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

REPLY BRIEF OF APPELLANTS

Christopher M. Carr 112505
Attorney General
Beth Burton 027500
Deputy Attorney General
Tina M. Piper 142469
Sr. Assistant Attorney General
Cristina M. Correia 188620
Sr. Assistant Attorney General
Office of the Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3535
ccorreia@law.ga.gov
Counsel for Appellants

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INTRODUCTION

This case is an appeal of the grant of an interlocutory injunction prohibiting district attorney Austin-Gatson "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. Appellants, the State of Georgia and the district attorney, established in their initial brief that the superior court erred in granting the interlocutory injunction. First, the court erred because the lawsuit, filed against the state and the district attorney, relied on a waiver of sovereign immunity that provided that the lawsuit should be filed exclusively against the state and *required* that lawsuit filed pursuant to the waiver "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) (emphasis added). Second, the court erred in granting an interlocutory injunction because the Georgia Constitution provides district attorneys with immunity from private suits. Third, the court erred in granting an interlocutory injunction because the underlying complaint has no merit. The complaint fails to state a claim for due process and misinterprets Georgia laws that establish that THC is a controlled substance with no applicable exception when found in food

products. Finally, the court erred in granting the injunction where the equitable factors weighed against the grant of an injunction.

Appellees, SASS Group, LLC and Great Vape, LLC, are two retail businesses. They argue in response that sovereign immunity is not a bar to the injunction because the immunity does not apply to actions against the district attorney in her individual capacity. They argue further that the prosecutor's constitutional immunity only applies to actions for damages, despite the lack of any such express limitation in the text of the Constitution. Appellees do not address at all that their due process claim, the only claim in the complaint, lacks merit. As to the interpretation of Georgia's hemp statute and criminal laws, Appellees suggest alternative definitions to what is provided by statute. Appellees urge this court to affirm the superior court's order to maintain the "status quo." Resp. at 18. Appellants address each of these arguments briefly below.

ARGUMENT

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

Appellants' initial brief explained that the waiver of sovereign immunity relied upon by Appellees in their complaint required that their lawsuit be dismissed in its entirety because they sued not only the state, but a state officer in her individual capacity. In response, Appellees simply argue that sovereign immunity is not a bar to the

interlocutory injunction because claims against the district attorney, in her individual capacity, are not barred by sovereign immunity. Appellants agree that sovereign immunity is not a bar to claims against District Attorney Austin-Gatson in her individual capacity. However, here, Appellees filed a single lawsuit against the State of Georgia and the district attorney. For the reasons addressed in the companion case, no. S22A1244, the superior court was precluded from granting an interlocutory injunction because Ga. Const. Art. I, § II, Para. V(b)(2) required that the lawsuit be dismissed in its entirety.

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

Appellees argue that prosecutorial immunity does not apply here because it does not apply at common law. Resp. at 15–17. Appellants do not disagree that the immunity, at common law, applies only to actions for damages. However, as Appellants addressed, the language of the Georgia Constitution does not limit the immunity to any particular type of case:

> District attorneys shall enjoy immunity from private suit for actions arising from the performance of their duties.

Ga. Const. Art. VI, § VIII, Para. I(e). Nothing in this language expressly limits the immunity to actions for money damages, and Appellees offer no argument to the contrary. Because the district

attorney is immune from private suit, the superior court erred in granting an interlocutory injunction.

III. The trial court erred in granting an interlocutory injunction because Appellees are unlikely to succeed on the merits of their claim.

A. THC is a controlled substance and not otherwise exempt when infused in food products.

Appellees contend that because the Georgia legislature has legalized hemp and hemp products, food products containing THC are exempt from criminal prosecution. Resp. at 6. Appellees' argument requires this Court to ignore the statutory definitions of THC, hemp, and hemp products. THC is defined as "tetrahydrocannabinol, tetrahydrocannabinolic acid, or a combination of tetrahydrocannabinol and tetrahydrocannabinolic acid." O.C.G.A. § 2-23-3(12). Georgia law includes THC as a Schedule I controlled substance unless it is "found in hemp or hemp products." O.C.G.A. § 16-13-25(3)(P).[1] Hemp is a plant.

