

STATE OF INDIANA ) IN THE MARION SUPERIOR/CIRCUIT COURT  
 ) ss:  
COUNTY OF MARION ) CAUSE NO.: \_\_\_\_\_

VISIBLY, INC., )  
 )  
Plaintiff, )

vs. )

The MEDICAL LICENSING BOARD OF )  
INDIANA; JOHN STROBEL, in his official )  
capacity as the President of the Medical )  
Licensing Board of Indiana; KIRK MATSEN, )  
in his official capacity as the Vice President of )  
the Medical Licensing Board of Indiana; )  
VICTORIA MCCANN, in her official capacity )  
as the Secretary of the Medical Licensing )  
Board of Indiana; BHARAT BARAI, in his )  
official capacity as a Member of the Medical )  
Licensing Board of Indiana; REBECCA )  
MOREDOCK-MUELLER, in her official )  
capacity as a Member of the Medical Licensing )  
Board of Indiana; SCOTT GREEN, in his )  
official capacity as a Member of the Medical )  
Licensing Board of Indiana; MICHAEL )  
BUSK, in his official capacity as a Member of )  
the Medical Licensing Board of Indiana; the )  
INDIANA PROFESSIONAL LICENSING )  
AGENCY; FRANCES KELLY, in her official )  
capacity as the Executive Director of the )  
Indiana Professional Licensing Agency; )  
CURTIS HILL, in his official capacity as the )  
Indiana Attorney General; and BETSY )  
DENARDI, in her official capacity as the )  
Director of the Consumer Protection Division )  
of the Office of the Indiana Attorney General, )

Defendants. )

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**COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

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## **INTRODUCTION**

1. This civil-rights lawsuit seeks to vindicate the rights of entrepreneurs and doctors to develop and use innovative technology that expands access to health-care services. Plaintiff Visibly, Inc. (“Visibly”), has developed a way for customers to take an online refractive test and have their results sent to a licensed doctor, who can use the results to write a prescription for new glasses or contact lenses where appropriate. Visibly’s technology has been used across the country, including in Indiana, to safely and effectively expand access to eye care. But a 2016 law, which legalized telemedicine in general but banned it for corrective lenses in particular, forbids doctors from using Visibly’s technology to write any further prescriptions.

2. The purpose of this ban on Visibly’s technology is not to protect the public health or safety. Indeed, Indiana’s telemedicine law recognizes that, in principle, telemedicine offers a safe and effective means of expanding access to care. The purpose of banning Visibly’s technology, rather, is to protect brick-and-mortar optometrists from competition.

3. That is unconstitutional. Article 1, Section 1 of the Indiana Constitution forbids the legislature from imposing arbitrary, irrational, and protectionist restrictions on the right to earn an honest living. Article 1, Section 23 of the Indiana Constitution also forbids the legislature from granting exclusive or special privileges to some groups but not to others who are similarly situated. Because Indiana’s ban on Visibly’s technology violates both provisions, Defendants must be enjoined from enforcing the law.

## **JURISDICTION AND VENUE**

4. Plaintiff brings this action under Article 1, Sections 1 and 23 of the Indiana Constitution and the Uniform Declaratory Judgment Act, Ind. Code §§ 34-14-1-1, *et seq.*

5. Plaintiff seeks declaratory and injunctive relief against enforcement of Indiana’s categorical ban on using telemedicine to prescribe ophthalmic devices (i.e., corrective lenses), Ind. Code § 25-1-9.5-8(a)(5) (the “Corrective Lens Exception”)—despite the state’s generally permissive telemedicine law, Ind. Code §§ 25-1-9.5-1, *et seq.* (the “Telemedicine Law”)—which violates Plaintiff’s right to be free from laws that grant exclusive or unequal privileges, and to due process of law.

6. The Marion County Circuit Court and Marion County Superior Court have jurisdiction under Indiana Code sections 33-28-1-2 and 33-29-1.5-2, respectively.

7. Venue lies in either Court under Indiana Rule of Trial Procedure 75 and Marion County Local Rule 49-TR3-200.

## **PARTIES**

### **I. Plaintiff**

8. Plaintiff Visibly is a Delaware corporation headquartered in Chicago, Illinois. Visibly is a healthcare-technology company that has developed innovative technology that allows customers to take an online refractive test and have their results sent to a licensed doctor, who can use the results to write a prescription for new glasses or contact lenses if, in their medical judgment, it would be appropriate to do so. In short, Visibly’s technology gives customers a way to obtain a new corrective-lens prescription from the comfort of their own homes.

