical history, or whether the customer has gone too long without having a comprehensive in-person eye exam. *See id.* at ¶¶ 8–9.

[12] *See id.* at ¶ 10.

ophthalmologists can use the software to write prescriptions for patients who need them.[13] This was true in South Carolina as well—for a time.[14] Up until 2016, South Carolina-licensed ophthalmologists—including Dr. Edward Chaum, who submitted an affidavit below—used Opternative's software to write prescriptions for multiple South Carolinians.[15] But the ECCPL changed that status quo.[16]

II. South Carolina Optometrists Drafted The ECCPL To Protect Their Brick-And-Mortar Business Model.

As noted above, Opternative's software threatened to break the link between vision tests and the retail sale of corrective lenses—and that link is big business. In 2014, the total vision-care market generated over $35 billion in revenue, $23 billion of which came from the sale of eyeglasses and contact lenses alone.[17] Optometrists—limited eye-health professionals who specialize in corrective-vision and certain ocular-pathological care—have a major stake in that market.[18] And a significant portion of that stake comes from their ability to bring patients into brick-and-mortar offices so the patients can be induced to purchase expensive frames from the optometrist after receiving their prescription.

Indeed, optometrists rely heavily on patients seeking corrective-lens prescriptions for a consistent source of daily appointments.[19] And at the conclusion of each appointment, it is

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[13] *See id.*

[14] *See id.* at ¶ 11; Chaum Aff. at ¶ 2.

[15] *See* Bodde Aff. at ¶ 11; Chaum Aff. at ¶ 2.

[16] *See* Bodde Aff. at ¶¶ 12–13; Chaum Aff. at ¶¶ 2–3.

[17] *See* Windham Aff., Ex. 2 at 153, 177.

[18] *See id.*, Ex. 1 at 9:2–9:18.

[19] *See id.* at 9:25–11:3 (Zolman admitting that half of his daily appointments come from patients seeking corrective-lens prescriptions and that his business model is "fairly typical").

common practice for optometrists (or office staff) to lead patients to a display room and attempt to sell them eyeglass frames.[20] For many optometrists, such in-person sales constitute a majority of their overall revenue stream.[21] It is in this way that optometrists have traditionally enjoyed a dual status as both the gatekeepers (prescription-writers) and first vendors (eyeglass-sellers) patients encounter as they enter the broader eye-care market.

This business model can be lucrative—but it depends largely on the traditional necessity of in-person refractive tests to the prescription-writing process. As patient demand for more convenient and affordable access to corrective lenses increased in recent years, and technological innovation marched to meet that demand, optometrists began to express concern that their longstanding market-share could be threatened.[22] And they recognized that Opternative, with its online vision-test software, appeared to be at the forefront of that progression.[23]

Faced with this threat, optometrists—both nationwide and in South Carolina specifically—mobilized in search of legislation that would outlaw Opternative. In 2015, the

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[20] *See id.* at 65:5–66:15 (Zolman admitting that optometrists attempt post-appointment eyeglass sales "most of the time").

[21] *Compare* Compl. ¶ 48 (alleging that "many professional optometrists make the majority of their revenue from selling expensive frames in their brick-and-mortar offices rather than from professional fees earned from conducting traditional in-person eye examinations"), *with* SCOPA Ans. ¶ 20 (admitting on information and belief the allegations of Paragraph 48 of the Complaint); *see also* Windham Aff., Ex. 5 at 28:20–28:22 (SCOPA Executive Director Jackie Rivers admitting that "most South Carolina optometrists sell eyeglass frames").

[22] *See* Windham Aff., Ex. 2 at 153 (Zolman expressing concern in a 2015 e-mail to SCOPA leadership that many patients "really come in just wanting a new prescription for glasses and/or contacts" and that online refractive technology would "allow them to get what they want"); Ex. 1 at 51:25–52:9, 53:23–54:1 (Zolman admitting that when he wrote the e-mail, he was concerned with how new vision-care technologies might impact the "business side" of the optometric profession).

[23] *See id.* at 54:2–54:12 (Zolman admitting that he "had Opternative in mind" when he wrote the 2015 e-mail), 66:16–67:9 (Zolman admitting that his revenue from eyeglass sales "would go down" if software like Opternative's ever became commercially popular).

American Optometric Association (AOA)—a national association of optometrists that promotes the optometric profession—began distributing model legislation to local affiliates designed to prevent Opternative from operating in states across the country.[24] One such affiliate, Respondent SCOPA, adapted that bill and waged an aggressive lobbying campaign to get it passed in South Carolina.[25]

While SCOPA made every effort to hide its anti-competitive motives throughout the legislative process—maintaining a strict internal policy of not singling out Opternative in public and taking care to clothe the bill in public-health rhetoric—internal e-mail communications reveal that the ECCPL was designed specifically to do one thing only: shut Opternative down.[26] That is how SCOPA celebrated the law when it went into effect in 2016.[27] And that is exactly

