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.

FINAL REPLY BRIEF OF APPELLANT

Institute for Justice
Nelson Mullins Riley & Scarborough, LLP

Robert J. McNamara*
Joshua A. Windham*
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
**Admitted Pro Hac Vice*

Miles E. Coleman
William C. Wood, Jr.
1320 Main Street
17th Floor
Columbia, SC 29201
P.O. Box 11070
(803) 799-2000

Attorneys for Appellant

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William C. Wood, Jr.
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(803) 799-2000

Attorneys for Appellant

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As explained at length in Appellant's primary brief, Opternative has standing to sue because the ECCPL banned its online vision-test software and forced it to shut down in South Carolina.[1] This satisfies South Carolina's injury, causation, and redressability requirements, and the trial court's conclusion to the contrary was therefore in error.[2] Respondents' brief fails to address or cite (let alone refute) any of these arguments, and prematurely invites this Court to decide the underlying substantive merits in the first instance.[3] Accordingly, Section I below only briefly reiterates why Respondents' theory of standing in this matter is erroneous. Section II then addresses Opternative's substantive claims, which are discussed only to the extent this Court chooses to accept Respondents' invitation to address the merits in the first instance.

I. Opternative Has Standing Because The ECCPL Outlaws Its Business Model.

This lawsuit challenges the constitutionality of the "Eye Care Consumer Protection Law" (ECCPL), which passed in 2016.[4] There is no dispute in the record that, immediately after that law was enacted, Opternative ceased its previously successful business operations in South Carolina—which is an injury.[5] There is no dispute in the record that the ***only*** reason Opternative

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[1] *See generally* Appellant's Primary Br. 3–11 (setting forth the salient record evidence).

[2] *See id.* 12–25 (setting forth Opternative's standing argument).

[3] One reason Respondents do not engage with Opternative's arguments is that their appellate brief appears to be a near-verbatim copy of their summary-judgment brief below. *Compare* LLR and BME's Mot. for Summ. J. (R. 64), *with* Br. of Respondents BME and LLR. The opinion of the trial court itself is a near-verbatim copy of the standing section of that same brief. *Compare* Order Granting LLR and BME's Mot. for Summ. J. (R. 2), *with* LLR and BME's Mot. for Summ. J. (R. 64). As such, Respondents' brief makes no new arguments and does not address any of the objections Opternative has raised to the decision below; it just reiterates that decision in almost exactly the same words, ignoring arguments and authority to the contrary.

[4] *See* Appellant's Primary Br. 8–11 (explaining the ECCPL).

[5] *See id.* 8–11.

ceased operating in South Carolina is that both Opternative, and the South Carolina-licensed ophthalmologists it had been working with, believed the ECCPL forbade Opternative from operating in South Carolina—which is causation.[6] And there is no dispute that, if Opternative succeeds in this lawsuit, at least some of those ophthalmologists will return to their prior practice of using Opternative's software to write prescriptions—which means Opternative's injury is redressable.[7]

Respondents' argument (like the decision of the trial court below) boils down to the notion that Opternative cannot have standing because the ECCPL bans only Opternative's "current business model." *See* LLR and BME's Br. at 9; LLR and BME's Mot. for Summ. J. at 9 (R. 72). But again, as explained in Opternative's primary brief, the fact that the ECCPL bans Opternative's chosen business is *precisely* what gives Opternative standing to sue here, and courts routinely adjudicate such disputes. *See, e.g.*, *Retail Servs. & Sys., Inc. v. S.C. Dep't of Revenue*, 419 S.C. 469, 799 S.E.2d 655 (2017) (plurality); *Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 449, 790 S.E.2d 763, 769–70 (2016) (plurality); *Painter v. Town of Forest Acres*, 231 S.C. 56, 61, 97 S.E.2d 71, 73 (1957); *Clinton v. N.Y.C.*, 524 U.S. 417, 432 (1998); *Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606, 608 n.5, 611 (Tex. App. 2014).[8] Indeed, were it otherwise, no plaintiff could *ever* challenge the constitutionality of a law banning its chosen course of conduct: A plaintiff would argue, in essence, "I want to engage in this activity, but the law I am challenging prevents me from doing so," and the government could defeat standing simply by pointing out that the plaintiff could engage in a *completely different* activity. Because that is not the law, and no party has even responded to (let alone refuted) the

[6] *See id.* 9–11.