### **II. Defendants**

9. Defendant Medical Licensing Board of Indiana is the state agency responsible for licensing, regulating, and sanctioning physicians and, along with the other Defendants, for enforcing the Corrective Lens Exception. *See* Ind. Code §§ 25-22.5-2-7, 25-1-9-4, 25-1-9.5-10.

10. Defendants John Strobel, Kirk Matsen, Victoria McCann, Bharat Barai, Rebecca Moredock-Mueller, Scott Green, and Michael Busk, in their official capacities as members and executive officers of the Medical Licensing Board of Indiana, are responsible for carrying out its powers and duties, including enforcement of the Corrective Lens Exception. *See id.* §§ 25-22.5-2-7, 25-1-9-4, 25-1-9.5-10

11. Defendant Indiana Professional Licensing Agency is the state agency responsible for coordinating the administrative duties and functions of Indiana's various professional licensing boards and, along with the other Defendants, for enforcing the Corrective Lens Exception. *See id.* §§ 25-1-6-4 & 25-1-9.5-10.

12. Defendant Frances Kelly, in her official capacity as the Executive Director of the Indiana Professional Licensing Agency, is responsible for carrying out its powers and duties, including enforcement of the Corrective Lens Exception. *See id.* §§ 25-1-6-5, 25-1-7-5, 25-1-9.5-10.

13. Defendant Curtis Hill, in his official capacity as the Indiana Attorney General, is responsible for receiving, investigating, and prosecuting complaints filed against physicians and, along with the other Defendants, for enforcing the Corrective Lens Exception. *See id.* §§ 25-1-7-2 & 25-1-9.5-10.

14. Defendant Betsy Denardi, in her official capacity as the Director of the Consumer Protection Division of the Office of the Indiana Attorney General, is responsible for receiving, investigating, and prosecuting complaints filed against physicians and, along with the other Defendants, for enforcing the Corrective Lens Exception. *See id.* §§ 25-1-7-3 & 25-1-9.5-10.

## **FACTS**

### **I. Visibly's Innovative Technology**

#### **A. Traditional Vision Tests**

15. Traditionally, the only way for a patient to obtain a prescription for new glasses or contact lenses was to physically travel to an ophthalmologist's or optometrist's office to take a refractive eye test.

16. Ophthalmologists are medical doctors specializing in total eye and vision care, who are qualified chiefly to conduct eye exams and vision tests, diagnose and treat ocular diseases, perform ocular surgeries, and prescribe corrective lenses.

17. Optometrists are not medical doctors, but more limited medical professionals who are qualified chiefly to conduct eye exams and vision tests, diagnose and treat certain ocular diseases, and prescribe corrective lenses.

18. A refractive test is a method of measuring a patient's refractive error to determine the appropriate corrective-lens prescription.

19. Refractive tests are distinct from comprehensive eye examinations in that refractive tests gauge only visual acuity, while comprehensive exams gauge overall eye health.

20. Some refractive tests are objective, in that they involve physically measuring a patient's eyes to determine their refractive error.

21. Traditional refractive tests, by contrast, are subjective, in that they rely on self-reporting to determine a patient's refractive error.

22. In a traditional refractive test, a patient sits in a chair and views various images through a lens-switching device called a phoropter. The patient reports what they see as an ophthalmologist or optometrist switches lenses to test the patient's vision. The ophthalmologist

or optometrist then uses the patient's responses to determine their refractive error and, in turn, the appropriate corrective-lens prescription.

23. It is both common and consistent with the standard of care for ophthalmologists and optometrists to allow clinical assistants (including unlicensed assistants) to perform a refractive test and record the patient's responses in the ophthalmologist's or optometrist's absence.

24. It is both common and consistent with the standard of care for ophthalmologists and optometrists to write corrective-lens prescriptions based on the results of refractive tests performed by clinical assistants (including unlicensed assistants) in the ophthalmologist's or optometrist's absence.

**B. Visibly's Online Vision Test**

25. Steven Lee is an Illinois-licensed optometrist who has conducted over 20,000 refractive eye tests.

26. In his practice, Lee found that traditional refractive tests were needlessly time-consuming and inconvenient for patients, since the only way for most patients to take one was to physically travel to a brick-and-mortar ophthalmology or optometry office.

27. Given advances in technology, however, Lee knew there must be a way to incorporate the same self-reporting principle at the core of traditional refractive tests (namely, reporting responses to images shown on a screen) into a test that anybody could take from home over the internet.

28. Lee also knew there would be real patient demand for a more convenient means of obtaining a corrective-lens prescription.