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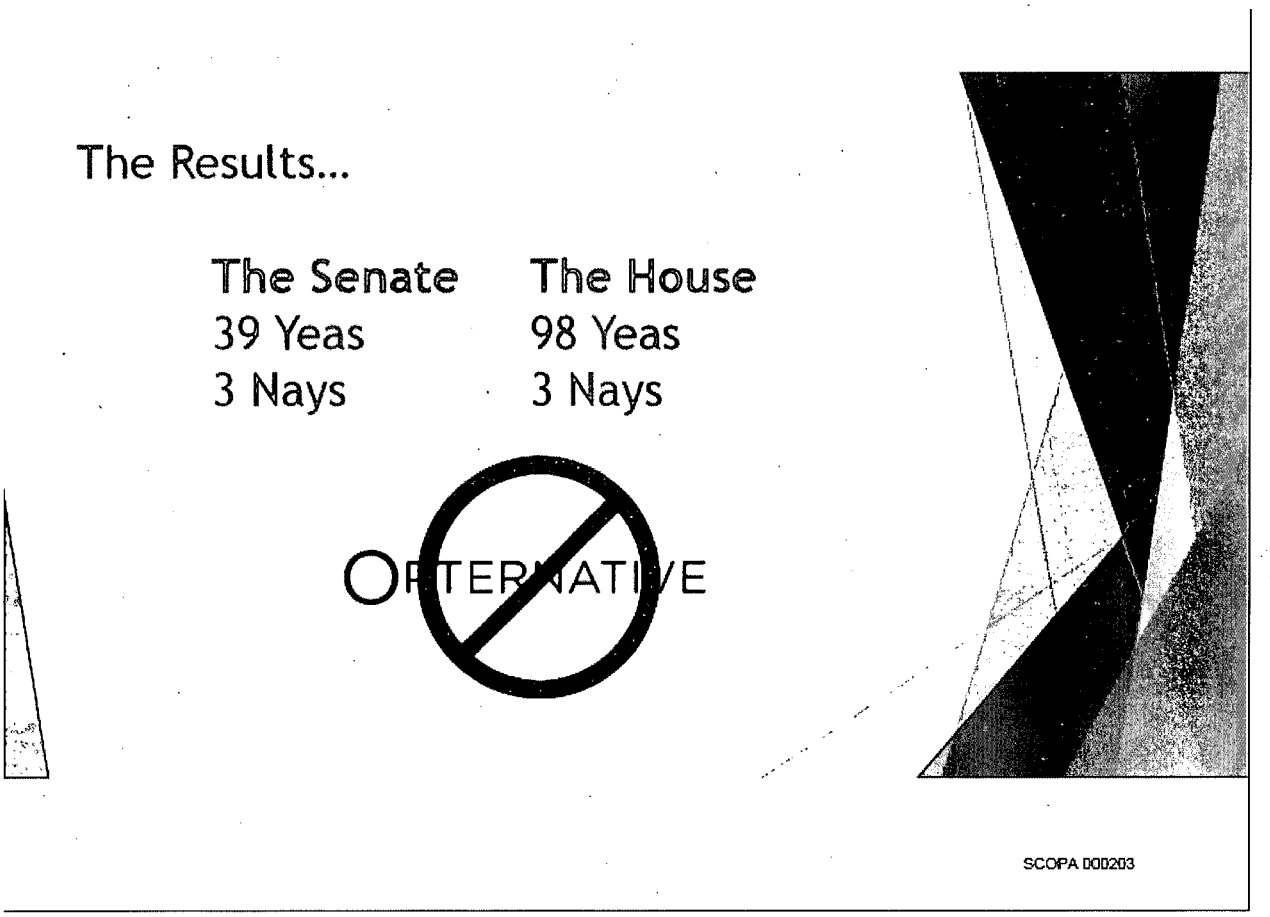
[24] *See id.*, Ex. 7 at 501 (AOA update on "the Opternative issue" promising to provide "recommendations to state affiliates about suggested strategies to stop this from operating in your state"); Ex. 2 at 155–79 (AOA webinar for state affiliates explaining how new vision-care technologies stood to impact the business side of optometry and introducing model legislation to combat those technologies).

[25] *See id.*, Ex. 2 at 153–54 (Zolman expressing concern to SCOPA's leadership that the technologies surveyed in the AOA webinar represented "a huge threat to our profession" and recommending that SCOPA "address [the issue] quickly and attack aggressively" by working to pass the AOA's "bill [which] can be modified on a state-by-state basis to prevent this"); Ex. 5 at 23:13–23:15 (Rivers admitting that "the ECCPL is a bill that SCOPA passed"), 34:17–35:2 (Rivers explaining that "[t]he original draft language [for the ECCPL] came from the American Optometric Association" and admitting that "SCOPA . . . generate[d] a draft based on that language").

[26] *Compare id.*, Ex. 8 at 469 (Rivers forwarding AOA admonition to "continue talking about patient safety"), *with id.*, Ex. 5 at 55:16–55:22, 56:6–56:11 (Rivers admitting that the ECCPL was "prompted by the existence of online eye exams" but that there were "internal discussions at SCOPA about the importance of discussing the ECCPL as if it were not an effort to ban Opternative"); *id.*, Ex. 13 at 1258 (Zolman e-mail to SCOPA membership explaining that "We do NOT want to make this an anti-Opternative arguement [sic] as Legislators frown upon legislation that singles out and restricts a specific business").

[27] *See id.*, Ex. 9 at 116 (Rivers e-mail to AOA during veto-override vote, exclaiming: "[T]ake that Opternative!!!!!!"); *id.*, Ex. 3 at 129 (Zolman e-mail to SCOPA's member after veto-

how SCOPA described it when, months later, the AOA asked them to present for other state affiliates on what they had really achieved[28]:



III. The ECCPL Destroyed Opternative's South Carolina Business.

The ECCPL did what it was designed to do: It banned Opternative in South Carolina. At its core, the law prohibits doctors from writing corrective-lens prescriptions unless a human being was involved—in any capacity—in generating the information the doctor relied on to write that prescription. *See* S.C. Code Ann. §§ 40-24-20(B) (requiring an "eye examination" for a

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override vote, boasting: "It's with the utmost pleasure to announce that today, Opternative and 'eye exam' kiosks are now **PROHIBITED BY LAW** in the great state of SC!," and "Good-bye Opternative!").

