RECEIVED

Aug 16 2021

S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM THE RICHLAND COUNTY
COURT OF COMMON PLEAS
DeAndrea Gist Benjamin, Circuit Court Judge

Appellate Case No. 2021-000818

Opternative, Inc.,

Respondent,

v.

South Carolina Board of Medical Examiners, et al.,

Appellants,

South Carolina Optometric Physicians Association,

Petitioner.

RESPONDENT'S RETURN TO SCOPA'S PETITION FOR WRIT OF CERTIORARI

Institute for Justice
Nelson Mullins Riley & Scarborough, LLP

Joshua Windham*
Robert McNamara*
901 North Glebe Road
Suite 900
Arlington, VA 22203
(703) 682-9320
*Admitted pro hac vice

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

Attorneys for Respondent

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

CASES **PAGE(S)**

CODES, RULES, AND STATUTES **PAGE(S)**

COUNTER-STATEMENT OF THE QUESTION PRESENTED

The Court of Appeals held that Opternative has standing to challenge a law that "prohibits [its] current business model." *Opternative, Inc. v. S.C. Bd. of Med. Exam'rs*, 433 S.C. 405, 859 S.E.2d 263, 267 (Ct. App. 2021), *reh'g denied* (July 1, 2021). Does that holding conflict with this Court's precedents?

COUNTER-STATEMENT OF FACTS

This case is a constitutional challenge to a law that Petitioner, the South Carolina Optometric Physicians Association (SCOPA), drafted for the specific purpose of destroying Opternative's business. The record below shows that SCOPA achieved its goal: It shut Opternative down—a result SCOPA publicly celebrated when the law passed. Yet now, SCOPA argues that the law it drafted to expel Opternative from the market has not harmed Opternative at all, and thus, Opternative lacks standing to challenge it. Before turning to the merits of SCOPA's petition, Opternative offers this counter-statement of facts to provide some context for SCOPA's argument.

The parties. Opternative is a healthcare-technology company that offers one product: online vision-testing software that allows eye doctors in one location to test a patient's vision in another location and, if appropriate, write a prescription for new glasses. (R. 394–95.) Opternative designed the software so that qualifying patients could take a vision test from home and obtain a prescription for new glasses "without having to physically travel to an optometrist's office every single time." (R. 394.)

SCOPA is an association of local optometrists whose members depend on brick-and-mortar eyeglass sales for much of their revenue. (*See, e.g.*, R. 19, 37, 326.)

