IN THE SUPREME COURT
STATE OF GEORGIA

GEORGIACARRY.ORG et al.,	)	**Supreme Court**
Appellants,	)	**Case No. S16A0294**
	)	
v.	)	**Fulton County**
	)	**Case No. 2014-CV-253810**
	)	
ATLANTA BOTANICAL GARDEN, INC.,	)	
	)	
Appellee.	)	

BRIEF FOR THE APPELLEE

Michael L. Brown
Georgia Bar No. 088875
David B. Carpenter
Georgia Bar No. 292101
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
Telephone: (404) 881-7000
Facsimile: (404) 881-7777

BRIEF FOR THE APPELLEE

The Atlanta Botanical Garden, Inc. (the "Garden") submits this Brief for the Appellee respectfully requesting that this Court affirm the trial court's order dismissing Case No. 2014-CV-253810 with prejudice due to Appellants' failure to state a claim for declaratory or injunctive relief.

INTRODUCTION

Appellant Phillip Evans believes that he has the right to carry a gun inside the Atlanta botanical garden. The Garden, a private entity that leases land from the City of Atlanta, has told him that guns are not permitted, has called the police to remove him from the property, and will prevent him from entering with a gun in the future. Mr. Evans wants to bring his gun to the botanical garden but fears being arrested. As a result, he and a gun-rights organization of which he is a member filed suit in Fulton County Superior Court seeking a declaration that it is not illegal for him to carry his gun in the botanical garden and an injunction prohibiting the Garden from calling the police if he attempts to do so.

It is well established, however, that declaratory relief is not available in Georgia for the interpretation of a criminal statute. This Court has long held that a declaratory judgment action is not proper for determining whether a proposed course of conduct is lawful or unlawful. Likewise, a declaratory judgment may not be used to compel another party to take some action or to order it not to take some

action. This Court has also long held that a court may not issue an injunction that inhibits or controls the enforcement of criminal laws.

The trial court followed the long standing precedent from this Court and dismissed Appellants' case with prejudice. Appellants provide no reason why this precedent should be ignored and a different result reached. Rather, they attempt to distinguish this case from past cases that are truthfully no different. Established Supreme Court precedent, and the policies behind it, support affirmance of the trial court's order.

STANDARD OF REVIEW

This Court reviews dismissals of complaints *de novo*. This Court can affirm an order granting a motion to dismiss for any reason, whether or not it was enumerated in the trial court's order. *Murrey v. Specialty Underwriters, Inc.*, 233 Ga. 804, 806, 213 S.E.2d 668 (1975). For the reasons set forth below, the trial court's order dismissing Appellants' Complaint should be affirmed.

ARGUMENT

The trial court dismissed Appellants' Complaint with prejudice. The court ruled that the declaratory judgment claim improperly sought interpretation of a criminal statute and declaration of how the Garden should act. R-67-69. The trial court also ruled that the injunctive relief claims impermissibly asked the court to

restrain or obstruct the administration of criminal laws. R-69-71. The trial court's order was correct and should be affirmed.

I. This Court Should Affirm the Dismissal of Appellants' Declaratory Judgment Claims.

The trial court identified two grounds in dismissing Appellants' declaratory judgment claim. First, it found that their declaratory judgment claim sought the interpretation of a criminal statute, thus violating long standing Georgia law that declaratory judgment actions "will take no part in the administration of the criminal law" and "may not be resorted to for determination of whether or not [a practice] violates a penal statute." R-68. Second, the trial court properly recognized that Appellants' declaratory judgment claim went "beyond a mere declaration of the [Appellants'] rights" and sought to compel Appellee to engage in specific conduct, another impermissible use of the declaratory judgment statute. R-68. For these and other reasons discussed below, the trial court's ruling on Appellants' declaratory judgment claim should be affirmed.

A. The trial court properly concluded that the declaratory judgment claim improperly sought to control the administration of Georgia's criminal law.

1. The statutory subsection at issue proscribes individual conduct and sets a standard for criminal liability.

Appellants contend that the trial court erred in holding that their declaratory judgment action "asked the trial court to interpret a criminal statute." Br. at 9.

Appellants contend that the statute at issue is an empowering statute – granting rights rather than identifying criminal conduct. Appellants mischaracterize O.C.G.A. § 16-11-127(c) to suit their needs. O.C.G.A. § 16-11-127(c) is a criminal statute found in Title 16 of the Georgia Code, which covers "Crimes and Offenses." The statute identifies locations where it is a crime to carry a gun. The subsection that Appellants seek to litigate states that a licensed individual may lawfully carry a gun anywhere else in the State of Georgia. The subsection further provides, however, that owners of private property or people in control of private property through a lease may prevent someone from carrying a gun on their property by complying with Georgia's criminal trespass statute, O.C.G.A. § 16-7-21. In other words, the statute at issue states that people who own or control private property may eject people with guns and that failure of the gun owner to comply constitutes the offense of criminal trespass. The statute is clearly a criminal statute – it is not misplaced in the "Crimes and Offenses" Title of the Georgia Code.

