IN THE SUPREME COURT OF GEORGIA

No. S22A1243

The State of Georgia and Patsy Austin-Gatson, in her individual capacity,

Appellants,

v.

SASS Group, LLC, and Great Vape, LLC,

Appellees.

BRIEF OF APPELLEES

THOMAS D. CHURCH
Georgia Bar No. 956589

PAGE A. PATE
Georgia Bar No. 565899

Attorneys for Appellees

Pate, Johnson & Church, LLP
101 Marietta Street NW
Suite 3300
Atlanta, Georgia 30303
(404) 223-3310

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Constitutional Provisions

INTRODUCTION

As this Court has repeatedly recognized, "An injunction is the appropriate remedy to prevent a wrongful act by a public official even when acting under color of his office but without lawful authority, and beyond the scope of his official power." *Smith v. Day*, 237 Ga. 48 (1976). (Citations and punctuation omitted).

This is a case about government overreach and Georgia's growing hemp industry. The Appellees are two retail stores in Gwinnett County that sell tobacco, tobacco accessories, vapes and vape cartridges, and products containing hemp extracts such as cannabidiol (CBD), cannabinol (CBN), cannabigerol (CBG), delta-8-tetrahydrocannabinol (Delta-8-THC), and delta-10-tetrahydrocannabinol (Delta-10-THC).

At issue is whether these products are legal under Georgia law ever since the legislature legalized hemp and hemp extracts. In 2019, the legislature legalized hemp and a broad range of hemp extracts, defining "hemp" as a cannabis plant, and any extracts, derivatives, and cannabinoids from that plant, that contain less than 0.3% delta-9-tetrahydrocannabinol (Delta-9-THC), the cannabinoid known for giving users a psychoactive "high." O.C.G.A. § 2-23-3(5). The legislature also amended Georgia's criminal code to exempt "hemp" and hemp extracts from its definitions of "marijuana" and "THC." O.C.G.A §§ 16-13-21(16) and 16-13-25(P).

For over two years, Appellees were able to sell these products without issue and grow their businesses until earlier this year, when District Attorney Austin-Gatson, the Appellant, disrupted the status quo and issued a press release warning she would pursue arrests and civil asset seizures against anyone possessing or selling products containing Delta-8-THC and Delta-10-THC. Shortly thereafter, Appellant directed raids of multiple businesses in Gwinnett County, resulting in several arrests and the seizure of millions of dollars in currency and products.

With their livelihoods on the line, Appellees filed a lawsuit for declaratory and injunctive relief against Appellant Austin-Gatson, in her individual capacity, under O.C.G.A. § 9-4-1, *et seq.* They also presented a motion for a temporary restraining order to the presiding judge in the Superior Court of Fulton County.

Recognizing the urgency of the moment and expressing "*concerns that this may or may not be a rogue DA*," the Honorable Craig L. Schwall, Sr. granted a 30-day restraining order prohibiting Appellant Austin-Gatson from initiating or continuing any arrests or civil asset forfeiture proceedings based on the sale or possession of products containing hemp-derived cannabinoids such as Delta-8-THC and Delta-10-THC. Less than a month later, the Honorable Charles M. Eaton, Jr. granted an interlocutory injunction extending Judge Schwall's restraining order.

Appellant appeals that injunction, arguing the injunction should be vacated because: 1) Appellees' case should have been dismissed because the action against

Appellant was barred by Ga. Const. Art. I, Sec. II, Para. V(b); 2) Appellant has absolute prosecutorial immunity under Ga. Const. Art. VI, § VIII; and 3) food products infused with Delta-8-THC and other extracts are controlled substances.

As detailed below, Appellant's arguments are without merit and contrary to longstanding Georgia precedents. Appellant cannot invoke sovereign immunity or prosecutorial immunity to prevent aggrieved citizens from seeking prospective relief against her, including interlocutory relief. For centuries, Georgia courts have recognized that immunity does not protect overreaching officials from claims for prospective relief when they act unlawfully or outside the scope of their authority.

Appellant is also wrong that Delta-8-THC and Delta-10-THC become controlled substances when they are infused in food products, since these extracts clearly fall under the definition of "hemp" and are thus excluded from Georgia's criminal laws outlawing marijuana and THC. In fact, while this litigation has been pending, several other judges have joined the chorus of courts across the country recognizing the legality of these products, including in Gwinnett County.

