IN THE SUPREME COURT
STATE OF GEORGIA

GEORGIACARRY.ORG et al.,	)	**Supreme Court**
Appellants,	)	**Case No. S18G1149**
	)	
v.	)	**Fulton County**
	)	**Case No. 2014-CV-253810**
	)	
ATLANTA BOTANICAL GARDEN, INC.,	)	
	)	
Appellee.	)	

BRIEF FOR THE APPELLEE

James C. Grant
Georgia Bar No. 305410
David B. Carpenter
Georgia Bar No. 292101
ALSTON & BIRD LLP
1201 West Peachtree Street
Atlanta, Georgia 30309-3424
Telephone: (404) 881-7000
Facsimile: (404) 881-7777

BRIEF FOR THE APPELLEE

The Atlanta Botanical Garden, Inc. (the "Garden") submits this Brief for the Appellee respectfully requesting that this Court affirm the trial court's judgment in Case No. 2014-CV-253810 and the Court of Appeals' decision affirming that judgment in Case No. A17A1639.

INTRODUCTION

In 1962, this Court declared, "Private property becomes public property when it passes into public ownership; and public property becomes private property when it passes into private ownership." *Delta Air Lines Inc. v. Coleman,* 219 Ga. 12, 16, 131 S.E.2d 768 (1963). Thus, "[w]hen 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." *Id.* This has been the law of Georgia since that time.

In 2014, the Georgia General Assembly, acting against that backdrop, passed a new act expanding the places where firearms can be carried with a license while making sure the new law did not trump the rights of landowners: "[P]rivate property owners or persons in legal control of private property through a lease . . . shall have the right to exclude or eject a person who is in possession of a weapon or long gun on their private property." O.C.G.A. § 16-11-127(c). In doing so, the legislature used many of the same terms and legal ideas that this Court used over 50 years ago.

Under well-settled rules governing the interpretation of statutory texts, courts do "not assume or infer that [a legislature] intended to depart from [the] precedents" of a Supreme Court. *Ryan v. Gonzales*, 568 U.S. 57, 66, 133 S.Ct. 696, 184 L.Ed.2d 528 (2013) (Thomas, J.). Rather, courts "normally assume that, when [a legislature] enacts statutes, it is aware of relevant judicial precedent." *Id.* (quoting *Merck & Co. v. Reynolds*, 559 U.S. 633, 648, 130 S.Ct. 1784, 176 L.Ed.2d 582 (2010)).

This Court adheres to those well-settled rules for ascertaining the meaning of statutes. Just last year, the Court reminded us that "the General Assembly is presumed to enact laws with full knowledge of the condition of the law and with reference to it . . . ." *City of Union Point v. Greene County*, 303 Ga. 449, 455, 812 S.E.2d 278 (Ga. 2018). And only the year before, the Court held:

> All 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. ***This principle is critical to our understanding of the statute.***

Grange Mut. Cas. Co. v. Woodard, 300 Ga. 848, 852, 797 S.E.2d 814 (2017) (quoting *Botts v. Southeastern Pipe-Line Co.*, 190 Ga. 689, 700-01, 10 S.E.2d 375 (1940) (citation and punctuation omitted, emphasis added)).

The upshot is plain: in enacting the 2014 version of Section 127(c), the General Assembly acted in reference to the existing law, under which "public property becomes private property" when leased to a private entity. Thus, 127(c)'s

reference to "[p]rivate property owners or persons in legal control of private property through a lease" includes private entities (like the Garden) leasing land from a public entity. In other words, as two courts have now held in this case, the statutory text allows the Garden to exclude gun carriers. The Court's inquiry can end there.

But there is more. Shortly after amending O.C.G.A. § 16-11-127(c), the Georgia House passed a bill that specifically precluded entities like the Garden from excluding licensed gun holders only to have the Senate vote the bill down. In addition to the statutory interpretation issues Appellants cannot overcome, their interpretation of the statute would lead to a wide range of improper consequences, including overriding due process and takings concerns that support the Garden's interpretation of O.C.G.A. § 16-11-127(c) and the lower courts' judgments. Finally, many of Appellants' arguments to the contrary are either not properly before this Court or insufficient to overturn the trial court or Court of Appeals.

The Court granted certiorari on the single issue "[w]hether O.C.G.A. § 16-11-127(c) permits a private organization that leases property owned by a municipality to prohibit the carrying of firearms on the leased premises." The answer, based on the plain text of the statute and as detailed below, is "YES."

BACKGROUND

The record in this case contains two critical, undisputed facts. One, the Garden leases land from the City of Atlanta under a 50-year lease with the City that was

signed in 1980. Affidavit of Gary Doubrava, R-186. Two, the Garden is a ***private*** 501(c)(3) organization. *Id.,* R-186. The Garden operates as a private entity on the leased land. When visitors come to the Garden, they visit the buildings that the Garden has built and the exhibits that the Garden presents. To the public, the Garden appears to be a private operation, which it is.

