# IN THE COURT OF APPEALS
# STATE OF GEORGIA

CASE NO. A17A1639

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GEORGIACARRY.ORG et al.,

Appellants,

vs.

ATLANTA BOTANICAL GARDEN, INC.,

Appellee.

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# BRIEF OF AMICUS CURIAE
# METRO ATLANTA CHAMBER

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## AMICUS CURIAE METRO ATLANTA CHAMBER

Under Court of Appeals Rule 26, amicus curiae Metro Atlanta Chamber (the "Chamber") submits this brief urging the Court to affirm the judgment of the Fulton County Superior Court in favor of defendant the Atlanta Botanical Garden, Inc. (the "Garden"). As the Superior Court correctly held, O.C.G.A. § 16-11-127(c) ("Section 127(c)") protects the right of private lessees to exclude or eject persons carrying weapons from their property. The Superior Court's decision, which is compelled by the plain text of Section 127(c), respects private property rights and will help ensure the continued economic development of the Metropolitan Atlanta region and the State of Georgia.

## STATEMENT OF THE INTEREST OF AMICUS CURIAE

The Chamber serves as a catalyst for a more prosperous and vibrant region. To advance economic growth and improve metro Atlanta's quality of place, the Chamber is focused on starting, growing, and recruiting companies to the 29-county region. The Chamber is also focused on growing the region's innovation and entrepreneurial culture. The Chamber is committed to being an active voice for the business community, serving as an advocate for a competitive business climate,

and promoting Atlanta's story. Because of their commitment to promoting economic development and policies that result in sustainable growth, the Chamber and its investors have a critical interest in the outcome of this matter. If this Court reverses the Superior Court and rules that private lessees are no longer allowed to control who may enter their property, businesses in the Metropolitan Atlanta region—along with those in the rest of the State—will be severely disadvantaged.

## I. STATEMENT OF MATERIAL FACTS

The Chamber adopts the Statement of Material Facts submitted in the Garden's Brief. *See* Appellee's Br. at 1-2. In that statement, the Garden acknowledges that it has found no material inaccuracies in the Statement of Material Facts submitted in the brief filed by Appellants GeorgiaCarry.Org, Inc., and Phillip Evans (collectively, "GeorgiaCarry"). *See id.* at 1 n.1. This case thus turns on a pure and far-reaching question of law and is ripe for resolution by this Court.

## II. ARGUMENT AND CITATION OF AUTHORITY

The Chamber wholly agrees with the positions taken by the Garden in its brief, which it urges the Court to adopt. *See* Appellee's

Br. at 2–20. In short, Section 127(c) protects the right of private lessees, including those who lease land from public entities, to exclude or eject persons carrying weapons from the leased property. As the Garden explains, the plain language of Section 127(c) and longstanding Georgia case law compel that conclusion. *See id.* at 3–8.

The Chamber submits this brief to set out three additional reasons for adopting the Garden's interpretation of Section 127(c). *First*, in protecting the right of lessees to exclude or eject persons bearing weapons from the leased property, Section 127(c) is consistent with the broad property rights afforded lessees under Georgia law. Those rights include the exclusive right of possession and the power to determine who may—*and may not*—enter the property.

*Second*, the General Assembly simply could not have intended to exclude those who lease from public entities from the protections afforded by Section 127(c). To put it bluntly, it would threaten havoc on the State of Georgia's economic development to prohibit those lessees from excluding or ejecting persons carrying weapons. Across the State, many businesses lease property from public entities. These ubiquitous lessees include businesses of all stripes, including residential apartment

complexes, day-care centers, law firms, bars, performance venues, and major sports stadiums, to name just a few. To adopt GeorgiaCarry's interpretation of Section 127(c) would upset the expectations of these tenants and potentially put many out of business. It would also hinder the efforts of local development authorities and threaten Georgia's entertainment, sports, and tourism industries. That the legislature could not have intended these results confirms the conclusion compelled by the plain statutory text: Private lessees may exclude or eject from the leased premises those carrying firearms.

*Third*, the Court should adopt the Garden's interpretation of Section 127(c) because the contrary construction proposed by GeorgiaCarry would raise serious constitutional concerns. GeorgiaCarry posits that property possessed by a private lessee remains public so long as the lessor is a public entity, such that private entities in possession of the property have no right to exclude or eject persons carrying weapons. So interpreted, the statute would deprive lessees of property without compensation, in violation of the Takings Clauses of the federal and Georgia constitutions. Moreover, under GeorgiaCarry's strained interpretation, Section 127(c) would violate the

due process rights of lessees. At the very least, GeorgiaCarry's interpretation of Section 127(c) raises serious constitutional concerns. The Court therefore should "invoke the doctrine of constitutional doubt" and adopt the Garden's interpretation of Section 127(c) "so as to avoid" those "serious constitutional concerns." *In re M.F.*, 298 Ga. 138, 145–46 (2015).

### A. Section 127(c) was enacted against a background of longstanding law confirming that private lessees control "private property."

