

No. S20G1214

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**In The  
Supreme Court of Georgia**

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STAR RESIDENTIAL, LLC and  
TERRACES AT BROOKHAVEN, LLC,

*Appellants,*

v.

MANUEL HERNANDEZ,

*Appellee.*

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**AMICUS CURIAE BRIEF OF THE  
GEORGIA DEFENSE LAWYERS ASSOCIATION**

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**I.****STATEMENT OF INTEREST**

The Georgia Defense Lawyers Association (“GDLA”) is an association of more than 950 lawyers, including sole practitioners and members of law firms of all sizes, who engage in litigation, primarily for defendants in civil lawsuits. The GDLA is dedicated to, among other purposes, supporting and improving the civil defense bar, improving the adversary system of jurisprudence in the courts, eliminating court congestion and delay in litigation, and otherwise promoting improvements in the administration of justice.

The GDLA is particularly concerned about negligent security litigation because, among other reasons, it is the fastest growing segment of tort litigation. ALAN KAMINSKY, A COMPLETE GUIDE TO PREMISES SECURITY LITIGATION 5 (3d ed. 2008); *see also* MICHAEL J. GORBY, PREMISES LIABILITY IN GEORGIA § 1:4, at 14 (2019-2020 ed.) (“In recent years, a multitude of cases in which the plaintiff claims that the premises owner is responsible for harm resulting from third-party criminal acts have arisen in Georgia.”); *id.* § 4:1, at 139-40 (“America’s rising crime rate has led to a corresponding increase in actions seeking to hold business owners liable for crimes on their properties.”). Indeed, crime is ubiquitous and virtually every person in Georgia goes upon the premises of someone else nearly every day, typically either as a residential tenant of a landlord or as a customer of a

restaurant, grocery store, or other business. These premises are owned and managed by clients of the GDLA's members, and so the GDLA has an interest in promoting their fair treatment in litigation.

Additionally, because every negligent security lawsuit involves a client (or potential client) of a member (or potential member) of the GDLA, the GDLA is particularly concerned with how the courts seem to be expanding the scope of liability in negligent security cases, such as by broadly interpreting the civil cause of action created by the Georgia Street Gang Terrorism and Prevention Act ("GSGTPA") like the trial court and the Court of Appeals did in this case. If the Court decides that a civil cause of action can be brought against owners and occupiers of property whose employees do not participate in criminal gang activity, the ramifications for these individuals and businesses will be enormous and unjustified. Virtually every subsequent negligent security lawsuit will include a claim under the GSGTPA because it incentivizes litigation by providing for the recovery of treble actual damages.

Such an interpretation of the GSGTPA would be contrary to its plain language and overall context, the General Assembly's intent, and the courts' interpretation of virtually identical language in the Georgia RICO Act. Additionally, this interpretation would create serious and far-reaching constitutional concerns. The GDLA is not asking the Court to adopt a skewed

interpretation of the GSGTPA to favor owners and occupiers of property, but neither should the Court adopt a skewed interpretation of the GSGTPA to unjustifiably expand their potential liability beyond the true intent of the Act. Instead, the GDLA is asking the Court to adopt an interpretation of the GSGTPA that is consistent with the its plain language and overall context, that furthers rather than obstructs the GSGTPA's purpose, that is consistent with how virtually identical language in the Georgia RICO Act has been interpreted, and that avoids unnecessary constitutional problems.

## II.

### **ARGUMENT AND CITATION OF AUTHORITIES**

Plaintiff alleges that on May 29, 2017, he was shot twice from behind by two unknown males as he was attempting to enter his apartment at Terraces at Brookhaven. (R-62, 524.) Defendants, who own and manage this apartment complex, allegedly failed to provide adequate security measures for their tenants. (R-63, 525.) Plaintiff asserts four claims: (1) negligent security under O.C.G.A. § 51-3-1; (2) nuisance under the GSGTPA; (3) negligence per se based on a violation of the City of Brookhaven's nuisance ordinance; and (4) negligence per se based on a violation of DeKalb County's nuisance ordinance. (R-62-72, 525-38.) Defendants filed a motion to dismiss the nuisance and negligence per se claims, (R-179-220), which the trial court denied. (R-589-97.)

On appeal, the Court of Appeals recognized that “the statute is silent as to the nature of the cause of action or the intended defendant of such an action.” *Star Residential, LLC v. Hernandez*, 354 Ga. App. 629, 633 (2020). The Court of Appeals also recognized that a judgment may not be entered for a plaintiff unless the jury determines that the cause of action is consistent with the General Assembly’s purpose in enacting the GSGTPA, as codified in O.C.G.A. § 16-15-2. *Id.* at 634. The Court of Appeals erred because these issues—who can be sued under the GSGTPA (and under what theory of liability) and whether the cause of action is consistent with the codified legislative purpose of the law—require separate inquiries. In other words, the GSGTPA does not require the jury to determine who can be a defendant, which is undeniably a question of law and not fact. Instead, determining who can be sued under the GSGTPA is an issue for the courts to decide as a matter of law consistent with the applicable rules of statutory interpretation.

