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 and Regulation.....Respondents,

and

South Carolina Optometric Physicians Association.....Respondent.

INITIAL BRIEF OF RESPONDENTS SOUTH CAROLINA BOARD OF MEDICAL EXAMINERS AND THE SOUTH CAROLINA DEPARTMENT OF LABOR, LICENSING AND REGULATION

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STATEMENT OF THE ISSUE ON APPEAL

I. Whether the trial court erred in granting summary judgment for Respondents on the ground that Opternative lacked standing to sue, or on any other ground before the trial court.

STATEMENT OF THE CASE

Plaintiff has brought a declaratory judgment action to challenge the constitutionality of South Carolina's Eye Care Consumer Protection Law ("ECCPL"), S.C. Code Ann. § 40-24-10 *et seq.*, arguing that the ECCPL is "protectionist" legislation and unconstitutional on grounds of (1) due process and (2) equal protection. (Complaint, ¶¶ 87-97).

Defendants South Carolina Board of Medical Examiners (the "Board") and the South Carolina Department of Labor, Licensing & Regulation ("LLR") filed a Motion for Summary Judgment under Rule 56, SCRCP, and requested that this Court dismiss the lawsuit of Plaintiff Opternative, Inc. "Opternative") on any of the following grounds:

- Opternative did not have proper standing to challenge the constitutionality of the ECCPL.
- Opternative has not suffered an "injury in fact" at the hands of the Board or LLR, who do not regulate Opternative.
- The ECCPL is constitutional because it bears a reasonable relation to its legislative purpose that is supported by a rational basis.

Opternative is a private foreign corporation that has developed an online technology designed to conduct eye examinations and produce prescriptions for corrective lens. (Complaint, ¶¶ 1, 5). In bringing this declaratory judgment action, Opternative argued that the ECCPL is "protectionist" legislation and unconstitutional on grounds of (1) due process and (2) equal protection. (Complaint, ¶¶ 87-97). Specifically, Opternative argued that:

- Article I, Section 3 of the South Carolina Constitution forbids protectionist legislation. Because the ECCPL does not further any valid public health or safety purpose, it has no legitimate basis under the South Carolina Constitution. For that reason, the ECCPL allegedly violates the "due process" rights of Opternative. (Complaint, ¶¶ 87-90).

- Article I, Section 3 of the South Carolina Constitution provides for "equal protection of the laws." The ECCPL purportedly violated Opternative's equal protection rights by drawing an "arbitrary and irrational distinction between ophthalmologists who write corrective-lens prescriptions based on an in-person refractive examination and ophthalmologists who write corrective-lens prescriptions based on Opternative's Exam." Opternative also argued that the ECCPL offends equal protection because it draws an "arbitrary and irrational distinction between ophthalmologists [] who are not allowed to use their medical judgment to use online tools like Opternative to provide medical services that otherwise meet the general standard of care, and other kinds of medical doctors [] who are allowed to use their medical judgment to use online tools like Opternative to provide medical services that otherwise meet the general standard of care." (Complaint, ¶¶ 92-96).

The ECCPL has two parts. The first part establishes the definitions of terms that it uses, and the second establishes the substance of the act.

Importantly, the first part of the act defines "provider" as "an individual licensed by the South Carolina Board of Examiners in Optometry or the South Carolina Board of Medical Examiners." S.C. Code Ann. § 40-24-10(7). The second part of the ECCPL provides as follows:

> **SECTION 40-24-20.** Valid prescription required to dispense spectacles or contact lenses; penalties.
>
> (A) A person in this State may not dispense spectacles or contact lenses to a patient without a valid prescription from a provider.
>
> (B) To be valid, a prescription must contain an expiration date on spectacles or contact lenses of one year from the date of examination by the provider or a statement of the reasons why a shorter time is appropriate based on the medical needs of the patient. The prescription must take into consideration medical findings made and refractive error discovered during the eye examination. If a provider determines a patient is a suitable candidate for a prescription for contact lenses or spectacles, a provider may not thereafter refuse to issue a prescription for spectacles or contact lenses to a patient.