Under a plain reading of Section 127(c)'s text, the Garden may exclude or eject persons carrying weapons from the property it leases. The text requires that result because the Garden is a private entity that leases property and, as such, "ha[s] legal control of private property through a lease." That conclusion finds confirmation in a string of decisions holding that "public property becomes private property when it passes into private ownership" through the conveyance of a leasehold interest. *Delta Air Lines Inc. v. Coleman*, 219 Ga. 12, 16 (1963); *see* Appellee's Br. at 3–7. Because the General Assembly acted against the body of law created by that line of cases when it legislated in 2014 to create the version of Section 127(c) at issue here, that body of law

should inform this Court's reading of Section 127(c). *See Grange Mut. Cas. Co. v. Woodard*, 300 Ga. 848, 852 (2017) ("'[A]ll statutes are presumed to be enacted by the legislature with full knowledge of the existing condition of the law and with reference to it. They are therefore to be construed in connection and in harmony with the existing law.'" (quoting *Botts v. Southeastern Pipeline Co.*, 190 Ga. 689, 700–01 (1940)). Accordingly, a private lessee has legal control of private property, regardless of the identity of the lessor.

A related body of law further supports the rule—embodied in Section 127(c)—that property is private when leased by a private entity. Specifically, the General Assembly enacted Section 127(c) against the background of well-settled Georgia law conferring broad property rights on lessees. *See Woodard*, 300 Ga. at 852.

As the Georgia Supreme Court has made clear, even a short-term lease or usufruct gives a tenant a property right protected by the constitution of Georgia. *See Ammons v. Central Ga. Ry. Co.*, 215 Ga. 758, 761–62 (1960); *see also Waters v. Dekalb Cnty.*, 208 Ga. 741, 745 (1952) ("[A] tenant, although he has no estate in the land, is the owner of its use for the term of his rent contract."). Thus, even where a lease

lasts only for days, Georgia law affords the tenant valuable rights. *See* O.C.G.A. 44-7-1(a); *Waters*, 208 Ga. at 744. Indeed, where the entire premises is rented, even the landlord has no right to enter the premises without the tenant's permission, absent an agreement to the contrary. *See Livaditis v. American Cas. Co. of Reading, Pa.*, 117 Ga. App. 297, 302 (1968). A short-term tenant is thus "entitled to the same protection against trespassers as an owner," 2 Ga. Real Estate Law & Procedure § 11:3 (7th ed.), as the "possession of land shall authorize the possessor to recover damages from any person who wrongfully interferes with such possession in any manner," O.C.G.A. § 51-9-3. Accordingly, even a short-term tenant enjoys the right to exclude others from the property she possesses, which suggests that the General Assembly intended that the identity of the *lessee* should control in determining exclusionary rights. *See Botts*, 190 Ga. at 700–01 ("All statutes are … to be construed in connection and in harmony with the existing law, and as part of a general and uniform system of jurisprudence, and their meaning and effect is to be determined in connection, not only with the common law and the constitution, but also with reference to other

statutes and the decisions of the courts." (quotation marks and citation omitted)).

Long-term lessees, like the Garden, enjoy even more expansive property rights than do short-term lessees. Where land is granted to another for a fixed or determinate period of time, the grantee receives an estate for years, which is a type of "realty." O.C.G.A. § 44-6-100. An estate for years "passes out of the landlord virtually all the attributes of present ownership, leaving him [a] reversionary interest" which vests only when the estate for years ends. 2 Ga. Real Estate Law & Procedure § 11:5 (7th ed.). "An estate for years carries with it the right to use the property in as absolute a manner as may be done with a greater estate, provided that the property or the person who is entitled to the remainder or reversion interest is not injured by such use." O.C.G.A. § 44-6-103. Of course, the expansive property rights enjoyed by a long-term lessee include the right to exclude others from the property. *See* O.C.G.A. § 51-9-3.

When it enacted the relevant version of Section 127(c), the General Assembly did so against this backdrop of longstanding Georgia law. Under that well-settled law, a long-term lessee acquires, for the

term of the lease, rights very nearly equal to those accompanying full ownership. It follows that property is considered "private" when leased by a private entity. Accordingly, private lessees have "legal control of private property through a lease" within the meaning of Section 127(c).

### B. As interpreted by GeorgiaCarry, Section 127(c) would have devastating consequences that the General Assembly could not have intended.

As the Garden explains in its brief, GeorgiaCarry's reading of Section 127(c) "would have substantial and absurd consequences that the legislature could not have intended." Appellee's Br. at 15. Those consequences provide yet another reason for the Court to reject GeorgiaCarry's interpretation of Section 127(c), because "[i]n all interpretations of statutes, the courts shall look diligently for the intention of the General Assembly." O.C.G.A. § 1-3-1. Thus, a court should reject an interpretation of a statute that would entail consequences that the legislature did not intend, because the very fact of those consequences suggests that the legislature did not intend the interpretation that would lead to them. And that is particularly true where, as here, one reading of the statute would "produce[]

contradiction, absurdity or such an inconvenience as to insure that the legislature meant something else." *Telecom*USA, Inc. v. Collins*, 260 Ga. 362, 363–64 (1990).