> "Hemp" means the Cannabis sativa L. plant and any part of such plant, including the seeds thereof and all derivatives,

[1] Appellees argue that "Appellants cannot point to any statute, ordinance, or other law that criminalizes or otherwise prohibits food products containing Delta-8-THC or Delta-9-THC, . . . [and] only cite the definition of 'hemp products' under O.C.G.A. § 2-23-3(6) for support." Resp. at 24. Of course, Georgia's criminal code instructs that *all* THC is a controlled substance, *unless* it is in hemp or a hemp product, as specifically defined in the code. O.C.G.A. § 16-13-25(3)(P). Possession of a controlled substance is a criminal offense. O.C.G.A. § 16-13-30(a).

> 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).[2] While all parts of the plant are hemp, once processed, they are no longer a plant or plant part: "Process" or "processing," … means *converting an agricultural commodity into a legally marketable form*. O.C.G.A. § 2-23-3(10) (emphasis added). Processed hemp plants, and plant parts, may become "hemp products," but *not* if they are food products.

> "Hemp products" means all products with the federally defined THC level 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). Since THC infused food products are not hemp or hemp products, as defined in O.C.G.A. § 2-23-3(5) and (6), the THC in these food products is a Schedule I controlled substance. O.C.G.A. § 16-13-25(3)(P).

Appellees' reading of the term "hemp" to include processed hemp plants, or plant parts, would render the inclusion of "hemp products" in O.C.G.A. § 16-13-25(3)(P) superfluous.[3] There would be no need to

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[2] The federally defined THC level is "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).

[3] There is no question that Appellees are referring to processed THC as "hemp," and not simply the raw plant. *Compare* Resp. at 11

exclude THC in hemp products if the definition of "hemp" *already* included any processed part of the hemp plant. "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).[4]

Appellees suggest further that the term "THC" in the statutory definition of hemp products refers specifically to "Delta-9-THC," and therefore the exclusion of THC in food products "is best understood as excluding food products infused with Delta-9-THC, not other cannabinoids and extracts," like Delta-8-THC and Delta-10-THC which Appellees argue are legal. Resp. at 25. In support of their definition, Appellees cite Ga. Comp. R. & Regs. r. 40-32-1-.02(16), which defines Delta-9 THC as "the primary psychoactive component of cannabis," and provides further that "[f]or the purposes of this part, delta-9 THC and THC are interchangeable." Resp. at 25. But that administrative regulation defines terms only as used elsewhere in those regulations.

(describing manufactured Delta-9-THC gummies) *with* O.C.G.A. § 2-23-3(10)(B) (excluding only raw or dried hemp plant, and the farming practices of "drying, shucking and bucking, storing, trimming, and curing," from the definition of processed as the conversion of "an agricultural commodity into a legally marketable form.").

[4] Appellants agree with Appellees that "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." Resp. at 25 (quoting *Gearinger v. Lee*, 266 Ga. 167, 169 (1996)).

Where, as here, the terms are defined by statute, the definitions are not subject to modification by regulation. As noted above, THC, hemp and hemp products, are all defined by statute. This Court should decline Appellees' invitation to rewrite these statutes.

Appellees argue that Appellants' interpretation of these statutes has the result of making TCH in food products a controlled substance, even when it is *not* a controlled substance in non-food products. Resp. at 26. Whatever the reason, the legislature chose to exclude THC below the federally defined level for hemp when it is found in hemp products, but not in food products. *See* O.C.G.A. § 16-13-25(3)(P). Where the statute's language is clear, this Court looks no further. *Deal v. Coleman*, 294 Ga. 170, 173 (2013).

Finally, as noted in Appellants' initial brief, whether a product is a controlled substance pursuant to federal law, or Kentucky or Texas law, does not control whether it is a controlled substance under Georgia law.[5] Br. at 20–21. Nor do the two Georgia Superior Court orders cited by Appellees support a statutory reading that food products infused with THC are legal. Resp. at 26. To the contrary, both cases expressly found that the THC infused gummies at issue were legal *because they were not a food product*. *See* R-223 ("the gummies in question are not a food product … [a]ccordingly, the seized products are legal."); *State of*

[5] Likewise, Dr. Clements' testimony of what she believes is a controlled substance under federal law has no bearing on any issue in this case. *See* Resp. at 9–12.

Georgia v. Azim Jiwani, 22-B-01152-3Q (Superior Court of Gwinnett County) (Order dated June 23, 2022, at 4) ("the Court finds that the gummies in question do not fall within the definition of a food product.") Here, Appellees argue that *food products* infused with THC are legal, a position that is not at all supported by the superior court orders they cite. Georgia's criminal laws provide that THC is a controlled substance, and the statutory definitions of THC, hemp, and hemp products, do not provide an exception for food products infused with THC.