(C) A prescription for spectacles or contact lenses may not be based solely on the refractive eye error of the human eye or be generated by a kiosk.

(D) Violation of this section constitutes misconduct as provided for in Sections 40-37-110 and 40-47-110. A provider who violates this section is subject to the penalties authorized in Chapter 37, Title 40 or Chapter 47, Title 40, as applicable.[1]

When requested to identify the public health or safety purpose advanced by the ECCPL, and how the ECCPL is tailored to achieve that purpose, the South Carolina Optometric Physician's Association ("SCOPA") noted that the ECCPL "protects patients of ophthalmologists and optometrists from unwittingly putting their eye health at risk by obtaining a prescription for corrective lenses without a comprehensive eye examination. Certain diseases of the eye or of the body may go undiagnosed if patients merely elect to purchase corrective lenses using remote eye refraction measurement tools without an in-person comprehensive eye examination." (R.). SCOPA further asserts that this assertion derives from the collective training and clinical experience of SCOPA's members. (R.).

The Board is the professional licensing board in South Carolina that regulates physician practice and conduct. S.C. Code Ann. § 40-47-5 *et seq.* Notably, it does not regulate Opternative, as Opternative is not a physician licensed in the State of South Carolina. S.C. Code Ann. § 40-1-70; S.C. Code Ann. § 40-47-10(I).

The LLR administers the Board. S.C. Code Ann. § 40-1-40(B). Like the Board, LLR does not regulate Opternative, as Opternative is not licensed by a Board that LLR administers. Rather, LLR merely "is responsible for all administrative, fiscal, investigative, inspectional, clerical, secretarial, and license renewal operation and activities" of the Board, and in fact does

[1] Chapter 37, Title 40 applies to optometrists. Chapter 47, Title 40 applies, among other physicians, to ophthalmologists.

make such support available to the Board. S.C. Code Ann. § 40-1-50(A).

In any event, neither the Board nor LLR has ever taken any enforcement action against any person that it regulates for an alleged violation of the ECCPL.

STANDARD OF REVIEW

When reviewing the grant of a summary judgment motion, the South Carolina Court of Appeals applies the same standard of review as the trial court under Rule 56, SCRCP. *Cowburn v. Leventis,* 366 S.C. 20, 30, 619 S.E.2d 437, 443 (S.C. App. 2005). Summary judgment is proper when no issue exists as to any material fact and the moving party is entitled to a judgment as a matter of law. Rule 56(c), SCRCP. To determine whether any triable issues of fact exist, the reviewing court must consider the evidence and all reasonable inferences in the light most favorable to the non-moving party. *Law v. S.C. Dep't of Corr.,* 368 S.C. 424, 434, 629 S.E.2d 642, 648 (2006); *Zurich Am. Ins. Co. v. Tolbert*, 378 S.C. 493, 496–97, 662 S.E.2d 606, 607–08 (S.C. App. 2008), *aff'd,* 387 S.C. 280, 692 S.E.2d 523 (2010).

However, when the constitutionality of a statute is challenged, every presumption will be made in favor of its validity. A statute will not be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it violates some provision of the constitution. *Id.* A "legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt." *Joytime Distribs. and Amusement Co. v. State,* 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999). The challenging party bears the burden of proving the statute unconstitutional. *Home Health Serv., Inc. v. South Carolina Tax Comm'n,* 312 S.C. 324, 440 S.E.2d 375 (1994); *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 135, 568 S.E.2d 338, 344 (2002).

ARGUMENT

I. OPTERNATIVE CANNOT BRING THIS LAWSUIT BECAUSE IT DOES NOT HAVE PROPER STANDING.

The trial court in this action properly determined that Opternative did not have proper standing to bring its claims.