The Court of appeals did not attempt to determine whether the General Assembly intended for owners and occupiers of property—who are *not* involved in the criminal gang activity that injured the plaintiff—to be sued under the GSGTPA. Had the Court of Appeals appropriately applied the rules of statutory interpretation to the specific statute at issue, O.C.G.A. § 16-15-7(c), it should have concluded that Plaintiff’s nuisance claim based on the GSGTPA is invalid because

the statute creates a civil cause of action against *only* the gangs and members of gangs who perpetrated the criminal gang activity against him.<sup>1</sup> It does not create a civil cause of action against owners and occupiers of property, such as Defendants in this case, who had no involvement in the criminal gang activity against Plaintiff. This is the only interpretation of the statute that is consistent with the plain language, codified legislative intent, and context of the GSGTPA and that avoids the serious constitutional concerns associated with the interpretation of this law advanced by Plaintiff, the trial court, and the Court of Appeals. Accordingly, the Court should reverse the judgment of the Court of Appeals and remand the case with instructions for Defendants' motion to dismiss to be granted as to Plaintiff's nuisance claim under the GSGTPA.

#### **A. HISTORY OF THE GEORGIA STREET GANG TERRORISM AND PREVENTION ACT**

The General Assembly enacted the GSGTPA in 1992 amid concerns about increasing criminal gang activity. Carla M. Dudeck, *CRIMES AND OFFENSES*

*Georgia Street Gang Terrorism and Prevention Act: Punish and Deter Street*

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<sup>1</sup> Subsections (a), (b), and (d) of O.C.G.A. § 16-15-7 do not apply in this case. Subsection (a) authorizes a nuisance abatement action, and subsection (b) identifies those who are authorized to bring a nuisance abatement action. Here, plaintiff did not allege a claim for nuisance abatement, nor could he have. First, he is not one of the people identified in subsection (b) who are authorized to bring such a claim. Second, he filed this case in a state court, and the state courts do not have subject-matter jurisdiction to award equitable relief, such as abatement. Subsection (d) authorizes injunctive relief, but that too is equitable, and so the trial court was similarly not empowered to enter an injunction.

*Gangs*, 9 GA. ST. UNIV. L. REV. 219, 219-20 (1992). Within six years, law enforcement officials and prosecutors had determined that the GSGTPA was ineffective. Adam P. Princenthal, *CRIMES AND OFFENSES Street Gang Terrorism and Prevention: Enact the Georgia Street Gangs Act of 1998* [. . .], 15 GA. ST. UNIV. L. REV. 80, 82 (1998). Ironically, it actually reduced the criminal penalties for participating in criminal gang activity, although this really did not matter because it was never used successfully in any prosecution. *Id.* Perhaps because of this, criminal gang activity increased during the early to middle 1990s. *Id.* at 81-82. In addition, the potential effectiveness of the GSGTPA was undermined by serious questions about its constitutionality. *Id.* at 82.

In an effort to overcome these deficiencies, the General Assembly enacted the Georgia Street Gangs Act of 1998, which comprehensively revised the GSGTPA. *Id.* at 82-84, 87. A significant addition to the GSGTPA was the creation of a civil cause of action in favor of persons who are injured by reason of criminal gang activity. *Id.* at 92-93. Specifically, the General Assembly added the following new subsection to the GSGTPA: “Any person who is injured by reason of criminal gang activity shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages . . . .” O.C.G.A. § 16-15-7(c). A judgment can be awarded on this claim only if “the finder of fact determines that the action is consistent with the intent of the General Assembly as

set forth in Code Section 16-15-2.” *Id.* The codified intent of the General Assembly in enacting the GSGTPA is as follows:

(a) The General Assembly finds and declares that it is the right of every person to be secure and protected from fear, intimidation, and physical harm *caused by the activities of violent groups and individuals. . . .*

(b) The General Assembly, however, further finds that the State of Georgia is in a state of crisis which has been caused by violent criminal street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods. These activities, both individually and collectively, present a clear and present danger to public order and safety and are not constitutionally protected.

(c) The General Assembly finds that there are criminal street gangs operating in Georgia and that the number of gang related murders is increasing. *It is the intent of the General Assembly in enacting this chapter to seek the eradication of criminal activity by criminal street gangs by focusing upon criminal gang activity and upon the organized nature of criminal street gangs which together are the chief source of terror created by criminal street gangs.*

(d) The General Assembly further finds that *an effective means of punishing and deterring the criminal activities of criminal street gangs is through forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated, or used by criminal street gangs.*

O.C.G.A. § 16-15-2 (emphasis added).

This civil cause of action went unused for almost twenty years before creative plaintiff attorneys decided to try it in negligent security cases. The theory is that by “allowing” criminal gang activity to occur on their property, owners and occupiers of property should be liable for injuries sustained by victims of this

particular type of crime. Of course, Georgia's premises liability statute already provides for the potential liability of owners and occupiers of property when their invitees are injured due to criminal activity—whether gang-related or not—on their property. O.C.G.A. § 51-3-1. But there is a very significant difference between the GSGTPA and the premises liability statute. The GSGTPA allows a plaintiff to recover treble actual damages, whereas the premises liability statute does not. So, not surprisingly, plaintiffs in negligent security cases started alleging claims under the GSGTPA as a way to enhance their damages, even though it was never intended to be a substitute for, or even a supplement to, the premises liability statute.