[28] *See id.*, Ex. 10 at 203.

valid prescription); 40-24-10(3) (requiring that an "eye examination" include a "visual status"); 40-24-10(9) (defining a "visual status" to exclude assessments "based solely on . . . information generated by an automated testing device"). Notably, the ECCPL does not require a doctor to examine—or even meet—a patient before writing a prescription.[29] All it requires is what Respondents LLR and BME's 30(b)(6) designee aptly described as "some type of human involvement" in the process.[30] Because the identity of that "human" and the nature of his "involvement" are otherwise left entirely to the discretion of the prescribing doctor, an ophthalmologist may decide to have an unlicensed assistant with a clipboard gather the information he needs to write a prescription.[31] What he may not decide, however, is that he would prefer to use online tools like Opternative—which uses a computer program to collect the same information—as the basis for that prescription.

Because that is the only product Opternative offers, the ECCPL effectively banned Opternative in South Carolina. There is, in fact, universal agreement that this is what the law does: It is how the optometrists who drafted the ECCPL understand the law.[32] It is how

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[29] *See* Windham Aff., Ex. 11 at 64:16–65:2 (Respondents LLR and BME's 30(b)(6) designee Darra Coleman explaining that the ECCPL has "no explicit requirement" regarding tests that must be performed before writing a corrective-lens prescription), 65:4–65:16 (Coleman admitting that the ECCPL "doesn't identify diagnostic methodologies that have to be employed in order to develop the medical findings" or even "specify what those medical findings must be"), 65:17–65:23 (Coleman admitting that "the ECCPL leaves it to an ophthalmologist's professional judgment exactly what diagnostic methodologies and exactly what medical information he needs before writing a prescription").

[30] *See id.* at 67:14–67:18.

[31] *See id.* at 65:17–65:23, 67:14–68:10 (Coleman explaining that it is generally within the physician's discretion to use any number of "physician extenders" and that such extenders can even include "unlicensed professionals, such as a medical assistant or a certified nurse assistant").

[32] *See id.*, Ex. 9 at 116 (Rivers e-mail to AOA during veto-override vote, exclaiming: "[T]ake that Opternative!!!!!!"); *id.*, Ex. 3 at 129 (Zolman e-mail to SCOPA's member after veto-

Respondents LLR and BME, the agencies charged with enforcing the ECCPL, understand the law.[33] It is how the ophthalmologists subject to the ECCPL understand the law.[34] And it is how Opternative, the company targeted by the ECCPL, understands the law.[35]

Ophthalmologists violate the ECCPL only at their own peril. It is considered professional misconduct for a provider to breach its terms. S.C. Code Ann. § 40-24-20(D). Any complaint that an ophthalmologist has committed such a violation would trigger an investigatory process that lasts a least a year.[36] At the end of that process, the ophthalmologist could be subject to ruinous financial and professional sanctions, including tens of thousands of dollars in fines and even suspension of the ophthalmologist's license to practice. *See* S.C. Code Ann. §§ 40-1-80, 40-47-80, 40-47-110, 40-47-120.

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override vote, boasting: "It's with the utmost pleasure to announce that today, Opternative and 'eye exam' kiosks are now **PROHIBITED BY LAW** in the great state of SC!," and "Good-bye Opternative!").

[33] *Compare* Bodde Aff. at ¶¶ 6–7 (Bodde explaining that Opternative's software allows ophthalmologists to write corrective-lens prescriptions based solely on information collected electronically and transmitted over the Internet), *with* Windham Aff., Ex. 11 at 67:14–67:18 (Coleman explaining that a corrective-lens prescription is only valid under the ECCPL if based on information collected by a human being).

[34] *See* Chaum Aff. at ¶ 3 (Chaum testifying that "[m]y understanding was and is that the ECCPL forbids South Carolina-licensed ophthalmologists from writing prescriptions for glasses and contact lenses based on information electronically compiled by services like Opternative"); *see also* Bodde Aff. at ¶ 12 (Bodde testifying that "the understanding of all the South Carolina-licensed ophthalmologists we were in contact with[] was that the ECCPL barred the use of Opternative's Technology to write prescriptions").

[35] *See id.* (Bodde testifying that "Opternative's understanding was (and still is) that the ECCPL forbids South Carolina-licensed ophthalmologists from writing corrective-lens prescriptions based solely on information electronically compiled by automated testing devices, including Opternative's Technology").

[36] *See* Windham Aff., Ex. 11 at 19:17–19:23 (Coleman admitting that the complaint-investigation process could not even theoretically take less than a year to complete).

Unsurprisingly, no South Carolina-licensed ophthalmologists were willing to risk these consequences, and Opternative was forced to cease operations in the state.[37] Crucially, testimony in the record reflects that the ECCPL was the *only* reason for this: An Opternative executive testified that Opternative stopped operating in South Carolina solely because of the ECCPL, but would immediately resume operating in its absence.[38] And at least one South Carolina-licensed ophthalmologist testified that he would go back to using Opternative in South Carolina if the law were struck down.[39] This lawsuit is an attempt to remove that barrier.