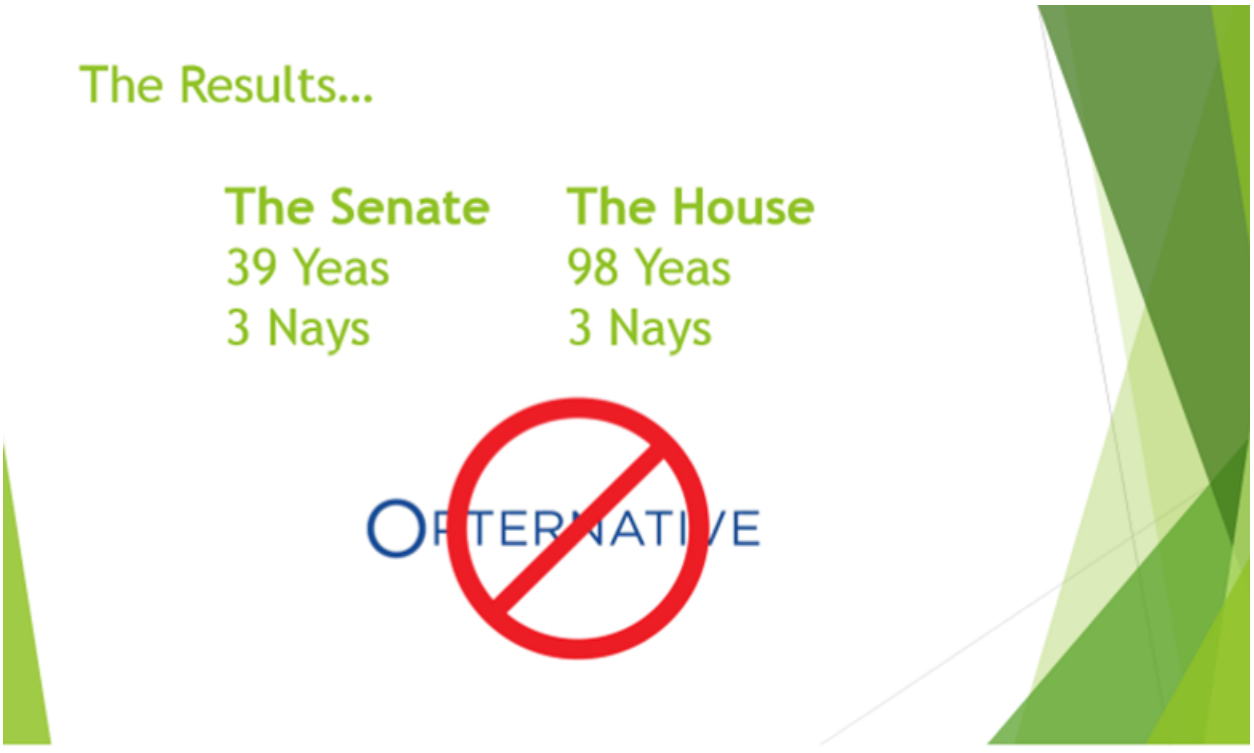
Opternative enters the market. In 2014, Opternative made its online vision-testing software available through its website and started operating in states across the country, including South Carolina. (R. 396–97.) From the start, Opternative "experienced a genuine demand for [its] services" and "many South Carolinians . . . receive[d] corrective-lens prescriptions" from eye doctors who used Opternative's software to test their patients' vision remotely. (*Id.*) As Daniel Bodde, Opternative's chief marketing officer, testified: "Opternative was successfully operating in South Carolina[.]" (R. 393, 396 (emphasis omitted).)

SCOPA mobilizes against Opternative. Soon after Opternative entered the market, the American Optometric Association (AOA) sent an email to state affiliates, including SCOPA, warning about "the Opternative issue" and promising to provide "recommendations . . . about suggested strategies to stop this from operating in your state." (R. 339.) The AOA presented its recommendations in a webinar that both explained how Opternative would impact the optometry business and introduced model legislation that local affiliates could use to "Fight" Opternative. (R. 285–88, 291–93.)

Based on the webinar, SCOPA's legislative chair concluded that Opternative represented "a huge threat to our profession" and recommended that SCOPA "address [the issue] quickly and attack aggressively" by pushing the AOA's bill. (R. 267–68.) SCOPA did not hesitate: It "generate[d] a draft based on [the AOA's]

language"—dubbed the Eye Care Consumer Protection Law (ECCPL)—and lobbied to get it passed. (R. 328–29.)

During the legislative process, SCOPA worked to conceal its anti-competitive motives, noting that "[w]e do NOT want to make this an anti-Opternative argument as Legislators frown upon legislation that singles out and restricts a specific business." (R. 376; *see also* R. 333, 344.) But when the law passed, SCOPA dropped the act: SCOPA's executive director exclaimed "take that Opternative!!!!!!" (R. 347.) SCOPA boasted to its members that "Opternative . . . [is] now **PROHIBITED BY LAW** in the great state of SC!" (R. 316.) And when SCOPA presented to other AOA affiliates on what it had really achieved, its message was clear (R. 356):



SCOPA 000203

Opternative exits the market. The ECCPL forbids doctors from writing corrective-lens prescriptions based solely on information generated by computer software. *See* S.C. Code Ann. §§ 40-24-20(B) (requiring an "eye examination" for a prescription), 40-24-10(3) (requiring that eye exams include a "visual status"), 40-24-10(9) (defining visual status to exclude assessments "based solely on . . . information generated by an automated testing device"). In practice, this means prescriptions must be based on information gathered through an exam that includes "some type of human involvement" (R. 370), rather than by online software like Opternative.