The Garden mentions in its brief some of the absurd and inconvenient consequences that would follow adoption of GeorgiaCarry's reading of Section 127(c).[1] But the Garden understates the extent of the havoc that GeorgiaCarry's interpretation of Section 127(c) would wreak. To be clear, as read by GeorgiaCarry, Section 127(c) would, among other things, upset the expectations of tenants, hinder the work of local development authorities, and threaten important Georgia industries. Because the General Assembly clearly did not intend

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[1] See Appellee's Br. at 15–17. For example, the Garden points out that GeorgiaCarry's interpretation would create an impossibly confusing situation for lawful gun owners who want to know where they can carry their guns in Georgia. *See* Appellee's Br. at 16–17. That result is both absurd and inconvenient for gun owners, and it is impossible to believe that the General Assembly intended to statutorily create that confusion through the Safe Carry Protection Act. *See* H.B. 60 § 1-1 (2013-2014). Moreover, as the Garden points out, GeorgiaCarry's interpretation would devastate ad valorem tax revenue in Georgia. *See* Appellee's Br. at 15. The General Assembly could not have intended to eviscerate that important source of public revenue. The Garden rightly argues that the Court should reject a statutory interpretation that would lead to those and other results that the General Assembly did not intend.

Section 127(c) to damage Georgia businesses and disrupt the Georgia economy, the Court should reject GeorgiaCarry's interpretation of Section 127(c).

*First*, as interpreted by GeorgiaCarry, Section 127(c) would upset the expectations of many tenants that they would be able to exclude persons carrying weapons. That is no small thing, if for no other reason than that public entities lease *a lot* of property to *a lot* of private lessees. All over this State, major employers in a variety of industries lease property from public entities for use in their business operations. In fact, considering *only* office and industrial buildings, public entities in Georgia own and rent *at least* 336 properties covering more than 36 million square feet. And those conservative numbers do not even take into account publicly-owned properties that are leased to tenants who use the leased premises for other purposes. As examples, residential apartment buildings, bars, and law firms, among others, all lease land owned by the Metropolitan Rapid Transit Authority ("MARTA").[2] Or, to

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[2] *See, e.g.,* Eric Jaffe, *The Atlanta Transit Agency's Big Plan to Convert Parking Lots into Housing*, CITY LAB (July 21, 2014) (noting that one development will consist of "13,000-square feet of retail and 386

take still other examples, many sports arenas and performance venues are leased by private entities from public ones. *See infra* at 18-20.

If GeorgiaCarry's interpretation of Section 127(c) prevails, every one of these lessees (and many, many others) would be forced to allow persons carrying guns on their property. That compulsion would have absurd results that the General Assembly just could not have intended. Consider the plight of someone who rents an apartment in a complex sitting on land owned by MARTA: On GeorgiaCarry's interpretation of Section 127(c), that tenant could not legally exclude someone carrying firearms from her own home. Nor could any of the businesses leasing government-owned land exclude guns from their premises on GeorgiaCarry's strained reading of Section 127(c). That would include, for example, daycare centers—which would not be free to decide to best protect the children in their care by excluding guns from the grounds. The General Assembly clearly did not intend these results.

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residential units"), https://www.citylab.com/solutions/2014/07/the-atlanta-transit-agencys-big-plan-to-convert-parking-lots-into-housing/374735/ (last visited August 30, 2017).

GeorgiaCarry's mistaken interpretation of Section 127(c) would also harm the businesses of the many tenant firms who lease publicly-owned land in this State. Many of these tenants—like the apartment buildings, bars, and law firms that lease land owned by MARTA—have particularly compelling business reasons to bar armed individuals from their premises. For instance, a daycare center could not long survive if it had no right to exclude guns from its grounds because a number of customers would likely not entrust their children to its care. And an apartment complex undoubtedly would have trouble attracting residents if potential residents knew that they would be unable to exclude guns from their homes. And other tenants, like bars and retail stores, would similarly lose customers and, potentially, their businesses.

On top of a loss of customers, GeorgiaCarry's reading of Section 127(c) would impose other unexpected costs on lessees. A compulsion to allow guns on the leased premises would carry with it an increased risk of danger. As a result, private entities leasing public land almost certainly would face higher insurance premiums and increased deductibles reflecting the heightened safety risk—and that is assuming

insurers will not simply cancel or refuse to issue policies at all.[3] These costs, too, would threaten the viability of many tenant businesses.

In short, on GeorgiaCarry's view, Section 127(c) will spring on tenants a loss of customers and increased insurance costs that will severely hurt their bottom lines—and risk shuttering many altogether.[4] An interpretation that would so badly harm Georgia businesses could not have been intended by the General Assembly—and certainly not the 2013–2014 General Assembly, "which overwhelming[ly] support[ed]

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[3] This risk is especially acute for manufacturers and distribution centers. Manufacturers and distribution centers make relatively heavy use of temporary and part-time labor, with resulting Human Resources challenges and turnover rates. According to the American Staffing Association, 37% of staffing company employees work in industrial settings. Liability insurers are attuned to the risks posed by guns at those businesses. Manufacturers and distribution centers therefore will face drastically increased insurance costs under GeorgiaCarry's reading of Section 127(c), if they can get insurance at all. And that, in turn, will make it more difficult for Georgia to attract and maintain distribution centers and manufacturers, which provide jobs to many hardworking Georgians.