STANDARD OF REVIEW

"A lower court may properly grant a motion for summary judgment when '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 a judgment as a matter of law.'" *Connor Holdings, LLC v. Cousins*, 373 S.C. 81, 84, 664 S.E.2d 58, 60 (2007) (quoting Rule 56(c), SCRCP) (citing *Tupper v. Dorchester County*, 326

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[37] *See* Bodde Aff. at ¶ 13 (Bodde testifying that "immediately after the passage of the ECCPL, South Carolina-licensed ophthalmologists refused to write prescriptions based on Opternative's Technology, and Opternative was unable to find ophthalmologists willing to risk violating the law and potentially incurring penalties or even losing their license," which meant that "Opternative was forced to cease operations in South Carolina"); Chaum Aff. at ¶ 3 (Chaum testifying that "[o]nce the ECCPL went into effect, I promptly stopped using Opternative's technology for this purpose and do not currently provide prescriptions for corrective lenses or contact lenses in South Carolina").

[38] Bodde Aff. at ¶ 14 (Bodde testifying that "[t]he ECCPL is . . . the only thing standing between Opternative and continued operations in South Carolina" and that "[i]n the absence of the ECCPL—or should it be struck down in this case—Opternative would immediately continue operating in South Carolina").

[39] Chaum Aff. at ¶ 4 (Chaum testifying that if the law were changed "I would support the reintroduction of this and other similar technologies to improve patient access for their refractive needs"); *see also* Bodde Aff. at ¶ 14 (Bodde testifying that "Opternative is currently in contact with South Carolina-licensed ophthalmologists who would continue using our Technology to write corrective-lens prescriptions (according to their medical judgment) if the barrier of the ECCPL were removed").

S.C. 318, 325, 487 S.E.2d 187, 191 (1997)). "When reviewing a grant of summary judgment, appellate courts apply the same standard that governs the trial court under Rule 56(c) . . . ." *S.C. Pub. Interest Found. v. S.C. Dep't of Trans.*, 421 S.C. 110, 117, 804 S.E.2d 854, 858 (2017) (citing *USAA Prop. & Cas. Ins. Co. v. Clegg*, 377 S.C. 643, 653, 661 S.E.2d 791, 796 (2008); Rule 56(c), SCRCP). Thus, "the appellate court will review all ambiguities, conclusions, and inferences arising in and from the evidence in a light most favorable to the non-moving party below." *Id.* (citing *Osborne v. Adams*, 346 S.C. 4, 7, 550 S.E.2d 319, 321 (2001)).

ARGUMENT

The trial court granted summary judgment for Respondents on the ground that Opternative lacked standing to challenge a law that was specifically designed to, and actually did, shut it down in South Carolina. The gravamen of the opinion below is that Opternative cannot maintain this lawsuit because the ECCPL bans only its "current business model" and Opternative could, in theory, change how it operates in order to comply with the law. This was error: State and federal cases make clear that a plaintiff has standing to challenge a law preventing it from pursuing its chosen business (Section I, below). And the record establishes that Opternative more than meets the requirements for standing here: It has demonstrated an injury-in-fact (Section II) that is directly caused by the ECCPL (Section III) and would be redressed by a ruling in its favor (Section IV).[40] The decision below should therefore be reversed.

[40] The three requisites of standing under South Carolina law—injury-in-fact, causation, and redressability—mirror the federal framework articulated in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). A notable difference, however, is that while Article III's case-or-controversy requirement is jurisdictional in federal courts, South Carolina courts take a less "inflexible" approach to standing. *Bodman v. State*, 403 S.C. 60, 67–68, 742 S.E.2d 363, 366 (2013)

I. A Plaintiff Has Standing To Challenge A Law That Outlaws Its Business Model.

The core of the trial court's reasoning below is that Opternative lacks standing because the ECCPL forbids only its chosen business model. *See* Order at 5, 6, 8. While the opinion acknowledges that "Opternative has certainly presented evidence that the ECCPL will deter state-licensed ophthalmologists and optometrists from using its technology *within Opternative's current business model*," Order at 6, the court found this showing irrelevant because Opternative could theoretically change its business model to comply with the ECCPL.[41]

This is not the law. Courts *routinely* adjudicate disputes where the plaintiff's complaint is that a challenged law prevents them from engaging in their chosen business. In *Joseph v. South Carolina Department of Labor, Licensing & Regulation*, the South Carolina Supreme Court decided a challenge brought by a physical therapist who wanted the freedom to work in the direct employ of physicians. 417 S.C. 436, 452, 790 S.E.2d 763, 771 (2016) (plurality opinion). That physical therapist could work, of course, but she had standing because she could not work *in the way she wanted.* Similarly, in *Retail Services & Systems v. South Carolina Department of Revenue*, the plaintiff company had standing to challenge a rule prohibiting it from acquiring a fourth liquor license—despite the fact that it could obviously have adopted a business model of owning only three liquor licenses. 419 S.C. 469, 799 S.E.2d 655 (2017) (plurality).

(recognizing that South Carolina courts in recent years have routinely found standing to raise questions of public importance).

[41] The opinion below cites no record evidence suggesting that Opternative could successfully retool its current, clearly illegal business in order to comply with the ECCPL. That is because there is no such evidence. To the contrary, as described above, the whole point of Opternative is to allow doctors and patients (in appropriate circumstances) to avoid the unnecessary burden and expense of an appointment at a brick-and-mortar establishment. By requiring patients to have an in-person interaction with a human—any human—before obtaining a corrective-lens prescription, the ECCPL prohibits the use of Opternative's software in the only way that software was designed to be used.