**B. THE GEORGIA STREET GANG TERRORISM AND PREVENTION ACT DOES NOT CREATE A CIVIL CAUSE OF ACTION AGAINST OWNERS AND OCCUPIERS OF PROPERTY WHO DO NOT PARTICIPATE IN CRIMINAL GANG ACTIVITY**

O.C.G.A. § 16-15-7(c) does not apply in this case because it does not create a civil cause of action against owners and occupiers of property who do not participate in criminal gang activity. Instead, the only proper defendants for a claim under O.C.G.A. § 16-15-7(c) are the criminal street gang and its members who perpetrated the criminal gang activity that caused the plaintiff's injuries and damages. Because no employees of Defendants are alleged to have been members of a criminal street gang who were involved in the shooting of Plaintiff,

Defendants cannot be civilly liable for Plaintiff's injuries and damages under O.C.G.A. § 16-15-7(c).

1. **The plain language, codified legislative intent, context of the Georgia Street Gang Terrorism and Prevention Act, and the appellate courts' interpretation of virtually identical language in the Georgia RICO Act show that the civil cause of action applies only to criminal street gangs and their members who participate in criminal gang activity.**

“The first rule of statutory construction is to construe the statute to effectuate the intent of the legislature. To that end, where the language of a statute is plain and unambiguous, judicial construction is not only unnecessary, but forbidden.” *Dozier v. Hanes*, 304 Ga. App. 572, 572 (2010) (punctuation and internal quotation marks omitted).

When [courts] consider the meaning of a statute, [they] must presume that the General Assembly meant what it said and said what it meant. To that end, [courts] must afford the statutory text its plain and ordinary meaning, we must view the statutory text in the context in which it appears, and we must read the statutory text in its most natural and reasonable way, as an ordinary speaker of the English language would. . . . Applying these principles, if the statutory text is clear and unambiguous, we attribute to the statute its plain meaning, and our search for statutory meaning is at an end.

*Deal v. Coleman*, 294 Ga. 170, 172-73 (2013) (footnote, citations, and internal quotation marks omitted). “If, on the other hand, the words of the statute are ambiguous, then [the court] must construe the statute, keeping in mind the purpose of the statute and the old law, the evil, and the remedy.” *Busch v. State*, 271 Ga. 591, 592 (1999) (footnote and internal quotation marks omitted). Regardless of

whether the language is ambiguous, “[t]he interpretation of statutes . . . presents a question of law for the court.” *Lue v. Eady*, 297 Ga. 321, 326 (2015). Statutory interpretation is not for a jury. *Crosby Aeromarine, Inc. v. Hyde*, 115 Ga. App. 836, 841 (1967) (per curiam).

The Court is not required to speculate about the General Assembly’s intent in enacting the GSGTPA. Other laws may require courts to employ extrinsic aides to divine the General Assembly’s intent, but when the General Assembly enacted the GSGTPA, it conveniently committed its intent to writing and codified it as part of the law. O.C.G.A. § 16-15-2. “When the General Assembly codifies its intent for a comprehensive statutory scheme, that codified preamble becomes part of the statutory context in which [the Court] read[s] individual passages.” *Harrison v. McAfee*, 338 Ga. App. 393, 400 n.5 (2016) (en banc); *see also Cavalier Convenience, Inc. v. Sarvis*, 305 Ga. App. 141, 146-47 (2010) (“But we have no authority to adopt a construction that is contrary to the General Assembly’s intent as plainly codified.”); ANTONIN SCALIA & BRYAN A. GARNER, *READING LAW: THE INTERPRETATION OF LEGAL TEXTS* 217-20 (2012) (arguing that a legislative statement of purpose or intent should be considered, regardless of whether it appears in an uncodified preamble of the act or is codified as part of the act).

The plain language of O.C.G.A. § 16-15-7(c), as well as the codified intent of the General Assembly in enacting the GSGTPA and the overall context of the

Act, reveal a statutory scheme designed to eradicate “criminal gang activity” by punishing “criminal street gangs.” O.C.G.A. § 16-15-2(c). One express way of achieving this goal is through “forfeiture of the profits, proceeds, and instrumentalities acquired, accumulated, or used by criminal street gangs.” O.C.G.A. § 16-15-2(d). Nowhere in its codified statement of intent or in O.C.G.A. § 16-15-7(c) did the General Assembly indicate that its purpose was to eradicate criminal gang activity by punishing owners and occupiers of property who are unable to prevent gang members from entering their property to commit crimes and who are likely unable to determine whether a person is a gang member in the first place.

On the contrary, the General Assembly declared its intent to protect the public from “fear, intimidation, and physical harm caused by the activities of violent groups and individuals.” O.C.G.A. § 16-15-2(a). Owners and occupiers of property, such as owners and managers of apartment complexes, are not “violent groups and individuals” from which the public needs protection. But criminal street gangs and their members are. Had the General Assembly intended to punish owners and occupiers of property or to protect the public from fear, intimidation, and physical harm caused by them, as Plaintiff has contended throughout this case, it could have easily said so. The fact that it did not indicates that this was not its intent. *Nisbet v. Davis*, 327 Ga. App. 559, 568 (2014).