From this flows the conclusion that the Garden's land is in fact its private property. As a result, and as explained further below, under the plain language of O.C.G.A. § 16-11-127(c), the Garden is allowed to exclude individuals carrying guns from the property that it leases.

STANDARD OF REVIEW

On appeal from a grant of summary judgment[1], this Court reviews the record *de novo* to determine whether there is a genuine issue of material fact and whether the undisputed facts, viewed in the light most favorable to the nonmoving party, warrant judgment as a matter of law. *Home Builders Ass'n of Savannah v. Chatham County*, 276 Ga. 243, 245, 577 S.E.2d 564 (2003).

A. The Trial Court and Court of Appeals did not err in their interpretations of O.C.G.A. § 16-11-127(c).

The Garden may exclude or eject persons in possession of a gun because the Garden is in control of private property through a private leasehold interest. The

[1] The Garden originally filed a motion for judgment on the pleadings that the trial court converted into a motion for summary judgment. R-121-123.

Georgia Court of Appeals agreed with the Garden on two separate grounds. First, in a unanimous opinion, the Court of Appeals held:

> [T]he plain and unambiguous language of O.C.G.A. § 16-11-127(c) grants persons in legal control of private property through a lease the right to exclude individuals carrying weapons, and well-established authority from the Supreme Court of Georgia designates land leased by the Garden as private property.

GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, Inc., 345 Ga. App. 160, 812 S.E.2d 527 (2018). Second, Chief Judge Dillard and Presiding Judge Ellington, in a concurring opinion that recognized the right to "keep and bear arms" as "the palladium of the liberties of a republic," also concluded that "any interpretation that denies a private entity in possession of leased property the right to exclude or eject persons carrying weapons is likely to run afoul of the Takings Clauses of the federal and Georgia constitutions as well as the Due Process Clauses of the federal and Georgia constitutions." *Id.* at 164-167. Both conclusions are correct, and both are reasons for affirming the Court of Appeals' and trial court's decisions in this matter.

1. The unambiguous language of O.C.G.A. § 16-11-127(c) allows the Garden to exclude licensed weapons holders.

The law of this State requires that, when a court "consider[s] the meaning of a statute, '[it] must presume that the General Assembly meant what it said and said what it meant.'" *Deal v. Coleman*, 294 Ga. 170, 172, 751 S.E.2d 337 (2013). "[I]f the statutory text is 'clear and unambiguous,'" as the Court of Appeals recognized,

the court then gives "the statute its plain meaning," and its "search for statutory meaning is at an end." *Id.* at 173.

The Court of Appeals correctly noted that O.C.G.A. § 16-11-127(c) is "unambiguous" and "leaves no doubt that the legislature afforded only private property owners, or those in control of private property through a lease or otherwise, the power to exclude licensed weapons holders from that private property." *GeorgiaCarry.Org*, 345 Ga. App. at 162. The question is whether the Garden is a private property owner or controls private property through its lease with the City.

The Court of Appeals rightly turned to long-settled precedent – the backdrop for the General Assembly's enactment of Section 127(c) – to answer that question. *Id.* at 163. For more than 50 years, Georgia law has provided that when a public entity conveys a leasehold estate in property to a private lessee (like the Garden), the "public property" becomes "private property" for the duration of the lease. That rule governs this case and confirms the correctness of the lower courts' decisions.

This Court discussed and applied the controlling rule in *Delta Air Lines Inc. v. Coleman,* 219 Ga. 12, 131 S.E.2d 768 (1963), which involved an issue of taxation of land leased to Delta Air Lines from the City of Atlanta. Delta sought to avoid paying taxes, arguing that "the property it leased from the City of Atlanta [was] public property" and therefore exempt from taxation. *Id.* at 13. In concluding that the airline could be forced to pay *ad valorem* taxes on the property, the Court held

that "public property" becomes "private property" when the City of Atlanta leases it to a private entity:

> 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 16 (emphasis added). That rule appears to have been the law of this State for at least 144 years. *See W. & Atlantic Ry. Co. v. State*, 54 Ga. 428, 429-30 (1875).

And to be clear, it remains the law today as more recent cases confirm. In *Douglas County v. Anneewakee,* 179 Ga. App. 270, 271, 346 S.E.2d 368 (1986), a county sought to tax land leased from a private entity to a tax exempt organization. The Court of Appeals reaffirmed that a lease of property from one type of entity to another results in a legal change of the status of the property from public to private or vice versa. *Id.* at 274 (citing *Coleman*, 219 Ga. at 12).