This has long been the rule, both in South Carolina and in federal courts. In *Painter v. Town of Forest Acres*, for instance, the South Carolina Supreme Court resolved a challenge brought by the owner of a drive-in restaurant who objected to a mandatory closing-time ordinance. 231 S.C. 56, 61, 97 S.E.2d 71, 31 (1957). That drive-in could surely have adjusted its business model to comply with the law—it could have closed earlier—but that did not obviate its standing. Similarly, in *Clinton v. New York City*, the United States Supreme Court found that a farmers' cooperative had standing to challenge the President's line-item veto of a tax provision that would have helped "facilitate [its] acquisition of processing plants." 524 U.S. 417, 432 (1998). The farmers' cooperative could have continued operating even after the change in tax law, but it had standing to maintain the suit because it was deprived of a "bargaining chip" that was central to its chosen business plan. *Id.*

The same principle holds here. Simply put, Opternative offers computer software that collects information about its customers and transmits that information to a *remote* ophthalmologist, who can then review the information and (if he chooses) write a prescription for corrective lenses.[42] South Carolina has outlawed the use of that product. *Even if* Opternative could design a new product that did not involve transmitting information to remote ophthalmologists (and nothing in the record suggests that it could), the company still has standing to challenge a law prohibiting its preexisting business.

II. Opternative Has Been Injured By The Destruction Of Its South Carolina Business.

An "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291

[42] *See* Bodde Aff. at ¶¶ 3–4, 6–7, 12–13.

(2001) (quoting *Lujan*, 504 U.S. at 559–61 (1992) (internal quotations omitted)). Opternative—which used to operate its business in South Carolina, but now cannot and does not—qualifies on both scores.

First, an injury is concrete and particularized when it affects the plaintiff "in a personal and individualized way." *Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 330 649 S.E.2d 31, 33 (2007). Personal economic injuries, by their very nature, satisfy this test. *See Toussaint v. State Bd. of Med. Exam'rs*, 285 S.C. 266, 268, 329 S.E.2d 433, 434–35 ("Appellant's interest in his own reputation and in his economic well-being clearly give him a personal stake in the outcome of the controversy." (quotation and citation omitted)).

This is no less true where the injury results from a law or tort more directly affecting a third party. In *Joseph*, for instance, a plurality of the South Carolina Supreme Court found that a physical therapist had standing to challenge a statutory interpretation prohibiting physicians from employing physical therapists as physical therapists. 417 S.C. at 499, 790 S.E.2d at 769–70. While it was the physicians who were directly regulated, the plurality found that the therapist "ha[d] been injured by the infringement on her ability to practice her chosen profession." *Id.* at 449–50, 790 S.E.2d at 770.

Similarly, in *Lee v. Chesterfield Gen. Hosp., Inc.*, the Court of Appeals found that an employing physician and his association had standing to sue over a hospital's alleged conspiracy against one of the physician's assistants. 289 S.C. 6, 14, 334 S.E.2d 379, 384 (Ct. App. 1986). Even though the physician and association were not direct targets of the conspiracy, this Court explained that because "[o]ne with a financial interest in a controversy ordinarily will have standing to sue," allegations that the conspiracy "caused [the physician and association]

pecuniary loss by restricting the services [the assistant] could perform for his employer" satisfied the injury requirement. *Id.*

Opternative's injury is concrete and particularized for the same reasons. Like the physical therapist in *Joseph*, Opternative has demonstrated that a law is preventing it from pursuing its chosen business by presenting evidence that it was successfully operating in South Carolina prior to the passage of the ECCPL; that it had a working relationship with at least one licensed ophthalmologist, Dr. Edward Chaum, who testified that he had previously used Opternative's computer software to write prescriptions for patients who needed them; and that after the ECCPL passed, ophthalmologists like Dr. Chaum stopped using Opternative's software to write prescriptions based on their (correct) understanding that it was now illegal to do so, forcing Opternative to shut down its South Carolina operations.[43] And like the physician and association in *Lee*, Opternative has alleged pecuniary loss and a financial interest in the outcome of the suit. Order at 5 ("Opternative alleges that it hast [sic] lost business in South Carolina and has been forced to shut down business."). These are concrete harms particular to Opternative.

Second, an injury must also be actual or imminent, rather than conjectural or hypothetical. Here, again, Opternative qualifies. Opternative's injury is neither conjectural nor hypothetical because it has already happened: Opternative does not argue that it *will* shut down its operations if certain events come to pass. Instead, it has presented evidence that it already *has* shut down its operations in South Carolina.[44] That is an actual injury.

The trial court disagreed, finding that Opternative has not been injured because (a) the ECCPL does not directly regulate Opternative, and (b) the ECCPL allows ophthalmologists to

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[43] *See* Bodde Aff. at ¶¶ 11–14; Chaum Aff. at ¶¶ 2–4.

[44] *See* Bodde Aff. at ¶ 13.

work with Opternative under a different business model. *See* Order at 6. But neither point is any obstacle to standing here.