Plaintiff has argued that the General Assembly's purpose was to incentivize owners and occupiers of property to eradicate criminal gang activity by allowing them to be sued for money damages when such crimes occur on their premises, the theory being that they will prevent these crimes (and avoid civil liability) by implementing certain security measures. This is circular logic because Plaintiff finds this legislative purpose in the very statute that is being interpreted. In other words, Plaintiff claims that his interpretation of O.C.G.A. § 16-15-7(c)—i.e., that the General Assembly intended for the civil cause of action to apply to owners and occupiers of property who do not participate in criminal gang activity—illustrates the General Assembly's purpose. The flaw in Plaintiff's reasoning is that he is attempting to prove the purpose of the GSGTPA by pointing to his preferred interpretation of the statute, whereas the reverse is how the Court should interpret the statute. That is, the Court should look at the express purpose of the GSGTPA, as codified in O.C.G.A. § 16-15-2, as well as the overall context of the Act, to determine the scope of the civil cause of action.

The General Assembly's codified statement of intent, which is discussed above, and the overall context of the GSGTPA show that criminal street gangs and their members are the target of its criminal and civil penalties. Even O.C.G.A. § 16-15-7(c) itself shows that criminal street gangs and their members are the target of the civil cause of action. This is because this statute applies only when a person

is injured “by reason of criminal gang activity,” and only criminal street gangs and their members can commit criminal gang activity. In addition, O.C.G.A. § 16-15-8 shows that only criminal street gangs and their members are intended to be the defendants in a civil action under O.C.G.A. § 16-15-7(c). Under O.C.G.A. § 16-15-8, “the defendant in any subsequent civil action” is estopped from disputing matters proved in a criminal proceeding if he or she is convicted of criminal gang activity. This shows that the criminal defendant and the civil defendant are the *same person* because an owner or occupier of property cannot be estopped with respect to a matter to which it was not a party. *Minnifield v. Wells Fargo Bank, N.A.*, 331 Ga. App. 512, 516 (2015) (“In Georgia, mutual identity of parties is required for collateral estoppel, which means that there must be an identity of parties or their privies in both actions.”).

Defendants’ interpretation of O.C.G.A. § 16-15-7(c) is validated by how the analogous provision in the Georgia RICO Act has been interpreted. The Georgia RICO Act provides that “[a]ny person who is injured by reason of any violation of Code Section 16-14-4 shall have a cause of action for three times the actual damages sustained and, where appropriate, punitive damages.” O.C.G.A. § 16-14-6(c). Compare this language to the corresponding language in the GSGTPA: “Any person who is injured by reason of criminal gang activity shall have a cause of action for three times the actual damages sustained and, where appropriate,

punitive damages.” O.C.G.A. § 16-15-7(c). The only difference is that the Georgia RICO Act uses “any violation of Code Section 16-14-4” to define the injury-causing conduct, whereas the GSGTPA uses “criminal gang activity.” The Georgia RICO Act just as easily could have used “pattern of racketeering activity,” and the GSGTPA just as easily could have used “any violation of Code Section 16-15-4.” Both statutes would still have the same meaning.

As this analysis shows, the relevant provisions in O.C.G.A. § 16-14-6(c) and O.C.G.A. § 16-15-7(c) are essentially identical for purposes of statutory interpretation. Thus, O.C.G.A. § 16-15-7(c) should be construed the same as O.C.G.A. § 16-14-6(c) has been construed in terms of who can bring a civil claim. *State v. Randle*, 331 Ga. App. 1, 6-7 (2015) (interpreting virtually identical phrases in two criminal statutes to mean the same); *see also* SCALIA & GARNER, *supra*, at 322-26 (arguing that words and phrases in a statute should be given the same interpretation as the same words and phrases in another statute). Under the Georgia RICO Act, a civil claim can be brought against the person who committed a predicate racketeering crime that was directed at the plaintiff and directly caused the plaintiff’s injury. *See, e.g., Wylie v. Denton*, 323 Ga. App. 161, 166 (2013) (physical precedent); *Nicholson v. Windham*, 257 Ga. App. 429, 430-31 (2002); *Gentry v. Volkswagen of Am., Inc.*, 238 Ga. App. 785, 791 (1999). This means the GSGTPA should be interpreted as allowing a civil claim to be brought against the

person who committed a predicate gang-related crime that was directed at the plaintiff and directly caused the plaintiff's injury. This interpretation would preclude a civil claim against owners and occupiers of property, unless they or their employees were directly involved in the predicate gang-related crime.

\* \* \*

In sum, the plain language of O.C.G.A. § 16-15-7(c), the General Assembly's codified intent in enacting the GSGTPA, the context of the entire act, and the virtually identical language in the Georgia RICO Act show that the GSGTPA does not create a civil cause of action against owners and occupiers of property whose employees do not participate in the criminal gang activity that injured the plaintiff. Thus, although Plaintiff may sue the person who shot him, if that person can be identified, he cannot sue Defendants under the GSGTPA since there is no allegation that their employees were members of a criminal street gang and participated in the shooting of Plaintiff or other criminal gang activity at the Terraces at Brookhaven apartment complex.