As recently as 2016, the Court of Appeals reaffirmed the *Coleman* rule in *Columbus, Georgia Board of Tax Assessors v. Medical Center Hospital Authority*, 338 Ga. App. 302, 304, 788 S.E.2d 879 (2016). The board of assessors sought property tax payments from the public hospital, arguing that the property remained

private property because it was private and taxable before it was leased to the public authority. *Id.* Following the *Coleman* decision, the Court of Appeals again ruled that, under Georgia law, the property that is the subject of the lease takes on the status of the lessee. *Id.* Because the lessee was a public entity, the property was public property. *Id.*

Georgia appellate courts have been consistent on this position since *Coleman*. As discussed at the outset of this brief, the legislature is presumed to have known the status of the law in Georgia when it passed the amendments to O.C.G.A. § 16-11-127(c). As the Court of Appeals correctly reminded Appellants: "[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." *GeorgiaCarry.Org*, 345 Ga. App. at 163 (quoting *Grange Mut. Cas. Co*, 300 Ga. at 852). Moreover, statutory law "[is] not understood to effect a change in the common law beyond that which is clearly indicated by express terms or by necessary implication." *Id.* (quoting *Avnet, Inc. v. Wyle Laboratories*, 263 Ga. 615, 619-20, 437 S.E.2d 302 (1993))).

With these basic requirements in mind, the Court of Appeals correctly concluded:

> Nothing in O.C.G.A. § 16-11-127(c) expressly contravenes the common-law authority cited above, nor does it do so by necessary implication. Indeed, the only way to rectify the plain and unambiguous language of O.C.G.A. § 16-11-127(c) with well-established Georgia

> precedent is to conclude that the Garden, a private entity with a leasehold interest in what is . . . private property, may exclude licensed weapons holders from entering that property.

Id. at 163-164.

Private property becomes public property when it passes to a public entity through a lease, and public property becomes private property when it passes to a private entity through a lease. *Coleman*, 219 Ga. at 12. Appellants have cited no case law limiting the *Coleman*, *Anneewakee*, and *Medical Center Hospital Authority* decisions. The General Assembly acted against the background of that precedent when it enacted Section 127(c), and it is thus "critical" that Section 127(c) "be construed in connection and in harmony" with it. *Grange Mut. Cas. Co.*, 300 Ga. at, 852. And that means that the Garden, a private lessee of public property, may exclude those carrying firearms under the plain language of Section 127(c).

2. Subsequent legislative proceedings confirm that the Garden may exclude licensed weapons holders.

As noted above, "[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." *Grange Mut. Cas. Co.*, 300 Ga. at 852. Here, such knowledge is not merely presumed. Rather, the legislature's actual knowledge of the law from *Coleman* is revealed through the subsequent legislative history of O.C.G.A. § 16-11-127(c). In

2016, the Georgia House of Representatives passed House Bill 1060 ("H.B. 1060"),[2] which proposed the following amendment to O.C.G.A. § 16-11-127(c):

SECTION 3.

Said part is further amended by adding two new paragraphs to subsection (a), by revising subsection (c), and by revising paragraph (2) of subsection (e) of Code Section 16-11-127, relating to carrying weapons in unauthorized locations, as follows:

"(3.1) 'Leased government property' means real property that is owned by a government entity but of which an individual or entity which is not a government entity is the lessee, licensee, or renter."

"(5) 'Private property' means real property that is not owned or controlled by any government entity; provided, however, that such term shall not mean leased government property."

"(c) A license holder or person recognized under subsection (e) of Code Section 16-11-126 shall be authorized to carry a weapon as provided in Code Section 16-11-135 and in every location in this state not listed in subsection (b) or prohibited by subsection (e) of this Code section; provided, however, that ~~private property owners~~ the owners or persons in legal control of private property through a lease, rental agreement, licensing agreement, contract, or any other agreement to control access to such private property shall have the right to exclude or eject a person who is in possession of a weapon or long gun on ~~their~~ such private property in accordance with paragraph (3) of subsection (b) of Code Section 16-7-21, except as provided in subsection (e) of this Code section and Code Section 16-11-135. A violation of subsection (b) of this Code section shall not create or give rise to a civil action for damages."

The clear intent of this new language was to define property like the botanical garden as "leased government property" so that the Garden and similarly situated entities

[2] Affidavit of David B. Carpenter, R-150-161.

would be unable to exclude those carrying firearms. The House understood that the current version of O.C.G.A. § 16-11-127(c) does ***not*** prohibit entities that lease property from the government from excluding people carrying guns and wanted to expand the statute to prevent those entities from doing so. If the existing statute were sufficient to prevent lessees of government property from excluding gun owners, there would be no reason to amend it.