[4] Of course, GeorgiaCarry's interpretation of Section 127(c) would also harm the bottom lines of public entities in Georgia. After all, if property owned by public entities becomes less attractive to potential tenants, those public entities will receive less in the way of rent. Just as it could not have intended to hurt Georgia businesses, the General Assembly could not have intended to damage an important source of public revenue, which can be used to, among other things, create jobs for Georgians and develop the State's economy.

pro-business measures," including "job creation and economic development measures."[5]

*Second*, Section 127(c) as construed by GeorgiaCarry would severely impede economic development efforts in Georgia. Public entities in Georgia—including local development authorities—often purchase land intended for use as office parks, industrial parks, distribution centers, or for other commercial purposes. The public entities then install basic infrastructure and lease the parcels to developers or final tenants. These arrangements help to develop Georgia's economy, but their ability to do so depends on the willingness of businesses to lease land owned by public entities in Georgia. As already explained, on GeorgiaCarry's interpretation, Section 127(c) will make businesses less likely to lease from public entities. *See supra* at 13–14 & n.4. And, as a result, Section 127(c) will hamstring economic development efforts in this State.

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[5] Walter C. Jones and Kelsey Cochran, *Georgia Chamber grades state lawmakers*, ATHENS BANNER-HERALD (May 10, 2014) (statement of Georgia Chamber of Commerce President Chris Clark), available at http://onlineathens.com/business/2014-05-10/georgia-chamber-grades-state-lawmakers (last visited August 30, 2017).

GeorgiaCarry's misreading of Section 127(c) would also blunt another important tool used to stimulate economic development in Georgia. Local development authorities in this State frequently develop property through tax abatements. That is, after issuing bonds to buy land and finance its development, the authority will remain the legal owner of the property during the period of the tax abatement. *See SJN Properties, LLC v. Fulton Cty. Bd. of Assessors*, 296 Ga. 793, 793 (2015) (describing one way in which these transactions are structured). Government entities across the State have used these sorts of arrangements to attract or retain major employers. Indeed, the Development Authority of Fulton County alone has used these methods to "help[]" hundreds of "organizations build, renovate, expand or relocate in Fulton County."[6]

There are thus many properties that were never intended to be "public" but which are legally owned by public development authorities because of the structure of the property tax abatement. It would upset

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[6] Development Authority of Fulton County, 2015 Activity Report: Building Prosperity, 11, available at http://www.developfultoncounty.com/dafc/images/documents/DAFC-2015-Activity-Report.pdf (last visited August 30, 2017).

the settled expectations of those businesses operating under tax abatements to inform them now—after they have spent time and money pursuing a project under the abatement arrangement—that they must welcome armed individuals onto the premises. Moreover, businesses will surely be less likely to enter into tax abatement arrangements going forward if they know that they will have to forgo the right to exclude firearms as part of the deal. And that means both that local development authorities will be unable to develop their properties and local economies using the tax abatement device *and* that businesses will pick other, out-of-state locations because Georgia's tax abatement opportunities will not attract them.

The General Assembly simply could not have intended an interpretation of Section 127(c) that would so drastically impair economic development efforts in this State. For confirmation, consider that, during the very same Session during it which it amended Section 127(c), the General Assembly passed laws to *encourage* the sorts of economic arrangements that GeorgiaCarry's interpretation of Section 127(c) would impair. For instance, H.B. 128 established a fund to assist the economic development efforts of local governments and development

authorities.[7] Moreover, H.B. 414, H.B. 795, H.B. 880, H.B. 892, H.B. 1016, H.B. 1071, H.B. 1072, H.B. 1073, H.B. 1075, H.B. 1077, H.B. 1102, H.B. 1111, H.B. 1112, H.B. 1113, and H.B. 1136 all authorized specific local government entities to use a variety of means, including the issuance of bonds and the leasing of property, to pursue economic redevelopment. The Court should reject GeorgiaCarry's reading of Section 127(c) because it would have the absurd consequence of hindering economic development in Georgia, contrary to the General Assembly's intent.

*Third*, as interpreted by GeorgiaCarry, Section 127(c) would threaten the State's thriving entertainment, sports, hospitality, and tourism industries. Many stadiums and performance venues are owned by government entities but are leased by private entities. GeorgiaCarry's interpretation of Section 127(c) would jeopardize the ability of those private entities to attract sporting events and

[7] Unless otherwise indicated, citations to bills of the General Assembly refer to bills from the 2013–2014 Session.

performers.[8] For example, under common industry practice, the contracts governing performances by entertainers require the strict prohibition of firearms from performance venues. As a result, more than twenty managers and directors of Georgia-located performance venues wrote a letter urging the General Assembly to reject a 2016 proposed amendment to Section 127(c), which would have prevented lessees of "government property" from excluding armed individuals from "leased government property." *See* Appellee's Br. at 11–14 (explaining the failed 2016 amendments). The letter explained that promoters, talent managers, artists, and customers had "made it abundantly clear that they [would] avoid venues which allow weapons." Thus, the signatories of the letter recognized that the rule proposed by

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[8] Even if these venues could attract performers and events, GeorgiaCarry's interpretation would exponentially increase the safety risks associated with such large events and, thus, drive up these venues' security and insurance costs. Because the General Assembly obviously did not intend such absurd results, the Superior Court of Floyd County in 2014 denied GeorgiaCarry's request for an injunction that would have barred the organizers of a popular airshow from excluding those who insist on carrying their guns from the (leased) public airfield at which the show was to occur. *See* Order on Plaintiffs' Motion for an Interlocutory Injunction, *GeorgiaCarry.org, Inc. v. Caldwell*, No. 14CV01823JFL002, at 7–8 (Floyd Cnty. Supr. Ct. Oct. 10, 2014).