**2. The Court of Appeals erred by abdicating its role as an interpreter of statutes.**

As previously noted, the role of interpreting statutes falls to the courts, not to juries. Nevertheless, the Court of Appeals held that it was not authorized to determine who can be sued under the GSGTPA (and under what theory of liability) because that determination is for the jury to make. This decision was based on the

following sentence in O.C.G.A. § 16-15-7(c): “No judgment shall be awarded unless the finder of fact determines that the action is consistent with the intent of the General Assembly as set forth in Code Section 16-15-2.” Because of this sentence, the Court of Appeals concluded that “whether the present action is consistent with the intent set forth in OCGA § 16-15-2 is not a threshold issue for courts to resolve, particularly at the motion to dismiss stage, and we must give effect to that policy choice.” *Star Residential, LLC*, 354 Ga. App. at 634 (footnote omitted).

The primary problem with this conclusion is that neither Defendants nor the GDLA argued to the Court of Appeals that this case is not consistent with the legislative intent set forth in O.C.G.A. § 16-15-2 as a matter of law, except insofar as the legislature did not intend for owners and occupiers of property who did not participate in the criminal gang activity at issue to be defendants in a claim under O.C.G.A. § 16-15-7. But this is the question of statutory interpretation that the Court of Appeals abdicated. Assuming for the sake of argument that it is appropriate and practical to ask a jury to determine whether a claim is consistent with the legislature’s codified intent, this does not mean that it is appropriate for a jury to determine who can be sued under the GSGTPA (and under what theory of liability). Again, juries do not interpret statutes.

Deciding whether O.C.G.A. § 16-15-7(c) allows owners and occupiers of property who did not participate in the criminal gang activity at issue to be sued is a matter of statutory interpretation. Deciding whether a specific claim under specific circumstances is consistent with the legislature's codified intent is not. There is nothing in O.C.G.A. § 16-15-7(c) that suggests juries should determine who can be sued under the GSGTPA (and under what theory of liability), and it was improper for the Court of Appeals to impose this burden on them. Perhaps this is why Judge Todd Markle wrote a specially concurring opinion in which he expressed misgivings about the unintended consequences of allowing juries to engage in statutory interpretation. *Star Residential, LLC*, 354 Ga. App. at 637 (Markle, J. specially concurring).<sup>2</sup> If juries were put in this position, one of two things would happen: (1) they would engage in sheer speculation as to what they are supposed to do (and how they are supposed to decide how to do it), which

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<sup>2</sup> Judge Markle recognized one other flaw with the decision of the Court of Appeals. That is, if all decisions about the nature of the civil cause of action created by O.C.G.A. § 16-15-7(c) must be decided by a jury, no trial court could enter summary judgment on this claim. *Star Residential, LLC*, 354 Ga. App. at 637 (Markle, J. specially concurring). But that is not all. Dismissal under O.C.G.A. § 9-11-12 would be prohibited, as would dismissal under O.C.G.A. § 9-11-37. It would also seem that a default judgment could not be entered on this claim since the statute provides that “[n]o judgment shall be awarded unless . . . .” Finally, neither the Court of Appeals nor this Court could enter judgments on this claim except to affirm the trial court's judgment following a verdict in favor of the plaintiff. Reversing the trial court's judgment following a verdict in favor of the defendant would not be allowed because, by definition, the jury would not have determined that the claim is consistent with the legislature's codified intent. All of these results would be absurd.

would cause unpredictable and inconsistent results, or (2) they would inundate the trial court with so many questions because of their confusion that their deliberations would grind to a halt. And, of course, the trial court could not answer any of these questions because the statute provides no assistance and the Court of Appeals has held that juries must figure it out for themselves because the statute has committed all decisions surrounding statutory interpretation to their discretion.

Simply put, determining who can be sued under O.C.G.A. § 16-15-7(c) is a separate inquiry from whether a claim itself, once the proper defendants are identified, is consistent with the legislature's codified intent. The Court of Appeals erred by conflating these inquiries and thereby abdicating its role as an interpreter of statutes.

**3. The canon of constitutional doubt or avoidance requires the Court to construe the Georgia Street Gang Terrorism and Prevention Act as creating a civil cause of action only against criminal street gangs and their members who participate in criminal gang activity.**

If the Court still believes that the interpretation of O.C.G.A. § 16-15-7(c) offered by Plaintiff and the Court of Appeals is plausible, it should resolve the issue by applying the canon of constitutional doubt or avoidance. Before proceeding further, it is important to recognize what this canon is and what it is not. It is merely one of many potential rules of interpretation for the Court to consider. It “is *not* a method of adjudicating constitutional questions by other

means.” *Clark v. Martinez*, 543 U.S. 371, 381 (2005) (emphasis added). The Court of Appeals misconstrued the GDLA’s arguments regarding this canon as improperly raising constitutional arguments that were not raised in the trial court and over which it lacked appellate jurisdiction. *Star Residential, LLC*, 354 Ga. App. at 629 n.2. On the contrary, the GDLA recognized in its amicus curiae brief for the Court of Appeals, just as it recognizes now, that the parties did not raise constitutional arguments in the trial court and that the trial court did not rule on the constitutionality of any aspect of the GSGTPA. Although this canon requires the Court to consider constitutional issues to a certain extent, it does not require the Court to rule on those issues. “Indeed, one of the canon’s chief justifications is that it allows courts to *avoid* the decision of constitutional questions.” *Clark*, 543 U.S. at 381. Thus, it is proper for the Court to utilize this canon as a matter of statutory interpretation; it is not a tool for improper constitutional adjudication.