Just as SCOPA intended, the ECCPL destroyed Opternative's South Carolina business. Bodde testified that eye doctors' ability "to use information generated by our Technology to write corrective-lens prescriptions is at the core of [Opternative's] business model[.]" (R. 397.) But after the ECCPL passed, "Opternative was unable to find ophthalmologists willing to risk violating the law [by using its software] and potentially incurring penalties or even losing their license." (R. 397; *see, e.g.*, R. 400.) As a result, "Opternative was forced to cease operations in South Carolina." (R. 397.)

However, Bodde testified that Opternative "is currently in contact with South Carolina-licensed ophthalmologists who would continue using [Opternative] to write corrective-lens prescriptions" if the ECCPL were struck down. (*Id.*) And at least one of the doctors who used Opternative before the ECCPL went into effect testified that he would resume doing so if the law were declared unconstitutional. (R. 401.) Thus, "[t]he ECCPL is . . . the only thing standing between Opternative and continued operations in South Carolina." (R. 397–98.)

ARGUMENT

The sole basis for SCOPA's petition is that the Court of Appeals' decision, which held that Opternative has standing to challenge the ECCPL, "conflicts with prior decisions of this Court" on the injury and causation elements of standing. SCOPA Pet. 9, 15 (citing Rule 242(b)(3), SCACR).[1] There is no such conflict. This Court has repeatedly held that a plaintiff has standing to challenge a law that—like the ECCPL—restricts its business model. (Section I, *infra*.) The Court of Appeals properly applied that precedent when it held that Opternative—which is no longer operating in South Carolina—has suffered an injury. (Section II, *infra*.) And the Court of Appeals rightly held that the ECCPL—the only reason Opternative is not operating—caused that injury. (Section III, *infra*.) Because SCOPA fails to explain how those holdings "conflict with" any of this Court's decisions, the Court should deny the petition and reject SCOPA's attempt to insulate its own anti-competitive law from constitutional review.

I. Under this Court's precedents, a plaintiff has standing to challenge a law that restricts its chosen business model.

Time and again, this Court has allowed plaintiffs to challenge laws that restricted their chosen business models. In some cases—including two the Court of Appeals relied on below—the Court expressly held that the plaintiffs had standing.

---

[1] SCOPA does not invoke any other reasons listed in Appellate Court Rule 242(b), nor does SCOPA argue that some other "special and important reason" not listed in Rule 242(b) supports certiorari. Further, SCOPA does not contest the Court of Appeals' holding that Opternative's injury is redressable. *See Opternative*, 433 S.C. 405, 859 S.E.2d at 269–70.

See, e.g., *Joseph v. S.C. Dep't of Lab., Licensing & Regul.* 417 S.C. 436, 449, 790 S.E.2d 763, 769 (2016) (physical therapist and two doctors had standing to challenge to Physical Therapy Board statement restricting physical therapists' ability to take referrals from doctors); *Joytime Distribs. & Amusement Co. v. State*, 338 SC. 634, 639–40, 528 S.E.2d 647, 650 (1999) (video-game company had standing to challenge law restricting its operations).

In other cases, the Court reached the merits and struck down the law without even discussing standing—the plaintiff's standing was so clear that it was not even challenged. *See, e.g.*, *Retail Servs. & Sys., Inc. v. S.C. Dep't of Revenue*, 419 S.C. 469, 475, 799 S.E.2d 665, 668 (2017) (plurality) (striking down law capping number of permits a liquor store could obtain); *G-H Ins. Agency, Inc. v. Cont'l Ins. Co.*, 278 S.C. 241, 249, 294 S.E.2d 336, 340–41 (1982) (striking down law forbidding auto-insurance carriers from terminating agents); *Painter v. Town of Forest Acres*, 231 S.C. 56, 61, 97 S.E.2d 71, 73 (1957) (striking down ordinance requiring businesses to close at midnight); *McCoy v. Town of York*, 193 S.C. 390, 8 S.E.2d 905, 908 (1940) (striking down ordinance setting maximum size for gas-transport trucks).

