No. S22A1243

In the

Supreme Court of Georgia

State of Georgia and District Attorney Austin-Gatson,

Appellants,

v.

SASS Group, LLC, and Great Vape, LLC,

Appellees.

On Appeal from the Fulton County Superior Court
Superior Court Case No. 2022CV362007

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

Page

Table of Authorities iv

Introduction 1

Jurisdiction 2

Statement 2

A. Factual Background 2

B. Proceedings Below 4

Enumeration of Errors 4

Standard of Review 5

Summary of Argument 5

Argument 6

I. The constitutional waiver of sovereign immunity relied on by Appellees required that the trial court dismiss the entire lawsuit. 6

II. The interlocutory injunction is improper as the district attorney has prosecutorial immunity pursuant to Ga. Const. Art. VI, § VIII, Para. I(e). 13

III. Even if dismissal of the entire case were not required pursuant to the constitutional waiver of immunity, the trial court erred in granting an interlocutory injunction. 15

A. Appellees are unlikely to prevail on the merits of their underlying claim. 17

1. Appellees are unlikely to prevail on the merits of their due process claim. 17

TABLE OF CONTENTS
(continued)

Page

2. Food products infused with Delta-8-THC, Delta-10-THC, or other cannabinoids are *not* exempt from prosecution. 19

B. The trial court erred in granting an interlocutory injunction where the remaining equitable factors all weigh against the issuance of an injunction. 21

Conclusion 23

TABLE OF AUTHORITIES

Page(s)