29. Thus, in 2012, Lee founded healthcare-technology company Visibly (then called Opternative) to produce such a product.

30. Visibly's online refractive test went live in 2014.

31. To take the test, customers start by visiting Visibly's website (<https://govisibly.com/>) and answering a series of screening questions about their existing corrective-lens prescription, most recent comprehensive eye exam, and relevant medical history.

32. Visibly's software then prompts customers with a series of written and audio questions that guide them through a vision test.

33. Customers next view various individually calibrated images on a computer screen and use a smartphone to report responses to what they see.

34. Throughout the test, Visibly's software reminds customers that the correct answer is an honest answer and employs a specialized algorithm to detect inconsistent responses.

35. Once the test is completed, Visibly's software sends all of the customer's recorded responses (to both the vision test and the initial screening questions) to a licensed doctor for review.

36. There is no fee associated with taking the test, but Visibly does charge customers for a doctor to review their results.

37. In total, Visibly's test takes approximately 10 minutes to complete, and customers typically receive a prescription within 24 hours.

**C. Visibly's Test Is Safe and Expands Access to Care**

38. There is no health or safety risk associated with taking Visibly's test or with receiving a prescription through Visibly.

39. On information and belief, Defendants do not possess and cannot produce evidence of any health or safety risk associated with taking Visibly's test or with receiving a prescription through Visibly.

40. A doctor can incorporate Visibly's technology into their practice consistent with the ophthalmological standard of care.

41. Indeed, there is no medical difference between a doctor writing a corrective-lens prescription based on the results of a traditional refractive test (whether performed by the doctor or by a clinical assistant in their absence) and a doctor writing a prescription based on the same information as recorded by Visibly's online refractive test.

42. Moreover, while Visibly does not offer a comprehensive eye exam, there is no medical reason for a doctor to conduct a comprehensive exam every single time they write a corrective-lens prescription.

43. According to the American Academy of Ophthalmology ("AAO"), before age 40, "the majority of American adults experience no changing refractive error or significant ocular disease and routine eye examinations are not indicated." AAO, *Frequency of Ocular Examinations* (Mar. 2015), <https://www.aao.org/clinical-statement/frequency-of-ocular-examinations>.

44. Thus, the AAO instructs, "[a]dults with no signs or risk factors for eye disease should receive a comprehensive medical eye evaluation at age 40 if they have not previously received one." *Id.*

45. "For asymptomatic individuals or individuals without risk factors who are 40 to 54 years old, and who have had a comprehensive eye examination, the recommended interval for evaluations is 2 to 4 years." *Id.*

46. “For individuals aged 55 to 64 years old, the recommended interval for evaluations is 1 to 3 years.” *Id.*

47. And “[f]or individuals 65 years old or older, the [AAO] recommends an examination every 1 to 2 years, even in the absence of symptoms.” *Id.*

48. The AAO’s recommendations on the frequency of comprehensive eye exams accurately reflect the current ophthalmological standard of care.

49. Customers can therefore safely take Visibly’s test and obtain a new corrective-lens prescription without also obtaining a comprehensive eye exam.

50. Even so, because routine comprehensive eye exams (as reflected in the AAO’s frequency recommendations) are important to long-term eye health, there are limitations on customers’ ability to obtain a prescription through Visibly.

51. One limitation is participating doctors’ professional judgment. Because doctors are bound by the standard of care, Visibly’s partnering doctors will not write prescriptions based on the technology unless, in their medical judgment, it would be appropriate to do so.

52. Beyond participating doctors’ duty to comply with the standard of care, Visibly also limits customers’ ability to obtain prescriptions through front-end screening requirements.

53. As stated on Visibly’s website, “Visibly **is not a replacement** for a comprehensive eye examination.” Visibly, *Frequently Asked Questions*, <https://www.visibly.com/about-us/frequently-asked-questions> (last visited April 3, 2019).

54. Thus, Visibly uses its initial screening questions to ensure that only customers who (a) are 18–55 years old; (b) have a prescription range that is (i) emmetropic, (ii) myopic with spherical power between -0.25 and -10.0, (iii) hyperopic with spherical power between +0.25 and +3.50, (iv) astigmatic with cylinder power between Cyl -0.25 and +3.00, or (v)

presbyopic with ADD power between +0.25 and +4.00; (c) do not have a history of amblyopia, diabetes, glaucoma, cataracts, retinal detachment, brain injuries, neurological issues, or other eye diseases or disorders; and (d) have not recently experienced discomfort or symptoms of acute eye pain, flashes, or eye floaters, may complete the test. *See id.*

55. While Visibly does permit certain customers with mild eyeglass prescriptions to complete the test without submitting a prior prescription, Visibly always requires customers seeking new contact-lens prescriptions to submit a prior prescription. *See id.*

56. Visibly's front-end screening requirements exceed the ophthalmological standard of care.

57. If a customer makes it through Visibly's screening requirements and completes the refractive test, and a doctor finds it appropriate to write a prescription based on the customer's results, a prescription is made available through Visibly's website, which the customer can then use to purchase glasses or contact lenses wherever they please.

