STATE OF SOUTH CAROLINA COUNTY OF RICHLAND	IN THE COURT OF COMMON PLEAS FIFTH JUDICIAL CIRCUIT
Opternative, Inc., Plaintiff, vs. South Carolina Board of Medical Examiners, and South Carolina Department of Labor, Licensing, and Regulation, Defendants, South Carolina Optometric Physicians Association, Defendant-Intervenor.	Civil Action No. 2016-CP-40-06276 **PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

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JEANNETTE W. McBRIDE
C.C.P. & G.S.

INSTITUTE FOR JUSTICE

Robert J. McNamara*
VA Bar No. 73208
E-Mail: rmcnamara@ij.org
Joshua A. Windham*
NC Bar No. 51071
E-Mail: jwindham@ij.org
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
**Admitted Pro Hac Vice*

NELSON MULLINS RILEY & SCARBOROUGH LLP

Miles E. Coleman
SC Bar No. 78264
E-Mail: miles.coleman@nelsonmullins.com
William C. Wood, Jr.
SC Bar No. 015111
E–Mail: bill.wood@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
Tel: (803) 799-2000

Attorneys for Plaintiff Opternative, Inc.

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INTRODUCTION

This case concerns an attempt by one group of medical professionals to use the power of government to prevent another group of medical professionals from exercising their medical judgment to rely on innovative technology that expands access to care. Plaintiff Opternative, Inc., ("Opternative") has developed an online refractive test and software ("Technology") that allows customers to renew or update their corrective-lens prescriptions from the comfort of their own homes using a smartphone and a computer. South Carolina-licensed ophthalmologists were actively using that Technology to write prescriptions for patients who needed them. But last year, the South Carolina Optometric Physicians Association (SCOPA)—a group of licensed optometrists whose brick-and-mortar business model depends on selling patients expensive eyeglass frames in their offices—launched an aggressive lobbying campaign to pass legislation specifically designed to prevent licensed ophthalmologists from using Opternative's Technology.

Although SCOPA publicly claimed the legislation would protect patient health, internal communications reveal that the law was actually designed to achieve one thing only: economic protectionism. And SCOPA succeeded: The Eye Care Consumer Protection Law (ECCPL) prohibited Opternative's ongoing business activities, caused South Carolina-licensed ophthalmologists to refuse to continue working with Opternative, and forced the business to shut down operations in South Carolina—all while doing literally nothing to protect the public health or safety.

The question for this Court to resolve is whether that sort of naked economic protectionism is a legitimate use of the state's police power. Under binding South Carolina precedent, it is not: The South Carolina Constitution forbids protectionist legislation and requires that laws restricting constitutionally protected rights bear a real and substantial

relationship to a legitimate government end. Because the evidence in this case clearly establishes that the ECCPL bears no such relationship to anything other than the anti-competitive, economic interests of SCOPA's members, summary judgment should be entered on behalf of Plaintiff.

STATEMENT OF FACTS

I. Opternative's Automated Technology Disrupts Optometrists' Brick-And-Mortar Business Model.

A. Optometrists' brick-and-mortar business model.

Vision care is a lucrative business. In 2014, the total market generated over $35 billion in revenue, $23 billion of which came from the sale of eyeglasses and contact lenses alone.[1] Optometrists—limited eye-health professionals who specialize in corrective-vision and certain ocular-pathological care—have a major stake in that market.[2] 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.

Most optometrists rely heavily on patients seeking corrective-lens prescriptions for a consistent source of daily appointments.[3] That is because, traditionally, it has only been possible to determine an appropriate prescription through an in-person examination: To generate an appropriate prescription, the optometrist instructs the patient to sit in a chair and view certain projected images through a lens-switching device called a phoropter.[4] The optometrist then asks

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

[2] *See id.*, Ex. 1 at 9:2–9:18.

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

[4] SCOPA Ans. ¶ 14; *see also* Windham Aff., Ex. 1 at 35:25–36:9, 36:13–37:7, 37:12–38:7 (Zolman explaining how optometrists use a phoropter to generate a patient's corrective-lens prescription).

the patient to self-report subjective responses to what they see as the optometrist physically cycles through various lenses in an effort to measure what is called the eye's refractive error.[5] Finally, the optometrist manually records the patient's responses and uses that refractive data to write an appropriate corrective-lens prescription.[6]

At the conclusion of each appointment, it is common practice for optometrists (or office staff) to lead patients to a display room and attempt to sell them expensive eyeglass frames.[7] For many optometrists, such in-person sales constitute a majority of their overall revenue stream.[8] In this way, 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.

B. Opternative's Technology.

Opternative is a healthcare-technology company founded in 2012 by optometrist Steven Lee out of a sincere belief that corrective-lens prescriptions should be accessible and affordable for everyone.[9] As a practicing optometrist who had conducted over 20,000 refractive tests, experience taught Steven that the traditional, brick-and-mortar model was needlessly

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[5] SCOPA Ans. ¶ 14; *see also* Windham Aff., Ex. 1 at 36:10–36:12, 36:13–36:23, 38:14–38:17 (Zolman explaining that optometrists rely on subjective refractive information based on patient's responses to projected images to generate a patient's corrective-lens prescription). "Refractive" in this context refers to how light bends in a person's eye. *See id.* at 34:21–35:3.

[6] *See id.* at 34:16–34:20, 39:23–40:6 (Zolman explaining how optometrists record the patient's refractive data in order to generate an appropriate corrective-lens prescription).

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

[8] *Compare* SCOPA Ans. ¶ 20 (admitting on information and belief the allegations of Paragraph 48 of Plaintiff's Complaint) *with* 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"); *see* Windham Aff., Ex. 5 at 28:20–28:22 (SCOPA Executive Director Jackie Rivers admitting that "most South Carolina optometrists sell eyeglass frames").

[9] *See* Bodde Aff. at ¶¶ 3–4.

inconvenient and expensive for patients just looking to renew or update their previous prescriptions.[10] Steven knew there must be a way for patients to obtain that simple care without having to physically travel to an optometrist's office—or endure a sales pitch on the way out—every single year.[11]

Opternative was the solution. In essence, Opternative's Technology allows qualifying customers to obtain a corrective-lens prescription from their own homes by using a smartphone and a computer.[12] Opternative's Technology is not a replacement for a comprehensive eye-health exam, as both Opternative's Technology and website repeatedly inform users; instead, it is a tool that an ophthalmologist can use where appropriate to write or renew a corrective-lens prescription for someone not currently in need of a comprehensive in-person eye-health exam.[13]

Using Opternative's Technology is straightforward: Customers start by visiting the Opternative website and providing detailed information about their existing prescription and relevant medical history.[14] Opternative's Technology then prompts customers with a series of written and audio questions that guide them through a vision assessment.[15] Customers next view various individually calibrated images on a computer screen and use a smartphone to self-report subjective responses to what they perceive.[16] Opternative's Technology records those responses and sends all of the user's responses (to both the vision assessment and the personal- and medical-history questions) to a state-licensed ophthalmologist for review.[17]

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[10] *See id.* at ¶ 4.
[11] *See id.*
[12] *See id.* at ¶ 3.
[13] Bodde Aff. at ¶¶ 8–9.
[14] *See id.* at ¶ 6.
[15] *See id.*
[16] *See id.*
[17] *See id.*; Chaum Aff. at ¶ 2.

Opternative's users are *not* guaranteed a prescription. Ophthalmologists are medical doctors who specialize in total eye care, which includes not only corrective-vision and ocular-pathological care, but also overall eye-health assessments and surgeries.[18] Accordingly, participating ophthalmologists review the information generated by the Technology and only write prescriptions where, in their *medical judgment*, it is appropriate to do so.[19] In addition, Opternative imposes front-end screening requirements to filter out people for whom ophthalmologists will not write prescriptions based on the Technology: Only otherwise-healthy customers between the ages of 18 and 50 are eligible for a prescription, and customers are prohibited from using Opternative's Technology four years in a row without first certifying that they have received a comprehensive eye-health examination.[20]

C. Opternative's Technology disrupts optometrists' business model.

Opternative's Technology expands access to care: There is real patient demand for more convenient and affordable access to renewed or updated corrective-lens prescriptions,[21] and, prior to the enactment of the ECCPL, South Carolina-licensed ophthalmologists successfully used Opternative's Technology to write or renew prescriptions.[22] But this expanded access to care is also a threat to optometrists' profits, because their bottom line depends on frequent office visits from patients seeking corrective-lens prescriptions.[23]

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[18] SCOPA Ans. ¶¶ 9, 11; Bodde Aff. at ¶ 7.