[7] *See id.* 11.

[8] *See* Appellant's Primary Br. 12–25.

arguments and authorities raised in Opternative's primary brief, the ruling below should be reversed and this case remanded for further proceedings.

II. While This Court Need Not Reach The Merits, The ECCPL Violates Opternative's Right To Due Process And Equal Protection.

Respondents alternatively invite this Court to weigh the parties' factual submissions in the first instance and resolve the underlying merits of this case, rather than remanding for further proceedings.[9] But the longstanding practice of South Carolina courts suggests this invitation should be rejected: While it is of course true that an appellate court can affirm a lower court's ruling on any legal ground that appears in the record, *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000), South Carolina courts routinely refuse to address the merits of a case in the first instance where, as here, the ruling below was based, even in part, on standing, *see, e.g.*, *Smiley v. S.C. Dep't of Health & Envtl. Control*, 374 S.C. 326, 333, 649 S.E.2d 31, 35 (2007) (reversing Court of Appeals' decision that plaintiff lacked standing to challenge issuance of sand-scraping permit and vacating ruling on the merits); *Prot. & Advocacy for People with Disabilities, Inc. v. S.C. Dep't of Disabilities & Special Needs*, 415 S.C. 526, 532, 783 S.E.2d 835, 839 (Ct. App. 2016) (reversing circuit court's decision that nonprofit association lacked standing to seek promulgation of disability regulations but vacating ruling on the merits). As no court has weighed the competing evidence or issued a merits ruling, Opternative expects this Court to decline to do so in the first instance.

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[9] The trial court did not address the merits, and as explained below, this Court need not do so either. Should the Court reach the constitutional issues, however, Opternative notes that Respondents' arguments are identical to those made below. *Compare* Resp'ts' Br. 13–16, *with* LLR and BME's Mot. for Summ. J. 12–15 (R. 75–78). Because Opternative has already addressed these arguments at length, *see* Opternative's Br. in Opp'n to LLR and BME's Mot. for Summ. J. 22–38 (R. 151–67), and made its own affirmative case for summary judgment, *see generally* Opternative's Mot. for Summ. J. (R. 82), this section offers only a summary response.

To the extent the Court reaches the merits, however, Respondents' arguments are incorrect and must be rejected. Respondents argue, in essence, that because this case is subject to "rational-basis" review, the challenged law must be upheld no matter what. But that is incorrect: The South Carolina Supreme Court has consistently rejected laws that (like the ECCPL) serve only to protect the private economic interests of market groups, rather than genuine public ends like health and safety. *See, e.g.*, *Retail Servs.*, 419 S.C. at 475–76, 799 S.E.2d at 668 (plurality) (striking down law limiting owner to three retail liquor licenses absent record evidence of alleged safety concerns); *Joseph*, 417 S.C. at 452–53, 790 S.E.2d at 771–72 (rejecting employment and referral restriction on physical therapists and surgeons because appellants failed to demonstrate basis for law rooted in actual benefits to patients) (plurality).[10] Accordingly, Part A below briefly explains why—based on the record evidence—the ECCPL is exactly this kind of irrational, protectionist legislation. Part B then explains why—under South Carolina precedent, which Respondents have largely ignored—the ECCPL fails the rational-basis test.

A. The undisputed facts reveal that the ECCPL is a purely protectionist law with no rational relationship to public health.