Cases

Alabama v. United States Army Corps of Eng'rs,
424 F.3d 1117 (11th Cir. 2005) 11

Alexander v. Dean,
29 Ga. App. 722 (1923), *aff'd* 157 Ga. 280 (1924) 9

Barwick v. Wind,
203 Ga. 827 (1948) 10

Berrien County Bank v. Alexander,
154 Ga. 775 (1923) 10

Bordenkircher v. Hayes,
434 U.S. 357 (1978) 18

Citizens' & Southern Nat'l Bank v. Hendricks,
176 Ga. 692 (1933) 9

City of East Point v. Minton,
207 Ga. 495 (1951) 15

City of Waycross v. Pierce County Bd. of Comm'rs,
300 Ga. 109 (2016) 16

City of Willacoochee v. Satilla Rural Elec. Mbrshp. Corp.,
283 Ga. 137 (2008) 22

Colon v. Fulton County,
294 Ga. 93 (2013) 8

Deal v. Coleman,
294 Ga. 170 (2013) 11

Doe #102 v. Dep't of Corr.,
268 Ga. 582 (1997) 7

Dubose v. Hodges,
280 Ga. 152 (2006) 13

Elliott v. State,
305 Ga. 179 (2019) 8

Georgiacarry.Org, *Inc. v. Atlanta Botanical Garden, Inc.*,
299 Ga. 26 (2016) 15

Green Bull Ga. Partners, LLC v. Register,
301 Ga. 472 (2017) 23

Grimes v. Catoosa Cnty. Sheriff's Office,
307 Ga. App. 481 (2010) 20

Hill v. Owens,
292 Ga. 380 (2013) 8

Imbler v. Pachtman,
424 U.S. 409 (1976) 14

Int'l Bus Machines Corp. v. Evans,
265 Ga. 215 (1995) 14

Kennedy v. Carlton,
294 Ga. 576 (2014) 20

Lathrop v. Deal,
301 Ga. 408 (2017) 9, 14

Lee v. Envtl. Pest & Termite Control,
271 Ga. 371 (1999) 16, 22

Lesesne v. Mast Property Management,
251 Ga. 550 (1983) 5

Lue v. Eady,
297 Ga. 321 (2015) 22

McSmith v. Brown,
317 Ga. App. 775 (2012) 13

Mohwish v. Franklin,
291 Ga. 179 (2012) 15

Robbins v. Lanier,
198 Ga. App. 592 13

S&S Towing & Recovery, Ltd. v. Charnota,
309 Ga. 117 (2020) 17

Sawnee Elec. Mbrshp. Corp. v. Ga. Dep't of Revenue,
279 Ga. 22 (2005) 7

Schumacher v. City of Roswell,
344 Ga. App. 135 (2017) 17

Slakman v. Continental Cas. Co.,
277 Ga. 189 (2003) 8

Starship Enterprises of Atlanta v. Nash,
357 Ga. App. 106 (2020) 14

State v. Wooten,
273 Ga. 529 (2001) 13

Street v. Au Health Sys.,
2021 U.S. Dist. LEXIS 227937 (S.D. Ga. 2021) 11

U.S. v. Goodwin,
457 U.S. 368 (1982) 18

Statutes

KRS § 260.850(6) 21

KRS § 260.852(2) 21

O.C.G.A. § 2-23-3 .... 3, 19

O.C.G.A. § 2-23-3(3) 3, 19

O.C.G.A. § 2-23-3(6) 3, 5, 19, 22

O.C.G.A. § 2-23-3(12) 19

O.C.G.A. § 5-6-34(a)(4) 2

O.C.G.A. § 9-2-1(1) 9

O.C.G.A. § 9-2-5(a) 9

O.C.G.A. § 9-2-61 10

O.C.G.A. § 9-5-2 15

O.C.G.A. § 9-16-1 *et seq.* 18, 22

O.C.G.A. § 16-13-25(3)(P) 3, 5, 19, 22

O.C.G.A. § 16-13-30 21

Tex. Health & Safety Code § 443.201(a) 20

Tex. Health & Safety Code § 443.204(2) 20

Tex. Health & Safety Code § 443.2025(b) 20

Other Authorities

Ga. Const. Art. I, § II, Para. V(b) 1, 4

Ga. Const. Art. I, § II, Para. V 6

Ga. Const. Art. I, § II, Para. V(b)(2) .... *passim*

Ga. Const. Art. I, § II, Para. V(b)(4) 8

Ga. Const. Art. III, § IV, Para. IX 14

Ga. Const. Art. VI, § VI, Para. II 2, 3

Ga. Const. Art. VI, § VIII, Para. I(e) .... *passim*

Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) 9

INTRODUCTION

This case is an appeal of a grant of an interlocutory injunction prohibiting a district attorney "from directing her office or agents to initiate or continue any criminal enforcement action or civil asset forfeiture proceeding against any individual or business based on their alleged possession, sale, or distribution of products containing hemp-derived cannabinoids, including but not limited to Delta-8-THC and Delta-10-THC." R-293-294. This appeal presents issues of first impression with regard to sovereign immunity, prosecutorial immunity, and the interpretation of Georgia's criminal laws.

The trial court committed legal error in granting an interlocutory injunction where appellees' underlying suit was required to be dismissed. Appellees filed this suit asserting a waiver of sovereign immunity pursuant to Ga. Const. Art. I, § II, Para. V(b). Contrary to the express terms of this limited waiver of immunity, the trial court permitted Appellees to pursue a lawsuit seeking declaratory relief from the State of Georgia while simultaneously seeking an interlocutory injunction from a state official sued in her individual capacity. The express terms of the Georgia Constitution provide that actions filed pursuant to this waiver "shall be brought exclusively against the state and in the name of the State of Georgia," and further provide that "[a]ctions … naming as a defendant any individual, officer or entity other than as expressly authorized under this Paragraph shall be

dismissed." Ga. Const. Art. I, § II, Para. V(b)(2). Pursuant to this constitutional mandate, this lawsuit should have been dismissed.[1]

The trial court also erred by failing to recognize the district attorney's constitutional prosecutorial immunity from private suit. Ga. Const. Art. VI, § VIII, Para. I(e).

Finally, the trial court erred in granting an interlocutory injunction where appellees failed to show they are entitled to this extraordinary relief.

JURISDICTION

The order of the Fulton County Superior Court was entered on April 15, 2022. The notice of appeal was filed on May 12, 2022. This Court has jurisdiction under O.C.G.A. § 5-6-34(a)(4) and Ga. Const. Art. VI, § VI, Para. II because this action is an appeal of a grant of an interlocutory injunction.

STATEMENT

A. Factual Background

Appellees SASS Group, LLC and Great Vape, LLC are businesses selling Delta-8-THC and Delta-10-THC products, including food products infused with THC. R-15 ¶ 29, R-16 ¶ 30. In January, 2022, the Gwinnett County District Attorney issued a press release

[1] This court granted Appellants' application for interlocutory appeal of the order denying a motion to dismiss. The appeal from the order denying the motion to dismiss is case no. S22A1244.

announcing that her office would pursue the prosecution of "individuals and businesses who engage in the possession, sale or distribution of . . . schedule 1 controlled substances." R-73-75. The press release described Delta-8-THC and Delta-10-THC as controlled substances. *Id*. Appellees filed suit against the State of Georgia and the DA seeking "a declaration that commercial products containing cannabinoids derived from hemp, including but not limited to products containing delta-8-tetrahydrocannibol ("Delta-8-THC"), delta-10-tetrahydrocannabinol ("Delta-10-THC"), Cannabidiol ("CBD"), Cannabinol ("CBN"), and Cannabigerol ("CBG"), are "hemp products" under O.C.G.A. § 2-23-3 and may be lawfully possessed and sold throughout the state of Georgia." Appellees sought a preliminary injunction against the DA in her individual capacity, while simultaneously seeking a declaratory judgment against the State of Georgia.