[19] *See id.* at ¶ 7.

[20] *See id.* at ¶¶ 8–9.

[21] *See id.* at ¶ 10; Chaum Aff. at ¶ 4; Windham Aff., Ex. 2 at 153 (Zolman asking rhetorically "how many patients do we see daily who really come in just wanting a new prescription for glasses and/or contacts?" and remarking that online refractive technology would "allow them to get what they want").

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

[23] SCOPA Ans. ¶ 20; *see* Windham Aff., Ex. 1 at 66:16–67:9 (Zolman admitting that his revenue from eyeglass sales "would go down" if online refractive tests like Opternative's Technology ever became commercially popular).

II. Optometrists Drafted And Lobbied For The ECCPL To Protect Their Brick-And-Mortar Business Model From Competition By Opternative's Automated Technology.

A. The American Optometric Association drafted model legislation as part of a national campaign to shut Opternative down.

The threat Opternative's Technology poses to the commercial viability of brick-and-mortar optometry shops has not gone unnoticed. Since Opternative's Technology entered the market, the American Optometric Association ("AOA")—a national association of optometrists devoted to the promotion of the optometric profession[24]—has devoted significant time and attention to combatting what it calls "the Opternative issue."[25]

As relevant here, that time and attention has come through the AOA's State Government Relations Committee, which works with state affiliates to pursue legislation.[26] In 2014, the AOA informed affiliates of a special campaign to shut Opternative down in states across the country.[27] Months later, the AOA produced a model bill: the Consumer Protection in Eye Care Act.[28] In 2015, the AOA's State Government Relations Committee formally presented that bill to state affiliates in a webinar titled "Online Vision Screening, Self-adjusting Glasses and Kiosks and What ODs Need to Know."[29] That webinar had three principal agenda items: (1) survey the most recent innovations and technologies in vision care and how those stood to impact the

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[24] *See id.*, Ex. 1 at 11:15–13:7.

[25] *See id.*, Ex. 7 at 501 (AOA providing state affiliates an "update on AOA actions on the Opternative issue").

[26] *See id.*, Ex. 1 at 15:3–15:19 (Zolman admitting that the State Government Relations Committee works with state affiliates—including SCOPA—to pursue legislation).

[27] *See id.*, Ex. 7 at 501 (AOA informing state affiliates of an upcoming legal review of Opternative's Technology and promising to "make recommendations to state affiliates about suggested strategies to stop this from operating in your state").

[28] *See id.*, Ex. 2 at 181–93.

[29] *See id.* at 155 (AOA webinar slides introducing the Consumer Protection in Eye Care Act to state affiliates).

business side of optometry; (2) recommend actions for state affiliates; and (3) explain the AOA's model bill.[30]

The webinar began with a "Background on The Issue."[31] According to the AOA, recent technological innovations have made self-refracting kiosks available through companies like CVS and Rite Aid, direct-to-consumer vision care available through companies like Warby Parker and 1-800 Contacts, and online refractive tests available through companies like Opternative—who received far more attention throughout the presentation than any other market entity.[32] The webinar was frank about the source of the AOA's interest in these innovations: A screen titled "Why are We Discussing Any of This???" explained that a majority of the revenue generated in the vision-care market comes not from medical treatment like eye examinations, but from the combined sales of eyeglasses and contact lenses.[33]

The webinar proceeded by asking, "Can We Fight This and Protect Our Patients?"[34] That question was answered below an image of two soldiers on horseback with an enthusiastic "YES!!!," followed by a slide recommending that affiliates "Pass the 'Consumer Protection in Eye Care Act.'"[35] As explained more fully below, the AOA's model bill formed the basis of the law challenged in this action.[36]

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[30] *See id.*, Ex. 2 at 158.

[31] *See id.* at 158, 160.

[32] *See id.* at 161–76.

[33] *See id.* at 177.

[34] *See id.* at 178.

[35] *See id.* at 178–79.

[36] *See id.*, Ex. 5 at 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").

B. SCOPA adapted the AOA's model legislation to shut Opternative down in South Carolina.

One of the attendees at the AOA's 2015 webinar was then-Legislative Co-Chair of the South Carolina Optometric Physicians Association, Michael Zolman.[37] SCOPA—Defendant-Intervenor in this case—is an AOA state affiliate devoted to the promotion of the optometric profession in South Carolina through a combination of public, legislative, and other advocacy.[38]

After viewing the webinar, Zolman shared the AOA's concerns about how the innovations and technologies presented might impact the business side of optometry.[39] Indeed, Zolman was so concerned by what he learned from the webinar that he immediately e-mailed the SCOPA Board to explain how "kiosks and online eye exams" posed "a huge threat to our profession"—and what could be done about it.[40] Echoing the AOA webinar, Zolman was frank about the economic interests at stake, noting that "total eye care [is] a 35 BILLION DOLLAR industry, 23 BILLION coming from glasses and [contact-lens] sales," and that this amount of revenue would give competing retailers an incentive to cut optometrists out of the process.[41]

With Opternative in mind, Zolman explained that "kiosks and online eye exams" would be cheaper, more convenient, and would generate more revenue because there was real patient demand for such options.[42] He warned that "[i]t would only take one sellout OD or

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[37] *See id.*, Ex. 1 at 48:21–48:25, 51:3–51:5 (Zolman acknowledging having attended the webinar); *id.*, Ex. 2 at 153–54 (same).

[38] *See id.*, Ex. 1 at 16:4–16:21, 22:15–22:21.

[39] *See id.* at 51:25–52:9, 53:23–54:1 (Zolman admitting that he was concerned with how new vision-care technologies presented in the webinar might impact the "business side" of the optometric profession).

[40] *See id.*, Ex. 2 at 153–54 (Zolman's post-webinar e-mail to the SCOPA Board); *id.*, Ex. 1 at 51:3–51:5 (Zolman confirming that his e-mail was prompted by the webinar).

[41] *See id.*, Ex. 2 at 153.

[42] *See id.*; *id.*, Ex. 1 at 54:2–54:12 (Zolman admitting that he "had Opternative in mind" when he wrote the e-mail).

ophthalmologist to approve of countless prescriptions generated from self-refracting kiosks and forego the exam altogether."[43] Zolman recommended that SCOPA "address [the issue] quickly and attack aggressively," explaining that "the AOA is on the ball and recently drafted a bill that can be modified on a state-by-state basis to prevent this . . . [which is] something we definitely want to do."[44]

To be fair to Zolman, one line of his eleven-paragraph e-mail actually does discuss patient safety, instead of just the economic impact of new technology on optometrists: "Think of all the glaucoma, ARMD, Diabetic retinopathy, Cataracts, amblyopia, (the list goes on and on) that would be missed."[45] But Zolman does not discuss how the AOA's proposed legislation would actually protect the public from these diseases. And as explained below, while the legislation eventually adopted in South Carolina would do nothing to address the public-health concern briefly identified in Zolman's e-mail, it would do quite a lot to address his economic-competition concerns.

In any event, the SCOPA Board took Zolman's advice.[46] In the months that followed, SCOPA engaged in a vigorous, AOA-assisted and Department of Labor, Licensing, and Regulation (LLR)-backed lobbying campaign to get their version of the AOA's model bill passed in South Carolina.

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[43] *See id.*, Ex. 2 at 153.

[44] *See id.*

[45] *See id.*

[46] *See id.* at 152 (Wayne Cannon notifying SCOPA's lobbyists that "[t]he SCOPA board voted to evaluate the passing of a consumer protection leg. The AOA suggested bill is attached for your review. We will need to meet soon to evaluate our strategy."); *id.*, Ex. 5 at 26:16–26:19 (explaining that Wayne Cannon was the President of the SCOPA Board).

C. SCOPA engaged in a vigorous lobbying campaign—assisted by the AOA and LLR—to ensure the passage of a law banning Opternative's Technology.