The canon of constitutional doubt or avoidance provides that “[s]tatutes should be interpreted to avoid serious constitutional concerns where such an interpretation is reasonable.” *Stone v. Stone*, 297 Ga. 451, 455 (2015); *see also Scott v. State*, 299 Ga. 568, 574 (2016) (recognizing the “obligation, in the interpretation of statutes, to adopt a readily available limiting construction where necessary to avoid constitutional infirmity”); SCALIA & GARNER, *supra*, at 247-51 (“A statute should be interpreted in a way that avoids placing its constitutionality

in doubt.”). “In other words, when deciding which of two plausible statutory constructions to adopt, a court must consider the necessary consequences of its choice. If one of them would raise a multitude of constitutional problems, the other should prevail—whether or not those constitutional problems pertain to the particular litigant before the Court.” *Clark*, 543 U.S. at 380-81. This canon ““is a tool for choosing between competing plausible interpretations of a statutory text, resting on the reasonable presumption that [the legislature] did not intend the alternative which raises serious constitutional doubts.”” *Nordahl v. State*, 306 Ga. 15, 20 (2019) (quoting *Clark*, 543 U.S. at 381).

The interpretation of O.C.G.A. § 16-15-7(c) offered by Plaintiff and the Court of Appeals raises serious concerns about the constitutionality of the civil forfeiture provisions in the GSGTPA and, by incorporation, the Georgia Uniform Civil Forfeiture Procedure Act (“GUCFPA”). The GSGTPA’s civil forfeiture provision broadly authorizes forfeiture of “[a]ny property which is, directly or indirectly, used or intended for use in any manner to facilitate a violation of” the GSGTPA, O.C.G.A. § 16-15-5(b), and it provides that such forfeiture shall proceed pursuant to the GUCFPA. O.C.G.A. § 16-15-5(c). Under the interpretation of O.C.G.A. § 16-15-7(c) offered by Plaintiff and the Court of Appeals, a person or entity who did not participate in criminal gang activity could be sued civilly for damages caused by criminal gang activity. Then, if a violation of the GSGTPA is

established, the real property owned by that person or entity where the criminal gang activity occurred would be subject to civil forfeiture in a manner that would present serious questions about its constitutionality. Such questions would not arise with respect to forfeiture of property (real or otherwise) owned by a person who participated in the criminal gang activity—i.e., a member of a criminal street gang. Thus, the canon of constitutional doubt or avoidance requires the Court to reject Plaintiff’s interpretation of O.C.G.A. § 16-15-7(c) and to find that only members of a criminal street gang can be sued civilly under the GSGTPA.

**a. Allowing a civil cause of action against owners and occupiers of property would create serious concerns about Defendants’ and others’ constitutional right to due process.**

Forfeiture of the real property where the criminal gang activity happened to occur would present serious questions about the owner’s due process rights under the United States and Georgia Constitutions. U.S. CONST. amend. XIV, § 1; GA. CONST. art. I, sec. I, para. I. One issue is that the GUCFPA appears to allow real property to be seized without first affording the owner notice and an opportunity to be heard. O.C.G.A. § 9-16-6. If so, this may violate the owner’s due process rights. *United States v. James Daniel Good Real Prop.*, 510 U.S. 43, 62 (1993) (“Unless exigent circumstances are present, the Due Process Clause requires the Government to afford notice and a meaningful opportunity to be heard before seizing real property subject to civil forfeiture.”). Even if the owner later proves

its innocence, “this determination, coming months after the seizure, would not cure the temporary deprivation that an earlier hearing might have prevented.” *Id.* at 56.

Another issue is that the GUCFPA allows an owner’s property to be forfeited based on a preponderance of the evidence. O.C.G.A. § 9-16-17(a)(1). Due process may require the state to satisfy a higher standard of proof, such as clear and convincing evidence. *Leonard v. Texas*, 137 S. Ct. 847 (2017) (Thomas, J., concurring in the denial of certiorari); *see also* Stephen J. Moss, Comment, *Clear and Convincing Civility: Applying the Civil Commitment Standard of Proof to Civil Asset Forfeiture*, 68 AM. U.L. REV. 2257 (2019) (arguing that civil forfeiture based on a preponderance of the evidence violates due process and that only the higher standard of clear and convincing evidence satisfies due process); Eric Moores, Note, *Reforming the Civil Asset Forfeiture Reform Act*, 51 ARIZ. L. REV. 777, 799-801 (2009) (arguing that the government’s burden should be clear and convincing evidence to ensure that due process rights are protected); Barclay Thomas Johnson, Note, *Restoring Civility—The Civil Asset Forfeiture Reform Act of 2000: Baby Steps Towards a More Civilized Civil Forfeiture System*, 35 IND. L. REV. 1045, 1075-79 (2001/2002) (arguing that allowing forfeiture based on a preponderance of the evidence violates due process because it creates “an unacceptable risk that innocent parties will be erroneously deprived of their property”).