The parties agree that non-food products containing Delta-8-THC or Delta-10-THC are not prohibited as long as the product contains less than a "delta-9-THC concentration of not more than 0.3 percent on a dry weight basis, or as defined in 7 U.S.C. Section 1639o, whichever is greater." *See* O.C.G.A. § 16-13-25(3)(P), § 2-23-3(3) and § 2-23-3(6). The parties disagree as to whether food products infused with THC are prohibited under state law. *See* O.C.G.A. § 16-13-25(3)(P) and § 2-23-3(6).

B. Proceedings Below

Appellees filed this suit on March 14, 2022, against both the District Attorney, in her individual capacity, and the State of Georgia. R-16 ¶¶ 31-32. Appellees also filed a motion for temporary restraining order and interlocutory injunction, which was filed with the clerk on March 18, 2022.[2] R-79–90. That same day, after a hearing, the court issued a temporary restraining order. R-96–99.

Appellants filed a response to the motion for interlocutory injunction and a motion to dismiss, both invoking sovereign immunity. R-135-167; R-188-191. On April 12, 2022, after a hearing, the trial denied the motion to dismiss. R-286. A hearing on the motion for interlocutory injunction followed on April 14, 2022 and the court granted the interlocutory injunction. R-290–294. Appellants have appealed both orders.

ENUMERATION OF ERRORS

1. The trial court erred in granting an interlocutory injunction where the Plaintiff, relying on the waiver of sovereign immunity in Ga. Const. Art. I, § II, Para. V(b), filed one lawsuit against both the State of Georgia and an individual state officer sued in her individual capacity.

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[2] Appellees presented the motion for TRO to the Court on March 16, 2022, and the Court scheduled a hearing from March 18, 2022. R-78.

2. The trial court erred in ignoring the prosecutorial immunity in Ga. Const. Art. VI, § VIII, Para. I(e) and granting an interlocutory injunction against District Attorney Austin-Gaston.

3. The trial court erred in granting an interlocutory injunction because Appellees are not likely to prevail on their due process claim.

4. The trial court erred in interpreting O.C.G.A. § 2-23-3(6) and O.C.G.A. § 16-13-25(3)(P) to permit the sale of food products infused with THC.

STANDARD OF REVIEW

A trial court's grant of an interlocutory injunction is reviewed for abuse of discretion as to factual disputes and *de novo* as to questions of law. *Lesesne v. Mast Property Management*, 251 Ga. 550, 551-552 (1983).

SUMMARY OF ARGUMENT

The trial court's order granting an interlocutory injunction against District Attorney Austin-Gaston should be reversed for numerous reasons. To start, the trial court misapplied a waiver of sovereign immunity. The waiver requires that actions brought pursuant to the waiver name only the State of Georgia as a defendant, and mandates that where a party names "any individual, officer, or entity other than

as expressly authorized . . . [the action] *shall* be dismissed." Ga. Const. Art. I, § II, Para. V(b)(2) (emphasis added).

The order also disregards the district attorney's constitutional immunity from private suit. *See* Ga. Const. Art. VI, § VIII, Para. I(e). District attorneys have broad immunity for "actions arising from the performance of their duties." *Id.* The trial court's order should be reversed for the additional reason that Appellees have not demonstrated that they are entitled to this extraordinary relief. Appellees are not likely to prevail on the merits of their underlying claim, and they are under no immediate threat of irreparable harm. Finally, the injunction is against the public interest.

ARGUMENT

I. The constitutional waiver of sovereign immunity relied on by Appellees required that the trial court dismiss the entire lawsuit.

The Georgia Constitution waives sovereign immunity for certain actions seeking declaratory relief for alleged constitutional violations by state actors. Ga. Const. Art. I, §II, Para. V. This waiver of immunity requires that actions filed pursuant to the waiver be filed "exclusively against the state and in the name of the State of Georgia." Ga. Const. Art. I, § II, Para. V(b)(2). The Constitution further provides that "[a]ctions filed pursuant to this Paragraph against this state naming as a defendant any individual, officer, or entity other than as

expressly authorized under this paragraph *shall* be dismissed." *Id.* (emphasis added).

Here, the trial court erred when it failed to dismiss an action filed pursuant to this constitutional waiver of immunity against the State of Georgia *and* a district attorney, in her individual capacity. The trial court interpreted the word "action" in the waiver of sovereign immunity as expansively as possible, holding that "action" meant "cause of action" rather than case or lawsuit. Tr. at 25:1–6.