And Appellants certainly seek a declaration regarding the enforceability of the statute in the criminal context. In seeking a declaratory judgment that the Garden may not eject licensed gun owners from the land that it leases, Appellants ask the Court to declare that Mr. Evans cannot be prosecuted for criminal trespass if he brings a gun to the botanical garden. They are plainly seeking a declaration

of criminal liability, asking for a declaration that Mr. Evans would not be trespassing if he brings a gun into the Garden. The fact that the declaratory judgment action involves the interpretation of a criminal statute is further confirmed by Appellants' request that the Garden be enjoined from "causing the arrest or prosecution" of Mr. Evans and others "for carrying weapons at the botanical garden." R-7, ¶¶ 38-39. The realities of their declaratory judgment complaint belie Appellants' contention that they have not "asked the trial court to interpret a criminal statute." Br. at 9.

2. A declaratory judgment may not be used to determine potential criminal liability.

It is understandable why Appellants mischaracterize the criminal statute at issue – under Georgia law a declaratory judgment may not be used to obtain an interpretation of a criminal statute. This Court has expressly stated, "not only may a declaratory action not be used to determine whether a proposed plan of conducting business amounts to a violation of criminal law in advance of undertaking such business, but such action may not be resorted to for determination of whether or not the plan or business already in existence violates a penal statute." *Butler v. Ellis*, 203 Ga. 683, 684, 47 S.E.2d 861, 862 (1948). In *Butler,* a member of a social club believed that his club should be allowed to serve alcohol to club members. The chief of police, however, disagreed and warned that such conduct would violate state law. *Id.* The plaintiff, therefore, sought a

declaratory judgment that his (and the club's) intended conduct was lawful. The Supreme Court affirmed the dismissal of the complaint, holding that a plaintiff cannot bring a declaratory judgment action to obtain a declaration of whether a person's conduct violates a criminal law: "It has been the law of this State for a long time that '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.'" *Id.*

The Supreme Court explained that this rule exists for several reasons. First, civil and criminal cases have different standards of proof: a preponderance of the evidence in a declaratory judgment proceeding and proof beyond a reasonable doubt in a criminal case. As a result, a declaratory judgment "would not and could not be binding as *res judicata* or even as *stare decisis* in a subsequent prosecution where guilt must be established beyond a reasonable doubt." *Id.* Second, the Supreme Court recognized that, even if granted, a declaratory judgment would have no binding effect if the facts at issue in a criminal case varied even slightly. *Id.* Third, the Supreme Court recognized that allowing this procedure would cause the courts to become flooded with declaratory judgment actions by defendants in criminal cases seeking to collaterally attack their prosecution or by individuals seeking protection against criminal liability for intended conduct:

> [T]he policy of this state is to reduce delays in the trying of all cases, not to increase them by resort to unnecessary procedure. There is no

> need nor necessity for a resort to a trial in Equity to determine whether a scheme or device is gambling within the Penal Law. We might as well try out a larceny or a bigamy case in equity. No doubt criminal prosecutions are always annoying and may disarrange the defendants' income and finances, but never yet has this been sufficient to change the usual and customary course of prosecutions for crime. The declaratory judgment has proved and no doubt is a useful procedure, but its usefulness will soon end when its advocates seek to make it a panacea for all ills, real or imaginary.

Id. Finally – and perhaps most importantly – this Court held that a declaratory judgment action against the Chief of Police (who might effectuate an arrest) was improper because the State of Georgia, not the Chief of Police, was responsible for the enforcement of state criminal law. "[S]ince the State is not a party, and in fact cannot be made such without its consent, an adjudication favorable to the plaintiff could not be pleaded in bar as *res judicata* in a criminal prosecution by the State; therefore, the relief prayed, if granted, would be fruitless." *Id.* at 684; *see also Martin v. Slaton*, 125 Ga. App. 710, 188 S.E.2d 926 (1972) (affirming dismissal of action bookstore clerk brought against district attorney seeking declaration as to whether certain materials were obscene under Georgia criminal law).

Appellants' use of the declaratory judgment action in this case is just as impermissible. Like the plaintiff in *Butler,* Appellants seek a declaration regarding the application of a criminal statute. And, like the plaintiff in *Butler*, Appellants in this case have not named the State of Georgia (which is responsible for the enforcement of criminal laws) as a defendant in this case. At least the plaintiff in

Butler filed his claim against the Chief of Police, who makes arrests for violations of the law. Appellants, on the other hand, seek to litigate the interpretation and enforcement of a criminal statute against the Garden, a private party with no responsibility for enforcing criminal laws. No doubt Appellants did this to obscure their attempt to control the enforcement of a criminal statute.