Both government employees and SCOPA officials agree that the ECCPL was passed at SCOPA's behest and as the result of SCOPA's lobbying campaign.[47] And SCOPA consistently viewed the purpose of the ECCPL as to prevent anyone from employing technology like Opternative's to compete with brick-and-mortar optometry shops: Indeed, when someone suggested amending the ECCPL to regulate optometrists only, SCOPA took the position that removing ophthalmologists from the ECCPL would render the entire legislation "moot."[48] The point of the law, in other words, was not to simply regulate the conduct of optometrists, but to limit the medical discretion of medical doctors in an effort to prevent them from undercutting optometrists' profits.

To be sure, SCOPA carefully managed its talking points (with help from the national AOA), with internal e-mails stressing the importance of avoiding any discussion of telemedicine

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[47] *See id.* at 23:13–23:15 (Rivers admitting that "the ECCPL is a bill that SCOPA passed"), 46:22–47:2 (Rivers admitting that "the bill that eventually became the ECCPL was primarily pushed by the optometrists"); *id.*, Ex. 3 at 129 (Zolman boasting that the passage of the ECCPL "is what organized Optometry looks like at it's [sic] best!" and that "[i]t took the grassroots efforts of all of you contacting your legislators to make this happen as well as the tireless efforts of your SCOPA Board of Directors working in conjunction with AOA to make this possible"); *id.*, Ex. 15 at 455, 573–74, 721 (Holly Beeson confirming that the ECCPL "was largely pushed by the optometrist community"); *id.*, Ex. 11 at 6:13–7:1, 40:18–41:5 (LLR 30(b)(6) designee Darra Coleman explaining that Holly Beeson is an attorney "responsible for the supervision of [LLR's] Office of Communications, which includes [LLR's] legislative affairs").

[48] *See id.*, Ex. 8 at 469 (Rivers forwarding AOA feedback on Opternative's proposed edit to the bill that would have removed ophthalmologists: "Removing MDs basically makes the bill moot."); *id.*, Ex. 5 at 52:1–52:8 (Rivers explaining that removing ophthalmologists would have made the bill moot "[b]ecause it would still create an avenue potentially for someone to give themselves a refraction utilizing technology that removes them out of the doctor's office"), 55:16–55:22 (Rivers admitting that SCOPA's "effort to pass the ECCPL [was] prompted by the existence of businesses offering online eye exams").

or kiosks and instead casting the ECCPL as a consumer protection law.[49] But these talking points were ultimately unpersuasive to then-Governor Nikki Haley, who vetoed the ECCPL on May 16, 2016. Her explanation of the veto read, in full:

> **I am vetoing this bill because it uses health practice mandates to stifle competition for the benefit of a single industry**, effectively banning eye care kiosks statewide.
>
> During my administration, South Carolina has expanded access to health care, including mental health services, to rural and underserved regions of our state using telemedicine. Unfortunately, a small group of eyecare professionals is seeking to block new technologies that expand low-cost access to vision correction services, using two basic arguments.
>
> First, advocates state that kiosks pose a public health risk, which is simply untrue. Individuals can, and should, continue to see their doctor for comprehensive medical exams, and these kiosks do not offer medical evaluations or advice. Second, optometrists argue that kiosks create an uneven playing field because licensed practitioners cannot take advantage of this technology and charge patients for its use in a medical practice. The answer to this problem is not to ban a new technology, but rather to expand its use. **Send a bill to my desk that allows for the expanded use of automated vision evaluations in all medical settings, and I will sign it.**
>
> If [the ECCPL were] allowed to become law, South Carolina would become the eighth state to impose such a ban, putting us on the leading edge of protectionism, not innovation. This is the wrong message to send to the business community. **I urge you to continue promoting South Carolina's use of innovative technologies to expand access to medical care and sustain this veto.**[50]

SCOPA's lobbying efforts continued after the veto, as did its internal insistence on message discipline: "We do NOT want to make this an anti-Opternative arguement [sic],"

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[49] *See id.*, Ex. 13 at 1257–58 (Zolman response to SCOPA membership e-mail with subject line "Fw: Governor Haley's Decision on The Consumer Eye Care Protection Bill"); *id.*, Ex. 8 at 469 (Rivers forwarding e-mail from AOA with subject line "RE: Meeting Monday"); *id.*, Ex. 6 at 667 (Rivers forwarding e-mail from SCOPA Board Member Michael Campbell with subject line "SCOPA's Bill – How to Reference").

[50] *See id.*, Ex. 16 (emphases in original).

Zolman explained in one e-mail, "as Legislators frown upon legislation that singles out and restricts a specific business."[51] Instead, SCOPA "must maintain the argument that this bill protects the consumer from false and misleading claims to what an eye exam is as well as that it protects our citizens from unproven technology and that anything less jeopardizes consumers [sic] health care."[52]

SCOPA was not alone in resisting the veto; it had help from the South Carolina Board of Examiners in Optometry ("Optometry Board"), which is part of Defendant LLR. *See* S.C. Code Ann. § 1-30-65. While LLR and its agencies are prohibited from engaging in lobbying and can generally provide input on legislation "[w]hen asked by . . . legislative staff or individual legislators,"[53] the Optometry Board appears to have been unusually excited about the ECCPL, engaging in atypical and apparently uninvited lobbying efforts of its own: On May 16, 2016, the Optometry Board's then-President—and SCOPA member—Peter Candela sent a letter on behalf of the Board to the Governor's office "in support of her hopeful signature," and asking his colleagues at LLR that, "if someone has a direct contact to the Gov, please pass a long [sic] that we strongly support this bill and hope that she signs it in to [sic] law."[54] The following day, Candela sent Senator John Scott a letter emphasizing the Optometry Board's support for the ECCPL and asking Scott to "continue to encourage your colleagues in the House and Senate to override the Governors [sic] veto."[55]

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[51] *See id.*, Ex. 13 at 1258.

[52] *See id.*

[53] *See* Windham Aff., Ex. 11 at 37:9–38:9.

[54] *See id.*, Ex. 12 at 2621; *id.*, Ex. Windham Aff., Ex. 11 at 46:18–47:22 (Coleman explaining that Candela is "an optometrist licensed in South Carolina" and that "in 2016, he would have been president of the Board of Examiners of Optometry"); *id.*, Ex. 5 at 20:15–20:18 (Rivers explaining that Candela is a SCOPA member).

[55] *See id.*, Ex. 14 at 86–87.

The post-veto lobbying efforts were successful, and the legislature overrode Governor Haley's veto on May 19, 2016.[56] Once the law's passage was final, though, SCOPA and its officials seemed to lose some of the message discipline that had characterized their lobbying efforts. Indeed, SCOPA's uncensored internal reaction to the veto override was markedly different from the organization's careful public statements: In public, SCOPA hewed to the AOA's advice to "[c]ontinue talking about public safety" to make it seem like the law was not protectionist legislation designed to restrict a single business—namely, Opternative.[57] But in private, as the Senate voted to override Governor Haley's veto, SCOPA Executive Director Jackie Rivers sent an e-mail to AOA officials, exclaiming: "[T]ake that Opternative!!!!!!"[58] Zolman followed almost immediately by describing the law's effect in a message to SCOPA's membership: "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!"[59] He closed with a final message summing up what SCOPA had achieved: "Good-bye Opternative!"[60]

Months later, when the AOA asked SCOPA to present for its other state affiliates on their success adapting and passing the AOA's model legislation in South Carolina, SCOPA used that

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[56] *See id.*, Ex. 3 at 129 (Zolman e-mail to SCOPA's membership with subject line "It's a GREAT day in SC" announcing that "[b]oth the SC House and Senate voted to override Governor Haley's veto of our bill S1016").

