IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GEORGIACARRY.ORG, INC., and PHILLIP EVANS,	)	
Plaintiffs,	)	Civil Action No.:
v.	)	2014-CV-253810
THE ATLANTA BOTANICAL GARDEN, INC.,	)	
Defendant.	)	

BRIEF IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

I. INTRODUCTION

Plaintiff Phillip Evans wants to carry a gun inside the Atlanta botanical garden. He claims that he has a right to do so. The Atlanta Botanical Garden, Inc. (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 go back. He fears arrest, however. As a result, he and Plaintiff GeorgiaCarry.org, Inc., a gun-rights organization of which he is a member, ask this Court to interpret the enforcement of a criminal statute in a declaratory judgment action between private entities. Specifically, he asks this Court to declare that the Garden may not exclude him and others from its property when they are carrying a

gun. He further asks this Court to enjoin the Garden from calling the police to have him or others arrested for trespassing if they refuse to leave the botanical garden when instructed to do so. Declaratory relief, however, is not available under Georgia law for the interpretation of a criminal statute. The Georgia Supreme Court has repeatedly held that a declaratory judgment action may not be brought to determine 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 them not to take some action. And, the Georgia Supreme Court has held that a court may not issue an injunction that inhibits or controls the enforcement of criminal laws.

Moreover, Plaintiffs' entire Complaint is based upon their contention that Mr. Evans has a "right" to carry a gun into the botanical garden because the Garden is not "in legal control of private property through a lease" as those terms are used in the criminal statute. But again, the Georgia Supreme Court has held that, when a private entity leases land from the City of Atlanta, the private entity holds the land as a private owner. Contrary to Plaintiffs' proposed interpretation, the Garden is in control of "private property."

No matter how Plaintiffs phrase their claim for relief, they cannot avoid the fact that binding Georgia Supreme Court precedent rejects their tactical decision to seek declaratory and injunctive relief as well as the statutory interpretation they

champion. This Court should follow controlling Georgia law and grant the Garden's motion to dismiss the Complaint in its entirety.

II. STATEMENT OF FACTS ALLEGED

The relevant factual allegations in Plaintiffs' Complaint are not currently disputed. The Garden is a private, non-profit corporation that operates a botanical garden, including indoor and outdoor plant exhibits. (Compl. ¶ 4). The Garden operates on land that it leases from the City of Atlanta. *Id.* The Garden does not allow guns to be carried by guests visiting the facility. (Compl. ¶ 25). Mr. Evans allegedly has a license to carry a firearm under Georgia law and is a member of Plaintiff GeorgiaCarry.Org, Inc., a gun-rights organization. (Compl. ¶¶ 10-11). Mr. Evans contends that he should be permitted to carry his gun in the botanical garden and that the Garden should not be allowed to stop him from doing so.

When Mr. Evans brought his gun to the botanical garden, he was told that he could not remain on the property with a gun. (Compl. ¶ 25). The Garden called the police and a police officer escorted Mr. Evans off the premises. (Compl. ¶ 28). The Garden has made it clear to Mr. Evans that weapons are prohibited in the botanical garden except by police officers. (Compl. ¶ 30).

Plaintiffs bring this action asking the Court to declare that the Garden may not preclude licensed gun owners from bringing guns onto the Garden property. (Compl. ¶ 38). Plaintiffs also seek an interlocutory and permanent injunction

preventing the Garden from "causing the arrest or prosecution" of Mr. Evans or other licensed gun owners who carry guns into the botanical garden. (Compl. ¶¶ 39-40).

III. ARGUMENT AND CITATIONS OF AUTHORITY

A defendant is entitled to dismissal of a complaint for failure to state a claim if "(1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought." *Anderson v. Daniel*, 314 Ga. App. 394, 395, 724 S.E.2d 401 (2012); O.C.G.A. § 9-11-12(b)(6). "When the claim alleged is a traditionally disfavored 'cause of action . . . the courts tend to construe the complaint by a somewhat stricter standard and are more inclined to grant a Rule 12(b)(6) motion to dismiss.'" *Hatcher v. Moree*, 133 Ga. App. 14, 16, 209 S.E.2d 708 (1974) (internal citation omitted). "[Georgia] courts have recognized that civil suits based upon criminal proceedings are not favored." *Id.* "A dismissal for failure to state a claim is a dismissal on the merits and is with prejudice." *Comprehensive Pain Mgmt. v. Blakely*, 312 Ga. App. 721, 722, 719 S.E.2d 579 (2011) (quoting *Roberson v. Northrup*, 302 Ga. App. 405, 406-407, 691 S.E.2d 547 (2010)).