The possible outcomes demonstrate the absurdity of Appellants' claim. If, for example, Appellants prevail and the Court announces that Appellant Evans may bring a gun into the botanical garden or that the Garden may not preclude guns from its property, will that order protect Appellant Evans from subsequent criminal prosecution? Will it prevent the police – who are not a party to the proceeding – from arresting him? Will it prevent the State of Georgia – who is also not a party to this proceeding – from seeking to prosecute him for criminal trespass? How could the Fulton County District Attorney be bound by the interpretation of a criminal statute in a proceeding between two private entities? (One can predict that the District Attorney will take the position that his office is not bound). Similarly, if Appellants prevail, will other citizens be entitled to the same protection from prosecution if they seek to bring a gun to the botanical garden? How about other members of GeorgiaCarry.org? Or will Mr. Evans alone be immune from criminal prosecution?

On the other hand, what if the Appellee prevails? In the event Appellant Evans seeks to bring a gun to the botanical garden and is arrested, will the trial court's judgment prevent him from arguing for his interpretation of O.C.G.A. § 16-11-127(c) in the criminal prosecution? Could some other private citizen who gets arrested for bringing a gun to the Garden be prevented from raising such an interpretation in his or her criminal prosecution? Of course not.

Just as the Supreme Court noted, allowing a declaratory judgment regarding the application of the criminal law in this proceeding will likely spawn copycat actions as gun owners throughout Georgia seek advice on where they can carry a weapon. The City of Atlanta leases property on which many other businesses operate, including hotels, high-rise office buildings, shopping centers, sporting arenas, and even the College Football Hall of Fame. If the Court allows Appellants' request for declaratory relief with respect to the Garden, Appellant Evans or another member of GeorgiaCarry.Org will seek declaratory judgments that each of these other businesses may not exclude them for carrying guns. Any individual who believes he has the right to carry a gun into an establishment will seek what amounts to an advisory opinion from a trial court in the hopes of avoiding criminal liability. This Court expressly warned against allowing declaratory judgments to become precisely this "panacea for all ills, real or imaginary." *Butler*, 203 Ga. at 684, 47 S.E.2d at 862.

The enforcement of criminal laws is accomplished between district attorneys and individuals who have taken action and been arrested. While the prospect of criminal prosecution is an ominous situation for any individual to face, that is how this Court said criminal statutes must be interpreted in *Butler*. A private entity like the Garden is not the appropriate party to litigate the interpretation of a criminal statute and should not be forced to do so. The dismissal of Appellants' declaratory judgment claim should be affirmed.

In an effort to avoid the well-established rule that declaratory judgment cannot be used to seek a declaration as to whether conduct violates a criminal statute, Appellants argue for a series of exceptions, limitations, or re-interpretations of *Butler*. First, Appellants contend that they may "seek a declaratory judgment pertaining to a criminal statute in a non-criminal context." Br. at 10. The Garden is not aware of any opinion from this Court or any other Georgia court that distinguishes between *Butler's* application in a "criminal context" as opposed to a "non-criminal context." Appellants appear to have invented this distinction.

In support of this "exception," Appellants cite one decision from the Georgia Court of Appeals – *Calabro v. Liberty Mutual Fire Insurance Co.*, 253 Ga. App. 96, 557 S.E.2d 427 (2001). But that case did not involve the interpretation of a criminal statute or a declaration as to whether the plaintiff could be arrested for engaging in certain conduct. Instead, *Calabro* involved a declaratory judgment

concerning the terms of an insurance policy. The plaintiff was a husband who had been awarded a engagement ring during a divorce proceeding. When he learned that his ex-wife had sold the ring, he "filed a property loss claim for the loss of the ring" under his homeowner's insurance policy on the grounds that his wife had stolen the ring in violation of one of Georgia's theft statutes. *Id.* at 96. The insurance company sought a declaratory judgment that the policy did not cover the loss. *Id.* In finding for the insurance company, the trial court did not interpret the criminal statute but rather interpreted the loss exclusions under the insurance policy, ultimately deciding that the loss of the ring was not an "accident" and, therefore, was not covered. *Id.* *Calabro* is totally irrelevant to the factual and legal situation here.

Appellants next contend that "*Butler* does not appear to be good law." Br. at 11. They argue that *Butler* should be interpreted only to prevent declaratory judgments concerning past conduct by a plaintiff but not to prevent declaratory judgments about proposed future conduct. But *Butler* expressly rejected this distinction, ruling that a declaratory judgment may not be used in both instances when it held that "not only may a declaratory action not be used to determine whether a ***proposed plan*** of conducting business amounts to a violation of criminal law in advance of undertaking such business, but such action may not be resorted to for determination of whether or not the plan or business ***already in existence***

violates a penal statute." *Butler*, 203 Ga. at 683, 47 S.E.2d at 862. Appellants seem to contend that the *Butler* court somehow misunderstood the relief sought in the complaint before it as the plaintiffs were only seeking a declaration about their prior conduct serving drinks. That is wrong. The plaintiffs had not been arrested for their prior conduct, but they sought a declaration that they "can legally serve intoxicating drinks" to its members. *Id.* This Court's opinion clearly intended to address the applicability of a declaratory judgment action to both proposed future conduct and previous conduct. *See id.* (Butler sought a declaration that his private club could "legally serve intoxicating drinks to the members" while the defendant argued that the act was "illegal and violated penal statutes" of Georgia).