This court has repeatedly held that waivers of sovereign immunity should be narrowly construed. *Sawnee Elec. Mbrshp. Corp. v. Ga. Dep't of Revenue*, 279 Ga. 22, 23 (2005) (waiver of sovereign immunity to be strictly construed); *Doe #102 v. Dep't of Corr.*, 268 Ga. 582 (1997) (waiver of immunity narrowly construed). Reading "action" to mean a cause of action expands the waiver of immunity to include lawsuits where the state is sued and any number of state officials are also sued, albeit in separate counts of the same complaint.[3] This broad reading by the trial court rendered the waiver's instruction that "[a]ctions filed pursuant [to this waiver] . . . shall be brought *exclusively* against the state and in the name of the State of Georgia" meaningless. Ga. Const. Art. I, § II, Para. V(b)(2) (emphasis added). This Court has instructed

[3] There is no bar to a party filing one lawsuit against the State of Georgia, *and* a county or municipality as provided in the waiver of immunity. *See* Ga. Const. Art. I, § II, Para. V(b)(2). It is only actions "naming as a defendant any individual, officer, or entity *other than as expressly authorized*" that require dismissal. *Id.* (emphasis added).

that "[b]ecause the General Assembly is presumed to intend something by passage of [an] act, we must construe its provisions so as not to render it meaningless." *Colon v. Fulton County*, 294 Ga. 93, 96 (2013) (quoting *Chatman v. Findley*, 274 Ga. 54, 55 (2001)); *Slakman v. Continental Cas. Co.*, 277 Ga. 189, 190 (2003) (explaining that, when interpreting a statute, a court must avoid "a construction that makes some language mere surplusage"). Here, the trial court's order renders the limitations on sovereign immunity within the waiver mere surplusage.

The meaning of the word "action" as a case or lawsuit is made clear by its use in other provisions of this same waiver of immunity. "Words, like people, are judged by the company they keep." *Hill v. Owens*, 292 Ga. 380, 383 (2013) (quoting *Anderson v. Southeastern Fidelity Ins. Co.*, 251 Ga. 556, 556 (1983)). In that part of the waiver addressing attorney's fees, the waiver provides:

> No damages, attorney's fees, or costs of litigation shall be awarded *in* an action filed pursuant to this Paragraph, unless specifically authorized by Act of the General Assembly.

Ga. Const. Art. I, § II, Para. V(b)(4) (emphasis added). Attorneys' fees are awarded *in* cases or suits, not *in* claims. This Court has instructed that "when we determine the meaning of a particular word or phrase in a constitutional provision or statute, we consider the text in context, not in isolation." *Elliott v. State*, 305 Ga. 179, 186-187 (2019) ("words often gain meaning from context") (internal quotation and citation

omitted); *Lathrop v. Deal*, 301 Ga. 408, 429 (2017) ("we must afford the constitutional text its plain and ordinary meaning, view the text in the context in which it appears, and read the text in its most natural and reasonable way, as an ordinary speaker of the English language would.") (internal quotation and citation omitted); *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* 167 (2012) (If the meaning of a statutory provision is "intricate, obscure, or doubtful, the proper mode of discovering its true meaning is by comparing it with the other sections, and finding out the sense of one clause by the words or obvious intent of the other.") (citation and quotation marks omitted). Here, the word "action," when read uniformly throughout Paragraph V(b), is best understood to mean "case" or "lawsuit."

The use of the word "action" to mean lawsuit and not a claim, is further supported in the Civil Practice Act. "Action" is defined as "the judicial means of enforcing a right." O.C.G.A. § 9-2-1(1). Courts enforce rights through cases or lawsuits, by contrast, a "cause of action . . . is the right itself." *Alexander v. Dean*, 29 Ga. App. 722, 723 (1923), *aff'd* 157 Ga. 280 (1924); *Citizens' & Southern Nat'l Bank v. Hendricks*, 176 Ga. 692, 696 (1933) ("An action is merely the judicial means of enforcing a right . . ., and differs from a cause of action in that the latter is the right itself.") (internal quotation and citation omitted).

This reading of the word "action" is consistent with other provisions of the Civil Practice Act. *See* O.C.G.A. § 9-2-5(a) ("No plaintiff may prosecute two actions in the courts at the same time for

the same cause of action and against the same party."); O.C.G.A. § 9-2-61 (using the words case and action interchangeably). Because the word "action" means case or suit, the trial court should have dismissed this lawsuit, disposing of the entire case.

Appellees argued below that this Court has "used 'claim' and 'action' interchangeably," citing *Barwick v. Wind*, 203 Ga. 827, 828 (1948); and *Berrien County Bank v. Alexander*, 154 Ga. 775 (1923), but neither case supports that position. R-199. In *Barwick*, this Court discussed a notice requirement prior to bringing an "action" for libel. 203 Ga. at 830. Nothing in this Court's opinion equates "action" with "claim." In *Berrien County Bank*, this Court *repeatedly* used the term "action" to mean "suit" *not* "claim." 154 Ga. at 779 ("Any action or suit upon such claim so rejected . . ."); 154 Ga. at 780 ("Is the State Superintendent of Banks suable in a city court, or must actions be brought against him in the superior court? To answer this question we must first see upon what causes of action the superintendent of banks is suable."); 154 Ga. at 781 ("any action or suit upon such claim . . . This section provides for actions against the bank; not for suits against the superintendent."); 154 Ga. at 782 ("But the only instance in which we find that there is any provision for suits or actions against the

superintendent . . ."). The word "action" in Ga. Const. Art. I, § II, Para. V(b)(2) means case or suit.[4]

Courts must "presume that the General Assembly meant what it said and said what it meant." *Deal v. Coleman*, 294 Ga. 170, 172 (2013). "If the statutory text is clear and unambiguous [courts] attribute to the statute its plain meaning, and our search for statutory meaning is at an end." *Id.* at 173. Here, the waiver of immunity is clear. To qualify for the limited waiver of immunity the action, i.e., lawsuit, "shall be brought exclusively against the state and in the name of the State of Georgia." Ga. Const. Art. I, §II, Para. V(b)(2) (emphasis added).