The allegations in the Complaint demonstrate with certainty that Plaintiffs are not entitled to declaratory, injunctive, or interlocutory injunctive relief and that Plaintiffs could not possibly introduce evidence to warrant the grant of the relief sought. As a result, the Complaint should be dismissed in its entirety.

A. Plaintiffs Have Not Stated a Claim for a Declaratory Judgment.

Trial courts have the power to determine and settle by declaration "any justiciable controversy of civil nature where it appears to the court that ends of justice require that such should be made for guidance and protection of petitioner, and when such declaration will relieve petitioner from uncertainty and iusecurity with respect to his rights, status, and legal relations." *Macko v. City of Lawrenceville*, 231 Ga. App. 671, 499 S.E.2d 707 (1998) (internal citations omitted). Plaintiffs' allegations, however, do not involve a "controversy of civil nature" as Plaintiffs seek to litigate the enforceability of a criminal statute. Plaintiffs also seek an order controlliug the Garden's behavior rather than a declaration of Plaintiffs' rights. And finally, Plaintiffs have no rights with respect to the conduct at issue. For all of these reasons, the Court shonld dismiss Plaintiffs' complaint for declaratory relief.

1. Courts may not issue a declaratory judgment determining liability under a criminal statute.

Plaintiffs seek to litigate the proper interpretation of O.C.G.A. § 16-11-127(c) through a declaratory judgment action against a private entity. O.C.G.A. § 16-11-127(c), however, is a criminal statute found in Title 16 of the Georgia Code, which covers "Crimes and Offenses." The statute identifies places where it is a crime to carry a gun. The subsectiou that Plaintiffs seek to litigate states that a licensed individual may lawfully carry a gun anywhere else in the State of Georgia. But, the subsection further provides 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. § 16-11-135. In other words, the statute at issue says that people who own or control private property may eject people with guns and that the failure of the gun owner to comply constitutes the offense of criminal trespass.

It is well settled under Georgia law that a declaratory judgment may not be used to obtain an interpretation of a criminal statute. In seeking a declaratory judgment that the Garden may not eject licensed gun owners from the land that it leases, Plaintiffs are asking the Court to declare that Mr. Evans cannot be prosecuted for criminal trespass if he brings a gun to the botanical garden. The fact that the declaratory judgment action involves the interpretation of a criminal

statute is confirmed by Plaintiffs' request that the Garden be enjoined from "causing the arrest or prosecution" of Mr. Evans and others "for carrying weapons at the botanical garden." (Compl. ¶¶ 38, 39).

The Georgia Supreme 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, 47 S.E.2d 861 (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 not unlawful. The Supreme Court affirmed the dismissal of the complaint, holding that a plaintiff cannot bring a declaratory judgment action to obtain a declaration as to 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.*[1]

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 proved 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 the 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

[1] "Although a petition seeking a declaratory judgment is not per se an equitable action, it confers equity jurisdiction when it contains both sufficient allegations and prayers for equitable relief." *Norbo Trading Corp. v. Wohlmuth*, 115 Ga. App. 69, 153 S.E.2d 727 (1967) (citing *Felton v. Chandler*, 201 Ga. 347, 39 S.E.2d 654 (1946); *Todd v. Conner*, 220 Ga. 173, 175, 137 S.E.2d 614 (1964); *State Hwy. Dept. v. Hewitt Contracting Co.*, 221 Ga. 621, 623, 146 S.E.2d 632 (1966)).