To start, the ECCPL does not *need* to directly regulate Opternative in order to give rise to standing. A plaintiff is entitled to redress under the Declaratory Judgments Act as long as the plaintiff is "affected" by the challenged law. S.C. Code Ann. § 15-53-30. Hence the plurality's recognition in *Joseph* that the physical therapist had suffered an injury, despite not being directly regulated. 417 S.C. at 449–50, 790 S.E.2d at 770. Similar examples abound. *See, e.g.*, *Smiley*, 374 S.C. at 330, 649 S.E.2d at 33 (jogger who used beach for recreation and rehabilitation had sufficient stake in appearance of beach to contest issuance of sand-scraping permit to private resort); *Blandon v. Coleman*, 285 S.C. 472, 475, 330 S.E.2d 298, 300 (1985) (nurse at County nursing home had standing to seek Council and Nursing Home Board's enforcement of anti-nepotism statute that directly regulated supervisor because it "related to her employment"); *Roe v. Wade*, 410 U.S. 113, 120 (1973) (pregnant woman prevented from obtaining abortion by Texas law banning physicians from providing them had standing to challenge law's constitutionality); *Truax v. Raich*, 239 U.S. 33, 36, 41 (1915) (alien employee fired from job was proper party to challenge constitutionality of Arizona law banning businesses from maintaining staff totaling under 80-percent qualified electors or native-born citizens). Here, the trial court openly acknowledged that the ECCPL deters ophthalmologists from using Opternative's software. *See* Order at 6. That is an injury to Opternative.[45]

[45] If it were not, then one would expect similar healthcare-technology companies to have trouble maintaining suits regarding laws regulating their software. But when such challenges have arisen in other jurisdictions, just the opposite has been true. *See, e.g.*, *Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606, 608 n.5, 611 (Tex. App. 2014) (telemedicine company Teladoc successfully challenged medical-board letter with "implications for [its] ability to do business in

And that injury is not obviated by the trial court's suggestion that Opternative could alter its product in order to comply with the ECCPL. As discussed above, Opternative's inability to continue running its chosen business *is* an injury. *See supra* 13–14. The fact that Opternative used to run that business in South Carolina, but now cannot and does not, means that Opternative is worse off than it used to be. That is injury-in-fact, and the decision below should therefore be reversed.

III. There Is Causation Because Destruction Of Opternative's Business In South Carolina Is Fairly Traceable To The ECCPL.

Standing also requires "a causal connection between the injury and the conduct complained of," which means that the injury must be "fairly traceable" to the challenged action. *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (quoting *Lujan*, 504 U.S. at 559–61 (internal quotation and brackets omitted)). Opternative satisfies this requirement because it has shown that the ECCPL was specifically designed to, and actually did, shut it down in South Carolina.

The United States Supreme Court clarified how the "fairly traceable" standard for causation applies to indirect injuries in *Duke Power Co. v. Carolina Environmental Study Group*, 438 U.S. 59, 75–78 (1978). There, residents alleging certain environmental, aesthetic, and other harms resulting from the construction of nearby nuclear-power plants challenged the constitutionality of the Price-Anderson Act, which limited the disaster liability of federally licensed nuclear-power plants. *Id.* at 62–67. After four days of evidentiary hearings, the trial court found that the harms had indeed occurred. *Id.* at 73–74. But the question was whether those harms were fairly traceable to the Act *itself*, which the Supreme Court explained required a "substantial likelihood" that construction would not be completed absent the Act. *Id.* at 75 n.20.

Texas" despite court's recognition that "[t]here is no contention that Teladoc itself is practicing medicine or is otherwise directly subject to [the board's] regulatory authority").

Noting the trial court's conclusion that the evidence demonstrated a "but for" connection between the limited-liability provision and construction of the particular plants in question, the Court found the harms "fairly traceable" to the Act. *Id.* at 75–77.

That is consistent with the outcome in *Joseph*. There, the physical therapist wanted to provide her services as an employee of a physician, but a statutory interpretation banned physicians from employing her for that purpose. *Joseph*, 417 S.C. at 442, 790 S.E.2d at 766. Considered narrowly, her injury was the direct result of the fact that physicians seeking to obey the law would not hire her to perform physical therapy services. *Id.* But considered through the lens of standing cases like *Joseph* and *Duke Power*, it was the law *preventing physicians from hiring her* that caused the injury. *See id.* at 449–50, 790 S.E.2d at 770 (noting that it would be "difficult to conceive of individuals more impacted by [the interpretation]" than therapists and physicians who wanted to employ them). The physical therapist would have been free to seek employment with physicians "but for" the challenged interpretation. *Cf. Duke Power*, 438 U.S. at 75–77. That was sufficient for causation. *Joseph* 417 S.C. at 449–50, 790 S.E.2d at 770.

So too, here. As in *Duke Power*, Opternative demonstrated "but for" causation in the court below by presenting undisputed evidence that it was operating in South Carolina prior to the passage of the ECCPL; that after the ECCPL passed, ophthalmologists like Dr. Chaum stopped using Opternative's software to write corrective-lens prescriptions to avoid breaking the law; and that if the ECCPL were struck down, Opternative would immediately resume partnering with Dr. Chaum and ophthalmologists like him in South Carolina.[46] And as in *Joseph*, where physicians were not free to hire physical therapists to perform the services they actually wanted to provide, Opternative's injury is "fairly traceable" to the fact that ophthalmologists are not free

[46] *See* Bodde Aff. at ¶¶ 11–14; Chaum Aff. at ¶¶ 2–4.

to use the only product the company actually offers: an online vision test resulting (where medically appropriate) in a corrective-lens prescription.[47] Indeed, both an Opternative executive and one of the independent South Carolina-licensed ophthalmologists who previously used Opternative in South Carolina testified that the ECCPL was the *only* reason Opternative shut down in South Carolina.[48]

The opinion below acknowledges as much, noting that "Opternative has certainly presented evidence that the ECCPL will deter state-licensed ophthalmologists from using its technology *within Opternative's current business model.*" Order at 6. But the court found that this evidence did not demonstrate causation because "ophthalmologists can presumably make their own decisions" about whether to use Opternative's software. *Id.* at 6–7 (citing *ATC S., Inc. v. Charleston County*, 380 S.C. 191, 195–96, 669 S.E.2d 337, 339 (2008)). That is incorrect.