GeorgiaCarry would prevent many prominent performance venues from hosting shows. And, as a result, it would pose a mortal threat to their businesses and to the entertainment industry in this State.

Under GeorgiaCarry's interpretation, Section 127(c) would similarly threaten Georgia's vibrant sports industry. Municipalities across the nation eagerly bid to host prominent sporting events, like the NCAA championships, the Super Bowl, and the World Cup. As part of that highly competitive bidding process, bidders must describe their policies and procedures for ensuring public safety. Being unable to exclude firearms from the venue would disqualify Georgia cities like Atlanta from hosting some events, and it will put them at a disadvantage with respect to other events. And that is no small thing. Cumulatively, these sporting events generate hundreds of millions of dollars in revenue and large (but unquantifiable) promotional value for overall local economic development.

So, as construed by GeorgiaCarry, Section 127(c) would threaten grave harm to Georgia's entertainment and sports industries. But it would also directly harm the State's hospitality industry. By conscious design, the State of Georgia has become home to conventions,

shareholder meetings, and other gatherings that invigorate the local economies in which they take place.[9] Indeed, recognizing the economic benefits of these gatherings, government entities across the State build and maintain venues to host them.

Thus, though these economy-boosting events are organized and hosted by private parties, they frequently take place in government-owned convention centers or other venues that the private organizers have leased. These meetings and conventions bring millions of dollars into Georgia every year: Not only do the organizers of the meetings pay for use of the government-owned facilities, but the attendees stay at local hotels, eat at local restaurants, and explore our State's many attractions and entertainment options.

If GeorgiaCarry's interpretation of Section 127(c) prevails, however, that flow of cash into Georgia will dry up. Many business and conference organizers will simply take their events elsewhere rather than face the prospect of being unable to exclude guns from their

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[9] *See, e.g.,* Eileen Falkenberg-Hull, *DragonCon and Other Can't-Miss Atlanta Conventions*, GEORGIA ON MY MIND (Feb. 20, 2017), available at http://www.exploregeorgia.org/blog/dragoncon-and-other-cant-miss-atlanta-conventions (last visited August 30, 2017).

conference, charitable event, or (potentially heated) shareholder meeting. In amending Section 127(c), the General Assembly surely did not intend to drive this important source of revenue away from Georgia and its citizens.

In sum, GeorgiaCarry's interpretation of Section 127(c) would severely injure Georgia's hospitality, entertainment, and sports industries. But the reverberations would not stop there, because a dearth of convention business and entertainment options will depress tourism and deter firms from locating their businesses in Georgia. Once again, the General Assembly clearly did not intend such a disastrous interpretation of Section 127(c), with its absurd and inconvenient consequences. And, once again, the General Assembly's own actions provide (unneeded) confirmation: During the very same 2013–2014 Session during which it amended Section 127(c), the General Assembly passed statutes designed to *encourage* Georgia's entertainment and tourism industries. *See* H.B. 958 (providing state income tax credit for entertainment industry); H.B. 1132 (creating local Convention and Visitors Bureau Authority "to promote special events[,] … tourism, conventions, and trade shows"). This Court should not undo

the General Assembly's hard work—and override its plain intent—by adopting GeorgiaCarry's misreading of Section 127(c).

### C. The Court should adopt the Garden's interpretation of Section 127(c) to avoid substantial constitutional concerns.

As already explained above and in the Garden's brief, Section 127(c) plainly protects the right of private lessees to exclude or eject persons carrying weapons from their property. Indeed, the General Assembly did not—and could not have—intended otherwise. But, even if the Court were to conclude that Section 127(c) is ambiguous, it should adopt the Garden's interpretation to avoid the substantial constitutional concerns raised by GeorgiaCarry's reading.

As the Georgia Supreme Court has made plain, "[s]tatutes should be interpreted to avoid serious constitutional concerns where such an interpretation is reasonable." *Stone v. Stone*, 297 Ga. 451, 455 (2015). This canon of constitutional avoidance or doubt serves two purposes. *First*, when courts apply the canon, they avoid the unnecessary adjudication of constitutional questions. *See Haley v. State*, 289 Ga. 515, 522 (2011). *Second*, by applying the canon, courts accord respect to the General Assembly which, like the courts, "is bound by and swears

an oath to uphold the Constitution." *Id.* (citation omitted). Recognizing that fact, "[t]he courts will … not lightly assume that the legislature intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it." *Id.* (alterations and citation omitted). Moreover, even where the legislature did cross a constitutional line, Georgia courts have an "obligation … to adopt a readily available limiting construction … to avoid constitutional infirmity," even if that limiting construction "significantly narrows the scope of the statute." *Scott v. State*, 299 Ga. 568, 574 (2016).