> 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 uever 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. (quoting *Reed v. Littleton*, 275 N.Y. 150, 157, 9 N.E.2d 814 (1937)). Finally – and perhaps most importantly – the Georgia Supreme Court held that a declaratory judgmeut 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, wonld be fruitless." *Id.* at 684; *see also Martin v. Slaton*, 125 Ga. App. 710, 188 S.E.2d 926 (1972) (affirming dismissal of declaratory judgment action that bookstore clerk brought against district attorney for declaration as to whether certain materials were obscene, where clerk feared being subject to criminal prosecution).

Plaintiffs' use of the declaratory judgment action in this case is just as impermissible. Like the plaintiff in *Butler,* Plaintiffs seek a declaration regarding the application of a criminal statute. And, like the plaintiff in *Butler*, Plaintiffs 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. Plaintiffs, 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 Plaintiffs did this to obscure their attempt to control the enforcement of a criminal statute through a declaratory judgment proceeding.

The possible outcomes demonstrate the absurdity of Plaintiffs' claim. If, for example, Plaintiffs prevail and the Court announces that Mr. Evans may bring a gun into the botanical garden or that the Garden may not preclude guns from its property, will that order protect Mr. 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, the entity responsible for enforcing violations of Georgia law at the botanical garden, 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 Plaintiffs 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 Garden prevails? In the event Mr. Evans seeks to bring a gun to the botanical garden and gets arrested, will this 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 botanical garden be prevented from raising such an interpretation in his or her criminal prosecution? Of course not.

Just as the Supreme Court noted, granting 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 entertains Plaintiffs' request for declaratory relief with respect to the Garden, Mr. 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. The Georgia Supreme Court expressly warned against allowing

declaratory judgments to become precisely this "panacea for all ills, real or imaginary." *Butler*, 203 Ga. at 684.

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 criminal statutes are interpreted. A private entity like the Garden is not the appropriate party to litigate the interpretation of a criminal statute and should uot be forced to do so. This is why the Georgia Supreme Court has long recognized that a declaratory judgment cannot be used to test the limits or applications of a criminal statute. Plaintiffs' claim for declaratory relief, therefore, should be dismissed.

2. A declaratory judgment seeking to prohibit the Garden from "banning the carrying of weapons" is likewise improper.

Even apart from the fact that Plaintiffs seek to control the application and enforcement of a criminal law, the Complaint should be dismissed as an improper request for a declaratory judgment. Georgia's declaratory judgment statute 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. Plaintiffs, however, do not seek merely a declaration of their rights. Rather, Plaintiffs seek an order declaring that the Garden may not ban individuals from carrying weapons at

the botanical garden; that is, an order requiring the Garden to act in a certain way. The Georgia Supreme Court has held that such relief is inappropriate because 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.***" *Barksdale v. DeKalb Cnty.*, 254 Ga. App. 7, 561 S.E.2d 163 (2002) (citing *Baker v. City of Marietta*, 271 Ga. 210, 213, 518 S.E.2d 879 (1999)) (emphasis added). In other words, a declaratory judgment action is not the proper vehicle for compelling a defendant to do or not do anything.

The fact that Plaintiffs seek both a declaration that the Garden may not prevent them from carrying guns into the botanical garden as well as an injunction preventing the Garden from doing so demonstrates Plaintiffs' improper use of the Declaratory Judgment Act. Indeed, the Supreme Court has explained that such a tactic amounts to an inappropriate declaratory judgment action. In *Gelfand v. Gelfand*, 281 Ga. 40, 635 S.E.2d 770 (2006), for example, the plainniff filed suit against her ex-husband seeking a modification of child support payments. She later amended her complaint to seek a declaratory judgment as to the proper interpretation of a prior settlement agreement executed as part of the divorce. *Id.* On appeal, the Georgia Supreme Court held that – while styled as a declaratory judgment action – the wife's claim was "not truly an action for declaratory

judgment" because it was part of her strategy to force her husband to increase child support payments. *Id.* The Court explained 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 to take some action:

> Wife's request for declaratory relief was not truly an action for declaratory judgment. The distinctive characteristic of a declaratory judgment is that the declaration stands by itself and ***does not seek execution or performance by the defendant.*** A party may seek to invoke a court's declaratory power to relieve the petitioner from uncertainty and insecurity with respect to [its] rights, status, and legal relations. Here, Wife filed her petition seeking guidance with respect to language in the settlement agreement in order to compel Husband to provide her with additional funds. In this regard, her action was not truly one for declaratory relief.