The 2016 Amendment ultimately failed in relevant part because the Senate Committee on the Judiciary offered a substitute to H.B. 1060 that completely removed the House's proposed language.[3] In other words, the House wanted to effectuate Appellants' proposed reading of the statute, and the Senate deliberately chose not to do so. And that doubly confirms that Section 127(c) – as written – does not enact Appellants' preferred policy.

Appellants now ask the Court to do what the General Assembly itself did not. This request is contrary to the "elementary" rule of "interpretations of statutes" under which "the courts shall look diligently for the intention of the General Assembly."

[3] A true and correct copy of the Senate Committee on Judiciary's substitute is found at R-163-175. Governor Deal vetoed the modified Bill on May 3, 2016. The Governor's veto had nothing to do with the proposed language affecting the Garden that the Senate had removed. He explained that his veto stemmed from "concerns about the change of policy . . . relating to the carrying of a weapon or long gun into a place of worship." *See* https://gov.georgia.gov/press-releases/2016-05-03/deal-issues-2016-veto-statements.

Spectera Inc. v. Wilson, 294 Ga. 23, 26, 749 S.E.2d 704 (2013). By striking the proposed language in H.B. 1060, the Senate (and the General Assembly) rejected a prohibition on entities like the Garden, which control private property through a lease from the government, from being able to exclude or eject individuals carrying a gun. The Court should thus affirm the decision of the Court of Appeals, which gives effect to the statutorily expressed intention of the General Assembly.

3. O.C.G.A. § 16-11-127(c) should be construed to avoid causing constitutional concerns.

Appellants' interpretation of O.C.G.A. § 16-11-127(c) is also fatally flawed because it runs afoul of basic constitutional rights afforded to Georgia citizens. Under circumstances like these, this Court has invoked the "doctrine of constitutional doubt" to "save a statute from unconstitutionality" where a reasonable, alternative interpretation is available. *Haley v. State*, 289 Ga. 515, 522, 712 S.E.2d 838 (2011). Appellants incorrectly argue that these constitutional issues "cannot be ruled upon here." Appellants' Br. at 22. While these issues were not raised in the trial court, they were the focus of the Court of Appeals' concurring opinion. And Appellants correctly acknowledge that "this Court cannot ignore the provisions of the Constitution." Appellants' Br. at 22.

While recognizing the right to "keep and bear arms" as "the palladium of the liberties of a republic," Chief Judge Dillard and Presiding Judge Ellington's concurring opinion concluded that "any interpretation that denies a private entity in

possession of leased property the right to exclude or eject persons carrying weapons is likely to run afoul of the Takings Clauses of the federal and Georgia constitutions as well as the Due Process Clauses of the federal and Georgia constitutions." *GeorgiaCarry.Org,* 345 Ga. App. at 164-167. If this Court finds the language of O.C.G.A. § 16-11-127(c) to be ambiguous – which it is not – Appellants' interpretation must be avoided to prevent these serious constitutional concerns.

a) Appellants' interpretation of O.C.G.A. § 16-11-127(c) violates the Takings Clauses of the federal and Georgia constitutions.

Under Appellants' interpretation, a private entity in possession of property through a lease with a public property owner would have no right to exclude or eject persons carrying weapons, thereby mandating public use of that private entity's property without any compensation. This deprivation of property rights without compensation is contrary to the Takings Clause of both the federal and Georgia constitutions, which prohibit the taking of private property "for public use, without just compensation." *See* U.S. Const. amend. V; Ga. Const. art. I, § 3, ¶ 1. Both federal and Georgia courts have held that a *per se* taking of property occurs when a fundamental property right – such as the right to exclude others[4] – is denied by government regulation. *See e.g. Kaiser Aetna v. United States*, 444 U.S. 164 (1979);

[4] The "right to exclude others from entering and using her property [is] perhaps the most fundamental of all property interests." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539, 125 S.Ct. 2074, 161 L.Ed.2d 876 (2005).

Woodside v. City of Atlanta, 214 Ga. 75, 103 S.E.2d 108 (1958). At a minimum, the leasehold interests of the Garden and similarly situated lessees are private, so Appellants cannot in good faith argue that no private property is in play. Appellants' Br. at 23.