As explained in Appellant's primary brief, Opternative's online vision-test software is designed to make the process of prescribing corrective lenses easier both for patients and for

[10] And even federal courts, applying (as they do) a more deferential review than South Carolina courts require under their own constitution, do the same. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215, 220–22 (5th Cir. 2013) (rejecting as unconstitutional Louisiana's restrictions on retail sale of caskets); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (noting federal trend of skepticism towards economic regulations with doubtful justifications but a close fit to anti-competitive effects).

ophthalmologists.[11] Under the traditional model for prescribing lenses, a patient sits in a chair and views various images through a lens-switching device called a phoropter, reporting what he sees to a human being (who is either the prescribing doctor himself or any assistant the doctor cares to employ).[12] An ophthalmologist can use these responses (along with a patient's medical history) to write or renew a corrective-lens prescription, which the patient can then use to purchase lenses wherever he wants.[13] Opternative's software does not eliminate the need for in-person eye-doctor appointments—it does not replace, for example, the glaucoma examination that doctors periodically recommend—but it does allow them to dispense with certain in-person appointments where, in their medical judgment, those appointments would be unnecessary and it would be safe to do so.[14] This proved attractive to some South Carolina-licensed ophthalmologists (along with ophthalmologists in 39 other states, and counting, where the company is successfully operating), who used it to renew or update prescriptions without requiring an in-person office visit.[15]

But Opternative's software also proved a major threat to the business of *optometrists*—limited-practice eye-health professionals who frequently make much of their revenue from selling retail lenses to patients who come in for an eye exam—who mobilized in response to that

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[11] The facts in this case were set forth at length in Opternative's affirmative motion for summary judgment below, *see* Opternative's Mot. for Summ. J. 2–19 (R. 131–48), and also in more condensed from (with an emphasis on facts salient to the standing analysis) in Opternative's primary appellate brief, *see* Appellant's Primary Br. 2–11. Accordingly, this section offers only a brief overview of the record.

[12] *See id.* 3.

[13] *See id.* 4.

[14] *See id.* 4 n.11; SCOPA Ans. ¶¶ 9, 11 (R. 36-37); Affidavit of Daniel Bodde at ¶ 7–9 (R. 395–96).

[15] *See* Appellant's Primary Br. 4.

economic threat.[16] In 2015, the American Optometric Association (a national association of optometrists devoted to the promotion of the optometric profession) distributed a model bill to affiliates to stop Opternative from operating in states across the country.[17] One such affiliate, Respondent SCOPA, adapted that bill and waged an aggressive lobbying campaign to get it passed in South Carolina.[18] While e-mail communications reveal that the legislation was designed from the very start to shut Opternative down and protect optometrists' share of the multi-billion-dollar corrective-lens industry, SCOPA maintained a strict internal policy of not focusing on Opternative in public, instead clothing the law in public-health rhetoric.[19] In any case, SCOPA dropped the pretext when the ECCPL went into effect, and has since openly celebrated their success in banning Opternative.[20]

At its core, the ECCPL achieves this ban by prohibiting doctors from writing corrective-lens prescriptions unless the information on which they base the prescription was generated by a process that involved *some* in-person contact—with any human. S.C. Code Ann. §§ 40-24-20(B) (requiring an "eye examination" for a 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"). The law also provides that corrective-lens prescriptions must expire annually. S.C. Code Ann. § 40-24-20(B). The result is that patients (a) cannot use Opternative to renew or update their

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[16] *See id.* 5.

[17] *See id.* 6–7.

[18] *See id.* 7.

[19] *See id.*

[20] *See id.* 7–8.

prescriptions, and (b) must visit a brick-and-mortar optometry shop every single year to maintain valid prescriptions.