Appellants next suggest that the one paragraph opinion in *Clark v. Karrh*, 223 Ga. 851, 159 S.E.2d 75 (1968) somehow illuminates the true meaning of *Butler*. In *Clark*, this Court followed *Butler* in affirming the dismissal of a declaratory judgment action after the plaintiff had been charged with a crime. *Id.* In doing so, the Court did not limit *Butler's* reach to proposed future conduct. *Id.* It simply did not address future conduct as such conduct was not before it. *Id*.

Appellants similarly claim that this Court's decision in *Magby v. City of Riverdale*, 288 Ga. 128, 702 S.E.2d 159 (2010) suggests that *Butler* has been tacitly overruled insofar as it precludes declaratory judgments concerning the application of criminal law to proposed future conduct. Appellants quote language

from *Magby* stating that declaratory relief is not available when the criminal activity "has already taken place." Br. at 15. That is correct. But Appellants ignore the essential holding in that case, wrongfully contending that this language implies that declaratory relief is unavailable in regards to proposed future conduct. In *Magby*, the plaintiff was charged in municipal court with failing to pay an annual occupational tax. *Id.* at 128-29. She filed a declaratory judgment action asking the court to declare that her current prosecution was invalid and that any future prosecution was barred as a violation of her constitutional rights. This Court affirmed the dismissal of her declaratory judgment concerning her ***prior*** conduct, stating that she was required to fight that battle in the criminal proceeding. *Id.* at 129. But, the Court also held that she could not seek declaratory relief about her proposed ***future*** conduct. Specifically, the Court held:

> Magby's due process and equal protection clams all boil down to her concern that she will be cited, prosecuted, and convicted for violating the ordinance in future years simply for failing to renew her occupation tax permit . . . . If Magby continues her pattern of operating a business in the city without paying the occupation tax until after she is cited for violating Code 68-33-1, she will have the opportunity in any ***future prosecution***, in both the city court and on appeal, to challenge the sufficiency of the evidence used to convict her. Consequently, at this juncture declaratory relief on constitutional grounds is inappropriate.

Id. at 129-30. Far from supporting Appellants' arguments on appeal, *Magby* provides further legal support for the trial court's conclusion that Appellants are

not entitled to a declaration as to whether their proposed conduct violates Georgia criminal statutes.

Appellants next argue that "post-*Butler* . . . the subject matter of a declaratory judgment action may be a criminal provision." Br. at 12. None of the cases Appellants cite overrule *Butler*, limit its application, or allow a plaintiff to seek a declaratory judgment against a private citizen for a declaration that the plaintiff's proposed conduct does not violate a criminal statute. Appellants, for example, cite *City of Atlanta v. Hotels.com, L.P.*, 285 Ga. 231, 236-37, 674 S.E.2d 898, 902 (2009). But that case involved a declaratory judgment as to whether the city had exhausted its administrative remedies in a case involving a tax ordinance – not a declaration as to whether an individual's proposed conduct violated some criminal law. Likewise, the plaintiffs in *Total Vending Services, Inc. v. Gwinnett County*, 153 Ga. App. 109, 110, 264 S.E.2d 574 (1980) sought a declaration that a new statute had repealed an older statute – that is, which law actually applied to all citizens rather than how one law applied to a specific citizen's proposed conduct.

The other cases cited by Appellants involved declaratory judgment actions alleging that a criminal statute was unconstitutional – again, an argument that applied to all citizens rather than to the particularized, proposed conduct of one citizen. For example, in *State v. Cafe Erotica*, 269 Ga. 486, 487, 500 S.E.2d 574, 575 (1998), the plaintiff sought a declaratory judgment that new legislation

targeted at strip clubs was unconstitutional. And in *Jenkins v. Manry*, 216 Ga. 538, 539, 118 S.E.2d 91, 93 (1961), the plaintiff requested a declaration that a statute setting standards for master plumber was unconstitutional. *See also Sarrio v. Gwinnett Cnty.*, 273 Ga. 404, 406, 542 S.E.2d 485, 487 (2001) (American Legion sought declaration regarding future "enforcement of [an] alleged unconstitutional Act"); *City of Atlanta v. Barnes*, 276 Ga. 449, 578 S.E.2d 110, 112 (2003) ("[A]ppellee Salo filed suit against Atlanta alleging the tax was unconstitutional and asking for declaratory judgment"); *Sexton v. City of Jonesboro*, 267 Ga. 571, 572, 481 S.E.2d 818, 820 (1997) (declaration that occupational tax was an unconstitutional regulation of the practice of law); *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979) (declaratory judgment concerning "intention to engage in a course of conduct arguably affected with a constitutional interest.").[1]

It may be that a declaratory judgment action – if properly alleged – could be brought to attack the constitutionality of the criminal statute at issue in this case.