Where a private party seeks to have a statute declared unconstitutional, it must first demonstrate that it has standing. *ATC v. Charleston Cty.*, 380 S.C. 191, 195–96, 669 S.E.2d 337, 339 (2008). Standing is defined as "a personal stake in the subject matter of a lawsuit." *Sea Pines Ass'n for the Prot. of Wildlife, Inc. v. S.C. Dep't of Natural Res.*, 345 S.C. 594, 600, 550 S.E.2d 287, 291 (2001) (citing *Charleston Cnty. Sch. Dist. v. Charleston Cnty. Election Comm'n*, 336 S.C. 174, 519 S.E.2d 567 (1999)).

A private person or entity does not have standing unless he has sustained, or is in immediate danger of sustaining, prejudice from an executive or legislative action. *Baird v. Charleston County,* 333 S.C. 519, 511 S.E.2d 69 (1999). Such imminent prejudice must be of a personal nature to the party laying claim to standing, and not merely of general interest common to all members of the public. *Id.* (citing *Citizens for Lee County, Inc. v. Lee County,* 308 S.C. 23, 416 S.E.2d 641 (1992)).

To make the required showing, the challenging party must satisfy the following three-part test:

> First, the plaintiff must have suffered an "injury in fact" – an invasion of a legally protected interest which is (a) concrete and particularized, and (b) "actual or imminent, not 'conjectural' or 'hypothetical,' " Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."

ATC, 380 S.C. at 195-96, 669 S.E.2d at 339 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations omitted)); *see also Youngblood v. S.C. Dept. of Social Services*, 402 S.C. 311, 317, 741 S.E.2d 515, 518 (2013).

In its Complaint, Opternative describes the "Injury to Plaintiff" in the following manner:

"80. As a direct result of the passage of the ECCPL, the use of Opternative's Technology has been effectively prohibited in South Carolina.

81. Prior to the adoption of the ECCPL, Opternative could (and did) allow a South Carolina-licensed ophthalmologist to write corrective-lens prescriptions for South Carolina residents.

82. As a direct result of the passage of the ECCPL, South Carolina-licensed ophthalmologists are legally prohibited from working with Opternative to provide corrective-lens prescriptions for South Carolina residents.

83. As a direct result of the passage of the ECCPL, South Carolina-licensed ophthalmologists are no longer willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents.

84. As a direct result of the passage of the ECCPL, Opternative has ceased business operations in South Carolina.

85. But for the ECCPL, Opternative would still be facilitating corrective-lens prescriptions for South Carolina residents.

86. But for the ECCPL, state-licensed ophthalmologists would be willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents."

(Complaint, ¶¶ 80-86). However, for the reasons stated below, these allegations fail to meet the standards set for establishing standing.

A. Injury in Fact.

First, Opternative must show that it has suffered an "injury in fact," which is an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not 'conjectural' or 'hypothetical." *ATC,* 380 S.C. at 195, 669 S.E.2d at 337. From its Complaint, Opternative appears to argue that its "injury in fact" is its belief that the ECCPL prevents South Carolina-licensed ophthalmologists from being "willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents," and that if the ECCPL were struck down, they presumably would be willing to use Opternative's technology to write corrective-lens prescriptions.[2] (Complaint, ¶¶ 83, 86). As an initial matter, this appears to be a conjectural or hypothetical harm rather than a concrete and particularized harm.

As the trial court properly determined, nothing in the ECCPL appears to forbid a South Carolina-licensed ophthalmologist from using Opternative's technology to assist in his or her work. (R). Rather, Opternative appears to argue that it is at a competitive disadvantage because a South Carolina-licensed ophthalmologist cannot base a prescription for spectacles or contact lenses solely on the refractive eye error of the human eye or be generated by a kiosk. S.C. Code Ann. § 40-24-20(C). Instead, the South Carolina-licensed ophthalmologist must also

[2] More specifically, the role of a state-licensed ophthalmologist appears to be as follows: (1) the patient takes an on-line test through Opternative's website, (2) Opternative shares the test results with a state-licensed ophthalmologist, and (3) the state-licensed ophthalmologist uses the test results to determine an appropriate a corrective lens prescription, which is made available to the patient via the Opternative website. (Complaint, ¶¶ 27-29). Opternative admits that its on-line test is not a "comprehensive eye exam." (Complaint, ¶ 32).