Further, as Defendants' 30(b)(6) designee confirmed at deposition, these are the *only* restraints the ECCPL places on an ophthalmologist's medical judgment.[21] The ECCPL does not specify what findings an ophthalmologist must make before prescribing corrective lenses.[22] It does not require an ophthalmologist to perform any particular tests or to use any particular diagnostic methods before prescribing corrective lenses.[23] All it requires is that prescriptions for corrective lenses expire annually and must be based, at least in part, on *some* in-person contact.[24] But the law does not say who the human has to be (it can be literally anybody, including an unlicensed medical assistant), and it does not say what the involvement has to consist of (only that it cannot be computerized).[25]

This very effectively bans Opternative and bolsters SCOPA's bottom line, but it does nothing to protect patient health. Before the ECCPL passed, an ophthalmologist could use any method he wanted to determine a person's refractive error and then write a prescription, so long as he concluded he had enough information to meet the standard of care without further examination. Under the ECCPL today, an ophthalmologist can still do exactly that, *unless* the information was generated by a computerized (rather than a manual, human) process. Moreover, the standard of care remains the same: There is still no medical reason for most patients to

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[21] *See id.* 9.

[22] *See id.* 9 n.29.

[23] *See id.*

[24] *See id.* 9.

[25] *See id.*

obtain a comprehensive eye-health examination every single year,[26] and ophthalmologists must still use their medical judgment to decide what tests and exams a particular patient needs, on a case-by-case basis.[27] The only genuine change is that now, patients cannot use Opternative to save time and money, and ophthalmologists cannot use Opternative to write prescriptions for patients who could otherwise safely get them.

B. The ECCPL violates both due process and equal protection.

Opternative claims the ECCPL violates its due process and equal protection rights to pursue a chosen business under Article I, Section 3 of the South Carolina Constitution. While the parties agree this case is subject to rational-basis review, they disagree over what that entails. Respondents suggest this case is governed by the federal rational-basis test—and the most deferential version of that test at that—under which essentially any law (no matter how tenuous its relationship to public health or safety) would survive.[28] But Article I, Section 3 is a *state* constitutional provision requiring its own interpretation, and South Carolina courts have flatly disclaimed deference to the federal judiciary on such questions. *State v. Forrester*, 343 S.C. 637, 643, 541 S.E.2d 837, 840 (2001) ("[T]he federal Constitution sets the floor for individual rights . . . the state constitution establishes the ceiling."); *State v. Austin*, 306 S.C. 9, 16, 409 S.E.2d

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[26] *See* Affidavit of Joshua A. Windham, Exhibit 4 at 1–2 (R. 318–19) (American Academy of Ophthalmology exam-frequency recommendations stating: "Adults with no signs or risk factors for eye disease should receive a baseline comprehensive eye evaluation at age 40. Individuals without risk factors aged 40 to 54 should be examined by an ophthalmologist every 2 to 4 years."); *see also id.*, Ex. 1 at 47:24–48:3 (R. 258) (South Carolina-license optometrist Michael Zolman admitting he has no reason to doubt this statement conveys the ophthalmological standard of care).

[27] *See* Appellant's Primary Br. 9 n.29.

[28] *See* LLR and BME's Mot. for Summ. J. 14–15 (R. 77–78).

811, 815 (Ct. App. 1991) ("It is firmly established that state courts may interpret their own constitutions in such a way as to expand rights conferred by the Federal Constitution.").

Indeed, South Carolina courts have spent decades articulating their own, independent formulation of the rational-basis test, under which they have consistently: (1) looked to see whether a law's *actual* purpose is legitimate, and (2) examined the record for evidence that the law *actually* furthers that purpose (rather than another, illegitimate purpose). *See, e.g.*, *Retail Servs.*, 419 S.C. at 475–76, 799 S.E.2d at 668 (plurality) (striking down law limiting owner to three retail liquor licenses absent record evidence of alleged safety concerns); *Joseph*, 417 S.C. at 452–53, 790 S.E.2d at 771–72 (rejecting employment and referral restriction on physical therapists and surgeons because appellants failed to demonstrate basis for law rooted in actual benefits to patients) (plurality).[29] That is the test that applies here—and that the ECCPL cannot hope to meet.[30]