As explained above, the ECCPL threatens ophthalmologists with ruinous fines and penalties for continuing to use Opternative's software to write corrective-lens prescriptions. *Supra* 10. That is why the record evidence shows, not that Opternative's partnering ophthalmologists mysteriously stopped using its product for reasons unknown, but that they stopped using Opternative specifically because of the ECCPL.[49] Again, Opternative was actually operating in partnership with South Carolina-licensed ophthalmologists before the ECCPL passed; afterwards, it was not; and both halves of that partnership testified that the ECCPL was the sole cause of the change.[50] The record contains no contrary evidence.

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[47] *See* Bodde Aff. at ¶¶ 3–4, 6–7, 12–13.

[48] *See id.* at ¶¶ 13–14; Chaum Aff. at ¶¶ 3–4.

[49] *See* Bodde Aff. at ¶¶ 12–13; Chaum Aff. at ¶ 3–4.

[50] *See* Bodde Aff. at ¶¶ 11–14; Chaum Aff. at ¶¶ 2–3.

The only case cited below to support the proposition that this evidence does not demonstrate causation—*ATC*, 380 S.C. at 195–96, 669 S.E.2d at 339—simply does not stand for that proposition. *ATC* involved one phone-tower company's challenge to a rezoning classification that would have allowed a competing phone-tower company to build on a nearby tract of land. 380 S.C. at 193–94, 669 S.E.2d at 338–39. The South Carolina Supreme Court found that the plaintiff company lacked standing because a business cannot claim an injury stemming merely from the favorable treatment of its competitors. *Id.* at 196, 669 S.E.2d at 339–40. That ended the inquiry—the Supreme Court did not discuss causation at all. *Id.* at 196, 669 S.E.2d at 339 ("We need go no further than the initial [standing] requirement of a concrete and particularized injury."). *ATC* is therefore inapposite.[51]

It is true, of course, that Opternative will only be able to re-start its operations in South Carolina if state-licensed ophthalmologists would be willing to use its software again. But there is every reason to believe they would—if for no other reason than that one has already testified that he would do exactly that.[52] Such evidence is a far cry from cases where a plaintiff's theory

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[51] Nor does *ATC*'s holding as to injury support the trial court's opinion. In *ATC*, the Court held that a rezoning decision that allowed additional competition with the incumbent company did not constitute an injury to the incumbent. *Id.* Here, the government has taken affirmative action—passing the ECCPL—to *prevent* Opternative from competing with brick-and-mortar optometrists. South Carolina courts routinely reject that sort of anti-competitive legislation. *See, e.g.*, *Retail Servs.*, 419 S.C. at 474, 799 S.E.2d at 667 (striking down law preventing retailer from obtaining more than three liquor licenses because "protectionism for a certain class of retailers is not a constitutionally sound basis for regulating liquor sales"); *Joseph*, 417 S.C. at 452–53, 790 S.E.2d at 771 (striking down law preventing physicians from hiring physical therapists where law "appear[ed] merely to be anti-competitive protectionist legislation intended to protect personal financial interests . . . rather than actual benefits to patients"); *Painter*, 231 S.C. at 61, 97 S.e.2d at 73 (striking down closing-hour ordinance that would have impaired or destroyed many lawful businesses and "appear[ed] to be directed at respondent with this purpose in mind").

[52] Chaum Aff. at ¶ 4; *see also* Bodde Aff. at ¶ 14.

of standing hinges on the unpredictable decisions of third parties not before the court. *See, e.g.*, *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40–45 (1976) (no redressability where patients failed to show "substantial likelihood" that striking down IRS policy allegedly encouraging private hospitals to deny service to indigents would result in greater services).

South Carolina courts have found standing based on far less: The physical therapist in *Joseph* was not required to demonstrate that a particular physician would hire her but for the legal prohibition on doing so. *Cf.* 417 S.C. at 499, 790 S.E.2d at 769–70. The nurse in *Blandon* was not required to demonstrate that the nursing home would hire a supervisor she liked better if the facility were forced to abide by nepotism laws. *Cf.* 285 S.C. 472, 475, 330 S.E.2d 298, 300 (1985). And Opternative should not be required to demonstrate that doctors would return to using its software in the absence of the ECCPL. Nevertheless, it *has* done so, and that more than satisfies its obligation to demonstrate standing here. The decision below should therefore be reversed.

IV. Opternative's Injury Is Redressable Because It Could Immediately Resume Operating Its Business In South Carolina If the ECCPL Were Struck Down.

Finally, standing requires that it be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Sea Pines*, 345 S.C. at 601, 550 S.E.2d at 291 (quoting *Lujan*, 504 U.S. at 559–61 (internal quotations omitted)). Here, Opternative seeks only the freedom to partner with ophthalmologists who can use its software as designed. The ECCPL—which Respondents LLR and BME are bound to enforce—is Opternative's only barrier to that freedom. *See* S.C. Code Ann. §§ 40-24-20(B), 40-24-10(3), 40-24-10(9). But a court is empowered under the DJA and in equity to remove that barrier by striking down the ECCPL and enjoining Respondents LLR and BME from enforcing it. S.C. Code Ann. § 15-53-20; *Blandon*,

285 S.C. at 475, 330 S.E.2d at 300. That is more than "likely" relief—as far as the record evidence reveals, it is *certain*.