Here, the Court should adopt the Garden's interpretation of Section 127(c) because GeorgiaCarry's contrary interpretation would render Section 127(c) unconstitutional or, at the very least, raise serious constitutional concerns. GeorgiaCarry posits that Section 127(c) excludes from its protection those private lessees who lease from public entities. This reading would preclude those lessees from excluding, and using trespass statutes to exclude, persons carrying weapons from the property. *See* Appellee's Br. at 17, 23. That proposed interpretation raises serious concerns regarding whether Section 127(c): (1) deprives lessees of property without compensation in violation of the Takings

Clauses of the federal and state constitutions, *see* U.S. Const. amend. V; Ga. Const. art. I, § 3, ¶ 1; and (2) violates lessees' rights under the Due Process Clauses of the federal and state constitutions, U.S. Const. amend. XIV; Ga. Const. art. I, § 1, ¶ 1.

1. *GeorgiaCarry's interpretation of Section 127(c) raises serious concerns under the Takings Clauses.*

The federal and Georgia constitutions both prohibit the taking of private property "for public use, without just compensation." *See* U.S. Const. amend. V[10]; Ga. Const. art. I, § 3, ¶ 1 (providing, with exceptions not relevant here, that "private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid").[11] "[G]overnment regulations of private property may, in some

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[10] The Fourteenth Amendment makes the federal Takings Clause applicable to the States. *See Nollan v. California Coastal Com'n*, 483 U.S. 825, 827 (1987).

[11] In keeping with this State's longstanding commitment to protecting private property rights, the Georgia Takings Clause grants greater protection than does its federal counterpart. *See* Ga. Const. art. I, § 1, ¶ II ("Protection to person and property is the paramount duty of government."); O.C.G.A. § 51-9-1 ("The right of enjoyment of private property being an absolute right of every citizen, every act of another which unlawfully interferes with such enjoyment is a tort for which an action shall lie." (originally enacted in 1863)); *supra* 5–9. That greater protection includes the requirement, under the Georgia Clause, that the

instances, be so onerous" as to amount to a "taking" within the meaning of the Takings Clauses. *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). Regulations can trigger the Takings Clauses because they (i) are *per se* takings, *id.* at 538, or (ii) are takings under the balancing test set forth in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978). In this case, there are serious questions whether Section 127(c), as interpreted by GeorgiaCarry, would result in either a *per se* or a *Penn Central* taking.

a. There is a serious question whether Section 127(c), as interpreted by GeorgiaCarry, causes a *per se* taking.

Section 127(c) effects a *per se* taking of private property because it destroys a fundamental property right—i.e., the right of private lessees to exclude from leased properties those bearing firearms. A *per se* taking occurs when the government "requires an owner to suffer a

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government provide "just and adequate compensation" *before* the taking. Ga. Const. art. I, § 3, ¶ 1; *see Woodside v. City of Atlanta*, 214 Ga. 75, 80–81 (1958) (strictly enforcing the compensation-before-taking requirement in the context of a regulatory taking). The State did not compensate private lessees before amending Section 127(c) in 2014. The State therefore has already violated the Georgia Takings Clause if, as GeorgiaCarry contends, Section 127(c) bars private lessees from excluding or ejecting those in possession of guns from their leased properties.

permanent physical invasion of her property—however minor." *Lingle*, 544 U.S. at 538.

The Supreme Court of the United States has held that a deprivation of one's right to exclude—a fundamental element of one's property rights—may constitute a *per se* taking. In *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), for example, private landowners dredged and filled a pond on their property, creating a marina that connected to major waterways in Hawaii. The federal government then convinced the Ninth Circuit to hold that federal regulations requiring public access applied to the former pond. "Thus, the public acquired a right of access to what was once petitioner's private pond." *Id.* at 166. The Supreme Court held that application of those public-access regulations resulted in a "taking." As the Court put it, the "'right to exclude,' so universally held to be a fundamental element of property right, falls within th[e] category of interests that the Government cannot take without compensation." *Id.* at 179–80 (footnote omitted); *see also Woodside*, 214 Ga. at 114–15 (reasoning that a taking of property under the Georgia Takings Clause occurs when there is

"substantial interference with the elemental rights growing out of ownership of private property," including "the … right to exclude others").

The United States Supreme Court has reaffirmed *Kaiser Aetna*'s holding that the government commits a taking when it deprives a property owner of the right to exclude. In *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), the Court observed that a *per se* taking occurs "where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises." *Id.* at 831–32. And, in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), the Court reiterated that depriving a property owner of the right to exclude may constitute a taking. *Id.* at 384–85, 393.