58. Since going live in 2014, Visibly has received an overwhelmingly positive response from customers.

59. For eligible customers, Visibly's test is just as effective at measuring visual acuity as traditional refractive tests performed in ophthalmology and optometry offices.

60. For eligible customers, Visibly's test is quicker and more convenient than traditional refractive tests performed in ophthalmology and optometry offices.

61. For eligible customers, Visibly's test expands access to corrective-lens prescriptions, including for those who can least afford to visit ophthalmology and optometry offices or who live in rural areas without ready access to such offices.

62. Due to the demand for Visibly’s more convenient online refractive test, the company has quickly expanded and now successfully operates in 34 states—but not Indiana.

## **II. Indiana’s Protectionist Ban on Visibly’s Technology**

### **A. Telemedicine Is Generally Legal in Indiana**

63. Telemedicine, in its broadest sense, is the use of communications technology (typically electronic or internet-based technology) to connect doctors and patients.

64. For doctors, telemedicine is simply a tool they can use (or not) to provide appropriate medical care, depending on the facts of the case and each doctor’s medical judgment.

65. In recent years, states across the country have increasingly embraced telemedicine as a safe and effective means of expanding access to medical care (especially for those who can least afford to visit a doctor’s office or who live in rural areas without ready access to such offices).

66. In 2016, recognizing the clear public benefits of telemedicine, Indiana enacted a general Telemedicine Law to officially allow certain health-care providers, including ophthalmologists and optometrists, to integrate telemedicine into their practices. *See* Ind. Code §§ 25-1-9.5-1, *et seq.*

67. Under the Telemedicine Law, “telemedicine” means “the delivery of health care services using electronic communications and information technology, including”: (a) “secure videoconferencing”; (b) “interactive audio-using store and forward technology”; or (c) “remote patient monitoring”; “between a provider in one [] location and a patient in another location.” *Id.* § 25-1-9.5-6.

68. Under the Telemedicine Law, “store and forward” means “the transmission of a patient’s medical information from an originating site [i.e., where the patient is located] to the

provider at a distant site [i.e., where the provider is located] without the patient being present.”  
*Id.* § 25-1-9.5-5; *see also id.* §§ 25-1-9.5-2 & -3.

69. Under the Telemedicine Law, a “prescriber who provides health care services through telemedicine shall be held to the same standards of appropriate practice as those standards for health care services provided at an in-person setting.” *Id.* § 25-1-9.5-7(a).

70. Under the Telemedicine Law, a doctor can offer services through telemedicine only if the doctor establishes a “provider-patient relationship” by (a) obtaining the patient’s name, location, and identifying information; (b) disclosing the provider’s name and whether the provider is a physician, physician assistant, advanced practice nurse, or optometrist; (c) obtaining informed consent from the patient; (d) obtaining the patient’s medical history and other information necessary to establish a diagnosis; (e) discussing the diagnosis, evidence for the diagnosis, and the risks and benefits of various treatment options (including whether it is advisable to seek in-person care) with the patient; (f) creating and maintaining a medical record for the patient and, subject to the patient’s consent and production of necessary contact information, notifying the patient’s primary-care provider of any prescriptions the provider has written for the patient; (g) issuing instructions for appropriate follow-up care; and (h) providing a telemedicine visit summary to the patient, including information that indicates any prescription being prescribed. *Id.* § 25-1-9.5-7(b).

71. Under the Telemedicine Law, a prescribing doctor is generally permitted to “issue a prescription to a patient who is receiving services through the use of telemedicine if the patient has not been examined previously by the prescriber in person if”: (a) “[t]he prescriber has satisfied the applicable standard of care in the treatment of the patient”; and (b) “[t]he issuance of

the prescription by the prescriber is within the prescriber's scope of practice and certification.”  
*Id.* § 25-1-9.5-8(a).