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[29] Although *Joseph* and *Retail Services* were plurality opinions, both were in keeping with longstanding precedent on this score. *See* Opternative's Mot. for Summ. J. 29–34 (R. 116–21) (collecting additional cases). Moreover, the Court in both cases was mostly united on the constitutional issues: The lead opinion in *Retail Services* commanded two votes, with two justices concurring in the result only and one dissenting on the merits. *See* 419 S.C. at 476, 799 S.E.2d at 668 (Hearn, J., concurring). *Joseph* similarly featured a two-justice lead opinion, with one justice concurring in the result, though there the two remaining justices dissented only on standing grounds, calling the lead opinion otherwise "laudable." *See* 417 S.C. at 466, 790 S.E.2d at 779 (Beatty, J., concurring).

[30] Although it is worth noting that, even if this case *were* governed by the federal test—which it is not—mere "conceivability" in the absence of record evidence would not suffice. That was the test applied in *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487 (1955) (dreaming up various justifications legislators might have had for banning opticians from fitting already-prescribed lenses into new eyeglass frames unless customers first obtained an additional prescription). But it is not the test as described by more modern federal courts, which have begun to cabin *Lee Optical* as "a zenith of . . . judicial deference to state economic regulation." *St. Joseph Abbey v. Castille*, 712 F.3d 215, 221 (5th Cir. 2013); *see also Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (noting federal trend of skepticism towards economic regulations with doubtful justifications but a close fit to anti-competitive effects).

As an initial matter, the record reveals only one asserted justification for the ECCPL: that the law was meant to encourage comprehensive eye-health examinations because "[c]ertain 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."[31] Therefore, that is the lens through which the law must be examined. *See Retail Servs.*, 419 S.C. at 475, 799 S.E.2d at 668 (plurality) (refusing to consider rationales not supported by the record in reviewing economic regulations).

Due process requires that the ECCPL "bear[] a reasonable relationship" to this purpose. *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 478, 527 S.E.2d 763, 765 (2000) (per curiam). In practice, this means requiring the relationship to have at least some basis in fact, and rejecting mere speculation as a substitute for that relationship.[32] The South Carolina Supreme Court's recent decision in *Joseph* illustrates this well. There, the question was whether a statutory interpretation banning physicians from employing and referring patients to physical therapists was rationally related to the goal of preventing conflicts of interest. *Joseph*, 417 S.C. at 443–46, 790 S.E.2d at 766–68. The Court observed that if the statute was actually intended to do that, it would have simply prevented referral-for-pay situations. *Id.* at 452, 790 S.E.2d at 771. Instead, all it did was "deprive[] physicians of their right to practice medicine in the best interests of their patients." *Id.*, 790 S.E.2d at 771. The Court found the interpretation arbitrary and, therefore, unconstitutional. *Id.* at 453, 790 S.E.2d at 771–72.

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[31] LLR and BME's Mot. for Summ. J. 13–14 (R. 76–77); Windham Aff., Ex. 17 at ¶ 1 (interrogatory response of Respondent SCOPA) (R. 389).

[32] *See* Opternative's Br. in Opp'n to LLR and BME's Mot. for Summ. J. 29 n.72 (collecting cases) (R. 158).

The ECCPL is more of the same. Respondents offer only a single, hypothetical justification for the ECCPL: that if patients take online vision tests, certain diseases that *could* be detected during a more comprehensive exam *might* be missed. But nothing in the ECCPL actually requires such exams. And Respondents openly admit they have no evidence that the ECCPL addresses this concern about undetected diseases.[33] Moreover, as in *Joseph*, this disconnect is underscored by the multiple obvious ways in which the ECCPL *could have* directly addressed a concern about undetected diseases, if that were truly the law's motivating purpose—things like requiring doctors to physically examine patients for certain risk-factors, or requiring doctors to take certain medical facts into account before writing prescriptions. This sort of purely speculative justification and utter lack of tailoring is simply insufficient to satisfy due process.