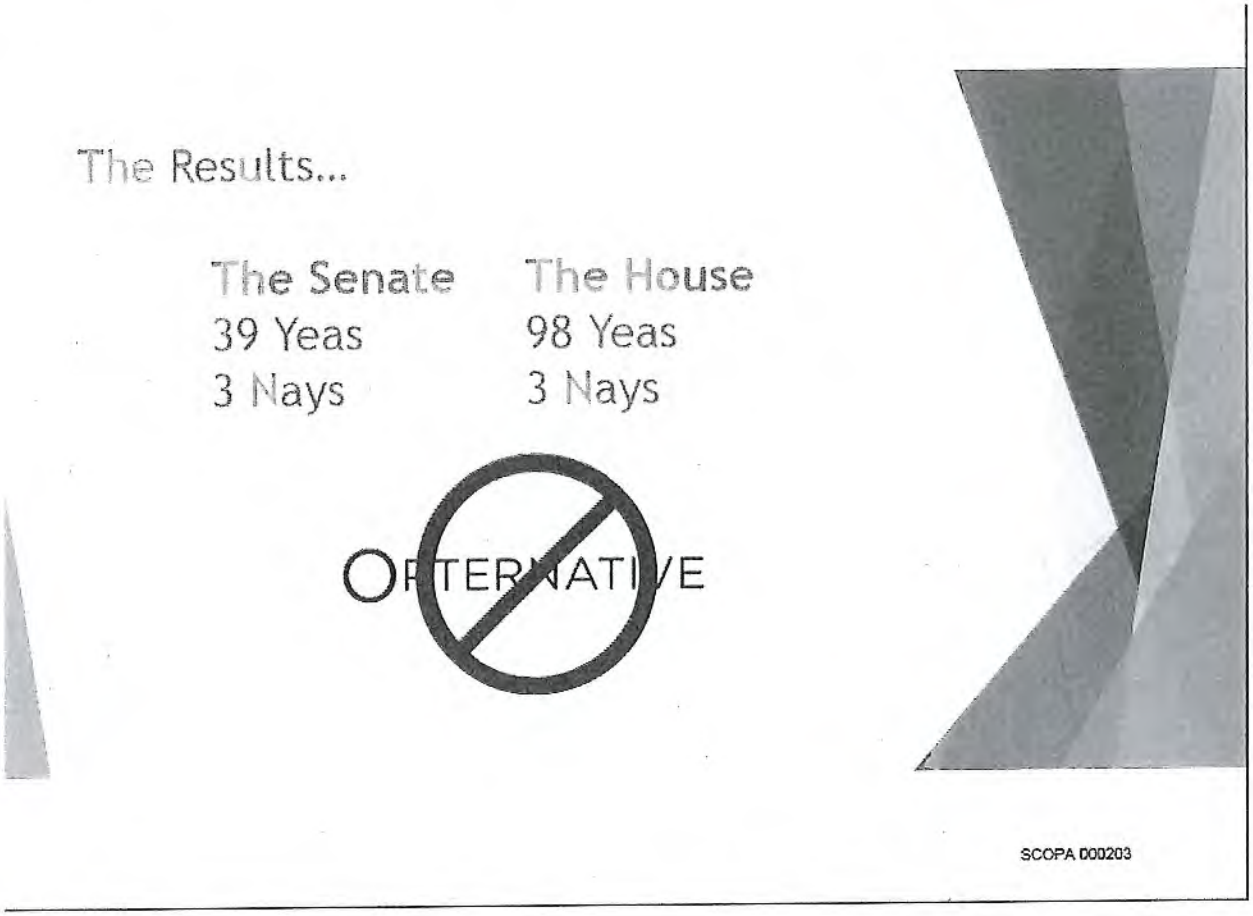
[57] *Compare id.*, Ex. 8 at 469 (Rivers forwarding AOA admonition to "continue talking about patient safety"), *with id.*, Ex. 5 at 55:16–55:22, 56:6–56:11 (Rivers admitting that the ECCPL was "prompted by the existence of online eye exams" but that there were "internal discussions at SCOPA about the importance of discussing the ECCPL as if it were not an effort to ban Opternative").

[58] *See id.*, Ex. 9 at 116.

[59] *See id.*, Ex. 3 at 129.

[60] *See id.*

presentation as an opportunity to boast without restraint about what the ECCPL had really accomplished[61]:



In sum, SCOPA and its officers treated the passage of the ECCPL as what it really was: The culmination of a successful effort to ban Opternative and its Technology.[62]

Understandably, South Carolina-licensed ophthalmologists seem to have had the same understanding of what the ECCPL does. Before the ECCPL, Opternative had no problem operating in South Carolina, and many South Carolinians actually received corrective-lens prescriptions after a South Carolina-licensed ophthalmologist used his medical judgment to write

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

[62] *See id.*, Ex. 5 at 59:5–60:6.

a prescription based on information generated by the Technology.[63] But after the ECCPL passed, no ophthalmologist was willing to use Opternative's Technology.[64] And rightly so: As explained below, the ECCPL clearly prohibits the use of Opternative's Technology because it requires corrective-lens prescriptions to be based in part on an examination by a human being (though not necessarily by the prescribing ophthalmologist).

South Carolina-licensed ophthalmologists have good reason not to test the boundaries of South Carolina law. *See* S.C. Code Ann. §§ 40-1-80, 40-47-80, 40-47-110. If the South Carolina Board of Medical Examiners receives a complaint that a licensed ophthalmologist has violated the law, that complaint triggers an investigatory process that lasts at least a year—indeed, the Board's 30(b)(6) designee testified that it was not even theoretically possible for the process to conclude in *less* than a year.[65] And while the Board has some discretion over the degree of punishment to mete out, it has no discretion at all to refrain from enforcing the law: If an ophthalmologist violates the ECCPL by writing a prescription based solely on automatically collected information (using Opternative or any other computerized technology), that ophthalmologist would face a lengthy investigation followed by an enforcement action.[66]

Unable to find ophthalmologists willing to risk burdensome investigations and ruinous penalties, Opternative was forced to cease its operations in South Carolina—though it is currently in contact with South Carolina-licensed ophthalmologists who would continue using

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

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

[65] *See* Windham Aff., Ex. 11 at 19:17–19:23 (Coleman responding "No, I would not say so" and "I would not say that that would be a realistic expectation" in response to question about whether case-investigation process could theoretically conclude in less than a year).

[66] *See id.* at 10:13–15:17 (Coleman explaining procedures of lengthy case-investigation process), 69:5–69:10 (Coleman explaining that LLR "[doesn't] have the luxury of not enforcing law").

the Technology to write corrective-lens prescriptions (where medically appropriate) if the barrier of the ECCPL were removed.[67]

III. The ECCPL Bans Opternative's Technology—And That Is All It Does.

The ECCPL was intended as a ban on Opternative's Technology, rather than as a requirement that patients receive a comprehensive eye-health examination before updating or renewing their corrective-lens prescriptions. Unsurprisingly, then, the ECCPL does a very good job of banning Opternative but almost nothing at all to ensure that patients receive comprehensive eye-health exams.

The ECCPL is codified at S.C. Code Ann. sections 40-24-10 and 40-24-20. The law lays out two requirements for a corrective-lens prescription:

> **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.

Id. § 40-24-20(B) (emphasis added). It also provides that "[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." *Id.* § 40-24-20(C). Both the term "eye examination" and the term "kiosk" are further defined: To be valid, an eye examination "must not be based solely on objective refractive data or information gathered by an automated testing device." *Id.* §§ 40-24-10(3) and 40-24-10(9). Similarly, "kiosk" is broadly defined to include any "automated application, which

[67] *See* Bodde Aff. at ¶¶ 13–14; Chaum Aff. at ¶¶ 3–4.

is designed to be used on a phone, computer, or Internet-based device . . . to provide refractive data or information." *Id.* § 40-24-10(4).

In other words, the ECCPL requires that corrective-lens prescriptions must expire annually, and they must be based at least in part on information collected by a human being.

Tellingly, and as confirmed by the Defendants' 30(b)(6) designee at deposition, these are the only constraints the ECCPL places on an ophthalmologist's medical judgment.[68] The ECCPL does not specify what findings an ophthalmologist must make before prescribing corrective lenses.[69] It does not require an ophthalmologist to conduct or not conduct any particular tests.[70] It only requires that some part (however small) of the medical information on which an ophthalmologist bases his corrective-lens prescription must have been collected by a human being instead of by a computerized device.[71]

And that human being *does not even need to be the prescribing ophthalmologist.* Ophthalmologists, like other South Carolina-licensed doctors, can and do delegate some or all of their examinations to assistants, either licensed assistants like nurses or totally unlicensed assistants, in their sole discretion.[72] The ECCPL does nothing to change this. In other words, the only requirement actually imposed by the ECCPL before an ophthalmologist writes a

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[68] *See* Windham Aff., Ex. 11 at 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").

[69] *See id.* at 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").

[70] *See id.* at 64:16–65:2 (Coleman explaining that the ECCPL has "no explicit requirement" regarding tests that must be performed before writing a corrective-lens prescription).