Appellees sought only an interlocutory injunction and no other relief from the District Attorney. R-25. Appellees argue that by separating their requested relief into separate counts, they are bringing separate "claims" against the State and the District Attorney. Even if separate claims were all that Ga. Const. Art. I, Sec. II, Para. V(b)(2) required, "an injunction is a remedy, not a claim or cause of action." *Street v. Au Health Sys.*, 2021 U.S. Dist. LEXIS 227937 *6 (S.D. Ga. 2021) (quoting *Murfin v. St. Mary's Good Samaritan, Inc.*, 2013 U.S. Dist. LEXIS 54908 (S.D. Ill. 2013)); *Alabama v. United States Army*

[4] Even assuming arguendo that there is some court or statute that has used the word "action" to mean "claim," that does not change the meaning of the word "action" here, where the context is clear and unambiguous.

Corps of Eng'rs, 424 F.3d 1117, 1127 (11th Cir. 2005) ("[A]ny motion or suit for either a preliminary or permanent injunction must be based upon a cause of action, such as a constitutional violation, a trespass, or a nuisance."). Here, Appellees have brought a single due process claim. It is only the relief sought against each defendant that differs.

Appellees alleged that the State of Georgia was acting unconstitutionally "through at least one of its district attorneys," R-19 ¶ 39, and alleged that the State acted outside of its lawful authority "[b]y publicly announcing that anyone engaged in the possession, purchase, or sale of products containing hemp-derived Delta-8-THC or Delta-10-THC will be prosecuted." R-21 ¶ 46. Appellees made identical allegations regarding the conduct of District Attorney Austin-Gasten. R-13 ¶ 24 (alleging the DA "issued a press release stating that her office intended to arrest and prosecute individuals and businesses involved in 'possessing, selling or distributing' products containing Delta-8-THC or Delta-10-THC.") Under the count of the complaint directed at the state, Appellees allege that the *DA's interpretation* of the law is incorrect. R-20 ¶ 44. In other words, Appellees' due process claim against the state is premised completely on the conduct of District Attorney Austin-Gaston. Appellees' lawsuit includes one claim, seeking multiple forms of relief. The trial court erred by failing to dismiss the lawsuit as expressly mandated by the Constitution. Ga. Const. Art. I, § II, Para. V(b)(2) (providing that such actions "shall be dismissed.").

II. The interlocutory injunction is improper as the district attorney has prosecutorial immunity pursuant to Ga. Const. Art. VI, § VIII, Para. I(e).

The trial court erred in its grant of an interlocutory injunction against District Attorney Austin-Gaston for the additional reason that she is entitled to prosecutorial immunity.

The Georgia Constitution provides that "[d]istrict attorneys shall enjoy immunity from private suit for actions arising from the performance of their duties." Ga. Const. Art. VI, § VIII, Para. I(e). A prosecutor enjoys broad discretion in making decisions about whom to prosecute, what charges to bring, and even whether to prosecute a case at all. *State v. Wooten*, 273 Ga. 529 (2001); *see also Dubose v. Hodges*, 280 Ga. 152 (2006). "The determining factor [in applying immunity] appears to be whether the act or omission is intimately associated with the judicial phase of the criminal process." *McSmith v. Brown*, 317 Ga. App. 775, 776 (2012). The immunity applies regardless of whether the District Attorney is sued in her official or individual capacity. *Robbins v. Lanier*, 198 Ga. App. 592, 593 91991) (damages action against district attorney in individual capacity). As in *Robbins*, here, Appellees' claim is "clearly based on allegations that the [district attorney] misused the power of [her] office."[5] *Id.*

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[5] To the extent that *Robbins* provides that prosecutors are "protected by the same immunity in civil cases that is applicable to judges," the court was only examining immunity in the context of a damages claim. 198 Ga. App. at 593. Therefore, cases providing that judicial