[1] The only decision Appellants cite that appears to have involved an "as applied" determination of constitutionality was *Steffel v. Thompson*, 415 U.S. 452 (1974). That was decided under the Federal Declaratory Judgment Act (formerly 28 U.S.C. § 400 and now 28 U.S.C. § 2201) and, therefore, is not binding on this Court as Appellants did not file suit under that statute. *See Allstate Ins. Co. v. Shuman*, 163 Ga. App. 313, 315, 293 S.E.2d 868 (1982) (decisions under the Federal Declaratory Judgment Act are not binding on Georgia courts).

But, Appellants have not brought such a claim. Instead, they seek a declaration involving the interpretation of the statutory language and its potential application to the specific conduct in which they intend to engage. Their allegations fall squarely with this Court's previous holding that "a declaratory action not be used to determine whether a proposed plan of conducting business amounts to a violation of criminal law in advance of undertaking such business." *Butler*, 203 Ga. at 683, 47 S.E.2d at 862; *see also Martin*, 125 Ga. App. at 710. The trial court's order dismissing Appellants' case should be affirmed.

B. The trial court also properly dismissed Appellants' declaratory judgment claim because it seeks to compel the Garden to act in a specific manner.

The trial court also concluded that the Appellants' declaratory judgment action should be dismissed because it improperly seeks to declare how the Garden may or should act in response to Appellants' proposed action rather than to merely declare the rights or liabilities of a litigant. On appeal, Appellants contend that the trial court did not "elaborate" sufficiently on its finding and that declaratory judgment actions are routinely used to declare how people should act. Appellants are wrong on both accounts. The trial court explained its ruling:

> Plaintiffs seek a declaration that the Garden "may not ban the carrying of weapons at the botanical gardens by people" with a gun license. (Compl. ¶ 38). In doing so, the Complaint goes beyond a mere declaration of the Plaintiffs' rights. Georgia's declaratory judgment statute, however, only provides courts the power to "declare rights and other legal relations of any interested party petitioning for such

> declaration." O.C.G.A. § 9-4-2. A declaratory judgment action is not the proper vehicle for compelling a defendant to do or not do anything. *Barksdale v. DeKalb Cnty.*, 254 Ga. App. 7, 561 S.E.2d 163, 164 (2002), (citing *Baker v. City of Marietta*, 271 Ga. 210, 213, 518 S.E.2d 879, 883 (1999) (The Declaratory Judgment Act "provides a means by which a superior court simply declares the rights of the parties or expresses its opinion on a question of law, without ordering anything to be done.")); *see also Gelfand v. Gelfand*, 281 Ga. 40, 635 S.E.2d 770 (2006) (explaining that a declaratory judgment may be used only to obtain a statement of a party's rights, status, or legal relations, but cannot be used to force someone act in a certain manner); *Charles H. Wesley Educ. Found. Inc. v. State Election Bd.*, 282 Ga. 707, 654 S.E.2d 127 (2007) (finding that petition seeking a declaration to compel parties to take immediate action goes beyond the Declaratory Judgment Act). Because the Complaint . . . seeks to compel the Garden to act in a certain way rather than simply to declare Plaintiffs' rights, the Complaint fails to state a claim under Georgia law.

R-68-69. The trial court's finding was clearly explained, well-reasoned, and supported by decisions from this Court. Appellants seek a declaration that the Garden may not prevent Mr. Evans from bringing a gun into the botanical garden. In *Barksdale v. DeKalb Cnty.*, 254 Ga. App. 7, 561 S.E.2d 163 (2002) – cited by the trial court – this Court stated that the Declaratory Judgment Act "provides a means by which a superior court simply declares the rights of the parties or expresses its opinion on a question of law, ***without ordering anything to be done***." *Id.* (emphasis added).

This Court's decision in *Charles H. Wesley Educ. Fndtn. Inc. v. State Election Bd.*, 282 Ga. 707, 654 S.E.2d 127 (2007) – another case cited by the trial court – is directly on point. In that case, the plaintiff sought a declaratory

judgment that an election commission was required to act on a petition he had filed. Just as Appellant Evans in this case claims that he has "a right" to carry his gun in the botanical garden and is entitled to a declaration that the Garden cannot bar him from doing so, the plaintiff in *Charles H. Wesley* claimed that he had a right to have the state election board address his petition and sought a declaration that he was entitled to "immediate commencement of such proceedings." *Id.* at 711. Because, as here, the plaintiff sought both a declaration as to how someone was required to behave and injunctive relief requiring that behavior, the Supreme Court concluded that the complaint "was not truly an action for declaratory judgment." *Id.* Rather the plaintiff "filed its petition seeking a declaration of rights in order to compel Appellees to institute rule-making proceedings immediately" – which goes beyond the Declaratory Judgment Act. *Id.*

Appellants in this case likewise do not merely seek a declaration as to where Mr. Evans may carry guns. If that was all they sought, they would seek a declaratory judgment against the entity that enforces gun laws: the State of Georgia. Instead, Appellants seek a declaration controlling the Garden's behavior – specifically, a declaration "prohibiting" the Garden from preventing licensed gun owners from carrying guns within its facility, ejecting them from the botanical garden, and calling the police if they refuse to leave their property. Perhaps what Appellants want is a declaration that they can present to the police to prevent their

arrest. Whatever their aim, Appellants' allegations clearly seek not just a declaration of their rights but a declaration controlling the conduct of others, an impermissible use of the Declaratory Judgment Act.