The Supreme Court's decisions in *Kaiser Aetna*, *Nollan*, and *Dolan* cast valuable light on this case. Those cases teach that the right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property," *Dolan*, 512 U.S. at 384,

and that the government commits a *per se* taking when it deprives a property holder of that right. Thus, Section 127(c) causes—or, at least, may well cause—a *per se* taking without just compensation if (as GeorgiaCarry contends) it deprives private lessees of the right to exclude armed individuals from leased property.[12] The Court therefore

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[12] Neither *Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964), nor *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), is to the contrary. Not only did the Court decide *Heart of Atlanta* long before its key regulatory taking decisions (including *Kaiser Aetna*, *Nollan*, and *Dolan*), but the Court relied heavily on a centuries-old tradition of using the law to compel operators of public accommodations to serve all patrons, regardless of their personal characteristics, in rejecting the motel owners' constitutional challenges to the Civil Rights Act of 1964. 379 U.S. at 259–61. There is no similar tradition of preventing all private leaseholders from excluding or ejecting from the property those who choose to bear arms. For at least two reasons, *Pruneyard* is likewise inapposite. *First*, *Pruneyard* involved public access (for expressive purposes) to a large commercial shopping center that "cover[ed] several city blocks, contain[ed] numerous separate business establishments, and [was] open to the public at large." 447 U.S. at 83. In other words, *Pruneyard* involved something substantially equivalent to the public square, and not "the property or privacy rights of an individual homeowner or the proprietor of a modest retail establishment." *Id.* at 78 (quoting *Robins v. Pruneyard Shopping Center*, 23 Cal. 899, 909 (1979)). Section 127(c), in contrast, applies to *all private parties* leasing property from public entities—no matter how small the premises and no matter how private the use to which the lessee puts the premises. Moreover, in deciding *Pruneyard* the Court emphasized that the owner of the shopping center was permitted to "restrict expressive activity by adopting time, place, and manner

should adopt the Garden's interpretation of Section 127(c), which raises no such constitutional concerns. *See*, *e.g.*, *Haley*, 289 Ga. at 522.

b. There is a serious question whether Section 127(c), as interpreted by GeorgiaCarry, causes a taking under *Penn Central*.

Even if Section 127(c) would not give rise to *per se* takings under GeorgiaCarry's interpretation, it would nevertheless cause regulatory takings under the *Penn Central* test. In applying that test to determine whether or not a taking has occurred, courts consider: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) the "character of the governmental action." *Penn Central*, 438 U.S. at 124. Here, all three factors point toward a regulatory taking under GeorgiaCarry's interpretation of Section 127(c).

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regulations that [would] minimize any interference with its commercial functions." *Id.* at 83. Section 127(c) allows no such flexibility; under GeorgiaCarry's interpretation, it flatly precludes private lessees from excluding weapons from their property. That categorical restriction makes Section 127(c) of doubtful validity. *See Dolan*, 512 U.S. at 394 (The owner's "right to exclude would … be eviscerated" if she were forbidden from imposing time, place, and manner restrictions.).

*First*, adopting GeorgiaCarry's reading of Section 127(c) would have a tremendous impact on private parties leasing property from public entities. Businesses like day-care centers, performance venues, and convention centers will surely lose contracts and customers if it is established that guns cannot be barred from the premises. In addition, insurance rates will increase in response to the heightened safety concerns associated with weapons. Those two forces combined may well put many of these lessees out of business. *See supra* at 9–15.

*Second*, under GeorgiaCarry's interpretation, Section 127(c) would interfere with distinct investment-backed expectations. As already explained, businesses throughout the State have leased land from public entities with the expectation that they will enjoy the traditional right to exclude others from the premises—including those bearing firearms. *See supra* at 9–15. For example, entities operating sports stadiums and performance venues have invested millions of dollars in those ventures with the expectation that they will be able to attract artists and win bids to host sporting events. *See supra* at 18–21. Many artists and sports leagues, however, refuse to perform and compete in facilities where weapons are permitted. *See id.*

Accordingly, adopting GeorgiaCarry's interpretation of Section 127(c) would upset the distinct investment-backed expectations of these businesses—to the tune of millions of dollars.

*Third*, if Section 127(c) is interpreted as GeorgiaCarry proposes, the character of the government intrusion on private property interests would be severe. On that interpretation, Section 127(c) would not merely "adjust[] the benefits and burdens of economic life," but would instead "result[] in a direct and serious deprivation of the right to exclude, which is the most treasured and fundamental of all property interests." Stefanie L. Steines, *Parking-Lot Laws: An Assault on Private-Property Rights and Workplace Safety*, 93 IOWA L. REV. 1171, 1192–93 (2008) (alterations omitted). Moreover, as interpreted by GeorgiaCarry, Section 127(c) would force potentially dangerous activity on the lessees' property, as the carrying of weapons may pose a safety risk to the lessees and their family members, employees, and customers. *Id.* at 1193. And Section 127(c) would do so without providing any mechanism whereby lessees could "control or minimize the unwanted invasion." *Id.* Finally, it must be remembered that Section 127(c) applies to *all* private parties leasing land from public entities, from the

largest businesses to the proprietors of "modest retail establishment[s]" and those renting residential apartments. *Pruneyard*, 447 U.S. at 78. In light of all this, GeorgiaCarry's vision of Section 127(c) can only be described as sweeping and oppressive in character.

In short, on GeorgiaCarry's reading, Section 127(c) amounts to an uncompensated taking under the *Penn Central* test. To avoid that serious constitutional concern, the Court should adopt the Garden's interpretation of Section 127(c). *See*, *e.g.*, *Haley*, 289 Ga. at 522.