72. For example, a dermatologist who complied with these provisions would be permitted, under the Telemedicine Law, to use telemedicine to diagnose certain skin conditions (e.g., acne, lesions, or infections) and to decide that they have sufficient information to render medical advice or prescribe appropriate medications (e.g., oral or topical anti-inflammatories or antibiotics).

73. Under the Telemedicine Law, such a dermatologist might, in appropriate cases, decide to prescribe oral azithromycin. This would be permitted despite the fact that, according to the FDA, the known side-effects of oral azithromycin include “cardiac arrhythmia,” “diarrhea” with severity ranging from “mild” to “fatal colitis,” and even “hepatotoxicity” (e.g., “cholestatic jaundice,” “hepatic necrosis” or “hepatic failure”) resulting in “death.” *See* FDA, *Azithromycin Tablets and Azithromycin for Oral Suspension*, [https://www.accessdata.fda.gov/drugsatfda\\_docs/label/2013/050710s039,050711s036,050784s023lbl.pdf](https://www.accessdata.fda.gov/drugsatfda_docs/label/2013/050710s039,050711s036,050784s023lbl.pdf) (last visited April 3, 2019).

74. Likewise, an ophthalmologist who complied with these provisions would be permitted, under the Telemedicine Law, to use telemedicine to diagnose certain ocular conditions (e.g., corneal irritation, lesions, or infections) and to decide that they have sufficient information to render medical advice or prescribe appropriate medications (e.g., anti-inflammatory or antibiotic eye drops).

75. Under the Telemedicine Law, such an ophthalmologist might, in appropriate cases, decide to prescribe moxifloxacin-hydrochloride or prednisolone-acetate eye drops. This would be permitted despite the fact that, according to the FDA, the known side-effects of moxifloxacin-hydrochloride drops include “decreased visual acuity,” “fever,” “infection,”

“keratitis” (corneal inflammation), and “subconjunctival hemorrhage,” while the known side-effects of prednisone-acetate drops include “glaucoma and infrequent optic nerve damage,” “posterior subcapsular cataract formation,” “development of secondary ocular infection,” “corneal ulcers,” and even “perforation of the globe” (eye puncture). *See* FDA, *Moxifloxacin Hydrochloride Ophthalmic Solution*, [https://www.accessdata.fda.gov/drugsatfda\\_docs/label/2011/021598s017lbl.pdf](https://www.accessdata.fda.gov/drugsatfda_docs/label/2011/021598s017lbl.pdf) (last visited April 3, 2019); FDA, *Prednisone Acetate Ophthalmic Suspension*, [https://www.accessdata.fda.gov/drugsatfda\\_docs/label/2017/017011s047lbl.pdf](https://www.accessdata.fda.gov/drugsatfda_docs/label/2017/017011s047lbl.pdf) (last visited April 3, 2019).

76. In 2017, Indiana amended the Telemedicine Law to allow providers to issue prescriptions for controlled substances (as defined under Indiana Code section 35-48-1-9) using telemedicine, subject to certain conditions. Ind. Code § 25-1-9.5-8(b).

77. The Telemedicine Law permits all of these prescriptions (and countless other forms of remote medical treatment) because it recognizes that allowing doctors to incorporate telemedicine into their practices—as long as doing so would meet the relevant standard of care and the doctors’ ethical and professional duties—is a safe and effective means of connecting them with patients and expanding access to care.

**B. Corrective Lenses Are Specifically Excluded from Indiana’s Telemedicine Law**

78. The Telemedicine Law specifically excludes providers from using telemedicine to issue prescriptions for just three items: (a) “opioid[s]”; (b) “abortion inducing drug[s]”; and (c) “ophthalmic device[s].” *Id.* § 25-1-9.5-8(a).

79. The term “ophthalmic device” includes: (a) “glasses”; (b) “contact lenses”; and (c) “low vision devices.” *Id.* § 25-1-9.5-8(a)(5).

80. Thus, the Telemedicine Law permits providers who comply with the health, safety, and patient-protection requirements of Indiana Code sections 25-1-9.5-7 and -8 to use telemedicine to issue prescriptions for virtually *all* forms of medical devices and substances (including those with dangerous side effects and controlled substances)—*except* opioids, abortifacients, and corrective lenses.

81. Corrective lenses are not like opioids or abortifacients, do not present the same or even similar concerns, and can be safely prescribed using telemedicine.

**C. The Corrective Lens Exception Was Pushed by Indiana Optometrists to Shut Down Visibly**

82. Optometrists have long held a major stake in the eye-care market due to the in-person nature of traditional refractive tests.

83. Indeed, most optometrists rely heavily on patients seeking corrective-lens prescriptions for a consistent source of appointments.