Notably, in several of these cases, the Court emphasized that the challenged law was motivated by mere economic protectionism. *See, e.g.*, *Joseph*, 417 S.C. at 452–53, 790 S.E.2d at 771 (noting that PT-referral restriction "appear[ed] merely to be anti-competitive protectionist legislation intended to protect personal financial interests . . . rather than actual benefits to patients"); *Retail Servs & Sys.*, 419 S.C. at 474, 799 S.E.2d at 667 (noting that "economic protectionism for a certain class of

retailers is not a constitutionally sound basis for regulating liquor sales"); *G-H Ins. Agency*, 278 S.C. at 248, 294 S.E.2d at 340 (noting that "the predominant purpose of the challenged provision was to protect the private interests of affected insurance agents rather than any broader societal interest") (cite omitted).

From all this, a clear picture emerges: This Court routinely allows plaintiffs to challenge laws that restrict their chosen business models. By the same token, the Court has taken a firm stand against protectionist legislation. Against this backdrop, the Court of Appeals' decision—which held that Opternative can challenge a law *specifically designed* to prevent it from operating—fits squarely within this Court's precedents. Which is why, as discussed below, SCOPA is unable to identify any South Carolina Supreme Court cases that conflict with the Court of Appeals' decision.

II. The Court of Appeals' holding that Opternative has suffered an injury does not conflict with this Court's precedents.

Standing requires an "injury in fact, i.e., an invasion of a legally protected interest that is concrete and particularized, and actual or imminent." *Pres. Soc'y of Charleston v. S.C. Dep't of Health & Env't Control*, 430 S.C. 200, 210, 845 S.E.2d 481, 486 (2000) (cleaned up). The Court of Appeals began its injury analysis by holding that "[a]n economic interest is a legally protected interest." *Opternative*, 433 S.C. 405, 859 S.E.2d at 268 (citing *Toussaint v. State Bd. of Med. Exam'rs*, 285 S.C. 266, 268, 329 S.E.2d 433, 434–35 (1985) (holding that physician's "interest in his own reputation and economic well-being clearly [gave] him a personal stake in the outcome of the controversy") (cleaned up)). SCOPA does not challenge the Court of Appeals' reliance on *Toussaint* or the principle stated in that decision.

The Court of Appeals next held that Opternative's economic interests have been harmed because Opternative cannot "engag[e] in business under the business model it desires." *Opternative*, 433 S.C. 405, 859 S.E.2d at 268 (citing, in part, *Joseph*, 417 S.C. at 449–50, 790 S.E.2d at 711). SCOPA argues this was error for two reasons: (1) the Court of Appeals wrongly relied on *Joseph*,[2] and (2) the court failed to follow this Court's decision in *ATC South, Inc. v. Charleston County*, 380 S.C. 191, 669 S.E.2d 337 (2008). SCOPA Pet. 11. But SCOPA is wrong: *Joseph* controls and *ATC* is inapposite.

A. *Joseph* controls.

In *Joseph*, this Court held that a physical therapist and two doctors had standing to challenge a Physical Therapy Board position statement that forbade PTs from taking referrals from physicians while in their employ. 417 S.C. at 449–50, 790 S.E.2d at 769. The statement did not forbid doctors and PTs from collaborating; PTs could still take referrals from doctors while employed elsewhere. Nevertheless, the Court held that the plaintiffs were injured because they could not collaborate in the way they wanted to: The PT was injured "by the infringement on her ability to practice her chosen profession." *Id.* at 449, 790 S.E.2d at 770. And the two doctors

[2] The Court of Appeals also cited this Court's decision in *Joytime* (mentioned above) for the proposition that a plaintiff has "standing to challenge a statute regulating its business." *Opternative* 433 S.C. 405, 859 S.E.2d at 269 (citing 338 S.C. at 639–40, 528 S.E.2d at 649–50). The court reasoned that "Opternative provides a service to the public and ophthalmologists" and that the ECCPL prevents those groups from using Opternative. *Opternative*, 433 S.C. 405, 859 S.E.2d at 269. SCOPA does not mention *Joytime*, much less explain why the Court of Appeals was wrong to rely on it.

were injured "[b]y extension . . . because they ha[d] an interest in how the PT system works and in their ability to employ PTs." *Id*.