Even if Appellants' interpretation did not result in a *per se* taking, it would result in a regulatory taking under the *Penn Central* test adopted by the U.S. Supreme Court. *Penn Cent. Transp. Co. v. City of N. Y.*, 438 U.S. 104 (1978). 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." *Id.* at 124. As outlined below, Appellants' interpretation of Section 127(c) will lead to significant economic impacts and disrupt the investment-backed expectations of both lessors of public lands and their private lessees across Georgia. Appellants themselves acknowledge that a "regulation that seriously diminishes the value of the property" constitutes a taking. Appellants Br. at 23. For some lessees – daycares for example – the regulation might deprive the property of all economically beneficial use.[5]

[5] Appellants' argument that the Garden "is no doubt a place of 'public accommodation'" is disingenuously limited. Appellants' Br. at 24-25. Even assuming that the Garden is a "public accommodation," a ruling in favor of Appellants would not be limited to the Garden. It would necessarily impact any private business that leased land from a municipality. As Justice Scalia noted in *Clark v. Martinez*, 543 U. S. 371, 382, 125 S. Ct. 716, 160 L. Ed. 2d 734 (2005),

Additionally, Appellants' interpretation would severely intrude on private property interests because it would deprive private entities of the fundamental right to exclude others and impose significant safety risks on the affected properties. Appellants offer no serious explanation of why this is not the case.[6]

b) Appellants' interpretation of O.C.G.A. § 16-11-127(c) violates the Due Process Clauses of the federal and Georgia constitutions.

Furthermore, Appellants' interpretation of O.C.G.A. § 16-11-127(c) would also deny constitutional due process rights guaranteed to private lessees under the federal and Georgia constitutions. *See* U.S. Const. amend. XIV; Ga. Const. art. I, § 1, ¶ 1. As discussed above, both federal and Georgia courts have held that the right to exclude others from one's property is a fundamental and elemental right. Even by the time of Blackstone the right was described as "sacred and inviolable." 1 William Blackstone, Commentaries *140 (cited in *GeorgiaCarry.Org, Inc v. Ga.,* 687 F.3d 1244, 1261-62 (11th Cir. 2012)). And that sacred, fundamental nature is all the more

---

"We find little to recommend the novel interpretive approach advocated by the dissent, which would render every statute a chameleon, its meaning subject to change depending on the presence or absence of constitutional concerns in each individual case."

[6] Appellants' argument that a "takings claim is not ripe unless and until the private property owner exhausts his state remedies" misunderstands the issue before the Court. Appellants Br. at 25. The issue is not whether compensation for the taking is due but whether the legislature intended to adopt a statute that might raise such a concern in the first place.

apparent when the property interest in question is in an apartment sitting on land leased from the government as the U.S. Supreme Court has held. *See, e.g., Griswold v. Conn.*, 381 U.S. 479, 484 (1965). The Due Process Clauses protect that fundamental right to exclude others from one's property. *See, e.g., id.*; *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 673 (1999) ("The hallmark of a protected property interest is the right to exclude others."). And because that right is so fundamental, it at least receives "heightened protection" from governmental intrusion.

By denying private lessees the fundamental right to exclude or eject persons carrying firearms from their privately controlled property, Appellants' interpretation would bring Section 127 in direct violation of those lessees' rights under the Due Process Clauses of the federal and Georgia constitutions. And there simply is no possibility that invasion of due process can survive the heightened scrutiny required for intrusions on fundamental rights.[7]

---

[7] Appellants protest that this case does not involve a general right to exclude others from one's property but instead involves only a "right to exclude people from public property leased to a private entity solely on account of the people's carrying weapons." Appellants Br. at 27, n.17. Appellants' protest improperly conflates the right (to exclude from one's property) with the parameters of the law interfering with that right (Section 127(c)). That approach makes no sense, as it would allow a legislature to side-step almost any established fundamental right by casting in narrower terms the statute invading that right, for example, a law prohibiting speech on blogs. Thankfully, that is not the law. *See, e.g., Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 790 (2011). And the existence of zoning laws and

B. Appellants have not provided sufficient grounds for ignoring the plain language of the statute and overturning the Court of Appeals' decision.

In the Court of Appeals, Appellants offered five principal arguments, most of which concerned the addition of the word "private" into O.C.G.A. § 16-11-127(c). These arguments likewise formed the basis for Appellants' petition for certiorari that was granted by the Court. *See* Appellants' Court of Appeals Br. at 13-17. But after four years of litigation, Appellants' core argument now appears to be that the Garden's interpretation fails to offer a distinction between the statutory phrases "private property owners" and "persons in control of private property through a lease." Appellants' Br. at 12-13. Appellants further argue that this Court's analysis in the *Coleman* case has no bearing on this case because the term "'private' in tax cases applies to the possessor and 'private' in O.C.G.A. § 16-11-127(c) applies to the fee owner." Appellants' Br. at 12. In other words, private property means one thing in the tax context and a completely separate thing in the context of gun rights

---

civil rights provisions do not suggest that the right at issue here is somehow not fundamental. Zoning laws do not infringe on the right to exclude. And the relevant civil rights statutes (which Appellants do not identify) 1) apply only to public accommodations and 2) rest on centuries' old tradition of compelling public accommodations to serve all patrons regardless of their personal characteristics. *See Heart of Atlanta Motel v. United States*, 379 U.S. 241 (1964). There is no similar tradition of forcing property owners to admit onto their premises those who choose to carry firearms.

legislation. None of these arguments – the new ones or the ones raised below – should result in the Court of Appeals' opinion being overturned.