Because Delta-8-THC and Delta-10-THC are clearly legal under the plain text of Georgia law, regardless of whether they are found in food products, the trial court did not err in granting an injunction against the Appellant. This injunction will remain necessary and proper so long as Appellant continues threatening Appellees and others with arrests and raids based on their sale of these products.

STATEMENT OF FACTS

In 2019, the Georgia legislature passed landmark legislation creating a new industry for a wide range of cannabis and cannabis extracts by legalizing "hemp," a variety of the cannabis plant that the legislature broadly defined as "the Cannabis sativa L. plant and any part of such plant, including the seeds thereof and all derivatives, extracts, cannabinoids, isomers, acids, salts, and salts of isomers, whether growing or not, with the federally defined THC level for hemp or a lower level." O.C.G.A. § 2-23-3(5) (Emphasis added). Reflecting the legislature's intent to bring Georgia law in line with the legalization of hemp at the federal level under the 2018 Farm Bill, the "Federally defined THC level for hemp" refers to "a delta-9-THC concentration of not more than 0.3 percent…or as defined in 7 U.S.C. Section 1639o, whichever is greater."[1] O.C.G.A. § 2-23-3(3) (Emphasis added).

The legislature also amended Georgia's criminal code to reflect the new reality that not all cannabis or cannabis extracts are controlled substances under Georgia law. Specifically, the legislature amended the definition of "marihuana" under O.C.G.A. § 16-13-21(16) to exclude "hemp or hemp products as such terms are defined in Code Section 2-23-3." The definition of "THC" under § 16-13-25(P) also now excludes "such substance when found in hemp or hemp products."

[1] Like Georgia law, "hemp" under 7 U.S.C. § 1639o includes all cannabinoids, derivates, extracts in cannabis with "a delta-9 tetrahydrocannabinol concentration of not more than 0.3 percent..."

On January 25, 2022, almost three years after the legislature legalized hemp and hemp extracts, Appellant Austin-Gatson issued a press release declaring that she considered Delta-8-THC and Delta-10-THC schedule I controlled substances under Georgia law and that anyone selling products with Delta-8-THC and Delta-10-THC would be "*subject to felony punishment and are at risk of having their assets seized and forfeited to the State*." (Transcripts-136, Plaintiff's Exhibit 1).[2] The press release made no distinction between food and non-food products.

Shortly thereafter, several businesses in Gwinnett County were raided, shop owners and employees were arrested, and millions of dollars in currency and inventory were seized. (T-108-09, Defendant's Exhibit 1). The vast majority of the products seized were non-food products. (T-196, Plaintiff's Exhibit 11). Appellees immediately ceased selling Delta-8-THC and Delta-10-THC products. (R-326-27).

Based on Appellant Austin-Gatson's actions, and facing an imminent threat to their livelihoods, Plaintiffs filed a verified complaint in the Superior Court of Fulton County on March 14, 2022, bringing actions against the State of Georgia and District Attorney Austin-Gatson, in her individual capacity. (R-4). Plaintiffs also presented a motion for a temporary restraining order and injunction against Appellant Austin-Gatson in her individual capacity to the presiding judge. (R-79).

[2] Citations to the transcripts in the record will herein be referred to by "T" and the page number on the bottom of each page of the combined transcripts.

On March 18, 2022, Judge Schwall granted the temporary restraining order, noting he had "*read the entire file*" and was concerned "*that this conduct of this DA could be inappropriate. And I think that there's no rush in these prosecutions and civil assets forfeitures. I think that the declaratory judgment action should be heard before any of this conduct continues*…(R-96); (T-188, 192-193).

Prior to the hearing on Appellees' motion for an injunction, the Appellants filed a motion to dismiss (R-188) and a response to the motion (R-135) which included an affidavit by Appellant Austin-Gatson stating, for the first time, that her position regarding the legality of Delta-8-THC and Delta-10-THC products had changed significantly since her press release. (R-156), (Defendant's Exhibit 1). Appellants now concede Delta-8-THC and Delta-10-THC are legal in all forms, such as concentrated oil and buds, unless found in "food products." (R-137, 435).

The Honorable Charles Eaton, Jr. was assigned this case and held a hearing on Appellants' motion to dismiss on April 12, 2022. (T-1-27). After the hearing, the trial court denied Appellants' motion to dismiss. (R-286).