2. *GeorgiaCarry's interpretation of Section 127(c) raises serious concerns under the Due Process Clauses.*

If Section 127(c) is interpreted as GeorgiaCarry proposes, it may well violate the rights of lessees under the Due Process Clauses of the federal and Georgia constitutions. *See* U.S. Const. amend. XIV; Ga. Const. art. I, § 1, ¶ 1. The Due Process Clauses protect both property and liberty, and they "provide[] heightened protection against government interference with certain fundamental rights and liberty interests." *Washington v. Glucksberg*, 521 U.S. 702, 719–20 (1997). A right or liberty interest will receive that heightened protection if it is "fundamental to our scheme of ordered liberty, or … deeply rooted in

this Nation's history and tradition." *McDonald v. City of Chicago*, 561 U.S. 742, 766 (2010) (emphasis, citation, and quotation marks omitted).

The right to exclude others from one's property easily satisfies both standards. Long before the Founding of the United States, the law protected the right "to control who may enter" one's property. *GeorgiaCarry.Org, Inc. v. Georgia*, 687 F.3d 1244, 1264 (11th Cir. 2012). In his Commentaries on the Laws of England, which was well known to our Founders, William Blackstone described the right to exclusive control over one's property "as a 'sacred and inviolable right[].'" *Id.* at 1261–62 (quoting 1 William Blackstone, Commentaries *140). Given their deep familiarity with Blackstone, it is unsurprising that our Founders similarly "placed … upon the highest of pedestals" the right to private property, including (especially) the right to exclusive control of one's own property. *Id.* at 1264–65. In sum, the fundamental right "to exercise exclusive dominion and control over [one's] land"—that is, the right to "control who, and under what circumstances, is allowed on

[one's] own premises"—has roots that run deep into the history and tradition of our Nation, *id.* at 1265, and of our State.[13]

There can be no doubt that Section 127(c) would interfere with this right if it is interpreted in the way GeorgiaCarry suggests. On that interpretation, Section 127(c) would bar *anyone* who leases land from a

[13] Once again, neither *Heart of Atlanta* nor *Pruneyard*, counsels otherwise. *Heart of Atlanta* is again off point because the Court relied heavily on the centuries-old tradition of using the law to compel operators of public accommodations to serve all patrons, regardless of their personal characteristics, in rejecting the motel owners' constitutional challenges. 379 U.S. at 259–61. Not only that, but the prohibition on racial discrimination at issue in that case, unlike Section 127(c)'s bar on excluding armed individuals, clearly would have survived heightened review in any event. As for *Pruneyard*, it is once again irrelevant because (1) the property owner in that case turned his property into the equivalent of the public square by making even the non-business areas available to all comers without payment, and (2) the challenged law authorized the property owner to limit and regulate the conduct he found objectionable, so long as he did not eliminate it. *See supra* 29 n.12 Section 127(c), in contrast, applies to *all* private lessees—no matter how private their use of the property—and allows them no flexibility to limit or regulate the carrying of firearms on the premises. Those two distinctions make all the difference, for they push GeorgiaCarry's vision of Section 127(c) squarely into conflict with the fundamental right to exclude. Moreover, neither *Heart of Atlanta* nor *Pruneyard* speak to the Georgia Constitution's protection of the fundamental right to exclude others from one's property. That protection may well be more robust than the corresponding federal protection, given the strength of Georgia's longstanding commitment to property rights. *See*, *e.g.*, Ga. Const. art. I, § 1, ¶ II; O.C.G.A. § 51-9-1; *see supra* 5–9.

public entity from excluding or ejecting persons carrying firearms. It would, in other words, deprive them of the fundamental right to "control who, and under what circumstances, is allowed on" their premises. *Id.* Indeed, on GeorgiaCarry's reading, Section 127(c) would even compel a person renting a residential apartment on government-owned land to allow a person carrying weapons into her home, where due process rights carry particular weight. *See*, *e.g.*, *Lawrence v. Texas*, 539 U.S. 558, 562 (2003); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969); *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). No matter the lessee, GeorgiaCarry would have Section 127(c) intrude on their fundamental rights. So construed, Section 127(c) could not survive heightened scrutiny and would, thus, be unconstitutional. At the very least, it would be of doubtful constitutionality. And that is yet one more reason to reject GeorgiaCarry's interpretation.

## CONCLUSION

Every possible relevant consideration points toward the interpretation of Section 127(c) adopted by the Superior Court and advanced by the Garden. The plain language compels that

interpretation, as does Georgia precedent (against which the General Assembly legislated), and the legislative history supports it. Because all of those considerations favor the Garden's reading of Section 127(c), there's nothing left to favor GeorgiaCarry's reading. But, in fact, things are worse than that for GeorgiaCarry's interpretation of Section 127(c). GeorgiaCarry's interpretation would give rise to absurd and inconvenient consequences—including severe disruptions to Georgia businesses, the Georgia economy, and the public fisc—and it would render Section 127(c) of doubtful constitutionality. This Court can and should avoid those consequences and constitutional questions by adopting the Garden's interpretation of Section 127(c), under which private lessees may exclude and eject those carrying firearms from their premises. The Superior Court did just that, and for that reason its judgment should be affirmed.

Respectfully submitted this 31st day of August, 2017.

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## CERTIFICATE OF COMPLIANCE

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The undersigned counsel of record hereby certifies that he has caused to be served on the below-listed counsel of record a copy of the foregoing brief by email and by United States mail, first-class postage prepaid and addressed as follows:

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