Appellants recognize that under common law, prosecutorial immunity is limited to immunity from civil damages. *Imbler v. Pachtman*, 424 U.S. 409 (1976). However, in *Lathrop*, 301 Ga. at 444 n. 25, this Court explained that even where sovereign immunity would not apply to a state official sued in their individual capacity for injunctive relief, "[s]pecial doctrines of immunity may apply in suits against particular state officers and employees . . . for instance, . . . prosecutorial immunity."[6] A plain reading of the text of the constitutional immunity for district attorneys does not limit the immunity to actions for damages. Instead, the immunity applies to all "private suit[s] for actions arising from the performance of their duties." Ga. Const. Art. VI, § VIII, Para. I(e). "The word 'suit' is all-inclusive and applicable to any type of action." *Int'l Bus Machines Corp. v. Evans*, 265 Ga. 215, 219 (1995) (Benham, P.J., concurring in part and dissenting in part) (citing *Department of Human Resources v. Briarcliff Haven*, 141 Ga. App. 448, 450 (1977)), *overruled on other*

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immunity is limited to claims for money damages are not conclusive as to the scope of prosecutorial immunity.

[6] Similarly, the Georgia Court of Appeals has recently applied legislative immunity to actions seeking prospective injunctive relief. *Starship Enterprises of Atlanta v. Nash*, 357 Ga. App. 106, 110 (2020). The court did so while noting that the *Lathrop* court had expressly left open the possibility that certain types of immunity, "for instance, judicial immunity, legislative immunity, or prosecutorial immunity," may bar claims for prospective injunctive relief. *Id.* at 111. Like prosecutorial immunity, legislative immunity is expressly provided in the state constitution. Ga. Const. Art. III, § IV, Para. IX.

grounds, *Ga. Dep't of Natural Res. v. Ctr. for a Sustainable Coast, Inc.*, 294 Ga. 593, 601 (2014).

Reading the constitutional immunity to extend to cases seeking injunctive relief is also consistent with O.C.G.A. § 9-5-2, prohibiting interference with the criminal process. *See also* G*eorgiacarry.Org, Inc. v. Atlanta Botanical Garden, Inc.*, 299 Ga. 26, 31 (2016). "Equity will take no part in the administration of the criminal law. It will neither aid criminal courts in the exercise of their jurisdiction, nor will it restrain or obstruct them." *Mohwish v. Franklin*, 291 Ga. 179, 180 (2012) (quoting O.C.G.A. § 9-5-2); *see also City of East Point v. Minton*, 207 Ga. 495, 499 (1951) ("Equity will not enjoin a criminal prosecution solely to prevent such a prosecution."). Here, the trial court's order did exactly that, enjoining "Defendant Austin-Gatson, in her individual capacity from directing her office or agents to initiate or continue any criminal enforcement action or civil forfeiture proceeding against any individual or business based on their alleged possession, sale, or distribution of products containing hemp-derived cannabinoids, including but not limited to Delta-8-THC and Delta-10-THC."

III. Even if dismissal of the entire case were not required pursuant to the constitutional waiver of immunity, the trial court erred in granting an interlocutory injunction.

To obtain an interlocutory injunction, appellees were required to show that:

> (1) there [was] a substantial threat that the moving party [would] suffer irreparable injury if the injunction [was] not

> granted; (2) the threatened injury to the moving party outweigh[ed] the threatened harm that the injunction may do to the party being enjoined; (3) there [was] a substantial likelihood that the moving party [would] prevail on the merits of her claims at trial; and (4) granting the interlocutory injunction [would] not disserve the public interest.

City of Waycross v. Pierce County Bd. of Comm'rs, 300 Ga. 109, 111 (2016). Here, all four factors weighed against the issuance of an interlocutory injunction.

First, as to the merits of Appellees' underlying claims, the trial court committed legal error. The trial court ignored the law that a due process claim is not cognizable until the state fails to provide a process for any alleged deprivation. The trial court also misapplied Georgia criminal statutes to permit the possession and sale of food products infused with THC, despite THC being a controlled substance in Georgia and the exemption for hemp products not including an exemption for food products.

Second, as to the remaining equitable factors, the trial court also erred. There is no irreparable harm here because Appellees have an adequate remedy. *Lee v. Envtl. Pest & Termite Control*, 271 Ga. 371, 373 (1999). The threatened injury to Appellees does not outweigh the harm to the state, as the state has a compelling interest in the enforcement of its criminal laws. Finally, interference with the prosecution of this state's criminal laws is contrary to the public interest.

A. Appellees are unlikely to prevail on the merits of their underlying claim.

1. Appellees are unlikely to prevail on the merits of their due process claim.

"Both the Georgia and Federal Constitutions prohibit the state from depriving any person of life, liberty, or property, without due process of law." *Schumacher v. City of Roswell*, 344 Ga. App. 135, 138-139 (2017) (quoting *Atlanta City School Dist. v. Dowling*, 266 Ga. 217, 218 (1996)).[7] "Due process of law as guaranteed by the Federal and State Constitutions includes notice and hearing as a matter of right where one's property rights are involved." *Schumacher*, 344 Ga. App. at 138-139 (quoting *Dansby v. Dansby*, 222 Ga. 118 (1966)). However, "[t]he Due Process Clause does not guarantee a particular form or method of procedure." *S&S Towing & Recovery, Ltd. v. Charnota*, 309 Ga. 117, 119 (2020). "Instead, due process 'is satisfied if a party has reasonable notice and opportunity to be heard, and to present its claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it.'" *S&S Towing & Recovery, Ltd.*, 309 Ga. at 119 (quoting *Cobb County Sch. Dist. v. Barker*, 271 Ga. 35, 37 (1999). It is only when the state refuses to provide adequate procedural safeguards that a procedural due process claim is actionable. *Schumacher*, 344 Ga. App. at 139.