On April 14, 2022, the trial court held a hearing on Appellees' motion for an injunction. (T-30). At the hearing, Appellees called Dr. Sarah K. Clements, a registered pharmacist, to testify as an expert witness. (T-50). Dr. Clements testified regarding her extensive experience in pharmacology, her background studying hemp and hemp extracts, and her role as a consulting pharmacist for PurIso Labs, a

company that manufactures and sells products containing CBD, Delta-8-THC, and other hemp-derived cannabinoids. (T-51). She testified that part of her training and practice includes familiarizing herself with the Controlled Substance Act, staying up to date with current DEA regulations, and ensuring compliance with the various federal and state laws regulating hemp. (T-52-53, 59).

Dr. Clements was qualified without objection as an expert in pharmacology and endocannabinoid medicine. (T-60). Dr. Clements testified that marijuana and hemp are variations of the cannabis plant and that both contain hundreds of naturally occurring substances called "cannabinoids." Dr. Clements explained that the main difference between marijuana and hemp is that marijuana tend to have a higher amount of "delta-9 THC," while hemp has more "CBD." (T-61-62).

Dr. Clements testified that each cannabinoid has different properties and that they are chemically distinct from each other. (T-62). For example, Dr. Clements testified CBD is "*used a lot for pain, anxiety, and sleep*" and as an "*antiepileptic*" for consumers who suffer from seizures. (T-62). She testified that CBG and CBN can be used to treat inflammation. (T-62). Regarding Delta-8-THC and Delta-10-THC, Dr. Clements testified that both substances are cannabinoids that are "*naturally occurring in the hemp plant*" and that both are "*distinct from delta-9 THC*." (T-63). Dr. Clements further testified that, compared to Delta-9-THC, Delta-8-THC and Delta-10-THC "*are much milder, and there is a mild chance of*

psychoactive with these. But it is much less than the delta-9 THC." *Id.*

Dr. Clements testified that all of these cannabinoids, including Delta-8-THC and Delta-10-THC, can be extracted from the hemp plant. (T-63). She explained that the process begins with extracting CBD from "*the biomass of the hemp plant*" and then isolating other cannabinoids from the CBD through "*convergence and distillation*." (T-63-64). Dr. Clements testified that her company maintains a "*chain of custody*" to ensure that the biomass "*comes from hemp*" and confirmed that there is a way for manufacturers to ensure that "*there's no impermissible amount of delta-9 THC*" in their extracts or end products. (T-64-65).

Dr. Clements testified that her company tests their extracts and end products through third party laboratories that are "*DEA certified*." (T-65). Over objection, the trial court admitted several test results for CBD isolate, Delta-8-THC gummies, and Delta-8-THC distillate manufactured and sold by PurIso Labs. (T-65-67); (Plaintiff's Exhibits 12-14). These lab results established that products containing Delta-8-THC and other hemp-derived cannabinoids, edible and non-edible alike, can be manufactured with less than the legal limit for Delta-9-THC, thus coming under the definition of "hemp" under Georgia and federal law. (T-67-68).

Dr. Clements confirmed that her company's Delta-8-THC products comply with federal law, and that, based on her expertise in pharmacology and familiarity with the Controlled Substances Act, hemp extracts like Delta-8-THC and Delta-10-

THC are not controlled substances if they contain less than 0.3% Delta-9-THC. (T-69-80).[3] She further testified that approval or lack of approval by the Food and Drug Administration ("FDA") has no bearing on whether these cannabinoids are controlled substances under federal law, comparing them to vitamin supplements that are legally sold despite a lack of approval by the FDA. (T-81-82).

On cross-examination, Dr. Clements confirmed that cannabinoids like Delta-8-THC are "*naturally made*" and can be extracted from hemp plants with under 0.3 percent Delta-9-THC. (T-83). She explained the manufacturing process involves increasing the concentration of Delta-8-THC and other naturally occurring cannabinoids in hemp but made clear these cannabinoids are not "*synthetic*." (T-84-86). She also testified that her company does not sell products to children and recommends their products only for adults 21 and older, though she also noted that Delta-8-THC and other cannabinoids might be appropriately administered to children in "*certain instances*," clarifying on re-direct that there is at least one study indicating children with cancer may benefit from Delta-8-THC. (T-87, 95).