Although the GUCFPA includes an innocent-owner defense, it puts the burden on the owner to prove its innocence rather than on the state to prove the owner's knowledge of and complicity in the criminal gang activity. O.C.G.A. § 9-16-17(a)(2). This, too, may violate the owner's due process rights. Dan Alban, *The Impact Litigation Campaign to End Civil Forfeiture*, 45 LITIG. 41, 45 (2019); Graeme S. R. Brown, Comment, *Bennis v. Michigan: Forfeiting the Due Process Rights of the Innocent Owner*, 32 NEW ENGLAND L. REV. 479, 500-10 (1998); Peter Petrou, *Due Process Implications of Shifting the Burden of Proof in Forfeiture Proceedings Arising Out of Illegal Drug Transactions*, 1984 DUKE L.J. 822. For a variety of reasons, "civil asset forfeiture places an unjust burden on innocent property owners." Adam Crepelle, *Probable Cause to Plunder: Civil Asset Forfeiture and the Problems it Creates*, 7 WAKE FOREST J.L. & POL'Y 315, 345 (2017).

Indeed, the United States Supreme Court has recognized that there are "serious constitutional questions" associated with forfeiture of the property of "an owner who proved not only that he was uninvolved in and unaware of the wrongful activity, but also that he had done all that reasonably could be expected to prevent the proscribed use of his property." *Calero v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 689 (1974). In such a scenario, "it would be difficult to conclude that forfeiture served legitimate purposes and was not unduly oppressive." *Id.* at 689-

90 (1974); *see also Austin v. United States*, 509 U.S. 602, 629 (1993) (Kennedy, J., concurring in part and in the judgment) (noting that “whether forfeiture is permitted when the owner has committed no wrong of any sort, intentional or negligent[,] . . . would raise a serious [constitutional] question”).

Finally, the unique circumstances of this case present a serious question of due process. Under the GUCFPA, forfeited property retroactively vests in the state as of the date of the conduct giving rise to the forfeiture. O.C.G.A. § 9-16-18(a). The incident at issue in this case occurred on May 29, 2017, and so the state would be deemed to have owned the property since then. However, according to the DeKalb County Tax Assessor’s website, Terraces at Brookhaven, LLC sold the property to WAH12 Buford Hwy Commons, LLC on August 19, 2018. If the property is forfeited to the state at some time in the future, would that retroactively invalidate the sale? After all, if the state is deemed to have owned the property as of May 29, 2017, how could Terraces at Brookhaven, LLC have sold the property to WAH12 Buford Hwy Commons, LLC more than a year later? This means Terraces at Brookhaven, LLC would have sold a property it did not own.

What about the constitutional rights of WAH12 Buford Hwy Commons, LLC? Could the state take the property from it even though there is no evidence showing that it participated in or sponsored any criminal gang activity there? Would doing so constitute an unconstitutional taking under the Fifth Amendment

to the United States Constitution or the Takings Clause in the Georgia Constitution? U.S. CONST. amend. V (“[N]or shall private property be taken for public use, without just compensation.”); GA. CONST. art. I, sec. III, para. I(a) (“[P]rivate property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.”). On this issue, the Court must remember that “[p]rotection to person and property is the paramount duty of government and shall be impartial and complete.” GA. CONST. art. I, sec. I, para. II. The Court must also remember that the canon of constitutional doubt or avoidance does not care whether the potential constitutional problems relate to parties or non-parties, *Clark*, 543 U.S. at 380-81, and so the Court cannot ignore the potential violations of WAH12 Buford Hwy Commons, LLC’s constitutional rights simply because it is not a defendant in the case.

**b. Allowing a civil cause of action against owners and occupiers of property would create serious concerns about Defendants’ and others’ constitutional right to be free from excessive fines.**

Both the United States and Georgia Constitutions prohibit the imposition of “excessive fines.” U.S. CONST. amend. VIII; GA. CONST. art. I, sec. I, para. XVII. This is a limitation on “the government’s power to extract payments, whether in cash or in kind, as punishment for some offense.” *Austin*, 509 U.S. at 609-10 (internal quotation marks omitted). A civil in rem forfeiture is a fine to which this limitation applies because the purpose of forfeiture, at least in part, is to punish the

owner of the property. *Timbs v. Indiana*, 139 S. Ct. 682, 689-91 (2019); *Austin*, 509 U.S. at 611-18; *Howell v. State*, 283 Ga. 24, 25-27 (2008).

Aside from the constitutional concerns regarding forfeiture itself that are discussed in the previous section, civil in rem forfeiture raises serious constitutional concerns about the relationship between the value of the property forfeited and the nature of the conduct that is punished by the forfeiture. “The touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish.” *Patel v. State*, 289 Ga. 479, 483 (2011) (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)).