Id. (internal citations and quotations omitted) (emphasis added).

The Supreme Court's decision in *Charles H. Wesley Educ. Fndtn. Inc. v. State Election Bd.*, 282 Ga. 707, 654 S.E.2d 127 (2007) is even more 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 Plaintiff 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.*

Plaintiffs in this case likewise do not merely seek a declaration as to where they 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, Plaintiffs 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 Plaintiffs want is a declaration that they can present to the police to prevent the police from arresting them. Whatever their aim, Plaintiffs' allegations clearly seek not just a declaration of their rights but a declaratiou controlling the conduct of others, an impermissible use of the Declaratory Judgment Act. Plaintiffs' claim for declaratory relief, therefore, should be dismissed.

3. *Plaintiffs' declaratory judgment action should be dismissed because there is no pending controversy and Plaintiffs have no rights under the criminal statute.*

"The object of the declaratory judgment is to permit determination of a controversy ***before*** obligations are repudiated or rights are violated." *Barksdale*, 254 Ga. App. at 7-8 (citing *Dean v. City of Jesup*, 249 Ga. App. 623, 624, 549 S.E.2d 466 (2001)) (emphasis added). This is the case because the Declaratory Judgment Act's "purpose is to afford relief from insecurity and uncertainty with respect to rights, status, and other legal relations." *Id.* At this point in time, there is no uncertainty between the Garden and Plaintiffs. The Garden has announced that it will not allow Mr. Evans to carry a gun in its facility. The police have indicated their willingness to remove him if he carries a gun in the botanical garden and, presumably, to have him prosecuted if he fails to comply. As Plaintiffs complain about an incident that has passed and legal issues that are now moot, "there is no justiciable controversy, and a declaratory judgment action cannot lie for a probable future contingency." *Barksdale*, 254 Ga. App. at 7 (citing *Baker*, 271 Ga. at 214-15).

In addition, Plaintiffs' declaratory judgment claim fails because O.C.G.A. § 16-11-127(c) does not create a "right" for Mr. Evans to carry a gun into the botanical garden. "(I)n order to be entitled to a declaratory judgment the plaintiff

must show facts or circumstances whereby it is in a position of uncertainty or insecurity because of a dispute and of having to take ***some future action which is properly incident to its alleged right***, and which future action without direction from the court might reasonably jeopardize its interest." *State Farm Auto. Ins. Co. v. Metro. Prop. & Cas. Ins. Co.*, 284 Ga. App. 430, 433, 643 S.E.2d 895 (2007) (quoting *Eberhardt v. Unigard Mut. Ins. Co.*, 142 Ga. App. 102, 103, 235 S.E.2d 616 (1977)) (emphasis added). "It 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 and subject to a declaration of rights, and it must be brought against an adverse party with an antagonistic interest." *Cook v. Sikes*, 210 Ga. 722, 726, 82 S.E.2d 641 (1954) (internal citation omitted) (emphasis added). "For a controversy to justify the making of a declaration, it must include a ***right*** claimed by one party and denied by the other, and not merely a question as to the abstract meaning or validity of a statute." *Id.* (internal citation omitted) (emphasis added).

Plaintiffs incorrectly contend that O.C.G.A. § 16-11-127(c) confers Mr. Evans the "right" "to carry a weapon 'in every location in this state.'" (Compl. ¶ 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, whether licensed or not. *See*

O.C.G.A. § 16-11-127(b). While the new 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. And, while O.C.G.A. § 16-11-127(c) identifies locations where individuals may carry guns without fear of criminal prosecution, the statute does not prohibit the Garden from banning guns in the botanical garden. The Garden, as Plaintiffs acknowledge, is a private entity that controls the botanical garden complex, including by deciding conditions of access and membership. (Compl. ¶¶ 2, 4, 11, 22). The statute at issue, therefore, does not expressly provide Plaintiffs the "right" to carry a weapon on a private property.