Dr. Clements testified that she was generally aware of a notice by the FDA regarding Delta-8-THC products but that she considered the FDA's comments

[3] Counsel attempted to introduce, and the Court intended to admit, a letter from the DEA stating that hemp-derived cannabinoids like Delta-8-THC are not controlled substances under federal law. (T-110). That letter has not been included in the record as an exhibit to the hearing. However, the letter is also Exhibit 1 of Appellee's verified complaint. (R-316)

"*misleading and confusing*" and was not sure of the FDA's "*position*" regarding these products. (T-90-92). On re-direct, Dr. Clements confirmed the FDA lacks "*any authority to regulate cannabis as a controlled substance*." (T-93). She also testified that Delta-8-THC and Delta-10-THC are not harmful or lethal. (T-95-96).

After Dr. Clements testified, Appellees introduced into evidence several exhibits, including Appellant Austin-Gatson's press release (Plaintiff's Exhibit 1), court orders from Kentucky and Texas granting injunctions against state officials treating Delta-8-THC as a controlled substance (Plaintiff's Exhibits 2-3), an order from a Georgia superior court requiring the State to return Delta-8-THC gummies that were wrongfully seized (Plaintiff's Exhibit 4), and the transcript from the TRO hearing before Judge Schwall (Plaintiff's Exhibit 10). (T-96-102).

In response, Appellant introduced the affidavit she prepared regarding her change of position as to the legality of Delta-8-THC and Delta-10-THC products and distanced herself from her recent raids of local businesses. (T-108-109), (Defendant's Exhibit 1). Appellant also introduced a letter she had received from Appellee's counsel, who also represented a distributor of Delta-8-THC products who had been raided, which requested the return of currency and products that were unlawfully seized. (T-109), (Defendant's Exhibit 2). The trial court also admitted the notice by the FDA regarding adverse health events allegedly attributable to Delta-8-THC. (T-110), (Defendant's Exhibit 5).

In rebuttal, Appellees introduced an affidavit by the owner of the local distributor, Elements Distribution, regarding the raid of his business and the seizure of his property shortly after Appellant issued her press release. (T-111, 196), (Plaintiff's Exhibit 11). As reflected in the affidavit, Appellant Austin-Gatson seized almost $300,000 in currency and $2 million in hemp inventory, the vast majority (85%) of which were "non-edible hemp products." (T-196-97).

The next day, the trial court granted Appellees' motion and issued an interlocutory injunction prohibiting Appellant Austin-Gatson, in her individual capacity, from initiating or continuing any criminal enforcement actions or civil asset forfeiture proceedings against businesses or individuals based on the sale or possession of Delta-8-THC, Delta-10-THC, or any other hemp-derived cannabinoids, regardless of whether these substances are found in food products or non-food products. (R-304-08).

ARGUMENT

I. The trial court did not err in denying Appellants' Motion to Dismiss, as the constitutional waiver of sovereign immunity under Ga. Const. Art. I, Sec. II, Para. V(b) does not apply to an action for prospective relief against a state official sued in her individual capacity.

As fully set forth in Appellees' Brief in the parallel appeal, No. S22A1244, the trial court did not err in denying Appellants' Motion to Dismiss. Appellant Austin-Gatson cannot invoke sovereign immunity against actions brought against her in her individual capacity, including claims for interlocutory injunctive relief.

That would be true regardless of where she is sued. As such, even in the event this Court reverses the trial court's order denying the motion in the parallel appeal, this Court should nonetheless affirm the trial court's injunction and remand for transfer of venue, as vacating the injunction and compelling Appellees to relitigate their motion would expose Appellees and the entire hemp industry to irreparable harm and undermine interests in judicial economy.

II. The doctrine of prosecutorial immunity does not bar actions seeking prospective relief against Appellant Austin-Gatson in her individual capacity.

Appellant Austin-Gatson argues the trial court erred in granting the injunction against her because she enjoys absolute prosecutorial immunity under Ga. Const. Art. VI, § VIII, Para. I(e), which states: "District attorneys shall enjoy immunity from private suit for actions arising from the performance of their duties." (S. Brief, p. 13).

While recognizing that, "under common law, prosecutorial immunity is limited to immunity from civil damages," Appellant nevertheless are urging this Court to sweep aside centuries of common law and legal tradition and broaden the scope of prosecutorial immunity to be "all-inclusive and applicable to any type of action," including against actions seeking declaratory and injunctive relief against officials in their individual capacity. *Id.* at 14. As Appellant acknowledges, not even judges enjoy such broad immunity under Georgia law. *Id.*, 13-14, n. 5.