Appellants are also wrong that courts routinely use declaratory judgment actions to order parties to take some action. A declaration that an insurance policy covers certain facts – the example that Appellants raise in their brief – is just that: a declaration as to the rights and obligations under the policy. Such an action does not declare that the insurance company "shall pay the claim." The court in such a case declares that the provision of the policy at issue covers the alleged loss but does not "order' the insurance company to pay the loss. If, after receipt of the order, the insurance company fails to pay the claim, the insured must bring a separate claim under the policy. In contrast, Appellants seek a declaration that the Garden may not ban people from bringing guns onto its property. The trial court properly ruled that Appellants' requested relief is inappropriate under Georgia's declaratory judgment statute.

C. Appellants fail to address many of the other arguments that necessitate dismissal of their declaratory judgment claim.

As noted above, the Court may affirm the trial court's order in this matter for any reason. There are at least two other grounds on which the Court could affirm the trial court's order.

First, "[i]t may be stated as a general rule, applicable to declaratory judgment actions generally, that the parties seeking to maintain the action must have the capacity to sue, and must have a ***right*** which is justiciable . . . ." *Cook v. Sikes*, 210 Ga. 722, 726, 82 S.E.2d 641, 644 (1954) (internal citation omitted) (emphasis added). O.C.G.A. § 16-11-127(c) does not create a "right" for Appellants to carry a gun at the Garden. R-7, ¶ 35. As discussed above, O.C.G.A. § 16-11-127(c) is a criminal statute. Rather than conferring rights to gun owners, the statute declares it a misdemeanor for individuals to carry guns in certain locations. *See* O.C.G.A. § 16-11-127(b). While the recent amendments may have narrowed the number of places in which it is illegal to carry a gun from prior versions of the statute, the statute nevertheless is one of prohibition, not one of entitlement. Without first establishing a "right," Appellants cannot bring a declaratory judgment action.

Second, Appellants' interpretation of the statue is wrong. Appellants contend that the Garden "is a lessee of public property and therefore cannot ban [license holders] from carrying weapons at the botanical [garden]." R-7 ¶¶ 36-37. Appellants' argument that the Garden is not "in legal control of private property through a lease" is incorrect. The Garden is in control of private property through a private leasehold interest.

This Court has previously stated that, when the City of Atlanta conveys a leasehold estate to a private company – as Appellants concede the city has done in this case – the lessee holds the land as a private owner. *Delta Air Lines Inc. v. Coleman,* 219 Ga. 12, 131 S.E.2d 768 (1963) involved an issue of taxation on land that the City of Atlanta leased to Delta Airlines. In concluding that the airline could be forced to pay *ad valorem* taxes on the property, the Court held that "public property" became "private property" when the City of Atlanta leased it to a private entity. The Court explained:

> A leasehold is an estate in land less than the fee; it is severed from the fee and classified for tax purposes as realty. Code Ann. § 92–114. When the City of Atlanta conveyed to the Delta Corporation a leasehold estate in the land here involved, it completely disposed of a distinct estate in its land for a valuable consideration, and Delta acquired it and ***holds it as a private owner***. When any estate in public property is disposed of, it loses its identity of being public property and is subject to taxes while in private ownership just as any other privately owned property. Private property becomes public property when it passes into public ownership; and ***public property becomes private property when it passes into private ownership***.

Delta Air Lines, Inc. 219 Ga. at 16, 131 S.E.2d at 771 (emphasis added). This Court's precedent provides yet another basis for affirming the trial court's order.

II. The Trial Court Properly Dismissed Appellants' Claims For Injunctive Relief.

In addition to declaratory relief, Appellants sought an injunction "prohibiting the [Garden] from causing the arrest or prosecution of people with [gun licenses] for carrying weapons at the botanical [garden]." R-7, ¶ 39. The trial

court properly concluded that the complaint failed to state a recognizable claim under Georgia law. The order dismissing injunctive relief should be affirmed.

A. Appellants' injunctive relief claims improperly implicated the administration of Georgia criminal law.

Under Georgia law, a plaintiff cannot seek an injunction against the enforcement of a criminal law or for the enforcement of their interpretation of a criminal law. The Georgia injunction statute expressly states that "[e]quity 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." O.C.G.A. § 9-5-2. Appellants recognize this authority but contend that the prohibition only applies to "prosecutions that are already underway." Again, no Georgia court has announced this distinction. It seems to be another figment conjured by Appellants out of necessity rather than legal authority.