"take into consideration medical findings made and refractive error discovered during the eye examination." S.C. Code Ann. § 40-24-20(B).

On its face, this showing is insufficient to establish an "injury in fact." It is well-established that South Carolina has "rejected a competitor's assertion that standing exists when alleged damages flow from increased or perceived unfair competition." *ATC*, 380 S.C. at 196, 669 S.E.2d at 340 (citing *Connor Holdings, LLC v. Cousins,* 373 S.C. 81, 86, 644 S.E.2d 58, 60–61 (2007)). Further, our courts have observed that this is the "prevailing law throughout the country." *ATC*, 380 S.C. at 197, 669 S.E.2d at 340 (citations omitted).

The trial court properly noted 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.*" (R). However, the trial court also properly noted that (1) Opternative is not regulated by either the Board or LLR, and (2) professionals under the authority of either the Board or LLR are not forbidden by the ECCPL from using Opternative's technology. (R). For that reason, the trial court properly found that Opternative had only raised theories of injury that were "conjectural" or "hypothetical." (R).

This is especially apparent when Opternative is compared to the plaintiffs in *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 790 S.E.2d 763 (2016), who were a physical therapist (PT) and two orthopedic surgeons challenging a 2011 position statement from the South Carolina Board of Physical Therapy that – unlike other licensed healthcare professionals – forbade PTs from providing treatment as direct employees of physicians. In *Joseph*, the court found that 2011 position statement – an actual act taken by the South Carolina Board of Physical Therapy – injured the PT "by the infringement on her ability to practice her chosen profession and by the adoption of a regulation that requires she and other PTs be treated

differently from other health care professionals who may be employed by doctors." 417 S.C. at 449, 790 S.E.2d 770. Similarly, the court found that the surgeons were injured because "they have an interest in how the PT system works and in their ability to employ PTs." *Id.*

In this case, Opternative can justly lay claim to none of the concerns aired in *Joseph*. Professionals under the authority of the Board are not forbidden by the ECCPL – and certainly not by any action of the Board or LLR – from using Opternative's technology. As the trial court properly determined, a South Carolina-licensed ophthalmologist may still use Opternative's technology to assist him or her in making a determination to write a prescription for spectacles or contact lenses. He or she simply cannot solely base the prescription on the refractive eye error of the human eye or be generated by a kiosk.

Further, unlike the professionals in *Joseph* who were actually regulated by LLR, and were protesting an actual action by a Board administered by LLR, Opternative is none of these things.

In sum, Opternative has failed to show that it has suffered an "injury in fact," and instead has only raised theories of injury that are "conjectural" or "hypothetical." For this reason alone, Opternative's claim must be dismissed.

B. Causal Connection.

Second, Opternative has not shown that there is a causal connection between the injury and the conduct complained of. The injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." *ATC,* 380 S.C. at 195-96, 669 S.E.2d at 339.

As the trial court correctly determined, the causal connection does not exist because the injury alleged by Opternative – that South Carolina-licensed ophthalmologists are no longer

"willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents" – actually requires an act from a third party not before the court. Namely, as set forth above, Opternative alleges that South Carolina-licensed ophthalmologists are no longer willing to use its on-line exam because, under the ECCPL, its on-line exam cannot be the sole basis to write a prescription for spectacles or contact lenses.