The trial court's contrary conclusion was based solely on the South Carolina Supreme Court's decision in *Sea Pines*. Order at 7–8. There, animal-rights organizations challenged a Department of Natural Resources decision to issue hunting permits allowing the lethal reduction in deer population in a wildlife sanctuary on Hilton Head Island. *Sea Pines*, 345 S.C. at 597–98, 550 S.E.2d at 289–90. The groups argued that issuance of the permits deprived them of their aesthetic and recreational interests in viewing the deer. *Id.* at 601–02, 550 S.E.2d at 291–92. The Supreme Court disagreed because, while such deprivation *would* constitute an injury, the organizations failed to present evidence that issuance of the permits would actually reduce the number of deer they viewed. *Id.* Moreover, even assuming such evidence, the groups failed to demonstrate redressability because their proposed non-violent alternative to the lethal method was still a *reduction* plan, which meant that a favorable decision would have resulted in the same injury. *Id.*

But *Sea Pines* actually cuts the other way. In *Sea Pines*, the South Carolina Supreme Court specifically faulted the plaintiffs for failing to demonstrate that the permits they challenged would result in their seeing fewer deer. *Id.* Here, by contrast, Opternative has provided undisputed evidence in the form of affidavits that the ECCPL—and only the ECCPL—resulted in the shuttering of its South Carolina business.[53] Such affidavits are sufficient to demonstrate standing. *See, e.g.*, *Smiley*, 374 S.C. at 330, 333, 649 S.E.2d at 33, 34 (jogger demonstrated standing by submitting affidavit showing that he was disabled, that he used areas of beach for rehabilitation, and that issuance of sand-scraping permits would make it impossible to jog in

[53] *See* Bodde Aff. at ¶¶ 11–14; Chaum Aff. at ¶¶ 2–3.

those areas). Moreover, in *Sea Pines*, the South Carolina Supreme Court noted that there was no reason to believe that a ruling in the plaintiffs' favor would prevent reductions in the deer population. 345 S.C. at 601–02, 550 S.E.2d at 291–92. But here, Opternative has presented undisputed evidence that an order enjoining the enforcement of the ECCPL would result in the immediate resumption of its South Carolina business.[54]

The trial court rejected this evidence based, again, on the assertion that "state-licensed ophthalmologists can already work with Opternative to provide corrective-lens prescriptions for South Carolina residents." Order at 8 (quotation omitted). But that is incorrect because, as discussed above, the only product actually offered by Opternative is banned under the ECCPL: South Carolina-licensed ophthalmologists *cannot legally* use Opternative's product. *Supra* 8–11. Accordingly, they *do not* use Opternative's product.[55] If Opternative succeeds in this pre-enforcement challenge, they will *once again* use its product.[56] *Cf. Joseph*, 417 S.C. at 450, 790 S.E.2d at 770 ("The only viable avenue to seek redress and access to our courts cannot be solely through disregarding our laws.").

In short, Opternative's injury is redressable because the DJA empowers courts to grant the precise relief it seeks: a declaration that the ECCPL—which bans ophthalmologists from using its software—is unconstitutional and cannot be enforced. Opternative has also offered affidavits demonstrating the real-world implications of that relief: that the company would immediately resume operating in South Carolina by partnering with ophthalmologists, including Dr. Chaum, to provide online vision tests and corrective-lens prescriptions for patients who need

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[54] *See* Bodde Aff. at ¶ 14; Chaum Aff. at ¶ 4.

[55] *See* Bodde Aff. at ¶¶ 12–13; Chaum Aff. at ¶ 3.

[56] *See* Bodde Aff. at ¶ 14; Chaum Aff. at ¶ 4.

them. Nothing more is needed to demonstrate redressability, and the decision below should therefore be reversed.

CONCLUSION

Appellant has demonstrated injury, causation, and redressability, and the trial court therefore erred in concluding that Appellant lacks standing to sue. For these reasons, Appellant respectfully requests this Court to reverse the trial court's grant of summary judgment, and remand for disposition of the remaining issues presented on cross-motions for summary judgment below.

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March 26, 2018

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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SC Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
DeAndrea Gist Benjamin, Circuit Court Judge

Case No. 2016-CP-40-06276

Opternative, Inc., ... Appellant,

v.

South Carolina Board of Medical Examiners and the South Carolina Department of Labor, Licensing & Regulation ..... Respondents,

and

The South Carolina Optometric Physicians Association ..... Respondents-Intervenors.

PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Opternative, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading hereinbelow specified by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

Pleading: Initial Brief of Appellant
Appellant's Designation of Matter for the Record on Appeal

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March 26, 2018

VIA HAND DELIVERY
The Honorable Jenny Abbott Kitchings
Clerk of Court
The South Carolina Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: Opternative, Inc. v. South Carolina Board of Medical Examiners *et al.*
Appellate Case No. 2018-000326
Our File No. 049516/01500

Dear Ms. Kitchings:

Pursuant to Rules 208 and 209, SCACR, enclosed please find an original and one copy of Appellant's Initial Brief and Appellant's Designation of Matter for the Record on Appeal. We ask that you file the originals and return a file-stamped copy of each to us via our courier. By copy of this letter to counsel of record, we are serving them with a copy of this filing.

Very truly yours,

Miles E. Coleman

Enclosures
cc: Eugene H. Matthews, Esquire
Kirby D. Shealy III, Esquire