So, too, for equal protection. In South Carolina, a statutory "classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Harbit v. City of Charleston*, 382 S.C. 383, 396, 675 S.E.2d 776, 783 (Ct. App. 2009). The ECCPL draws two clear classifications: First, the law penalizes licensed ophthalmologists who use their medical judgment to write corrective-lens prescriptions based on "medical findings" generated automatically, but does not penalize ophthalmologists who base prescriptions on precisely the same information, *some* of which was collected by a human being. *See* S.C. Code Ann. §§ 40-24-10(3), (9), and 40-24-20(B). Second, the law forbids licensed ophthalmologists from using telehealth technologies to provide services according to their

[33] *See* Windham Aff., Ex. 11 at 54:22–55:7; 55:9–56:1 (R. 368) (LLR and BME's 30(b)(6) designee admitting they have no evidence that the ECCPL actually protects public health or safety).

medical judgment and within the relevant standard of care, while all other licensed physicians—*including fellow ophthalmologists who are doing anything other than writing corrective-lens prescriptions*—are statutorily permitted to do just that. *Compare id.*, *with* S.C. Code Ann. § 40-47-37 (permitting the use of telemedical technologies in medical practice so long as the physician honors the relevant standard of care).

Respondents contend these classifications satisfy equal protection because "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 [that purpose]."[34] But again, Respondents appear to misunderstand the nature of the test. In South Carolina, classifications like these must be based on *facts*, not fancy. *Daniel v. Cruz*, 268 S.C. 11, 14, 231 S.E.2d 293, 294 (1977) ("If there is no real difference between localities, persons, occupations, or property, the State cannot make one.").[35] There are no facts in the record to support these classifications.

As for the first classification, the South Carolina Supreme Court's decision in *Hanvey v. Oconee Mem'l Hosp.*, 308 S.C. 1, 416 S.E.2d 623 (1992) is instructive. There, a patient who was admitted to a charitable hospital for a hip replacement suffered complications, and sued the hospital seeking actual and punitive damages of $200,000. *Id.* at 2–3, 416 S.E.2d at 624. The hospital invoked a statute specifically capping liability for charitable hospitals at $100,000, which the patient then challenged under Article I, Section 3. *Id.* at 4–5, 416 S.E.2d at 625–26. The Court found "no rational basis for distinguishing between charitable hospitals, on the one

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[34] *See* LLR and BME's Br. Defs.' Mot. Summ. J. 13, 16 (R. 76, 79).

[35] *See also* Opternative's Br. in Opp'n to LLR and BME's Mot. for Summ. J. 36 n.89 (R. 165) (collecting additional cases).

hand, and medical providers of goods and services, such as the Red Cross, on the other," and struck the cap down. *Id.* at 5, 416 S.E.2d at 626.

Similarly here, there is no real difference between information collected manually by a human being, and the *same* information when collected automatically. The ECCPL would allow licensed ophthalmologists to write prescriptions based on a patient's responses to images and prompts identical to those used in Opternative's vision-test software, so long as those responses were recorded manually by a human being using, say, a clipboard. But the same prescription, based on the same information, would be banned if the ophthalmologist received that information over the Internet from a patient using Opternative's software. Information does not become tainted simply because it was generated automatically, and there is no valid health or safety reason to pretend that it does.

As for the second classification, *Joseph* is again instructive. There, a statute was interpreted to prohibit physicians from employing and referring patients to physical therapists, despite the fact that physicians were allowed to employ all other types of healthcare professionals. *Joseph*, 417 S.C. at 442–43, 790 S.E.2d at 766–67. The government claimed the classification was intended to protect patients and government-sponsored programs from conflicts of interest, but the Court observed that "the PTs stand alone in South Carolina," *id.* at 442, 790 S.E.2d at 766, and found the distinction "arbitrary and not calculated to avoid the legislative purpose," *id.* at 452, 790 S.E.2d at 771. That classification violated equal protection, too. *Id.*, 790 S.E.2d at 771.