Naturally, South Carolina-licensed ophthalmologists can presumably make their own decisions about whether and how to use – or not use – Opternative's on-line technology to assist them in their provision of lawful corrective-lens prescriptions to their patients. In any event, that decision rests with South Carolina-licensed ophthalmologists, and not with the Board or with LLR.

Indeed, to the extent that Opternative argues that the ECCPL places it at a competitive disadvantage because its on-line technology cannot serve as the sole basis for a corrective-lens prescription, its claim must be rejected, as "a competitor challenging legislative or executive action solely to protect its own economic interests lacks standing." *ATC*, 380 S.C. at 198, 669 S.E.2d at 340.

Furthermore, the pleadings are devoid of any "conduct complained of" by either the Board or LLR. In fact, neither the Board nor LLR have ever taken any enforcement action against Opternative, perhaps because Opternative is not an entity that is regulated by either the Board or LLR. This fact alone eviscerates Opternative's argument that either the Board or LLR has engaged in "conduct" that is causally connected to an "injury in fact" that Opternative has suffered.

C. **Redress by a Favorable Decision.**

Opternative must allege a particularized harm – which is denied – and it has failed to allege adequately that the injury would be redressed by a favorable decision in this case. *Sea Pines Ass'n*, 345 S.C. at 602, 550 S.E.2d at 292. In its Complaint, Opternative appears to address this element by alleging that "[b]ut for the ECCPL, Opternative would still be facilitating corrective-lens prescriptions for South Carolina residents" and that "state-licensed ophthalmologists would be willing to work with Opternative to provide corrective-lens prescriptions for South Carolina residents." (Complaint, ¶¶ 85-86).

In this regard, Opternative's claims appear similar to those of the plaintiffs in *Sea Pines Ass'n*, who raised a constitutional challenge to the decision of the South Carolina Department of Natural Resources ("SCDNR") to issue permits to lethally eliminate a substantial number of white-tailed deer on Hilton Head Island. The court found that the plaintiffs lacked standing in part because their alternative plan to hunting permits – use of non-lethal means to reduce the deer population – would lead to the same result, namely, the reduction of the deer population at Sea Pines. 345 S.C. at 603, 550 S.E.2d at 292. For that reason, the plaintiffs failed to demonstrate standing because the proposed alternative would result in the same "injury."

As set forth above, Opternative cannot rely on the alleged "competitive disadvantage" imposed by the ECCPL on Opternative's technology to serve as the "injury in fact."

* * *

To show standing, Opternative must satisfy each of the three elements referenced above. It has failed to demonstrate that it can satisfy any of them. For this reason, the trial court's order must be affirmed.

II. OPTERNATIVE CANNOT SHOW THAT THE ECCPL LACKS A "RATIONAL BASIS," AND FOR THAT REASON, ITS DUE PROCESS AND EQUAL PROTECTION CLAIMS MUST BE DISMISSED.

Although the trial court's decision was based on Opternative's lack of standing alone, there were two other reasons put before the trial court that would also require dismissal of the lawsuit. It is, of course, well-settled that an appellate court may review respondent's additional reasons and, if convinced it is proper and fair to do so, rely on them or any other reason appearing in the record to affirm the lower court's judgment. *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 420, 526 S.E.2d 716, 723 (2000).

Opternative's constitutional attack on the ECCPL is based on both "due process" and "equal protection" grounds. Its due process claim is based on its allegation that the ECCPL is protectionist legislation that does not further any valid public health or safety purpose. In this regard, the claim is presumably a "substantive due process" claim.[3] Opternative's equal protection claim is based on two imagined "classifications" of physicians that Opternative posits are created by the ECCPL:

- between (1) ophthalmologists who write corrective-lens prescriptions based on an in-person refractive examination and (2) ophthalmologists who write corrective-lens prescriptions based on Opternative's Exam;
- Between (1) ophthalmologists who are not allowed to use their medical judgment to use online tools like Opternative to provide medical services that otherwise meet the general standard of care, and (2) other kinds of medical doctors who are allowed to use their medical judgment to use online tools like Opternative to provide medical services that otherwise meet the general standard of care.