Plaintiffs posit one interpretation of the statute that might suggest Mr. Evans could not be arrested for carrying a gun on the Garden's property: that the Garden is not "in legal control of private property through a lease" as those terms are used in the statute. Rather, Plaintiffs contend that the Garden "is a lessee of public property and therefore cannot ban [license holders] from carrying weapons at the botanical [garden]." (Compl. ¶¶ 36-37). Plaintiffs' contention 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.

While no court has addressed the specific language in this statute, the Georgia Supreme Court has previously stated that, when the City of Atlanta

conveys a leasehold estate to a private company - as the Plaintiff concedes 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 Georgia Supreme 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***.

Id. at 17 (emphasis added). This remains good law in Georgia. *See Douglas Cnty. v. Anneewakee,* 179 Ga. App. 270, 275, 346 S.E.2d 368, 372 (1986). Plaintiffs' interpretation of the statute and resulting contention that it confers as a "right" on him vis-à-vis the Garden is simply incorrect.

Plaintiffs' declaratory judgment suffers from a number of deficiencies. Since the goal is a declaration of the parties' criminal liability, the claim should be dismissed. And since the goal is also to prevent the Garden from excluding gun

carriers from the property, the claim should be dismissed. Neither is appropriate for a declaratory judgment under Georgia law. In addition, there is no justiciable controversy or right owned by Plaintiffs for the Court to even decide at this point. For these reasons, Plaintiffs' declaratory judgment claim should be dismissed.

B. The Court Should Dismiss Plaintiffs' Claim for an Injunction as Barred by Georgia Law.

In addition to seeking declaratory relief, Plaintiffs also ask the Court to issue an injunction "prohibiting the [Garden] from causing the arrest or prosecution of people with [gun licenses] for carrying weapons at the botanical [garden]." (Compl. ¶ 39). 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.

The Georgia Supreme 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 Supreme 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.[2] He filed a complaint seeking to enjoin his prosecution. *Id.*

The trial court dismissed the action and the Supreme Court affirmed, holding that Georgia's injunction statute "does not interfere with the administration of the criminal law." *Id.* The Supreme 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.[3] *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

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[2] The litigation in *Holmes v. Bd. of Comm'rs.*, 271 Ga. 206, 517 S.E.2d 788 (1999), involved at least four separate appeals. The facts of their dispute are more fully set forth in one of the related opinions. *See Achor Ctr., Inc. v. Holmes*, 219 Ga. App. 399, 465 S.E.2d 451 (1995).

[3] The Georgia Supreme Court has held that another exception might apply if the prosecution was "for the sole purpose of unlawfully taking or destroying property . . . or that they will in fact result in irreparable injury." *Arnold v. Mathews*, 226 Ga. 809, 810, 177 S.E.2d 691 (1970).

right to challenge his prosecution by raising defenses in the trial court and, if necessary, by attacking any conviction of appeal. *Id.* The Court held that the criminal process was an "adequate remedy at law" – thus prohibiting equitable relief. *Id.*

Eveu 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 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").

The same rule applies in this case. Plaintiffs cannot obtain an injunction to prevent prosecution under a criminal statute. While Mr. Evans potentially faces criminal prosecution, there is no claim that the prosecution threatens irreparable injury or prevents him from pursuing his employment. He can 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 Georgia Supreme Court precedent, he cannot obtain an injunction to prevent his prosecution. It makes no difference that Mr. Evans brought his claim against the Garden prior to violating the criminal trespass statute rather than bringing his claim against law enforcement after being charged. Certainly, Plaintiff cannot undermine this well-

established law simply by moving up in the process and targeting citizens who might call the police to complain about illegal behavior. As the Georgia Supreme 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.

Plaintiff has an avenue to pursue his interpretation of the criminal statute at issue. He may be arrested and raise his interpretation of the statute during the criminal proceeding. While he may not like that path forward, the Georgia Supreme Court has held that it is an adequate remedy and, therefore, his only path for asserting his claim that he can bring a gun to the botanical garden despite the Garden's instructions to the contrary. Injunctive relief is not available.