For support, Appellant cites only dicta from a footnote in *Lathrop v. Deal*, 301 Ga. 408, 415 n. 25 (2017), where this Court reaffirmed that state officials can be sued for declaratory and injunctive in their individual capacity notwithstanding sovereign or official immunity, while suggesting that other forms of immunity "may apply" in other, unspecified contexts. The Court declined to decide the applicability or scope of those other immunities at the time.

Neither the Court's holding or dicta in *Lathrop* support Appellant's claim. A central holding in *Lathrop* was that state officials, which in that case included "the district attorneys for Fulton and Dekalb Counties," are not protected by sovereign or official immunity from actions for prospective relief in their individual capacity "when they do things not authorized by law." *Id*. at 410 n. 5, 435.

Key to this Court's holding is "the understanding in American law generally that the personal immunities of public officers typically do not extend to prospective relief." *Id*. at 437. The Court also noted that the defendants had "not cited a single case in which this Court, our Court of Appeals, or any other court has applied the doctrine of official immunity (*or a doctrine like it*) to bar a suit for injunctive or declaratory relief." *Id*. at 443 (emphasis added).

Cases from our Court of Appeals regarding prosecutorial immunity also reflect that, like the "official immunity" discussed in *Lathrop*, prosecutorial immunity in Georgia is traditionally limited to retrospective claims for monetary

damages and is generally unavailable for prospective claims against a prosecutor who has acted unlawfully or outside the scope of their authority.

In *Mosier v. State Bd. of Pardons & Paroles*, 213 Ga. App. 545, 546, (1994), for example, the Court of Appeals stated: "The rationale behind this immunity is that prosecutors, like judges, should be free to make decisions properly within the purview of their official duties without being influenced by the shadow of liability. Therefore, a district attorney is protected by the same immunity in civil cases that is applicable to judges, provided that his acts are within the scope of his jurisdiction." (Emphasis added and citations and punctuation omitted).

In *Holsey v. Hind*, 189 Ga.App. 656, 657 (1988), the Court of Appeals suggested prosecutors may even be sued for damages in some contexts, observing that "[i]t appears well-settled that although a prosecutor enjoys absolute immunity when engaging in quasi-judicial functions, he has only a qualified immunity when carrying out administrative or investigative functions." (Cleaned up).

This is consistent with this Court's recognition that "a declaratory judgment action is not inappropriate merely because it touches upon a question of criminal law; in fact, such an action is an available remedy to test the validity and enforceability of a statute where an actual controversy exists with respect thereto." *GeorgiaCarry.org v. Atlanta Botanical Garden, Inc*., 299 Ga. 26, 29 (2016).

In sum, Appellant's argument for extending prosecutorial immunity to claims for prospective relief has no basis in the law, history, or tradition of this state and is contrary to a long tradition of Georgia courts enjoining prosecutions and prosecutors who act unlawfully or outside the scope of their authority. *See Monte Carlo Parties, Ltd. v. Webb*, 253 Ga. 508 (1984), involving claims for declaratory judgment and injunctive relief brought against city solicitor and district attorney to determine whether organization's "casino night" events violated gambling laws; *Harris v. Ent. Sys., Inc.*, 259 Ga. 701, 704 (1989), holding that, "when injury to property is threatened...injunction will lie notwithstanding the fact that in the process a criminal prosecution is involved"; *Great Atl. & Pac. Tea Co. v. City of Columbus*, 189 Ga. 458, 465 (1939), holding injunction was proper "to protect the plaintiff's property and business against serious injury that would result from the threatened prosecution of all of its employees."

III. The trial court did not err in granting an interlocutory injunction against Appellant Austin-Gatson, in her individual capacity.

Under O.C.G.A. §§ 9-4-2 and 9-4-3, in cases involving a request for declaratory judgment, the trial court may grant an injunction or other interlocutory relief "to maintain the status quo pending the adjudication of the questions or to preserve equitable rights."

As this Court has recognized, "[t]he decision whether to grant a request for interlocutory injunctive relief is in the discretion of the trial court according to the

circumstances of each case, and we will not disturb the injunction a trial court has fashioned unless there was a manifest abuse of discretion." *Grossi Consulting, LLC v. Sterling Currency Grp., LLC*, 290 Ga. 386, 388 (2012).