84. Yet these optometrists make the majority of their profits, not from fees associated with traditional refractive tests, but from selling patients expensive eyeglass frames in their brick-and-mortar offices.

85. Visibly’s online refractive test disrupts this bundling of traditional refractive tests and frame sales by giving patients a way to obtain a new corrective-lens prescription from the comfort of their own homes.

86. Thus, in 2014, the American Optometric Association (“AOA”) and related local optometric groups launched a national public-media and private-lobbying campaign to drive Visibly out of business.

87. The AOA's campaign to shut down Visibly included targeted efforts in Indiana conducted in coordination with the AOA's state affiliate, the Indiana Optometric Association ("IOA").

88. On information and belief, when the AOA and IOA learned of Indiana House Act 1263 (which would eventually become the Telemedicine Law enacted in 2016), the groups mobilized in opposition to the bill.

89. On information and belief, the AOA and IOA sent letters to state legislators voicing their strong opposition to the bill unless corrective-lens prescriptions were excluded.

90. On information and belief, the AOA and IOA's opposition to House Bill 1263 was motivated chiefly by a desire to drive Visibly out of business to protect their members' brick-and-mortar business model.

91. On information and belief, House Bill 1263 was amended in response to the AOA and IOA's vigorous lobbying.

92. On information and belief, the amendment added language that would become the Corrective Lens Exception set forth under Indiana Code section 25-1-9.5-8(a)(5).

93. On information and belief, after House Bill 1263 was amended to add the Corrective Lens Exception, the AOA and IOA fully supported the bill.

94. Once the Telemedicine Law was enacted with the Corrective Lens Exception, the AOA publicly boasted about how the law "contains language, championed by the Indiana Optometric Association" that "prohibit[s] ophthalmic devices from being prescribed by purely electronic means." AOA, *States and AOA persevere in fight against heightened opposition from Opternative/1-800 Contacts* (Mar. 8, 2017), <https://www.aoa.org/news/advocacy/states-and-aoa-persevere-in-fight-against-heightened-opposition-from-opternative-1800contacts>.

95. The result, according to the AOA, is that “[c]ompanies utilizing these online app-based technologies, such as Opternative, are currently unable to implement their unproven technology in Indiana.” *Id.*

96. The AOA views its Indiana campaign as “a model of a state affiliate successfully combatting [Opternative’s] purported examinations.” *Id.*

97. At the time these comments were made, Visibly was known and doing business as Opternative.

**D. There Is No Health or Safety Justification for the Corrective Lens Exception**

98. The Corrective Lens Exception represents a deviation from the general purpose of the Telemedicine Law—to expand access to care by allowing doctors to incorporate telemedicine into their practices, subject to the specific health-and-safety restrictions set forth in the law—in order to appease the special economic interests of the AOA and IOA.

99. For purposes of the Telemedicine Law, corrective lenses are not meaningfully distinct from the countless other medical devices and substances (including controlled substances) that can be safely prescribed using telemedicine within the health, safety, and patient-protection parameters of Indiana Code sections 25-1-9.5-7 and -8.

100. On information and belief, Defendants do not possess and cannot produce any evidence that, for purposes of the Telemedicine Law, corrective lenses are meaningfully distinct from the countless other medical devices and substances (including controlled substances) that can be safely prescribed using telemedicine within the health, safety, and patient-protection parameters of Indiana Code sections 25-1-9.5-7 and -8.

101. For purposes of the Telemedicine Law, ophthalmologists who wish to prescribe corrective lenses using telemedicine are not meaningfully distinct from the countless other

doctors (including ophthalmologists who wish to prescribe things *other than* corrective lenses) who can safely prescribe virtually all other medical devices and substances within the health, safety, and patient-protection parameters of Indiana Code sections 25-1-9.5-7 and -8.

102. On information and belief, Defendants do not possess and cannot produce any evidence that, for purposes of the Telemedicine Law, ophthalmologists who wish to prescribe corrective lenses are meaningfully distinct from the countless other doctors (including ophthalmologists who wish to prescribe things *other than* corrective lenses) who can safely prescribe virtually all other medical devices and substances within the health, safety, and patient-protection parameters of Indiana Code sections 25-1-9.5-7 and -8.

103. For purposes of the Telemedicine Law, ophthalmologists who wish to prescribe using Visibly's technology are not meaningfully distinct from the countless other doctors who can safely prescribe using virtually all other telemedical technologies that would comply with the parameters of Indiana Code section 25-1-9.5-6.