This Court has repeatedly held that a private plaintiff may not obtain an injunction to prevent a current or threatened prosecution for violating Georgia law, including the criminal trespass statute. Rather, the Court has held that an individual must raise any claim regarding the enforceability of a criminal statute against him or her as a defense to his or her criminal prosecution and/or on appeal from a conviction. In *Holmes v. Bd. of Comm'rs.*, 271 Ga. 206, 517 S.E.2d 788 (1999), for example, a Baptist church sought to prevent a pastor from holding services on its property. When the pastor refused to leave, the church swore out an

arrest warrant to have the pastor prosecuted for trespassing. The pastor claimed that he had the right to hold services on the property pursuant to a pre-existing agreement. He filed a complaint seeking to enjoin his prosecution. *Id.*

The trial court dismissed the case and this Court affirmed, holding that Georgia's injunction statute "does not interfere with the administration of the criminal law." *Id.* The Court recognized that an exception might apply when the criminal prosecution prevents the plaintiff from pursuing his or her occupation. *Id.* But, otherwise, the Court held that O.C.G.A. § 9-5-2 prevented a trial court from restraining or obstructing the enforcement of criminal laws. *Id.* The Court further recognized that the pastor was not entitled to equitable relief because he had not exhausted his legal remedies. *Id.* Specifically, he still had the right to challenge his prosecution by raising defenses in the trial court if arrested and by attacking any subsequent conviction on appeal. *Id.* The Court held that the criminal process was an "adequate remedy at law" – thus prohibiting equitable relief. *Id.*

Even the likelihood of multiple ***future arrests*** does not change this analysis. In *Arnold v. Mathews*, 226 Ga. 809, 810, 177 S.E.2d 691 (1970), plaintiffs sought to enjoin the enforcement of municipal ordinances against them, including a threat from the police that they could face on-going prosecutions for every day that they did not curtail their behavior. The trial court dismissed the complaint and the

Supreme Court affirmed, holding that "courts exercising equitable jurisdiction will not enjoin prosecutions," even in the face of a threat of multiple prosecutions. *Id.*

The court further recognized that the plaintiffs' only avenue for pursuing their claim that the ordinance was invalid as applied to them was to raise the claim as a defense in a subsequent criminal action, a valid alternative remedy that precluded equitable relief. *Id.* at 810 ("if the ordinances are void as here alleged, both the conviction and any injuries which may result therefrom may be avoided as well or better by a defense to the prosecution as by an action for injunction") (internal citation omitted); *see also City of Eatonton v. Peck*, 207 Ga. 705, 706, 64 S.E.2d 61 (1951) (affirming dismissal of complaint for injunctive relief against current and ***future*** prosecutions because "equity will not intervene to enjoin arrests where the prosecutions do not illegally threaten irreparable injury or destruction to property"); *Staub v. Mayor, etc., of Baxley*, 211 Ga. 1, 2, 83 S.E.2d 606 (1954) (affirming dismissal of injunctive action seeking to "restrain the defendants from prosecuting the plaintiffs under a pending charge and from ***further*** prosecutions" on the grounds that "the court below had no authority to enjoin such prosecutions"); *City of Bainbridge v. Olan Mills, Inc.*, 207 Ga. 636, 63 S.E.2d 655 (1951) (defendant "can test the validity of the ordinance by . . . defending the criminal prosecution in the courts having jurisdiction of criminal matters, and a court of equity will not invade their domain"); *Mayor, etc., of Athens v. Co-op.*

Cab Co., 207 Ga. 505, 505, 62 S.E.2d 906, 908 (1951) ("[a] ***threat*** to arrest and prosecute [parties] for any ***future*** violation of a municipal ordinance . . . will not authorize the grant of an injunction."); *Thomas v. Mayor, etc. of Savannah*, 209 Ga. 866, 866, 76 S.E.2d 796, 797 (1953) ("the petition is based upon a ***threat*** or mere apprehension of injury to person or property rights [and] it is proper to refuse" an injunction.) (emphases added).

The trial court correctly recognized that the same rule applies in this case. Appellants cannot obtain an injunction to prevent criminal prosecution. While Mr. Evans may face criminal prosecution if he fails to obey law enforcement direction that he cannot carry a gun at the Garden, there is no claim that the prosecution threatens irreparable injury or prevents him from pursuing his employment. He can, therefore, raise his interpretation of O.C.G.A. § 16-11-127(c) as a defense in his subsequent prosecution or on appeal if convicted. But under controlling precedent, he cannot obtain an injunction to prevent his prosecution.

Contrary to Appellants' contention, it makes no difference that Appellants brought their claim against the Garden prior to violating the criminal trespass statute rather than bringing a claim against law enforcement after being charged. Certainly, Appellants cannot undermine well-established law from this Court simply by moving up in the process and targeting citizens who might call the police to complain about illegal behavior. As this Court has held that prosecuting

agencies cannot be forced to litigate injunctive actions over the enforcement of a criminal statute or ordinance, a private party certainly cannot be forced to litigate that issue. More than 100 years ago, this Court adopted language from the United States Supreme Court that recognized and explained that the rule precluding injunctions against criminal actions is intended to preserve the separation of powers:

> the office and jurisdiction of a court of equity, unless enlarged by express statute, are limited to the protection of the rights of property. It has no jurisdiction over the prosecution, punishment, or pardon of crimes or misdemeanors . . . To assume such a jurisdiction, or to sustain a bill in equity to restrain or relieve against proceedings for the punishment of offenses . . . is to invade the domain of courts of common law, or of the executive and administrative department of the government.