1. Appellants waived their new arguments and, regardless of waiver, those arguments fail.

Principally, Appellants' new arguments fail because Appellants have waived them. In the four years this case has been pending, Appellants have filed four briefs and one cert petition but never once raised the distinction between the phrases "private property owners" and "persons in control of private property through a lease" and never gave reasons why "private property" should be treated differently in one context versus the other.[8] These arguments have therefore been waived. And if not waived, they are nonetheless unsuccessful.

First, contrary to Appellants' contention, there is a clear, meaningful distinction between "private property owners" and "persons in control of private

[8] Appellants had previously offered no argument or case law on the distinction between "private property owners" and "persons in control of private property through a lease" or as to why the opinions in *Coleman*, *Anneewakee*, and *Medical Center Hospital Authority* – all tax cases – should not control here (instead, offering only a single paragraph and a footnote where they intimated those decisions are limited to classification "for tax purposes."). Appellants' Court of Appeals Br. at 15. Appellants had a duty to present "whatever viable theory of recovery they might have or run the risk of an adjudication on the merits of their case" at summary judgment. *Pfeiffer v. Ga. DOT*, 275 Ga. 827, 828 n.3, 573 S.E.2d 389, 391 (2002), citing *Summer-Minter v. Giordano*, 231 Ga. 601, 604 (203 S.E.2d 173) (1974). Appellants have therefore waived their new arguments by failing to raise them once in the last four years of litigation and should not be permitted to raise them for the first time before this Court. *See e.g. Abushmais v. Erby*, 282 Ga. 619, 652 S.E.2d 549 (2007).

property through a lease" that stems from this Court's *Coleman* decision. As Appellants concede, the statute's inclusion of the two phrases "made a distinction between fee owners and interest in land less than a fee (e.g., lessees and tenants)." Appellants' Br. at 10. O.C.G.A. § 16-11-127(c) currently allows "private property owners" and "persons in control of private property through a lease" to exclude gun owners under the authority of the criminal trespass statute. The "property" referred to in the statute necessarily means the physical property itself; limiting that right to a lessee's private leasehold estate makes no sense as a party cannot physically trespass on "an estate in land less than the fee." The City – not the Garden – is the owner of the physical property itself, and the leasehold conveyed to the Garden "is an estate in land less than the fee," which remains held by the City. *Coleman*, 219 Ga. at 16. But by virtue of having been leased from a public entity to the Garden, as *Coleman* makes clear, the physical property itself became private property, controlled by the Garden as the leaseholder. So while the Garden does not own private property here, it is in legal control of private property through a lease.

Second, Appellants' suggestion to define "private property" differently in the tax context and in the gun rights context should be rejected. Appellants have offered no precedent limiting to the tax context *Coleman* and the line of cases that clearly set out the legal effect of a lease on a property's designation as public or private. Nor have Appellants come forward with legislative history suggesting that the General

Assembly took that view. Adopting Appellants' position would unfairly prejudice entities like the Garden, forcing upon them the burdens in both areas of the law (such as subjecting them to the taxes associated with private entities) without allowing them the basic benefits of private ownership, namely excluding unwanted visitors from their properties.

By way of example, O.C.G.A. § 51-9-1 provides, "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." Adopting Appellants' definition of "private property" in this context might prevent the Garden from acting as any other owner of private property, with no redress for trespass or tortious interference with its property. It would also arguably leave the Garden unable to raise any claim of criminal trespass, which cannot be brought in the case of an intrusion onto public land. *See Miller v. Smith & Smith Land Surveyors, P.C.*, 194 Ga. App. 474, 391 S.E.2d 20 (1990) ("[I]t is plain that no trespass of any kind occurred. Miller's own testimony shows that all of the actions she complains of here took place on a public road and not on her property."). This result would similarly impact properties leased by MARTA to private developers for the construction of office and apartment buildings or the many office buildings that are technically owned by local development authorities (governmental entities) but are leased back to the "real owners" for long periods of time.