[71] *See id.* at 67:14–67:18 (Coleman explaining that the ECCPL imposes "some expectation that there will be some type of human involvement").

[72] *See id.* at 65:17–65:23, 67:14–68:10 (Coleman explaining 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").

prescription is that a human—any human—obtain some information—any information—from the person seeking the prescription.

This very effectively bans Opternative, whose Technology uses a computer program to automatically collect and send information over the Internet for a doctor's review. But it does nothing to require that an ophthalmologist conduct a comprehensive eye-health examination every single time he writes a corrective-lens prescription. Nor should we expect an ophthalmologist to do so: While periodic comprehensive eye-health examinations are important, the American Academy of Ophthalmology does not recommend that most people receive such exams annually. Instead, the American Academy of Ophthalmology recommends that otherwise-healthy people obtain at least ***one*** such examination by the time they reach 40 years old, and that otherwise-healthy people between the ages of 40 and 54 obtain one every 2–4 years.[73]

To be sure, the ophthalmologists' professional recommendations recognize that comprehensive eye-health exams are important, but they also recognize that for most people—people without sudden changes in their vision or other symptoms of eye disease—more regular exams are simply unnecessary. That group—the people who need new glasses occasionally but whose doctors believe they do not need annual eye-health checkups—is exactly the group that was using and benefitting from Opternative prior to the ECCPL.

The ECCPL's expiration period is further evidence that it has no relationship to public health or safety. While the one-year expiration requirement has no footing whatsoever in—and

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[73] *See id.*, Ex. 4 at1–2 ("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."); *id.*, Ex., 1 at 47:24–48:3 (Zolman admitting that he has no reason to doubt that the American Academy of Ophthalmology's statement conveys the ophthalmological standard of care because "I'm not an ophthalmologist"); *see also* SCOPA Ans. ¶ 16.

indeed, is radically different from—ophthalmologists' actual recommendations for comprehensive eye-health examinations, it bears an obvious relationship to optometrists' interest in selling expensive eyeglass frames to their customers on a regular basis.

In short, the ECCPL does not require ophthalmologists to conduct comprehensive eye-health examinations; instead, it requires in-person exams by someone (who can be anyone) who is looking for something (which can be anything). And it requires these in-person exams far more frequently than practicing doctors believe comprehensive eye-health examinations are necessary for the vast majority of the population. These requirements bear strikingly little relationship to a concern about the detection of eye disease in the general public, but they bear an undeniable relationship to the economic interests of practicing optometrists—the very group that everyone agrees drafted and lobbied for the law in the first place. The question before the Court, as discussed below, is whether this kind of pure economic protectionism is a valid use of government power under the South Carolina Constitution.

STANDARD OF REVIEW

"Summary judgment is appropriate where the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Lawing v. Univar, USA, Inc.*, 415 S.C. 209, 220, 781 S.E.2d 548, 554 (2015); *accord Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 448, 790 S.E.2d 763, 769 (2016) (plurality). Material facts cannot be disputed based upon mere denials or averments of ignorance as to the factual basis for allegations set forth in the pleadings. *Bankers Tr. of S.C. v. Benson*, 267 S.C. 152, 154–55, 226 S.E.2d 703, 704 (1976). Nor will contrary allegations suffice. *City of Columbia v. Town of Irmo*, 316 S.C. 193, 195, 447 S.E.2d 855, 857 (1994). Instead, the non-

moving party must proffer actual evidence of a specific factual dispute. *Coker v. Cummings*, 381 S.C. 45, 54–55, 671 S.E.2d 383, 388 (Ct. App. 2008). If the non-moving party fails to meet that burden, the trial court must enter summary judgment. *Id.* at 55, 671 S.E.2d at 388.

ARGUMENT

Summary judgment is appropriate in this case because the undisputed evidence reveals the ECCPL to be nothing more than a protectionist law designed to ban Opternative's Technology in order to protect South Carolina optometrists' outdated business model from competition, and protectionism is not a legitimate use of the state's police power. Moreover, this case is brought under the South Carolina Constitution, which demands a far more searching version of rational-basis review than is sometimes applied by federal courts. Not only have South Carolina courts squarely rejected the sort of naked economic protectionism embodied by the ECCPL, but South Carolina's due-process and equal-protection jurisprudence demand that economic regulations like the ECCPL bear a real and substantial relationship to some legitimate, non-protectionist end of government—a standard the ECCPL cannot hope to meet.

I. The South Carolina Rational-Basis Test Controls.

Plaintiff challenges the ECCPL under Article I, Section 3 of the South Carolina Constitution—and only that provision. Because this case involves no suspect class or fundamental right, the rational-basis test applies. *Denene, Inc. v. City of Charleston*, 359 S.C. 85, 91, 596 S.E.2d 917, 920 (2004). But this Court is bound to apply the version of that test articulated and applied by South Carolina courts—and that test (unlike some articulations of the federal rational-basis test) requires an inquiry into the true purpose of a statute and whether the record evidence suggests that the statute actually serves that purpose. As explained more fully below, under *that* test, the ECCPL cannot hope to survive. *See infra* 23–35.

This difference between state and federal law matters because the facts of this case bear a striking resemblance to those considered by the United States Supreme Court over a half-century ago in *Williamson v. Lee Optical of Oklahoma, Inc.* *See* 348 U.S. 483 (1955). There, an Oklahoma statute made it illegal for opticians to fit already-prescribed lenses into new eyeglass frames, or to replace those lenses when they broke, unless customers obtained an additional prescription from a state-licensed optometrist or ophthalmologist. *Id.* at 485. A review of the record led the District Court to conclude that while some patient-health interest was at stake, banning opticians from "tak[ing] old lenses and plac[ing] them in new frames and then fit[ting] the completed spectacles to the face of the eyeglass wearer" failed to further that interest by means "reasonably necessary []or reasonably related to the end sought to be achieved." *Lee Optical of Okla., Inc. v. Williamson*, 120 F. Supp. 128, 135, 137 (W.D. Okla. 1954).

But the Supreme Court reversed. Rather than weigh record evidence to determine whether the law actually protected patient health, the Court suggested that no such facts were necessary to dispose of the challenge: "[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it." *Lee Optical*, 348 U.S. at 487–88. The Court suggested that "the legislature may have concluded that eye examinations were so critical, not only for correction of vision but also for detection of latent ailments or disease, that every change in frames and every duplication of a lens should be accompanied by a prescription from a medical expert." *Id.* at 487.

Defendants will undoubtedly invoke *Lee Optical* here, arguing that the ECCPL makes it harder to get corrective-lens prescriptions without going to an optometrist or ophthalmologist's office, and that simply being in such an office makes it more likely that certain eye diseases will

be detected. But *Lee Optical* does not control the outcome of this case. Indeed, *Lee Optical* does not even describe the rational-basis test as actually applied by modern federal courts: Modern federal courts have repeatedly rejected regulations that, like the regulation at issue here, are justified by purported "health and safety" concerns that the government has declined to regulate more directly. *See, e.g.*, *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002).

Moreover, the South Carolina Supreme Court has never adopted *Lee Optical*. Quite the contrary: The case has been cited all of twice in South Carolina history, most recently in a two-Justice plurality opinion—which cites it in dicta, in a footnote noting that the plaintiff had failed to make arguments "sufficient to invoke the rational basis test." *State v. Dykes*, 398 S.C. 351, 369, 728 S.E.2d 455, 464 n.8 (2012), *superseded by State v. Dykes*, 403 S.C. 499, 744 S.E.2d 505 (2013); *see also Dantzler v. Callison*, 230 S.C. 75, 94 S.E.2d 177 (1956) (weighing challenge under Article 3, Section 17 of the South Carolina Constitution and citing *Lee Optical* in dicta as illustration of police power). And South Carolina courts have flatly disclaimed acquiescence to the federal judiciary on questions of state-constitutional interpretation. *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 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.").