104. On information and belief, Defendants do not possess and cannot produce any evidence that, for purposes of the Telemedicine Law, ophthalmologists who wish to prescribe using Visibly's technology are meaningfully distinct from the countless other doctors who can safely prescribe using virtually all other telemedical technologies that would comply with the parameters of Indiana Code section 25-1-9.5-6.

105. But for the Corrective Lens Exception, Visibly's partnering doctors could safely prescribe corrective lenses using telemedicine within the health, safety, and patient-protection parameters of Indiana Code sections 25-1-9.5-7 and -8.

106. On information and belief, Defendants do not possess and cannot produce any evidence that Visibly's partnering doctors could not safely prescribe corrective lenses using

telemedicine within the health, safety, and patient-protection parameters of Indiana Code sections 25-1-9.5-7 and -8.

107. On information and belief, Defendants do not possess and cannot produce any other evidence that the Corrective Lens Exception serves the public health or safety.

108. Thus, there is no public health or safety justification for the Corrective Lens Exception.

### **III. The Corrective Lens Exception Destroyed Visibly's Indiana Business**

109. By 2015, Visibly was successfully operating in dozens of states across the country, including Indiana.

110. Between 2015 and 2016, Visibly safely administered between 60 and 70 online refractive tests in Indiana.

111. Between 2015 and 2016, Indiana-licensed ophthalmologists partnered with Visibly to safely write between 60 and 70 corrective-lens prescriptions for patients who needed them.

112. But after the Telemedicine Law and the Corrective Lens Exception went into effect in 2016, it was no longer legal for doctors to rely on Visibly's technology to write corrective-lens prescriptions.

113. Indeed, an ophthalmologist who violates the Corrective Lens Exception is subject to disciplinary action from Defendant Medical Licensing Board of Indiana including, but not limited to, revocation or suspension of the ophthalmologist's license, censure, reprimand, probation, and the assessment of a civil fine of up to \$1,000 per violation. *See* Ind. Code §§ 25-1-9-9(a) & 25-1-9.5-10(a).

114. Defendant Indiana Professional Licensing Agency may also investigate complaints and recommend sanctions regarding violations of the Corrective Lens Exception and refuse to renew the license of an ophthalmologist found to have violated it. *See id.* §§ 25-1-6-4(e) & (f), 25-1-7-5(b), 25-1-7-7(a).

115. Defendant Curtis Hill, in his official capacity as the Indiana Attorney General, is also empowered to receive, investigate, and prosecute complaints filed against an ophthalmologist who violates the Corrective Lens Exception, and may seek disciplinary sanctions for the violation from Defendant Medical Licensing Board of Indiana. *See id.* §§ 25-1-7-2, -7 & 25-1-7-3.

116. Due to the clear threat of sanctions doctors face for violating the Corrective Lens Exception, none of the Indiana-licensed ophthalmologists who worked with Visibly were (or are) willing to risk their licenses or ruinous penalties by continuing to use Visibly's technology.

117. Deprived of an essential component of its business (namely, Indiana-licensed doctors who could legally prescribe corrective lenses using its technology), Visibly was forced to shut down its Indiana operations, resulting in continuing and irreparable financial losses and damage to Visibly's business goodwill and reputation.

118. But for the Corrective Lens Exception, Visibly could launch a version of its technology in Indiana that complies with the requirements of Indiana Code section 25-1-9.5-6 and all other relevant portions of the Telemedicine Law.

119. But for the Corrective Lens Exception, Indiana-licensed doctors (including Visibly's partnering ophthalmologists) would be permitted to use Visibly's technology to continue writing prescriptions for Indiana patients who need them.

120. But for the Corrective Lens Exception, Indiana-licensed doctors (including Visibly’s partnering ophthalmologists) would, in fact, continue using Visibly’s technology to write prescriptions for Indiana patients who need them.

121. The Corrective Lens Exception is the only thing preventing Visibly from resuming its Indiana business operations and safely expanding access to eye care using telemedicine in Indiana.

**FIRST CAUSE OF ACTION**  
**(The Corrective Lens Exception Violates Article 1, Section 1 of the Indiana Constitution)**

122. Plaintiff reasserts and realleges the content of paragraphs 1 through 121 as if fully set forth herein.

123. Article 1, Section 1 of the Indiana Constitution protects “certain inalienable rights,” including “life, liberty, and the pursuit of happiness.” Ind. Const. art. 1, § 1.

124. Among the rights protected under Section 1 is the right to earn an honest living in the pursuit of a chosen business, subject only to those restrictions necessary to protect the public health, safety, or welfare.