(Complaint, ¶¶ 92-96).

[3] The Complaint contains no discernable allegations that it has been denied "procedural" due process. Opternative bases its due process claim on its allegations that the ECCPL is protectionist legislation that deprives it of its "right to pursue an honest living." (Complaint, ¶¶ 88-90).

However, each of these arguments fail because the ECCPL is supported by a "rational basis."

A. Due Process.

In order to show that the ECCPL violates Opternative's substantive due process rights, Opternative must show that it was arbitrarily and capriciously deprived of a cognizable property interest rooted in state law. *Sunset Cay, LLC v. City of Folly Beach,* 357 S.C. 414, 430, 593 S.E.2d 462, 470 (2004). The standard for reviewing all substantive due process challenges to state statutes or municipal ordinances, including economic and social welfare legislation, is whether the statute or ordinance bears a reasonable relationship to any legitimate interest of government. *Id.* at 430, 593 S.E.2d at 470; *Denene, Inc. v. City of Charleston,* 359 S.C. 85, 96, 596 S.E.2d 917, 923 (2004).

"No one has an unfettered right to pursue a business detrimental to the public health, safety, and welfare." *Denene, Inc.*, 359 S.C. at 97, 596 S.E.2d at 923 (citing *Greenville County v. Kenwood Enterprises, Inc.,* 353 S.C. 157, 170-71, 577 S.E.2d 428, 435 (2003) (county ordinance requiring a 1,500-foot setback for sexually oriented businesses based on the rationale of combating secondary effects of those businesses was constitutional)); *Curtis v. State,* 345 S.C. 557, 573, 549 S.E.2d 591, 599 (2001) (statute making it unlawful to defraud a drug test furthers the public purpose of ensuring a drug-free workplace, which is a legitimate exercise of the State's police powers in regulating public safety and welfare, and outweighs any legitimate interest of the business).

As set forth above, SCOPA noted that the ECCPL "protects patients of ophthalmologists and optometrists from unwittingly putting their eye health at risk by obtaining a prescription for

corrective lenses without a comprehensive eye examination. Certain diseases of the eye or of the body may go undiagnosed if patients merely elect to purchase corrective lenses using remote eye refraction measurement tools without an in-person comprehensive eye examination." (R). SCOPA further asserts that this assertion derives from the collective training and clinical experience of SCOPA's members. (R).

In light of the standards applicable to Opternative's due process claim, South Carolina's General Assembly could readily conclude that (1) undiagnosed diseases of the eye are a legitimate health concern of the state, and (2) requiring an in-person comprehensive eye examination may increase the chance of detecting these diseases. Therefore, the statute in question bears a reasonable relationship to a legitimate interest of government.[4]

For these reasons, Opternative's due process claim must fail.

B. Equal Protection.

In ruling on an equal protection challenge to a statute, if a classification does not implicate a suspect class[5] or abridge a fundamental right,[6] courts employ the "rational basis" test.

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[4] Furthermore, as set forth above, nothing prevents South Carolina-licensed ophthalmologists from deciding for themselves whether to use – or not use – Opternative's on-line technology to assist them in their provision of lawful corrective-lens prescriptions to their patients. That decision does not rest with the Board or with LLR.

[5] A suspect class, as defined by numerous court opinions, is a discrete and insular minority that is unable to shake or rise above the bonds and stigma of its minority status. Courts have been unwilling to extend suspect class status to any classification other than race, alienage and national origin. *Eldridge v. Bouchard*, 645 F. Supp. 749, 752 (W.D. Va. 1986), *aff'd*, 823 F.2d 546 (4th Cir. 1987). Opternative does not appear to argue that "ophthalmologists" are a suspect class.