Most significantly for purposes of this case, South Carolina's courts have read the South Carolina Constitution to provide far more robust protection for individual rights against economic regulations than the sort of deference embodied by *Lee Optical*. Indeed, twice in the

past year alone, pluralities of the South Carolina Supreme Court have used the specific guarantees of the South Carolina Constitution to reject economic regulations subject to so-called "rational-basis review." *See Retail Servs. & Sys., Inc. v. S.C. Dep't of Revenue*, 419 S.C. 469, 474, 799 S.E.2d 665, 667 (2017) (plurality) (rejecting law restricting liquor-license ownership); *accord Joseph v. S.C. Dep't of Labor, Licensing & Regulation*, 417 S.C. 436, 453, 790 S.E.2d 763, 772 (2016) (plurality) ("It is the duty of this Court, not the legislature, to determine the constitutionality of a statute.").

South Carolina's robust review of economic regulation is not an anomaly; it is a natural outgrowth of South Carolina's independent constitutional language. Neither is South Carolina alone here: Other states with similar constitutions to South Carolina's have similarly rejected *Lee Optical*-style deference in favor of more meaningful review of economic regulations. For example, Texas, like South Carolina, has a state constitution whose individual-rights protections that are phrased differently than those of the United States Constitution and which state courts have applied differently.[74] As in South Carolina, the relevant language of Texas's Constitution was adopted in the second half of the 19th century, "after the United States Supreme Court decision in the *Slaughter-House Cases* by which the Court put the responsibility for protecting a large segment of individual rights directly on the states." *Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 87 (Tex. 2015).[75] And as in South Carolina, Texas courts have held

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[74] Article I, Section 3 of the South Carolina Constitution, the provision raised in this action, reads: "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." Article I, Section 19 of the Texas Constitution similarly provides: "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land."

[75] The relevant provision of Texas's Constitution was adopted in 1875. *Id.* at 86–87. The relevant provision of the South Carolina Constitution was adopted in 1895. *See State v. Duncan*,

that their independent Constitution was meant to take this responsibility seriously and have interpreted it to provide more robust protection for individual rights than is provided in some instances by the U.S. Constitution. *Id.*

Specifically, Texas courts interpret their Constitution to require a real examination of record evidence to determine whether a challenged "statute's purpose could not arguably be rationally related to a legitimate governmental interest" or "when considered as a whole, the statute's actual, real-world effect as applied to the challenging party could not arguably be rationally related to, or is so burdensome as to be oppressive in light of, the governmental interest." *Id.* In other words, in interpreting Texas's parallel constitutional provision, Texas courts look both to the arguable legislative motive and to the evidence of the effect a challenged law would have in the real world. The Texas Supreme Court in *Patel* used this test in 2015 to reject a cosmetology regulation that, while nominally related to public health and safety, did not actually achieve public-safety goals commensurate with the restrictions it imposed on individuals. *See id.* at 87–90.

As discussed more fully below, the South Carolina Supreme Court has interpreted its own independent Constitution to require review just as robust as that of Texas (if not more so). South Carolina courts are *also* charged to examine whether a law's actual purpose is a legitimate one and are *also* charged to examine record evidence to determine whether, in the real world, a law actually serves that legitimate purpose (instead of another, illegitimate purpose). As explained below, the ECCPL fails on both scores, and summary judgment should therefore be granted in favor of Plaintiff.

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269 S.C. 510, 512, 238 S.E.2d 205, 206 n.2 (1977); *Standard Oil Co. v. City of Spartanburg*, 66 S.C. 37, 44 S.E. 377, 377 (1903).

II. The ECCPL Is A Purely Protectionist Law, And Protectionism Is Not A Legitimate Government End.

Article I, Section 3 of the South Carolina Constitution secures individual rights against encroachment by government power: "The privileges and immunities of citizens of this State and of the United States under this Constitution shall not be abridged, nor shall any person be deprived of life, liberty, or property without due process of law, nor shall any person be denied the equal protection of the laws." S.C. Const. art I, § 3. Under any provision of Article I, Section 3, whether styled as a due process or equal protection guarantee, the fundamental requirement is that all exercises of the police power further a *legitimate* government end, such as the protection of the public health or safety. *See Denene, Inc.*, 359 S.C. at 93, 596 S.E.2d at 921; *R.L. Jordan Co. v. Boardman Petroleum, Inc.*, 338 S.C. 475, 478, 527 S.E.2d 763, 765 (2000) (per curiam).

While the police power is broad, South Carolina has a proud tradition of consistently rejecting naked economic protectionism. *See, e.g.*, *Retail Servs. & Sys., Inc. v. S.C. Dep't of Revenue*, 419 S.C. 469, 474, 799 S.E.2d 665, 667 (2017) (plurality) (rejecting law limiting owner to three retail liquor licenses because economic 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 771–72 (plurality) (striking down arbitrary employment and referral restriction on physical therapists and surgeons as merely anti-competitive regulation intended to protect therapists' personal financial interests rather than those of patients); *Kirven v. Cent. States Health & Life Co.*, 409 S.C. 30, 42–43, 760 S.E.2d 794, 801 (2014) (rejecting retroactive application of statutory definition to existing insurance contracts because it appeared that insurance industry had merely convinced General Assembly to contract for them by fiat); *ATC S., Inc. v. Charleston Cty.*, 380 S.C. 191, 198, 669 S.E.2d 337, 340 (2008) (denying standing to

cell-phone-tower company seeking to use zoning system to prevent competitor from building tower on nearby land because increased business competition is not a cognizable injury); *G-H Ins. Agency, Inc. v. Cont'l Ins. Co.*, 278 S.C. 241, 248–49, 294 S.E.2d 336, 340–41 (1982) (striking down law forbidding auto-insurance providers from terminating agents where it appeared that predominant purpose was merely to protect private profits of insurance agents rather than any broader social interest); *Painter v. Town of Forest Acres*, 231 S.C. 56, 61, 97 S.E.2d 71, 73 (1957) (rejecting ordinance requiring all businesses to close at midnight where ordinance would have destroyed lawful enterprises and appeared directed at respondent with that purpose in mind); *McCoy v. Town of York*, 193 S.C. 390, 8 S.E.2d 905, 907–09 (1940) (striking down petroleum-vehicle restrictions so specific as to apply to only one filling station because restrictions appeared designed to discriminate against that station to benefit of all other local stations); *City of Orangeburg v. Farmer*, 181 S.C. 143, 186 S.E. 783, 785 (1936) (rejecting ordinance declaring door-to-door solicitation a nuisance where no public-health justification appeared and ordinance was passed not due to complaints by homeowners but at request of city's Retail Merchants Association).

Thus, where a challenged law appears designed to further merely private interests rather than some broader social purpose, or its asserted justification appears spurious, courts in this state will not hesitate to recognize economic protectionism as the true motivation behind that law and strike it down.

This approach is perhaps best illustrated by the South Carolina Supreme Court's recent plurality opinion in *Joseph*. *See* 417 S.C. at 442, 790 S.E.2d at 766.[76] There, a physical therapist

[76] While the lead opinion in *Joseph* commanded only two votes, two Justices dissented on the grounds that the appellants lacked standing while calling the lead opinion otherwise "laudable." 417 S.C. at 466, 790 S.E.2d at 799 (Beatty, J., dissenting).

and two orthopedic surgeons challenged certain South Carolina Board of Physical Therapy position statements and judicial precedent interpreting a law that allowed physicians to employ and refer patients to healthcare professionals according to their judgment—*except* physical therapists, who could only be employed by and refer patients to one another. *Id.* at 446, 790 S.E.2d at 768. The government claimed the distinction was intended to protect patients and state-sponsored programs from conflicts of interest, but the Court did not hesitate to pull back the veil to identify the true motivation at work: "[This law] appears merely to be anti-competitive protectionist legislation intended to protect personal financial interests, which is driven by reimbursement purposes, rather than actual benefits to patients." *Id.* at 452–53, 790 S.E.2d at 771–72. The interpretation was declared unconstitutional. *Id.* at 453, 790 S.E.2d at 771–72.