125. The Corrective Lens Exception is not grounded on any feature of corrective lenses, the patients who use them, the practice of ophthalmology, or Visibly’s technology that, for purposes of the Telemedicine Law, presents a risk to the public health, safety, or welfare.

126. The Corrective Lens Exception does not bear a real, substantial, reasonable, or rational relationship to protecting the public health, safety, or welfare.

127. The Corrective Lens Exception is a purely protectionist law, and economic protectionism is not a legitimate government purpose.

128. The Corrective Lens Exception therefore violates Article 1, Section 1 of the Indiana Constitution, both on its face and as applied.

129. Unless Defendants are enjoined from enforcing the Corrective Lens Exception, Plaintiff will suffer continuing and irreparable harm.

**SECOND CAUSE OF ACTION**  
**(The Corrective Lens Exception Violates Article 1, Section 23 of the Indiana Constitution)**

130. Plaintiff reasserts and realleges the content of paragraphs 1 through 129 as if fully set forth herein.

131. Article 1, Section 23 of the Indiana Constitution bans the legislature from granting “privileges or immunities which, upon the same terms, shall not equally belong to all citizens.” Ind. Const. art. 1, § 23.

132. In *Collins v. Day*, 644 N.E.2d 72, 80 (Ind. 1994), the Indiana Supreme Court announced a two-pronged test for Section 23 claims:

Article 1, Section 23 of the Indiana Constitution imposes two requirements upon statutes that grant unequal privileges or immunities to differing classes of persons. First, the disparate treatment accorded by the legislation must be reasonably related to inherent characteristics which distinguish the unequally treated classes. Second, the preferential treatment must be uniformly applicable and equally available to all persons similarly situated.

133. There is nothing about corrective lenses, the patients who use them, the practice of ophthalmology, or Visibly’s technology that, for purposes of the Telemedicine Law, requires, necessitates, or makes expedient different or exclusive legislation.

134. The Corrective Lens Exception is not based on any inherent characteristics that, for purposes of the Telemedicine Law, meaningfully distinguish corrective lenses from the countless other medical devices and substances (including controlled substances) that can be safely prescribed using telemedicine within the parameters of the law.

135. The Corrective Lens Exception is not based on any inherent characteristics that, for purposes of the Telemedicine Law, meaningfully distinguish ophthalmologists who wish to

prescribe corrective lenses from the countless other doctors (including ophthalmologists who wish to prescribe things *other than* corrective lenses) who can safely prescribe virtually all other medical devices and substances using telemedicine within the parameters of the law.

136. The Corrective Lens Exception is not based on any inherent characteristics that, for purposes of the Telemedicine Law, meaningfully distinguish ophthalmologists who wish to prescribe corrective lenses using Visibly's technology from the countless other doctors who can safely prescribe using virtually all other telemedical technologies that would comply with the law.

137. Thus, the Corrective Lens Exception fails the first *Collins* prong.

138. The Telemedicine Law grants certain doctors an exclusive or special privilege to prescribe using telemedicine within the health, safety, and patient-protection parameters of Indiana Code sections 25-1-9.5-7 and -8.

139. The Corrective Lens Exception denies that privilege to doctors, including Visibly's partnering ophthalmologists, who wish to prescribe corrective lenses for Indiana patients using telemedicine within the health, safety, and patient-protection parameters of Indiana Code sections 25-1-9.5-7 and -8.

140. Thus, the Corrective Lens Exception fails the second *Collins* prong.

141. The Corrective Lens Exception therefore violates Article 1, Section 23 of the Indiana Constitution, both on its face and as applied.

142. Unless Defendants are enjoined from enforcing the Corrective Lens Exception, Plaintiff will suffer continuing and irreparable harm.

## REQUEST FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that this Court:

A. Enter a declaratory judgment that the Corrective Lens Exception, Ind. Code § 25-1-9.5-8(a)(5), both on its face and as applied, violates Article 1, Sections 1 and 23 of the Indiana Constitution;

B. Enter an order permanently enjoining Defendants from enforcing the Corrective Lens Exception, in any way, against Plaintiff, its partnering ophthalmologists, or any other doctor who would like to use telemedicine to write corrective-lens prescriptions within the parameters of the Telemedicine Law, Ind. Code §§ 25-1-9.5-1, *et seq.*;

C. Award Plaintiff its reasonable costs and attorneys' fees;

D. Award Plaintiff any other legal or equitable relief the Court may deem just and proper.

Respectfully submitted this 10th day of April, 2019.

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