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[7] The claims here were brought only pursuant to the Georgia Constitution. *See* R-20 ¶ 39; R-24 ¶ 46.

Here, state law clearly provides a sufficient process for Appellees to challenge any civil forfeiture. *See generally* O.C.G.A. § 9-16-1 *et seq*. (Uniform Civil Forfeiture Procedures Act). Nor is a threat of prosecution, even if, assuming arguendo, it is premised on an incorrect reading of a criminal statute, a violation of due process. See R-24 ¶ 54. Plaintiffs rely on *U.S. v. Goodwin*, 457 U.S. 368 (1982) for their broad proposition that the threat of prosecution is a due process violation where Plaintiffs' actions are lawful. However, that is not at all what *Goodwin*, or the cases cited therein, stand for. Instead, these cases stand for the unremarkable proposition that the state may not retaliate against a criminal defendant for exercising his constitutional right to attack his conviction. *Bordenkircher v. Hayes*, 434 U.S. 357, 362 (1978).

> The Court has emphasized that the due process violation … lay not in the possibility that a defendant might be deterred from the exercise of a legal right … but rather in the danger that the State might be retaliating against the accused for lawfully attacking his conviction.

Bordenkircher v. Hayes, 434 U.S. 357, 363 (1978) (emphasis added). "Absent a presumption of vindictiveness, no due process violation has been established." *United States v. Goodwin*, 457 U.S. 368, 384 (1982) (emphasis added). Absent evidence that the district attorney was acting vindictively, the trial court erred in granting the preliminary injunction. Therefore, there can be no due process violation.

2. Food products infused with Delta-8-THC, Delta-10-THC, or other cannabinoids are *not* exempt from prosecution.

The trial court's interpretation of Georgia criminal laws to permit the sale of food products with THC is legal error. THC is defined as "tetrahydrocannabinol, tetrahydrocannabinolic acid, or a combination of tetrahydrocannabinol and tetrahydrocannabinolic acid." O.C.G.A. § 2-23-3(12). THC is a controlled substance in Georgia, *except* "when found in hemp or hemp products as such terms are defined in Code Section 2-23-3." O.C.G.A. § 16-13-25(3)(P) (identifying Schedule I controlled substances).

> "Hemp products" means all products with the federally defined THC level[8] for hemp derived from, or made by, processing hemp plants or plant parts that are prepared in a form available for legal commercial sale, *but not including food products infused with THC* unless approved by the United States Food and Drug Administration.

O.C.G.A. § 2-23-3(6) (emphasis added). In other words, food products infused with THC, no matter whether delta-8, delta-9 or delta-10, are expressly excluded from the definition of hemp products, and therefore the THC contained in food products is a controlled substance under Georgia law. The trial court's reading of these statutes ignores the

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[8] "'Federally defined THC level for hemp' means a delta-9-THC concentration of not more than 0.3 percent on a dry weight basis, or as defined in 7 U.S.C. Section 1639o, whichever is greater." O.C.G.A. § 2-23-3(3).

exclusion of food products from the definition of hemp products.[9] "A statute . . . is to be construed according to its terms, giving those terms their plain and ordinary meaning, and avoiding a statutory construction that will render some of the statutory language mere surplusage . . . ." *Kennedy v. Carlton*, 294 Ga. 576, 578 (2014); *see also Grimes v. Catoosa Cnty. Sheriff's Office,* 307 Ga. App. 481, 483–84 (2010) ("All parts of a statute should be harmonized and given sensible and intelligent effect, because it is not presumed that the legislature intended to enact meaningless language.").

The trial court's interpretation of Georgia law erroneously relied on cases from Texas and Kentucky interpreting those states' very different statutes. R-293. Texas law expressly provides that "[a] person may possess, transport, sell, or purchase *a consumable hemp product* processed or manufactured in compliance with this chapter." Tex. Health & Safety Code § 443.201(a) (emphasis added). *See* also Tex. Health & Safety Code § 443.2025(b) (providing that persons selling consumable cannabidiol products must register with the State); Tex. Health & Safety Code § 443.204(2) (providing that "products containing one or more hemp-derived cannabinoids, such as cannabidiol, intended for ingestion are considered foods, *not* controlled substances or adulterated products.") (emphasis added).