C. Plaintiffs' Allegations Do Not Satisfy the Requirements for an Interlocutory Injunction.

"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 (2012) (quoting *Hampton Island Founders v. Liberty Capital*, 283 Ga. 289, 293, 658 S.E.2d 619 (2008); citing OCGA § 9-4-3(b) (allowing for interlocutory extraordinary relief in declaratory judgment actions "to maintain the status quo pending the adjudication of the questions or to preserve equitable

rights")). If the Court dismisses Plaintiffs' two primary claims, it should also dismiss his claim for interlocutory relief because there would be no status quo to maintain pending a final resolution. *Marietta Props.*, 319 Ga. App. at 189.

But, even if the Court does not dismiss Plaintiffs' claims for declaratory and injunctive relief, it should still deny his claim for an interlocutory injunction because Plaintiffs' 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(2), 742 S.E.2d 702 (2013) (internal citation omitted). In exercising its discretion, the 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., No. S14A0728, 2014 WL 4958172, 764 S.E.2d 361 (Ga. Oct. 6, 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.

Plaintiffs' allegations do not satisfy any of these conditions and certainly do not present a clear and urgent case. As a threshold matter, Plaintiffs do not have a substantial likelihood of prevailing on the merits. As explained above, Plaintiffs' entire claim seeks to control the enforcement of a criminal statute, and Georgia law does not allow use of declaratory or injunctive relief to do so. Plaintiffs simply cannot get the relief that they seek.

And, even if declaratory and injunctive relief were an available remedy for the interpretation of a criminal statute, Plaintiffs' interpretation of the statute at issue is entirely wrong. Plaintiffs contend that the Garden cannot exclude them because the Garden is not a "person in legal control of private property." (Compl. ¶¶ 36-37). As explained above, the Georgia Supreme Court has held that an entity that leases land from the City of Atlanta is an owner of private property under Georgia law. *See Delta Air Lines*, 219 Ga. at 16 ("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***") (emphasis added). In order to resolve Plaintiffs' claim for an interlocutory injunction, the Court need not decide this issue. In assessing whether there is a "substantial likelihood" that Plaintiffs will prevail, it is enough to understand that Plaintiffs' simplistic interpretation of the statute at issue is not quite so clear. Precedent from the Georgia Supreme

Court supports a contrary interpretation that the Garden – having obtained a leasehold interest from the City of Atlanta – is a private owner of the land on which it operates.

Plaintiffs also cannot establish that they will suffer any irreparable injury from the denial of an interlocutory injunction. Mr. Evans may still enjoy the botanical garden at any time it is open. He simply cannot carry a gun while doing so. This poses no irreparable injury. On the other hand, if the Court grants Plaintiffs' motion for interlocutory injunction, the Garden will have to reassess its security protocols and staffing to address potential safety risks from gun-carrying members. The Garden also believes that it will suffer significant irreparable injury in the foregoing loss of business as guests who enjoy the gun-free environment decide not to visit the botanical garden when other guests may be armed. And finally, the public interest will certainly be disserved from the granting of an interlocutory injunction. Allowing guns in the botanical garden will almost certainly cause many members of the public to stay away, thereby preventing them from enjoying its benefits. Plaintiffs' Complaint simply does not satisfy the requirements for an interlocutory injunction.

IV. CONCLUSION

In the end, this case does not call for equitable relief, a declaratory judgment, or injunctive relief of any kind. Plaintiffs ask this Court to take

extraordinary steps to interfere with the administration of criminal laws in the face of binding Georgia Supreme Court precedent that it should not do so. Plaintiffs have an alternative remedy to test their belief that they can bring a gun on the Garden's property. It may not be the remedy that they prefer, but it is the remedy that the Supreme Court says they must pursue. Suing a private entity to champion their interpretation of a criminal law is not a viable alternative. The Court, therefore, should dismiss the Complaint in its entirety.

This 17th day of December, 2014.

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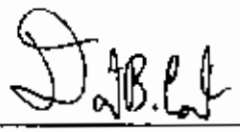
CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing document on counsel of record via United States First Class Mail, postage prepaid, at the following address:

John R. Monroe
9640 Coleman Road
Roswell, GA 30075

This 17th day of December, 2014.



David B. Carpenter