In this case, the entire apartment complex is potentially subject to forfeiture. While this case was pending in the trial court, Terraces at Brookhaven, LLC sold the property to WAH12 Buford Hwy Commons, LLC for \$26,284,000 (according to the DeKalb County Tax Assessor’s website), and so Terraces at Brookhaven, LLC could lose that amount simply because a crime happened to occur on its property. Typically, forfeited property goes to the state, but the GUCFPA grants to the injured person a right or claim to forfeited property that is superior to any right or claim the state has in the property. O.C.G.A. § 9-16-16(c). Thus, the plaintiff in any negligent security case could take the owner’s property in addition to whatever

money damages are awarded by the jury. As the value of the apartment complex in this case shows, this has the potential to allow forfeitures that are wildly disproportionate to the injuries and damages at issue.

Indeed, as the late Justice John Paul Stevens once observed, “[s]ome airline passengers have marijuana cigarettes in their luggage; some hotel guests are thieves; some spectators at professional sports events carry concealed weapons; and some hitchhikers are prostitutes.” *Bennis v. Michigan*, 516 U.S. 442, 458 (1996) (Stevens, J., dissenting). If Georgia law governed these scenarios envisioned by Justice Stevens, some rather valuable property could be forfeited: a Delta jet, the Ritz-Carlton hotel, Mercedes-Benz Stadium, and countless vehicles of all values. Imagine if a fan of the Atlanta Falcons were assaulted by a member of a gang in a bathroom at Mercedes-Benz Stadium during a game. Under Plaintiff’s interpretation of O.C.G.A. § 16-15-7(c), that fan could become the owner of a stadium that cost about \$1.6 billion.

The sheer lunacy of such a disproportionate forfeiture cannot be permitted by the United States and Georgia Constitutions. *Id.* at 462 (noting that the precedents in this area of the law “would [not] justify the confiscation of an ocean liner just because one of its passengers sinned while on board”); *Austin*, 509 U.S. at 627-28 (Scalia, J., concurring in part and in the judgment) (“But an *in rem* forfeiture goes beyond the traditional limits that the Eighth Amendment permits if

it applies to property that cannot properly be regarded as an instrumentality of the offense—the building, for example, in which an isolated drug sale happens to occur. Such a confiscation would be an excessive fine.”). Nevertheless, this is exactly what Plaintiff is advocating, because allowing a property owner to be sued civilly under the GSGTPA necessarily subjects its property to forfeiture under the GUCFPA. The examples discussed above demonstrate the disproportionality—and, therefore, the unconstitutionality—of such forfeitures, which is why the Court should interpret the GSGTPA as allowing a civil cause of action to be asserted against only the criminal street gang or members thereof who participated in the injury-causing criminal gang activity.

**c. Allowing a civil cause of action against owners and occupiers of property would create serious concerns about the imposition of unconstitutional vicarious criminal liability.**

Because a civil in rem forfeiture is a punishment for a crime—albeit a crime committed by someone else—there is a serious constitutional concern about whether forfeiture by a property owner who did not participate in the criminal gang activity at issue essentially constitutes vicarious criminal liability. After all, the essence of a forfeiture claim is the use of the property for illegal purposes, and so forfeiture proceedings have many of the definitive characteristics of criminal prosecutions. B.A. Glesner, *Landlords as Cops: Tort, Nuisance & Forfeiture Standards Imposing Liability on Landlords for Crime on the Premises*, 42 CASE W.

RES. L. REV. 679, 769-72 (1992). But vicarious criminal liability is an unconstitutional deprivation of due process under both the United States and Georgia Constitutions, at least if the vicariously liable person has a “responsible relation” to the crime (i.e., the power to prevent the crime from occurring) or if the punishment involves imprisonment. *Lady J. Lingerie, Inc. v. City of Jacksonville*, 176 F.3d 1358, 1367 (11th Cir. 1999); *Davis v. City of Peachtree City*, 251 Ga. 219, 221-22 (1983). In addition to there being a serious constitutional concern regarding the forfeiture procedure, there is a similar concern regarding the nuisance abatement procedure because it also seems to impose vicarious criminal liability on a property owner for the crimes of others on its property. O.C.G.A. § 41-3-1.1.

\* \* \*

To summarize, serious constitutional questions abound, and so the canon of constitutional doubt or avoidance requires the Court to construe O.C.G.A. § 16-15-7(c) as creating a civil cause of action only against criminal street gangs and their members who participated in the criminal gang activity that caused the plaintiff’s injuries and damages. In employing this canon, it is important for the Court to remember that it does not have to be convinced that Defendants’ interpretation of O.C.G.A. § 16-15-7(c) is more reasonable than the interpretation offered by Plaintiff and the Court of Appeals. All that is necessary is that Defendants’

interpretation not be unreasonable. *La Fontaine v. Signature Research, Inc.*, 305 Ga. 107, 111 (2019) (Peterson, J., concurring specially). This standard, combined with the serious constitutional questions discussed above, requires the Court to reject the interpretation offered by Plaintiff and the Court of Appeals.

**III.**

**CONCLUSION**

For the foregoing reasons, the Court should reverse the judgment of the Court of Appeals and remand the case with instructions for Defendants' motion to dismiss to be granted as to Plaintiff's nuisance claim under the GSGTPA.

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