> "In exercising this discretion, a trial court generally must consider whether:
>
> (1) there is a substantial threat that the moving party will suffer irreparable injury if the injunction is not granted;
>
> (2) the threatened injury to the moving party outweighs the threatened harm that the injunction may do to the party being enjoined;
>
> (3) there is a substantial likelihood that the moving party will prevail on the merits of [its] claims at trial; and
>
> (4) granting the interlocutory injunction will not disserve the public interest."

Jansen-Nichols v. Colonial Pipeline Co., 295 Ga. 786, 787 (2014). The moving party need not "prove all four factors to obtain the interlocutory injunction." *City of Waycross v. Pierce County Board of Commissioners*, 300 Ga. 109, 111 (2016).

In this case, the trial court properly exercised its discretion and granted Appellees' request for an interlocutory injunction based on compelling evidence supporting each of these four factors.

A. <u>There is a substantial threat that Appellees will suffer irreparable injury if the injunction is vacated.</u>

The trial court properly found that Appellees would suffer irreparable harm unless it granted the requested injunction, recognizing that their businesses might

be "*unable to remain open if District Attorney Patsy Austin-Gatson is not enjoined from this conduct*." (R-305). As reflected in the amended verified complaint, Appellees were losing 30-60% of their income after pulling their products off the shelf in response to Appellant Austin-Gatson's press release and raids. (R-326-27). The trial court also noted the harm caused by Appellant Austin-Gatson's raid of a local distributor. (R-305).

Appellant Austin-Gatson argues that there was "no imminent injury" since she conceded that "non-food products" with Delta-8-THC and Delta-10-THC are legal. (S. Brief, p. 21-22). In doing so, however, Appellant ignores the undisputed evidence that she directed her office to seize hundreds of thousands of dollars' worth of food products infused with these extracts and has refused to return them, or any money derived from the sale of those products. (T-111, 196); (Plaintiff's Exhibit 11). The evidence of the irreparable harm to Appellees was overwhelming in this case, and as this Court has recognized, the factor involving the threat of irreparable harm "is the most important one, given that the main purpose of an interlocutory injunction is to preserve the status quo…" *City of Waycross*, at 112.

B. <u>The threatened injury to Appellees outweighs the threatened harm that the injunction could do to Appellant.</u>

The trial court also properly found the threatened injury to Appellees outweighs any threatened harm the injunction could do to Appellant. (R-305). The trial court made several findings regarding the scope of the losses suffered by

Appellees, other retailers, and distributors who would be "*left with uncertainties about the legality of their products and businesses*." *Id*. The trial court also noted that "*consumers will be unsure of whether they may be subject to arrest for possession of the same products they have believed to be legally available for at least two years*." *Id*. at 305-06.

Regarding whether an injunction could threaten any harm to Appellant Austin-Gatson—a prosecutor cannot be harmed or threatened by an injunction that only prohibits them from acting unlawfully or outside the scope of their authority. Critically, the trial court found that Appellant "*provided no actual evidence to indicate that the distribution and sale of these products (edible or otherwise) has led to any direct harm to any individuals or parties in Gwinnett County. In fact, Defendant presented no actual evidence as to harm to anyone in Georgia beyond purely speculative scenarios*." (R-306). As such, the trial court properly concluded that the harm to Appellees outweighs the harm to Appellant.

While this injunction has not harmed Appellant Austin-Gatson in any way, vacating the injunction would wreck the Appellees' businesses, and likely the hemp industry in Gwinnett County and beyond. Appellant argues Appellees have "an adequate remedy at law if any of their property were seized," citing the Uniform Civil Forfeiture Procedures Act (S. Brief, p. 17-8), and "avenues within the criminal process" if they are arrested (S. Brief, p. 22-23).

Under the laws of this state, however, Appellees do not have to their property unlawfully taken from them or suffer arrest and prosecution before seeking protection from unlawful government conduct. *See Sarrio v. Gwinnett County*, 273 Ga. 404, 405-06 (2001), reversing denial of request for declaratory and injunctive relief where trial court failed to consider claimant's loss of revenue; *Great Atl. & Pac. Tea Co. v. City of Columbus*, 189 Ga. at 465, affirming injunction "sought to protect the plaintiff's property and business against serious injury that would result from the threatened prosecution of all of its employees."