Appellants' proposal also creates an impossibly confusing situation for gun owners who want to know where they can carry their guns in Georgia. It is illogical to think that the General Assembly wanted gun owners to research title issues in order to know where they can carry weapons. Under the Garden's interpretation, that task is unnecessary. Consistent with the plain language of the statute, gun owners will know that they may be excluded by private entities who, like the Garden, control membership and admission on property. Complaint, R-6-7. This allays Appellants' previous worry that the Garden's view of the statute could allow the state to "[r]egulat[e] the possession or carrying of firearms . . . via lease" (Appellants' Court of Appeals Br. at 22), positing that the government could start leasing its land in a hidden way to stop people from carrying guns. This fear is completely unfounded. Not only is the government practically unable and unlikely to outsource functions in such fashion, lessees who simply manage public property (as opposed to control it like the Garden) likely would not qualify under 127(c)'s provisions allowing exclusion of firearms from "private property." *See Coleman,* 219 Ga. 12 at 21 ("An estate for years is one which is limited in its duration to a period fixed or which may be made fixed and certain. If it is in lands, it passes as realty.").[9]

[9] Note that the Court of Appeals found that Appellants' argument concerning the Garden's interest in the land as an estate for years versus a usufruct had been waived. *GeorgiaCarry.Org*, 345 Ga. App. at 163, n.1.

2. Many of Appellants' previous statutory interpretation arguments have been abandoned and also fail.

The crux of Appellants' Court of Appeals brief focused on the argument that their interpretation was the only one that gave any meaning to the addition of the word "private" into the current version of O.C.G.A. § 16-11-127(c). Appellants' Court of Appeals Br. at 15-16; *see also* Appellants' Petition for Certiorari at 13-14. As part of that argument, Appellants contended that the Garden's interpretation of O.C.G.A. § 16-11-127(c) is meaningless because "private property owners," under the Garden's theory, "would have meant persons who owned private property and private persons who leased property," and the 2014 amendment therefore had no impact. Appellants' Court of Appeals Br. at 15-16. Appellants also argued in the Court of Appeals that their interpretation is the only one consistent with the legislative history of O.C.G.A. § 16-11-127 (Appellants' Court of Appeals Br. at 15), that the Garden's interpretation "would have been inconsistent with the language of O.C.G.A. § 16-11-173" (Appellants' Court of Appeals Br. at 15-16), and that the City of Atlanta could not have conveyed upon the Garden the right to exclude gun owners because "a property owner cannot assign a right by contract . . . that he does not possess in the first place." Appellants' Court of Appeals Br. at 21.

But Appellants appear to have removed most of these arguments from their opening brief in this Court. If so, they have abandoned them. *See Cohran v. Carlin*, 254 Ga. 580, 584, 331 S.E.2d 523 (1985) (holding that an appellant's argument

"must be deemed abandoned" when the appellant "provides no argument in support of it."). Even if not abandoned, each of these arguments fails on the merits.

First, the 2014 amendments do give meaning to the addition of the word "private" under the Garden's interpretation of the statute. Under the 2010 version of the statute, all entities "in legal control of property through a lease" had the right to forbid possession of a gun on their properties. This included, for example, the defendant in the *Medical Center Hospital Authority* case discussed above, which was a public entity (the Medical Center Hospital Authority) that leased land from a private entity (Columbus Regional Healthcare System, Inc.). Under the Court of Appeals' (proper) interpretation of the statute, the Hospital Authority holds its land as public property as a public lessee. The Hospital Authority could preclude guns under the 2010 statute as an entity in legal control of property through a lease; it cannot preclude guns under the 2014 version of the statute because it is not "in legal control of private property through a lease." Appellants previously conceded this point, noting that the 2010 version of the statute "did not at that time distinguish between persons controlling ***public*** property and persons controlling ***private*** property" and that under the 2014 version the "exception [is] applicable only to persons in control of ***private*** property." Appellants' Court of Appeals Br. at 14. The Garden agrees with both of these statements. Contrary to what Appellants previously

contended – and by Appellants' own admission – there is meaning to the addition of the word "private" into the current version of O.C.G.A. § 16-11-127(c).

Second, Appellants incorrectly argued that the Garden's interpretation of O.C.G.A. § 16-11-127(c) is meaningless because "private property owners," under the Garden's theory, "would have meant persons who owned private property and private persons who leased property." The Garden has never argued that it, as a lessee, owns the property where the botanical garden sits. If that were the case, the idea of a lessor/lessee relationship would be a nullity. The City of Atlanta remains the owner of the property that it leases to the Garden. The *Coleman* decision simply means that the Garden controls the property as private property, much "as a private owner" does. *Coleman,* 219 Ga. at 16. Under this common sense view, the 2010 version of O.C.G.A. § 16-11-127(c) allowed 1) private property owners and 2) any entities – public or private – leasing privately owned property to preclude guns from their property. After the 2014 amendment, public entities leasing land from private entities no longer had that right, giving clear meaning to the addition of the word "private" to O.C.G.A. § 16-11-127(c).

Third, Appellants' argument that their interpretation is the only one consistent with the legislative history of O.C.G.A. § 16-11-127 fails for the reasons stated in section B(1) above. The General Assembly in 2016 rejected a prohibition on entities

like the Garden, which control private property through a lease from the government, from being able to exclude or eject individuals carrying a gun.