Paulk v. City of Sycamore, 104 Ga. 24, 30 S.E. 417 (1898) (quoting *In re Sawyer*, 124 U.S. 200, 210 (1888)). Appellants cannot undue a century of jurisprudence by simply moving up in line and seeking to enjoin a party from reporting criminal conduct to the police. Because Appellants request an injunction that would interfere with "the administration of the criminal law," the trial court's order should be affirmed.

B. Appellants fail to address other arguments supporting dismissal of their injunctive relief claims.

Again, there are other grounds upon which this Court can affirm the trial court's order dismissing the claims for injunction. First, an injunction is not

available if the plaintiff has an adequate remedy at law. *Sarrio*, 273 Ga. at 406. As stated above, Mr. Evans can raise his interpretation of O.C.G.A. § 16-11-127(c) as a defense in any criminal prosecution if arrested. While he may not like that path forward, this Court has held that it is an adequate legal remedy. *See City of Bainbridge*, 207 Ga. at 636 (defendant charged with violating criminal ordinance "can test the validity of the ordinance by . . . defending the criminal prosecution in the courts having jurisdiction of criminal matters, and a court of equity will not invade their domain").

Second, while Appellants do not individually address the dismissal of the claim for an interlocutory injunction, the law and facts support the trial court's decision to dismiss it as well. "It is axiomatic that the sole purpose of a temporary or interlocutory injunction is to maintain the status quo pending a final adjudication on the merits of the case." *Marietta Props., LLC v. City of Marietta*, 319 Ga. App. 184, 188-89 732 S.E.2d 102, 107 (2012). In this case, the status quo remains intact. Appellants cannot bring a gun to the Garden, and there is no threat to the current situation that requires interlocutory injunctive relief.

Third, Appellants' interlocutory injunction claim should remain dismissed because Appellants' allegations do not warrant such relief. Whether to grant an interlocutory injunction is committed to the discretion of the trial court. *Holton v.*

Physician Oncology Svcs., 292 Ga. 864, 866, 742 S.E.2d 702, 704 (2013). In exercising its discretion, the trial court must generally 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 her 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, 764 S.E.2d 361, 362 (2014). Although all four of these elements need not be proven, the trial court must be aware that "an interlocutory injunction is an extraordinary remedy" that should be used sparingly. *Id.* Indeed, Georgia law provides that "[t]his power shall be prudently and cautiously exercised and, except in clear and urgent cases, should not be resorted to." O.C.G.A. § 9-5-8.

Appellants do not demonstrate on appeal how their claim met the necessary elements and the trial court was well within its discretion to dismiss Appellants' interlocutory injunction claim. As a threshold matter, Appellants do not have a substantial likelihood of prevailing on the merits. Appellants' entire case involves enforcement of a criminal statute, and Georgia law does not allow use of declaratory or injunctive relief to do so.

Also as explained above, Appellants' interpretation of the statute was rejected by this Court's decision. *Delta Air Lines*, 219 Ga. at 16, 131 S.E.2d at 771

("When the City of Atlanta conveyed to the Delta Corporation a leasehold estate in the land here involved, it completely disposed of a distinct estate in its land for a valuable consideration, and Delta acquired it and holds it as a private owner"). In assessing whether there was a "substantial likelihood" that Appellants would prevail, it is enough to understand that Appellants' simplistic interpretation of the statute at issue is not quite so clear. Appellants also cannot establish that they will suffer irreparable injury from the denial of an interlocutory injunction. Mr. Evans may still enjoy the botanical garden, he simply cannot bring his gun. This poses no irreparable injury. On the other hand, if Appellants were granted an interlocutory injunction, the Garden would have to reassess its security protocols and staffing to address potential safety risks from gun-carrying members. The Garden would also suffer significant irreparable injury in the loss of business as guests who enjoy the gun-free environment decide not to visit the botanical garden when other guests may be armed. For the same reason, the public interest would be disserved from the granting of an interlocutory injunction. Appellants' Complaint simply does not satisfy the requirements for an interlocutory injunction, and the trial court's order should therefore be affirmed.

CONCLUSION

For all of the reasons stated herein, Appellee asks that this Court affirm the trial court's order dismissing Appellants' claims in their entirety.

Respectfully submitted this 8th day of December, 2015.

s:\ Michael L. Brown
Michael L. Brown
Georgia Bar No. 088875
David B. Carpenter
Georgia Bar No. 292101
Alston & Bird LLP
1201 W. Peachtree Street
Atlanta, Georgia 30309
Phone: 404-881-7000
Fax: 404-253-8180

Attorneys for Appellee Atlanta Botanical Garden, Inc.

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the within and foregoing BRIEF FOR THE APPELLEE upon all counsel of record by U.S. Mail at the following addresses:

John R. Monroe
9640 Coleman Road
Roswell, GA 30075

This 8th day of December, 2015.

s:\ Michael L. Brown
Michael L. Brown