B. Even if Appellees were correct on their interpretation of the hemp statutes, they have failed to sufficiently allege a violation of due process.

Appellants explained in their initial brief that Appellees' due process claim fails because it is only when the state refuses to provide adequate procedural safeguards that a procedural due process claim is actionable. Br. at 17–18; *see also S&S Towing & Recovery, Ltd. v. Charnota*, 309 Ga. 117, 119 (2020) (providing that due process "is satisfied if a party has reasonable notice and opportunity to be heard"). Appellees have failed to address this argument in their response and due process is the *only* substantive claim in their complaint. Because Appellees cannot succeed on the merits of their due process claim, the lower court erred in granting the interlocutory injunction.

IV. The superior court erred in granting an interlocutory injunction where there is no irreparable harm to the Appellees, the threatened injury to the Appellants outweighs any injury to Appellees, and the injunction is against the public interest.

Appellees contend that absent the interlocutory injunction they will be irreparably harmed because "the undisputed evidence" is that Appellant Austin-Gatson "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." Resp. at 20 (citing T-111, 196); *see also id.* at 14 ("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.") There is zero evidence that District Attorney Austin-Gatson authorized, directed, or participated in any seizure. Even Appellees' cited authority, an affidavit from the owner of Elements Distribution, LLC, states only that "our warehouse was raided by *law enforcement officers*."[6] T-196 ¶ 2 (emphasis added). District Attorney Austin-Gatson testified that neither she nor her staff "directed the search or seizure" of Elements Distribution. R-158 ¶ 8. In fact, the District Attorney agrees that non-food products containing Delta-8-THC or Delta-10-THC are legal under Georgia law. R-157

[6] Elsewhere in their brief Appellees state that the District Attorney was responsible for the "raid of a local distributor." Resp. at 20. Again, there is no evidence in the record that the District Attorney, as opposed to law enforcement officers, directed, conducted, or authorized raids, searches or seizures.

¶¶ 5, 6. To the extent that Appellees will lose money from their inability to sell a controlled substance, that cannot be characterized as an irreparable injury. Moreover, Appellees have an avenue in state law to address the seizure of any property they allege is unlawful. *See* generally O.C.G.A. § 9-16-1 et seq. (Uniform Civil Forfeiture Procedures Act). There is no irreparable harm where there is an adequate remedy at law. *Lee v. Envtl. Pest & Termite Control*, 271 Ga. 371, 373 (1999).

Finally, the balance of interest and the public interest weigh heavily against issuance of an injunction. 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). Here, the interlocutory injunction usurps the prosecutor's role by preventing lawful prosecutions of this state's criminal laws. Appellants have a compelling interest in the enforcement of this state's criminal laws. Interference with the prosecution of this state's criminal laws is contrary to the public interest.

Where, as here, the superior court's grant of an interlocutory injunction is "based on a misunderstanding or a misapplication of the law," the court has abused its discretion. *Owens v. Hill*, 295 Ga. 302, 309 (2014) (citing *Holton v. Physician Oncology Svcs., LP*, 292 Ga. 864, 866-867 (2013)). Here, the superior court's order granting the interlocutory injunction misapplied the law on sovereign immunity,

prosecutorial immunity, due process, and Georgia's criminal laws and hemp statute. Therefore, the superior court abused its discretion in granting the interlocutory injunction against district attorney Austin-Gatson.

CONCLUSION

For the reasons set out above, this Court should reverse the judgment of the superior court.

Respectfully submitted.

/s/*Cristina M. Correia*
Christopher M. Carr 112505
Attorney General
Beth Burton 027500
Deputy Attorney General
Tina M. Piper 142469
Sr. Assistant Attorney General
Cristina M. Correia 188620
Sr. Assistant Attorney General
Office of the Attorney General
40 Capitol Square, SW
Atlanta, Georgia 30334
(404) 458-3535
ccorreia@law.ga.gov
Counsel for Appellants

SUPREME COURT OF GEORGIA
Case No. S22A1243

September 6, 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 a reply brief of appellant in the above case is granted. You are given an extension until September 15, 2022.

A copy of this order be attached as MUST 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

CERTIFICATE OF SERVICE

I hereby certify that on Sept. 15, 2022, I served this brief via email, addressed as follows:

Thomas D. Church
Pate, Johnson & Church, LLC
101 Marietta Street, Suite 3300
Atlanta, Georgia 30303
tom@patejohnson.com

/s/ *Cristina M. Correia*
Counsel for Appellant