C. There is a substantial likelihood that Appellees will prevail on the merits of their claims at trial.

The trial court properly found that this factor weighed in favor of granting the injunction, recognizing that several courts across the country, including in Georgia, have already found that Delta-8-THC and other hemp extracts are not controlled substances. (R-306-07). The trial court emphasized that "*this law has been in place for more than 2 years, with businesses across the state selling Delta-8-THC and Delta-10 products (including gummies), but there has been little to no action taken against or involving these products until this year*." (R-307).

As illustrated by Dr. Clements' testimony and other evidence presented at the hearing, CBD, Delta-8-THC, and other cannabinoids can be isolated from each other and extracted from hemp while maintaining a concentration of less than 0.3% Delta-9-THC. Appellees introduced lab tests from DEA-certified labs showing that

these cannabinoids can be infused into products, including gummies, and contain less than 0.3% delta-9 THC. That makes them legal under Georgia law.

The Ninth Circuit recently became the first federal court of appeals to consider the legality of Delta-8-THC products, holding that "the plain and unambiguous text of the Farm Act compels the conclusion that the delta-8 THC products before us are lawful." *AK Futures LLC v. Boyd St. Distro, LLC*, 35 F.4th 682, 690 (9th Cir. 2022). The Ninth Circuit's holding regarding the federal law is particularly important since Georgia's hemp laws repeatedly refer to the "Federally defined THC level" to distinguish hemp extracts from illegal marijuana and THC.

Delta-8-THC and all the other hemp-derived cannabinoids involved in this case were explicitly legalized under the plain text of O.C.G.A. § 2-23-3(5), which includes not only hemp plants in the definition of "hemp," but also "all derivatives, extracts, cannabinoids" with less than 0.3% Delta-9-THC. Since the criminal prohibition of "THC" under O.C.G.A. § 16-13-25(P) explicitly exempts THC when "such substance is found in hemp," Delta-8-THC, Delta-10-THC, and Delta-9-THC in concentrations of 0.3% or less are not controlled substances in Georgia.

The merits of Appellee's position are so evident that, shortly after Appellees filed this lawsuit, Appellant Austin-Gatson changed her position regarding the legality of Delta-8-THC and Delta-10-THC, and she now concedes that they are not controlled substances. She maintains, however, that "Georgia law expressly

prohibits THC of any amount in food products," such as the gummies that Appellant seized from local businesses in Gwinnett County. (S. Brief, p. 21).

Appellants' argument has no basis in law, and Appellants cannot point to any statute, ordinance, or other law that criminalizes or otherwise prohibits food products containing Delta-8-THC or Delta-10-THC, and certainly not Georgia's Controlled Substance Act. Appellant can only cite the definition of "hemp products" under § 2-23-3(6) for support since it excludes "food products infused with THC" from its definition unless the products have been approved by the FDA.

Neither O.C.G.A. § 2-23-3 nor its subsections created any criminal cause of action, however. In fact, § 2-23-3 does not set forth any prohibitions of any kind. The statute only provides definitions for certain terms used in Georgia's hemp laws and regulations. Even if food products infused with legal amounts of THC are not "hemp products," this does not make them controlled substances. It simply means they cannot be treated as "hemp products" under § 2-23-1, *et seq*, *see* O.C.G.A. § 2-23-7 (requirements for certificates of authenticity and shipping regulations for hemp products); O.C.G.A. § 2-23-4 (storage requirements for hemp products).

A prosecutor can only bring criminal charges under Georgia's criminal code, and O.C.G.A. § 16-13-25(P) explicitly exempts "THC" as a controlled substance "when found in "hemp or hemp products." As this Court has recognized, "where a legislative provision is phrased in the disjunctive, it must be so construed

absent a clear indication that a disjunctive construction is contrary to the legislative intent." *Gearinger v. Lee*, 266 Ga. 167, 169 (1996). When used in the disjunctive, "the word 'or' is usually interpreted as being inclusive, thereby expanding the statute's coverage." *Mathis v. State*, 336 Ga. App. 257, 260 (2016).

Based on the plain language of § 16-13-25(P) and its disjunctive use of the word "or," it is irrelevant whether food products containing Delta-8-THC or Delta-10-THC are "hemp products." Because these substances constitute "hemp" under § 2-23-3(5), they are excluded from the definitions of "THC" and "marihuana" under Georgia's Controlled Substance Act, and thus cannot be treated as such.