[6] There is also no fundamental right for a physician to use Opternative's technology in violation of the ECCPL. *In re Evans*, 413 B.R. 315, 322 (Bankr. E.D. Va. 2009) (no "fundamental right" under the equal protection clause to pursue a calling as a bankruptcy petition preparer).

Denene, Inc., 359 S.C. at 91, 596 S.E.2d at 920. In such a case, Opternative bears the burden "to negate every conceivable basis which might support" the legislation. *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S.Ct. 1001, 35 L.Ed.2d 351 (1973); *Mitchell v. Comm'r of the Soc. Sec. Admin.*, 182 F.3d 272, 274 (4th Cir. 1999). To be irrational in the Constitutional sense, "the relationship of the classification to its goal" must be "so attenuated as to render the distinction arbitrary." *Nordlinger v. Hahn*, 505 U.S. 1, 11, 112 S.Ct. 2326, 120 L.Ed.2d 1 (1992); *Johnson v. Hall*, 2011 WL 4501323, at *8 (D.S.C. Aug. 9, 2011), *report and recommendation adopted*, 2011 WL 4483642 (D.S.C. Sept. 28, 2011), *aff'd sub nom. Johnson v. Bryant*, 474 F. App'x 105 (4th Cir. 2012). Indeed, when social or economic legislation is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.[7] *City of Cleburne, Tex. v. Cleburne Living Ctr.*, 473 U.S. 432, 440, 105 S. Ct. 3249, 3254, 87 L. Ed. 2d 313 (1985) (citations omitted).

Whatever Opternative's substantive objection to the ECCPL, and however it may disagree with the underlying reason articulated by SCOPA, it cannot dispute that the South Carolina General Assembly has a legitimate interest in supporting good eye health, that undiagnosed diseases of the eye are a legitimate public health concern, and that legislation requiring an in-person comprehensive eye examination in order to increase the chance of detecting these diseases is reasonably related to a sound legislation.

For these reasons alone, Opternative's equal protection argument must fail.

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[7] Indeed, the ECCPL only became law after the General Assembly overrode the Governor's veto.

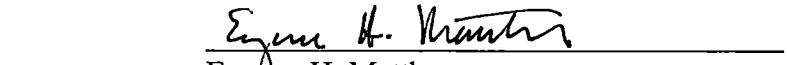
CONCLUSION

As set forth above, the trial court correctly determined that Opternative did not have standing to challenge the constitutionality of the ECCPL. Further, Opternative has also failed to raise a genuine issue of material fact sufficient to satisfy the exacting standard that a statute will not be declared unconstitutional unless its invalidity appears so clearly as to leave no doubt that it violates some provision of the Constitution.

For these reasons, the Board and LLR respectfully request that the trial court's order be affirmed, and that this Court grant any other such relief as it deems just and proper.

Dated this the 25h day of April, 2018.

RICHARDSON PLOWDEN & ROBINSON, P.A.



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PROOF OF SERVICE

I, the undersigned Administrative Assistant of the law offices of Richardson Plowden & Robinson, P.A., Attorneys for South Carolina Board of Medical Examiners and The South Carolina Department of Labor, Licensing and Regulation, do hereby certify that I have served all counsel in this action with a copy of the **Initial Brief of Respondent** by mailing a copy of the same by United States Mail, postage prepaid, to the following addresses:

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April 25, 2018

HAND DELIVERED

Jenny Abbott Kitchings, Clerk
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RE: *Opternative, Inc. v. South Carolina Board of Medical Examiners and South Carolina Department of Labor, Licensing & Regulation*
Appellate Case No.: 2018-000326
Our File No. 8520-003

Dear Ms. Kitchings:

Enclosed herewith for filing is the original *Initial Brief of Respondent* concerning the above referenced matter, together with the original *Proof of Service*.

With kind regards, I am

Sincerely,

RICHARDSON PLOWDEN & ROBINSON, P.A.

Mary Jane Wilson
Legal Assistant

/mjw
Enclosures as Stated