As the Court of Appeals held, Opternative's injury is analogous to those in *Joseph* because "Opternative is prohibited from engaging in business under the business model it desires." *Opternative*, 433 S.C. 405, 859 S.E.2d at 268. SCOPA disagrees, arguing that unlike the PT in *Joseph*, Opternative is not regulated by the law it is challenging. SCOPA Pet. 11–12. But SCOPA ignores the doctors in *Joseph*, who were injured "[b]y extension"—even though they were not regulated—based on their "interest" in working more closely with PTs. 417 S.C. at 449, 790 S.E.2d 763 at 769. Similarly here, Opternative is harmed because the ECCPL forbids eye doctors from using its software as designed, which strikes "at the core" of Opternative's business. (R. 397.)

SCOPA also argues that *Joseph* is inapposite because the state Appellants here, unlike the Physical Therapy Board in *Joseph*, have taken no action that could harm Opternative. SCOPA Pet. 12. But the "action" in *Joseph* was just a Physical Therapy Board statement clarifying that the plaintiffs could not collaborate as they wanted to. *See* 417 S.C. at 443, 790 S.E.2d 763 at 766–67. There had been no enforcement. In fact, this Court expressly rejected the argument that enforcement was necessary for an injury because "[t]he only viable avenue to seek redress and access our courts cannot be solely through disregarding our laws." *Id.* at 450, 790 S.E.2d at 770. The Court of Appeals properly applied that principle when it held that

Opternative does not need to convince eye doctors to violate the ECCPL before Opternative can challenge it. *See Opternative*, 433 S.C. 405, 859 S.E.2d at 269.

B. *ATC* is inapposite.

In *ATC*, a cell-tower company challenged a rezoning decision that would have allowed a competing company to build on a nearby tract of land. 380 S.C. at 193–94, 669 S.E.2d at 338–39. This Court held that the plaintiff lacked standing because *new market competition* is not an injury. *Id.* at 196–97, 669 S.E.2d at 340. The Court could not have been clearer:

> [A] person whose sole interest for objecting to a zoning board's action is to *prevent competition* with his or her business is not a person aggrieved, and therefore does not have standing to challenge a zoning decision in court. . . . [W]here, as here, the potential injury or prejudice is only an *increase in business competition*, such injury or prejudice is insufficient to confer standing.

Id. (cleaned up) (emphasis added). SCOPA's attempt to analogize Opternative to the *ATC* plaintiff fails. *See* SCOPA Pet. 10–11. Unlike the *ATC* plaintiff, Opternative is not trying to prevent competition. Just the opposite: Opternative *wants to compete*, but *cannot compete* because SCOPA drafted a law to exclude Opternative from the market. That is an injury, and *ATC* does not say otherwise.

III. The Court of Appeals' holding that the ECCPL caused Opternative's injury does not conflict with this Court's precedents.

Standing also requires "a causal connection between the injury and the conduct complained of." *Pres. Soc'y of Charleston*, 430 S.C. at 210, 845 S.E.2d at 486. The Court of Appeals held—and SCOPA agrees—that the test for causation is whether Opternative's injury is "fairly traceable" to the ECCPL. *Opternative*, 433 S.C. 405,

859 S.E.2d at 268 (citing *Sea Pines Ass'n for Prot. of Wildlife, Inc. v. S.C. Dep't of Nat. Res.*, 345 S.C. 594, 601, 550 S.E.2d 287, 291 (2001)); *accord* SCOPA Pet. 13.

The court concluded that Opternative's injury was fairly traceable to the ECCPL because "Opternative's affidavits presented evidence that ophthalmologists stopped using [its] Technology because the Act prohibited" them from doing so. *Opternative*, 433 S.C. 405, 859 S.E.2d at 269 (citing *Joseph*, 417 S.C. at 449–50, 790 S.E.2d at 770). SCOPA says this was error for two reasons: (1) the ECCPL does not prohibit eye doctors from using Opternative, and (2) the Court of Appeals drew a "false equivalency" to *Joseph* by placing "undue reliance" on Opternative's affidavits. SCOPA Pet. 13–14. Both arguments miss the mark: The ECCPL bans eye doctors from using the only product Opternative offers, and this Court has held that it is proper to rely on affidavits to establish standing.