Similarly here, the overwhelming evidence indicates that the ECCPL was intended to protect the personal financial interests of optometrists rather than to serve patient health. While the Court in *Joseph* made an inference about the corrupt purpose of the challenged law based on the lack of any plausible connection to a legitimate justification, here there is actually *direct evidence* that the ECCPL was designed by the very group that stands to benefit economically from its enforcement.[77] Moreover, just as the interpretation in *Joseph* appeared arbitrary absent any evidence that it protected patients, so the ECCPL—which does nothing to require a

[77] *See* Windham Aff., Ex. 7 at 501 (AOA e-mail to state affiliate on "the Opternative issue" and forecasting plan to "stop this from operating in your state"); *id.*, Ex. 2 at 152–53 (Zolman post-webinar e-mail to SCOPA Board stressing that "kiosks and online eye exams" posed "a huge threat to our profession" and recommending that SCOPA adapt the AOA's model legislation for a legislative campaign); *id.* at 152 (Cannon e-mail informing SCOPA's lobbyists that the Board had voted to pursue Zolman's recommendation); *id.*, Ex. 5 at 23:13–23:15, 34:17–34:20, 38:6–38:14 (Rivers taking complete responsibility for the ECCPL on SCOPA's behalf); *id.*, Ex. 3 at 129 (Zolman boasting to SCOPA's membership after veto override about SCOPA's efforts to get the ECCPL passed and exclaiming that "Opternative and 'eye exam' kiosks are now **PROHIBITED BY LAW** in the great state of SC!"); *id.*, Ex. 10 at 203 (SCOPA presentation slide portraying "The Results…" of SCOPA's efforts to get the ECCPL passed and prominently displaying the word "Opternative" with a red circle and strikethrough).

comprehensive eye-health examination—is arbitrary if viewed as anything *other* than economic protectionism: Indeed, the only justification in the record is that requiring an examination by a human being *might* result in ophthalmologists' choosing to conduct comprehensive eye-health exams more frequently than they otherwise would.[78] But again, Defendants admit they have no evidence for this justification, and the ophthalmological standard of care does not even recommend annual comprehensive eye-health examinations for the vast majority of the population.[79]

Accordingly, the ECCPL is nothing more than "anti-competitive protectionist legislation" of the sort expressly rejected in *Joseph*, and is beyond the legitimate bounds of the state's police power. The ECCPL therefore violates the South Carolina Constitution, and summary judgment should be granted in Plaintiff's favor.

III. The ECCPL Lacks A Rational Relationship To Patient Health And Thereby Violates Both Due Process And Equal Protection.

The best either Defendants or Defendant-Intervenor can muster in defense of the ECCPL is to say that comprehensive eye-health examinations are good, and that certain diseases of the eye can be detected in the course of such examinations. But that rationale simply has no connection to the ECCPL, which: (1) requires prescriptions to be renewed annually (even though the relevant ophthalmological guidelines do not call for comprehensive eye-health exams on an annual basis); and (2) in any event, does not require ophthalmologists to conduct in-person examinations at all—only that some information (any information) be collected by a human (any

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[78] *See id.*, Ex. 17 at ¶ 1 (SCOPA interrogatory response asserting that "[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").

[79] *See id.*, Ex. 11 at 54:22–55:7, 55:9–56:1 (Coleman admitting that Defendants have no evidence that the ECCPL actually protects the public health or safety); *id.*, Ex. 4 at 2 (American Academy of Ophthalmology policy statement); *see also* Chaum Aff. at ¶ 4.

human) who then reports that information to the ophthalmologist. This falls far short of the kind of genuine relationship to public health and safety that South Carolina courts consistently demand under the South Carolina Constitution's due-process and equal-protection guarantees.

A. The ECCPL lacks a reasonable relationship to patient health and thereby violates due process.

The South Carolina Supreme Court has recently clarified that the standard for reviewing all substantive-due-process challenges to state statutes is: "Whether it bears a reasonable relationship to any legitimate interest of government." *Boardman*, 338 S.C. at 478, 527 S.E.2d at 765. This makes sense, because the whole point of substantive due process is to protect against arbitrary deprivations of life, liberty, and property. *Worsley Cos. v. Town of Mount Pleasant*, 339 S.C. 51, 56, 528 S.E.2d 657, 660 (2000). While the threshold is not high in rational-basis cases, it nonetheless demands a genuine inquiry into how a law actually operates: Unlike federal courts, which sometimes reach for any *conceivable* justification, South Carolina courts consistently look to see whether laws have *plausible* justifications. *Joseph*, 417 S.C. at 452, 790 S.E.2d at 771 (plurality opinion); *see also Lurey v. City of Laurens*, 265 S.C. 217, 222, 217 S.E.2d 226, 228 (1975) (principle of avoiding judicial lawmaking "does not suggest that this Court should abdicate its obligation to closely scrutinize legitimate constitutional questions").

In practice, this means requiring that the relationship between a law and its purported end have at least some basis in fact, and rejecting mere speculation as a substitute for that relationship. *See, e.g.*, *Retail Servs.*, 419 S.C. at 475–76, 799 S.E.2d at 668 (plurality opinion) (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 articulate basis for law rooted in actual benefits to patients); *Kirven*, 409 S.C. at 43, 760 S.E.2d at 801

(striking down retroactive application of statutory definition to existing insurance contracts absent showing that actual language of definition addressed some important societal problem); *G-H Ins. Agency*, 278 S.C. at 248–49, 294 S.E.2d at 340 (rejecting law forbidding auto-insurance providers from terminating agents where experience revealed that provision lacked tailoring that should have been obvious given purpose of law); *McCoy*, 193 S.C. 390, 8 S.E.2d at 907–09 (striking down petroleum-vehicle restrictions for lack of real connection to actual dangers involved in handling petroleum despite recitation of protective purpose in preamble); *Orangeburg*, 181 S.C. 143, 186 S.E. at 785 (rejecting ordinance banning door-to-door solicitation where appellant offered testimony to effect that solicitation was harmless and ordinance lacked tailoring to valid public health concern despite numerous less-restrictive alternatives).

The thrust is that under the South Carolina Constitution, where the evidence reveals no tendency in a law to serve its purported purpose, and there appear to be obvious means by which it might have done so, that law is arbitrary and cannot survive even rational-basis review.

Joseph is again illustrative. There, the question was whether a statutory interpretation that banned physicians from employing and referring patients to physical therapists was rationally related to the goal of protecting patients and state-sponsored programs from conflicts of interest. *Joseph*, 417 S.C. at 443–46, 790 S.E.2d at 766–68. The Court observed that if the statute were actually intended to do that, it would have 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. Similarly, in *Retail Services*, the Court was not persuaded by the fact that (as the dissent noted)

the challenged statute's protectionist justifications were "listed *after* several non-protectionist motives, such as promoting temperance by discouraging business practices that promote alcohol consumption." *Retail Servs.*, 419 S.C. at 480, 799 S.E.2d at 670 (dissenting opinion). These notional rationales, the plurality noted, were simply "not supported by the record below." 419 S.C. at 475, 799 S.E.2d at 668.

Similarly, here, the challenged law can be supported only by hypothetical rationales, not by record evidence of how it actually addresses patient safety. Just like the statutory interpretation in *Joseph*, which deprived physicians of the right to practice in the best interests of their patients, the ECCPL deprives South Carolina-licensed ophthalmologists from using their medical judgment to write corrective-lens prescriptions for patients who need them.[80] Defendant-Intervenor admits that there is real patient demand for more convenient and affordable access to updated corrective-lens prescriptions, and that Opternative's Technology would help meet this demand.[81] Even Michael Zolman, who led SCOPA's efforts to pass the ECCPL, concedes that in some circumstances updating a corrective-lens prescription without first conducting a comprehensive eye-health examination neither violates the standard of care nor endangers patient health, but instead can actually *improve* patients' quality of life.[82] And the South Carolina-licensed ophthalmologists who have exercised their medical judgment to use Opternative's Technology in appropriate cases obviously agree.[83]

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[80] *See* Chaum Aff. at ¶ 3.

[81] *See* Windham Aff., Ex. 2 at 153 (Zolman asking rhetorically "how many patients do we see daily who really come in just wanting a new prescription for glasses and/or contacts?" and remarking that online refractive technology would "allow them to get what they want"); *see also, e.g.*, Bodde Aff. at ¶ 10; Chaum Aff. at ¶ 4.

[82] *See* Windham Aff., Ex. 1 at 32:8–33:14, 47:5–48:3.

[83] *See* Chaum Aff. at ¶¶ 2, 4.

Moreover, just as there was an obvious means by which the statute in *Joseph* could have addressed the government's purported concern, there are numerous simple ways that the ECCPL could have addressed the "diseases-might-be-missed" issue if that were truly the law's motivating concern (which it was not). As explained above, the ECCPL requires valid corrective-lens prescriptions to: (1) expire annually; and (2) be based on an eye examination that includes (a) a written or electronic medical history, (b) an assessment of the patient's visual acuity (including refractive error), *plus* (c) some additional "medical findings." *See generally* S.C. Code Ann. §§ 40-24-10 and 40-24-20.