Similar to the physical therapists in *Joseph*, who were accorded arbitrarily preferential treatment, ophthalmologists "stand alone" in South Carolina as the *only* physicians forbidden from using telehealth technologies to provide services according to their medical judgment and

within the relevant standard of care. *See* S.C. Code Ann. §§ 40-24-10(3), (9), and 40-24-20(B). All other licensed physicians are statutorily permitted to do so without running afoul of a concern about undetected diseases in their respective practice areas. *Compare id.*, *with* § 40-47-37. And Respondents have not produced any evidence of the sort of "real difference" between ophthalmologists and all other physicians that would warrant singling the former out for disparate treatment. Again, they fully admit they have no such evidence.[36]

The upshot is that the ECCPL violates due process and equal protection because there is no evidence in the record that either its actual restrictions or the classifications it draws bear any relationship to patient health. Instead, the law does exactly what it was designed to do: ban Opternative's software to protect optometrists' bottom line. Prohibiting corrective-lens prescriptions based on online vision tests means that patients seeking updated prescriptions must continue visiting optometrists' brick-and-mortar offices—where, conveniently, optometrists can attempt to sell them expensive eyeglass frames (as most of them do).[37] And the annual expiration requirement keeps them coming on a regular basis, which boosts optometrists' revenues. This is the sort of nakedly protectionist legislation that the South Carolina Supreme Court has, for decades, explicitly rejected. *See Retail Servs.*, 419 S.C. at 474, 799 S.E.2d at 667 (plurality) ("[T]here [is] no indication in the record that these provisions exist for any other reason than economic protectionism . . . ."); *Joseph*, 417 S.C. at 452–53, 790 S.E.2d at 771 (plurality) ("[This law] appears merely to be anti-competitive protectionist legislation intended to protect personal financial interests, which is driven by reimbursement purposes, rather than

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[36] *See* Windham Aff., Ex. 11 at 54:22–55:7; 55:9–56:1 (R. 368).

[37] *See* Appellant's Primary Br. 3, 5.

actual benefits to patients.").[38] Should this Court reach the merits, it should continue that tradition by striking down the ECCPL as an illegitimate use of this state's police power.

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. Because this appeal can be resolved on the standing issue alone, this Court need not address Respondents' arguments on the merits. But should the Court reach those issues, governing precedent requires the Court to hold that the ECCPL violates the South Carolina Constitution because it is a purely protectionist law with no rational relationship to patient health.

Institute for Justice
Nelson Mullins Riley & Scarborough, LLP

By: _____

Miles E. Coleman
William C. Wood, Jr.
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

Robert M. McNamara*
Joshua A. Windham*
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
**Admitted Pro Hac Vice*

Attorneys for Appellant

Columbia, South Carolina
June 20, 2018

[38] *See also* Opternative's Br. in Opp'n to LLR and BME's Mot. for Summ. J. 26 n.68 (collecting additional cases) (R. 155).

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Appellate Case No. 2018-000336
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.

CERTIFICATE OF COMPLIANCE

Undersigned counsel certifies that the Final Brief of Appellant and the Final Reply Brief of Appellant comply with Rule 211(b), SCACR.

NELSON MULLINS RILEY & SCARBOROUGH, LLP

By: _____

Miles E. Coleman
William C. Wood, Jr.
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
(803) 799-2000

INSTITUTE FOR JUSTICE

Robert M. McNamara*
Joshua A. Windham*
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
**Admitted Pro Hac Vice*

Attorneys for Appellant

June 20, 2018

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

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:

Pleadings: Final Brief of Appellant
Final Reply Brief of Appellant
Certificate of Compliance

Counsel Served:

Eugene H. Matthews, Esq.
Richardson Plowden & Robinson, PA
Post Office Drawer 7788
Columbia, SC 29202
Attorney for Respondent

Kirby D. Shealy III, Esq.
Adams and Reese LLP
1501 Main Street, 5th Floor
Columbia, SC 29201
Attorney for Respondent-Intervenor

Karan C. DiGiacomo
Administrative Assistant

June 20, 2018