A. The ECCPL bans eye doctors from using the only product Opternative offers.

SCOPA first says there is no causation because Opternative's injury stems from eye doctors' supposed "decisions" not to use Opternative as part of an in-person eye exam. SCOPA Pet. 13–14 (cite omitted). But the whole point of Opternative is to provide a way for patients to take a vision test online and obtain a prescription "without having to physically travel to an optometrist's office every single time." (R. 394–95.) To ban eye doctors from "writ[ing] a prescription for corrective lenses based solely upon Opternative's technology"—as SCOPA concedes the ECCPL does, SCOPA Pet. 14 (emphasis omitted)—is to forbid eye doctors from using Opternative in the only way it was designed to be used. Which is precisely why SCOPA took

"utmost pleasure" in declaring, after the ECCPL passed, that "Opternative . . . [is] now **PROHIBITED BY LAW** in the great state of SC!" (R. 316.)

SCOPA's change of position today is nothing more than an expedient move designed to prevent Opternative from challenging the ECCPL in court.

B. The Court of Appeals properly relied on Opternative's affidavits to find causation.

In *Joseph*, the Court held that there was a "causal connection" between the PT and doctor plaintiffs' injuries and the Physical Therapy Board statement they were challenging. 417 S.C. at 449–50, 790 S.W.2d at 770. That is, the plaintiffs' inability to collaborate in the way they desired was fairly traceable to the Board's statement. *See id*. SCOPA says the Court of Appeals placed "undue reliance" on Opternative's affidavits to find the same sort of causal connection here. SCOPA Pet. 13. But the affidavits are unambiguous:

- Daniel Bodde, Opternative's chief marketing officer, testified that Opternative was operating in South Carolina before the ECCPL passed; that after the law passed, eye doctors were no longer willing to use Opternative; that Opternative is currently in contact with eye doctors who have said they would continue using Opternative if the ECCPL were struck down; and that the ECCPL is the *only* thing preventing Opternative from operating in South Carolina. (R. 397.)

- Dr. Edward Chaum, a South Carolina-licensed ophthalmologist, testified that he used Opternative before the ECCPL passed; that he *only* stopped because of the ECCPL; and that he would continue using Opternative if the law were struck down. (R. 400.)

This Court has held that it is proper to rely on a plaintiff's affidavits when deciding whether the plaintiff has standing. *See Smiley v. S.C. Dep't of Health & Env't Control*, 374 S.C. 326, 333, 649 S.E.2d 31, 34 (2007). In *Smiley*, for example, the Court held that a jogger had standing to challenge the issuance of a sand-scraping permit

after the jogger submitted an affidavit explaining how the decision would affect his ability to use the beach. *Id.* SCOPA does not explain—because it cites no cases—why the Court of Appeals' decision to take the same approach here conflicts with this Court's precedents.

* * *

In the end, this is not a complicated issue. SCOPA drafted the ECCPL specifically to destroy Opternative's business—and then, when Opternative was forced to shut down, SCOPA publicly boasted about it. By any plausible reading of this Court's cases, Opternative has standing to challenge the ECCPL. Because that is exactly what the Court of Appeals held, and because SCOPA fails to identify any cases that "conflict with" that holding (Rule 242(b)(3), SCACR), SCOPA's petition should be denied.

CONCLUSION

The Court should deny SCOPA's petition for a writ of certiorari.

[*SIGNATURE PAGE ATTACHED*]

Institute for Justice
Nelson Mullins Riley & Scarborough, LLP

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

Joshua Windham*
Robert McNamara*
901 North Glebe Road, Suite 900
Arlington, VA 22203
(703) 682-9320
*Admitted pro hac vice

Attorneys for Respondent

August 16, 2021