But the ECCPL fails to specify *which* medical findings must be made, *how*, or even *by whom*. The law could have required that they be made during an in-person, comprehensive eye-health exam—it does not.[84] It could have required ophthalmologists to physically examine patients for certain ocular-pathological risk factors before writing prescriptions—it does not.[85] It could have even required ophthalmologists to take particular medical facts into account before writing prescriptions—it does not.[86] It does not require these things because for most people, annual comprehensive eye-health exams are unnecessary, and South Carolina law relies on ophthalmologists (like other doctors) to exercise their medical judgment on a case-by-case basis—*unless* the ophthalmologist is using computerized technology.

Instead of requiring that a doctor conduct a particular test or search for particular diseases, all the ECCPL requires is that a doctor writing a corrective-lens prescription rely on

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[84] *See* Windham Aff., Ex. 11 at 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").

[85] *See id.* at 64:16–65:2 (Coleman explaining that the ECCPL has "no explicit requirement" regarding tests that must be performed before writing a corrective-lens prescription).

[86] *See id.* at 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").

information collected by a human being instead of an automated device.[87] Unsurprisingly, Defendant-Intervenor has failed to produce any evidence that restricting ophthalmologists' medical judgment in this way—and *only* in this way—actually protects patient health, and Defendants outright admit they have none.[88] By contrast, the impact on SCOPA's members' economic well-being is obvious: Opternative's Technology is automated, and it is therefore banned.[89]

In short, just like in *Joseph* and the numerous other cases cited above, there is no evidence here that the ECCPL furthers a public health or safety purpose. The law hinders patient health by preventing ophthalmologists from using innovative technology to write corrective-lens prescriptions—prescriptions their patients want—when their medical judgment indicates that such prescriptions are appropriate and within the ophthalmological standard of care. And it lacks any of the obvious tailoring that would be expected of a law actually designed to address the "diseases-might-be-missed" justification. Accordingly, the ECCPL is arbitrary, does not bear a reasonable relationship to patient health, and cannot stand under the Article I, Section 3's guarantee of due process.

B. The ECCPL lacks a fair and substantial relationship to patient health and thereby violates equal protection.

The basic mandate of equal protection is that government classifications 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.

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[87] *See id.* at 67:14–67:18 (Coleman explaining that the ECCPL imposes "some expectation that there will be some type of human involvement").

[88] *See id.*, Ex. 11 at 54:22–55:7, 55:9–56:1 (Coleman admitting that Defendants have no evidence that the ECCPL actually protects the public health or safety)

[89] *See* Bodde Aff. at ¶¶ 6, 12–13; Chaum Aff. at ¶¶ 2–3.

App. 2009) (citation omitted). Should the Court decide to credit SCOPA's spurious "diseases-might-be-missed" justification, therefore, equal protection still demands that any classifications drawn by the ECCPL bear a fair and substantial relationship to that end. As in the substantive-due-process context, while this is not a heavy burden, it does still require that classifications find their basis in *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." (emphasis added) (citation omitted)).

Indeed, it is only when such facts support the classification as a reasonable means of achieving the asserted end that the relationship between the two can be called "fair and substantial," and courts in this state have no trouble recognizing when no such relationship exists. *See, e.g.*, *Joseph*, 417 S.C. at 452, 790 S.E.2d at 771 (plurality opinion) (law prohibiting physicians from employing physical therapists and referring patients to them was not calculated to further asserted end); *Hanvey v. Oconee Mem'l Hosp.*, 308 S.C. 1, 5, 416 S.E.2d 623, 626 (1992) (law lacked rational basis for distinguishing between charitable hospitals and other medical providers for purposes of limiting liability); *Broome v. Truluck*, 270 S.C. 227, 230–31, 241 S.E.2d 739, 740 (1978) (law lacked rational basis for drawing statute-of-limitations distinctions for recovery against various professionals whose work involved designing improvements to real estate); *Daniel*, 268 S.C. at 14, 231 S.E.2d at 294 (law prohibiting practice of fortunetelling in some counties but not others was not based on any real difference between fortunetellers); *Gasque, Inc. v. Nates*, 191 S.C. 271, 2 S.E.2d 36, 44 (1939) (law imposing maximum-hours caps on certain manufacturing and mercantile establishments but not others was not based on any material differences between such establishments).

The ECCPL draws two clear classifications. First, the law penalizes South Carolina-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 manually by a human being. *See generally* S.C. Code Ann. §§ 40-24-10 and 40-24-20. Second, the law forbids South Carolina-licensed ophthalmologists from using telehealth technologies to provide services according to their medical judgment and within the relevant standard of care, while all other South Carolina-licensed physicians are statutorily permitted to do just that. *See* S.C. Code Ann. § 40-47-37. The question for both is whether the classification bears a fair and substantial relationship to the "diseases-might-be-missed" justification.

As for the first, *Daniel* is instructive. There, a statute prohibiting licensed fortunetellers from practicing in one county while allowing them to practice in the other state counties was challenged under Article I, Section 3. *Daniel*, 268 S.C. at 13–14, 231 S.E.2d at 294. Relying on the principle that "[i]f there is no real difference between localities, persons, occupations, or property, the State cannot make one," the South Carolina Supreme Court found no rational basis for the classification and struck it down as an equal-protection violation. *Id.*, 231 S.E.2d at 294 (citation omitted).

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 South Carolina-licensed ophthalmologists to use Opternative's Technology to write corrective-lens prescriptions based on information collected by a physical person who manually recorded

patients' responses using, say, a clipboard.[90] But the same prescription based on the same information would be banned if the ophthalmologist received that information directly from Opternative's Technology, over the Internet.[91] 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 generally allowed to do so for 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 442–43, 790 S.E.2d at 767, 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.

Just like the physical therapists in *Joseph*, 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 generally* S.C. Code Ann. §§ 40-24-10 and 40-24-20. All other South Carolina-licensed physicians are statutorily permitted to do so without running afoul of the "diseases-might-be-missed" concern in their respective practice areas. *See id.* § 40-47-37. And neither Defendants nor Defendant-

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[90] *See* Defs.' Mot. Summ. J. 9 ("[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 [sic] by a kiosk.").

[91] *See* Windham Aff., Ex. 11 at 67:14–67:18 (Coleman explaining that the ECCPL imposes "some expectation that there will be some type of human involvement").

Intervenor have 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.

In sum, SCOPA contends that the ECCPL is designed to prevent certain diseases of the eye from going undetected. But the record is utterly devoid of evidence that would help to explain how either of the two distinctions discussed above alleviate that concern. The argument for the ECCPL seems to boil down to: "If Opternative is banned, then patients will need to see their optometrists more frequently—where, perhaps, they will receive comprehensive eye-health exams." While that sort of purely speculative argument may have carried the day in *Lee Optical*, it is not the stuff of which "fair and substantial" relationships are made. The South Carolina Constitution, equal protection, and common sense demand more.

CONCLUSION

The ECCPL is a purely protectionist law that bears no rational relationship to patient health or safety, which violates both the due-process and equal-protection guarantees of the South Carolina Constitution. Plaintiff therefore respectfully requests this Court to issue an Order granting summary judgment for Plaintiff on both claims, declaring the ECCPL unconstitutional, and permanently enjoining Defendants from enforcing that law.

[*SIGNATURE PAGE ATTACHED*]

Respectfully submitted,

INSTITUTE FOR JUSTICE

Robert J. McNamara*
VA Bar No. 73208
E-Mail: rmcnamara@ij.org
Joshua A. Windham*
NC Bar No. 51071
E-Mail: jwindham@ij.org
901 North Glebe Road, Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
**Admitted Pro Hac Vice*

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: _____
Miles E. Coleman
SC Bar No. 78264
E-Mail: miles.coleman@nelsonmullins.com
William C. Wood, Jr.
SC Bar No. 015111
E–Mail: bill.wood@nelsonmullins.com
1320 Main Street / 17th Floor
Post Office Box 11070 (29211-1070)
Columbia, SC 29201
Tel: (803) 799-2000

Attorneys for Plaintiff Opternative, Inc.

Columbia, South Carolina
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