Fourth, Appellants argued the Garden's interpretation "would have been inconsistent with the language of O.C.G.A. § 16-11-173 (preempting regulation of carrying firearms) and asked the Court of Appeals, "If a public entity is not permitted to regulate carrying firearms, then why create a carve-out in a separate statute, appearing to preserve the power of a public entity leasing public property to forbid carrying firearms?" Appellants' Court of Appeals Br. at 16. Appellants ignored that the legislature had the right to do just this: "no county or municipal corporation . . . or authority of this state, ***other than the General Assembly***, by rule or regulation or by any other means shall regulate in any manner . . . [t]he possession, ownership, transport, carrying, transfer, sale, purchase, licensing, or registration of firearms" in Georgia. O.C.G.A. § 16-11-173(b)(1)(B) (emphasis added). The General Assembly chose in 2010 to allow public entities that leased land from private owners to regulate guns, then changed its mind in 2014 and, in accordance with O.C.G.A. § 16-11-173, took that right away.

And ***fifth***, Appellants previously argued that the City of Atlanta could not have conveyed upon the Garden the right to exclude gun owners because "a property owner cannot assign a right by contract . . . that he does not possess in the first place." Appellants' Court of Appeals Br. at 21. The Garden does not argue – and has never

argued – that it can exclude or eject individuals carrying a gun because that right has somehow been passed on from the City of Atlanta. The Garden's right to exclude or eject individuals carrying guns is wholly independent from any rights the City of Atlanta may have and does not result from a "transfer" of that right.

3. The Garden's interpretation is consistent with the "massive, comprehensive" change to the state's gun laws in 2014.

The one argument that Appellants properly have before the Court fails because the Garden's interpretation of the 2014 amendment is consistent with the legislature's preamble. Appellants note that "the preamble to HB 60 clearly shows the General Assembly intended a massive, comprehensive, and substantive change to existing law" and contend, "It would be a difficult task indeed to reconcile HB 60's preamble with the notion that the General Assembly did not indeed intend to change existing law when it passed HB 60." Appellants' Br. at 19. The Garden has never argued that HB 60 "did not indeed intend to change existing law." On the contrary, the Garden agrees that HB 60 represented "a comprehensive overhaul with wholesale changes liberalizing many provisions relating to carrying weapons." *Id*. First and foremost, as discussed above, the House Bill removed the right of public entities to preclude gun carry on land leased from private entities. Moreover, HB 60 amended no fewer than 20 sections[10] of the Georgia code governing gun rights. The

[10] The full text of HB 60 passed in 2014 can be found at http://www.legis.ga.gov/Legislation/20132014/144825.pdf

Garden's interpretation of the 2014 amendment to O.C.G.A. § 16-11-127(c) is in no way inconsistent with the legislature's preamble to HB 60.

C. The Garden is entitled to judgment as a matter of law because Appellants have no private right of action under O.C.G.A. § 16-11-127.

Finally, Georgia law precludes Appellants from pursuing a declaratory judgment claim or injunctive relief concerning the interpretation of O.C.G.A. § 16-11-127(c). In Georgia, "[n]o private right of action shall arise from any Act enacted after July 1, 2010, unless such right is expressly provided therein." O.C.G.A. § 9-2-8; *see also e.g. Somerville v. White*, 337 Ga. App. 414, 418, 787 S.E.2d 350 (2016). The Virginia Supreme Court considered a similar situation in *Cherrie v. Virginia Health Servs.*, 292 Va. 309, 787 S.E.2d 855 (2016), where the plaintiffs sought to assert a private right of action in the form of a declaratory judgment, and rejected the plaintiffs' argument that a declaratory judgment was proper for interpreting a statute that did not provide for a private right of action. The logic of the Virginia Supreme Court applies in this case and precludes Appellants from doing what they seek to do in this matter, where the Act[11] does not provide for a private right of action.

[11] The text of HB 60 makes clear it was "A BILL TO BE ENTITLED AN ACT." http://www.legis.ga.gov/Legislation/20132014/144825.pdf

CONCLUSION

For all of the reasons stated herein, the Garden asks that this Court affirm the trial court's order awarding it summary judgment on all of Appellants' claims.

Respectfully submitted this 1st day of March, 2019.

s:\ James C. Grant
James C. Grant
Georgia Bar No. 305410
David B. Carpenter
Georgia Bar No. 292101
Alston & Bird LLP
1201 W. Peachtree Street
Atlanta, Georgia 30309
Phone: 404-881-7000
Fax: 404-253-8180

Attorneys for Appellee Atlanta Botanical Garden, Inc.

CERTIFICATE OF SERVICE

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

John R. Monroe
156 Robert Jones Road
Dawsonville, GA 30534

Respectfully submitted this 1st day of March, 2019.

s:\ James C. Grant
James C. Grant