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[9] There are no FDA approved food products at issue here.

Kentucky's definition of hemp has no exception for food products. KRS § 260.850(6) ("'Hemp products' or 'industrial hemp products' means products derived from, or made by, processing hemp plants or plant parts."). Kentucky's declared policy is also, among other things, to "[p]romote the expansion of the Commonwealth's hemp industry to the maximum extent permitted by federal law by allowing citizens of the Commonwealth to cultivate, handle, or process hemp and hemp products for commercial purposes." KRS § 260.852(2). Contrary to both Texas and Kentucky, as shown above, Georgia law expressly prohibits THC of any amount in food products. The trial court's order to the contrary was legal error.

B. The trial court erred in granting an interlocutory injunction where the remaining equitable factors all weigh against the issuance of an injunction.

The trial court held that Appellees would "suffer irreparable harm if District Attorney Austin-Gaston [was] not enjoined." R-291. The court did so relying on testimony from another business owner whose warehouse had been raided by law enforcement. *Id.* and Tr. 196–197. However, the District Attorney testified that "[a]bsent a change in the law, [her] office will not initiate prosecutions pursuant to O.C.G.A. § 16-13-30 for possession of *non-food products* containing less than .3% delta-9-THC, regardless of whether they contain delta-8-THC, delta-10-

THC, or another cannabinoid."[10] Tr. 203 ¶ 6. Therefore, there was no imminent injury to justify an interlocutory injunction. *Lue v. Eady*, 297 Ga. 321, 329 (2015). "There must be some vital necessity for the injunction so that one of the parties will not be damaged and left without adequate remedy." *Lee*, 271 Ga. at 373 (emphasis added). Unless "the injury is pressing and the delay dangerous," the injunction should not be granted. *Id.* *See similarly*, *City of Willacoochee v. Satilla Rural Elec. Mbrshp. Corp.*, 283 Ga. 137, 138 (2008) (An interlocutory injunction should "never be granted except where there is grave danger of impending injury to person or property rights"). Here, there was no risk of imminent injury and Appellees had an adequate remedy at law if any of their property were seized. *See generally* O.C.G.A. § 9-16-1 *et seq*. (Uniform Civil Forfeiture Procedures Act).

The remaining equitable factors, that the threatened injury outweigh the harm the injunction may cause the non-moving party, and that the injunction not disserve the public interest, also weighed against the issuance of the injunction. The state has an interest in the enforcement of its criminal laws. Because the district attorney's enforcement of the criminal laws is a valid exercise of the state's police power and does not impermissibly burden a constitutional right, the threatened injury to Appellees did not outweigh the harm to the State.

[10] With respect to food products containing THC, Plaintiff is not entitled to income through the sale of illegal products. *See* O.C.G.A. § 2-23-3(6) and O.C.G.A. § 16-13-25(3)(P).

Similarly, the interference with the prosecution of this state's criminal laws is contrary to the public interest. Appellees have avenues within the criminal process to challenge the district attorney's interpretation of the criminal laws. The trial court held that the public interest was served by "preserv[ing] the status quo." R-293. However, as this Court has held:

> That interlocutory injunctions are available in proper cases to maintain the status quo does not mean that the status quo must be maintained in every case.

Green Bull Ga. Partners, LLC v. Register, 301 Ga. 472, 474 n. 4 (2017). Where, as here, no constitutional rights are burdened, an injunction is contrary to the public interest.

CONCLUSION

For the reasons set out above, this Court should reverse the order of the trial court and dissolve the interlocutory injunction.

Respectfully submitted.

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CERTIFICATE OF SERVICE

I hereby certify that on August 8, 2022, I served this brief by mailing a copy of the brief to be delivered via email, per the prior agreement of the parties, addressed as follows:

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Exhibit

SUPREME COURT OF GEORGIA
Case No. S22A1243

July 27, 2022

The Honorable Supreme Court met pursuant to adjournment.

The following order was passed.

THE STATE et al. v. SASS GROUP, LLC et al.

Your request for an extension of time to file the brief of appellant in the above case is granted. You are given an extension until August 08, 2022.

Appellee's brief shall be filed within 20 days after the filing of appellant's brief.

A request for oral argument must be independently timely filed, except in direct appeals from judgments imposing the death penalty, every interim review which is granted pursuant to Rule 37, appeals following the grant of petitions for writ of certiorari, applications of certificates of probable cause to appeal in habeas corpus cases where a death sentence is under review, and appeals in habeas corpus cases where a death sentence has been vacated in the lower court, where oral argument is mandatory. Rule 50(1) -(2). No extensions of time for requesting oral argument will be granted. Rule 51(1).

A copy of this order **MUST** be attached as an exhibit to the document for which you received this extension.

SUPREME COURT OF THE STATE OF GEORGIA

Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.

Witness my signature and the seal of said court hereto affixed the day and year last above written.

, Clerk