Moreover, the exclusion of "food products infused with THC" from the definition of "hemp products" is best understood as excluding food products infused with Delta-9-THC, not other cannabinoids and extracts that are explicitly legal under the definition of "hemp." The legality of "hemp products" explicitly hinges on whether the product is infused with "the federally defined THC level," which refers exclusively to "a delta-9 THC concentration of not more than 0.3% percent" under 7 U.S.C. § 1639o. Bolstering this interpretation of "hemp products" is the fact that Georgia's hemp regulations explicitly mandate that the terms "Delta-9 THC" and "THC" be treated as "interchangeable." Ga. Comp R. & Regs. 40-32-1.02(16). Accordingly, the second reference to "THC" in the definition of "hemp products" clearly refers only to Delta-9-THC.

Adopting Appellant's interpretation of Georgia's hemp laws and criminal code would yield absurd results. Appellant is essentially arguing that Delta-8-THC and Delta-10-THC are illegal controlled substances when found in edible products, while conceding that they are legal in any other form, including pure, concentrated forms that can be smoked. This would arguably be the first time in Georgia history that the legal status of a substance hinges entirely on whether it is found in edible form. Appellant has not cited any support under Georgia law or elsewhere for the remarkable proposition that an otherwise legal substance can become an illegal controlled substance solely by being infused into a gummy or baked into a cookie.

As the trial court noted, several courts across the country have considered the legality of these Delta-8-THC and Delta-10-THC and ruled them legal, including when they are found in food products, which the trial court gave "*some persuasive weight*." (R-307). The trial court noted that at least one Superior Court in Georgia, in Madison County, has "*ruled that gummies containing Delta-8-THC are legal and not a controlled substance in Georgia*," explicitly rejecting Appellant's distinction regarding "food products." *Id.*

In fact, since the hearing, another Superior Court, this time in Appellant's own Gwinnett County, has ruled that gummies with Delta-8-THC are not controlled substances under Georgia law. In *State of Georgia v. Azim Jiwani*, 22-B-01152-3Q, the Honorable Deborah R. Fluker held a hearing and ordered the State

to return Delta-8-THC gummies that it had unlawfully seized. Under these circumstances, there is a strong likelihood Appellees will prevail on the merits.

D. Granting the interlocutory injunction has not disserved the public interest.

Finally, the trial court properly found that granting the requested injunction would not "*disserve the public interest as it will preserve the status quo and prevent conflicting application of O.C.G.A. § 2-23-3 between neighboring counties*." (R-307). Counsel respectfully contends that the public interest has actually been furthered by this injunction. In addition to protecting the rights of law-abiding businesses in Gwinnett County, the trial court's injunction has protected consumers as well. As Dr. Clements testified, the products at issue in this case have legitimate benefits for consumers, whether in babies with cancer or opioid addicts confronting their addictions (T-57-59).

While Appellant Austin-Gatson is the elected district attorney of Gwinnett Count, it is her duty to enforce Georgia's criminal code, not create law. That is for the legislature, and the legislature has spoken in clear terms regarding the legality of hemp-derived cannabinoids like Delta-8-THC and Delta-10-THC. As long as Appellant maintains her position that individuals and businesses selling Delta-8-THC and Delta-10-THC products are breaking the law, the public interest is best served by an injunction prohibiting Appellant from initiating arrests or civil asset forfeiture proceedings based on the sale of these products.

CONCLUSION

For these reasons, Appellees respectfully request that this Court affirm the trial court's order granting Appellees' motion for an interlocutory injunction.

PATE, JOHNSON & CHURCH LLC

/s/ Thomas D. Church

Pate, Johnson & Church, LLC
101 Marietta Street, Suite 3300
Atlanta, Georgia 30303
(404) 223-3310

Thomas D. Church
Georgia Bar No.: 956589

Page A. Pate
Georgia Bar No.: 565899

CERTIFICATE OF SERVICE

This certifies that the foregoing pleading was served via electronic delivery, per the prior agreement of the parties, addressed as follows:

Cristina Correia, Senior Assistant Attorney General
Attorney General's Office
40 Capitol Square, SW
Atlanta, Georgia 30334

This 29th day of August, 2022.

PATE, JOHNSON & CHURCH LLC

/s/ Thomas D. Church
Thomas D. Church
Georgia Bar No.: 956589

Page A. Pate
Georgia Bar No.: 565899

Pate, Johnson & Church, LLC
101 Marietta Street, Suite 3300
Atlanta, Georgia 30303
(404) 223-3310