UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, INC., *Plaintiff,* v. GEMINI TRUST COMPANY, LLC, *Defendant.*	Case No. 1:24-cv-2356 Hon. John D. Bates

DEFENDANT GEMINI TRUST COMPANY, LLC'S
OPPOSITION TO NACA'S MOTION TO REMAND

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Defendant Gemini Trust Company, LLC ("Gemini"), respectfully submits its opposition to Plaintiff National Association of Consumer Advocates, Inc.'s ("NACA") Motion to Remand.

I. Introduction

NACA's lengthy motion to remand raises non-issues, misunderstands Gemini's basis for removal, and misinterprets the law. Distilled to their core, NACA's arguments do not support a remand because both Article III standing and federal question jurisdiction are present in this case.

First, NACA's claims give rise to Article III associational standing because NACA brought them on behalf of a discrete, objectively identifiable constituency—Gemini users who reside in the District of Columbia and who could themselves bring an action against Gemini under the District of Columbia Consumer Protection Procedures Act, D.C. Code §§ 28-3901 *et seq*. ("CPPA"). These constituents are not passive recipients or readers of NACA's publications or subscribers to NACA's mailing list. Rather, they play a direct role in shaping NACA's decision-making and activities, including the decision to pursue the current litigation.

Second, NACA's complaint presents substantially important questions of federal law, specifically the applicability of the Electronic Funds Transfer Act, 15 U.S.C. § 1693 *et seq*. ("EFTA"), to cryptocurrency transactions—a novel issue with far-reaching implications for a multitrillion-dollar industry. By NACA's own admission, the success of NACA's claims hinges entirely on this Court's determination of whether certain provisions of Gemini's User Agreement conflict with the EFTA. Accordingly, this Court should deny NACA's Motion to Remand.

II. Argument

A. Article III Standing Exists.

NACA attacks Article III standing on several grounds. *See* ECF No. 11-1 *passim* ("NACA Mem."). Each of the asserted grounds lacks merit. *First*, NACA's allegations and claims go beyond establishing NACA's statutory standing to sue under the CPPA and do in fact give rise to

Article III standing. *Second*, associational standing can be based on the interests of non-member constituents that meet the broad, non-exclusive "traditional indicia of membership" test. *Third*, this test is met here as demonstrated by NACA's own Complaint and the statements on NACA's website. Accordingly, the motion to remand should be denied, but if the Court were to conclude that the present record is insufficient to rule on the issue, the Court should order jurisdictional discovery.

1. Organizational and statutory standing under the CPPA are non-issues; the removal is based on NACA's Article III associational standing.

NACA devotes a large portion of its brief to non-issues. In particular, NACA argues that it has not alleged a concrete injury-in-fact sufficient to give rise to Article III organizational standing, and that NACA's statutory standing under the CPPA does not automatically confer Article III standing required to proceed in federal court. NACA Mem. at 7–10. Gemini does not contest either point.

Gemini's removal is based on NACA's associational, not organizational, standing. ECF No. 1 at 7–15. Further, NACA's allegations and claims rise above invoking merely statutory standing. NACA is suing on behalf of a discrete set of constituents whose interests NACA represents—Gemini users with addresses in the District of Columbia—and who are substantially equivalent to traditional members because these users shape NACA's decision making and activities. As NACA has already told the Court, NACA "serves as [their voice]." Compl. ¶ 8, ECF No. 1-2. Consequently, NACA has Article III associational standing, as explained in more detail in the Notice of Removal and this brief.[1]

[1] Gemini assumes solely for purposes of this motion that NACA has adequately pled the facts needed to establish statutory standing to sue under the CPPA. Gemini does so without prejudice to its right to file an appropriate motion on this point at a later stage.

2. Associational standing can be based on an injury to non-member constituents with the indicia of membership.

NACA also argues that "[a]ssociational standing does not exist where an organization brings suit on behalf of non-members" and that "Gemini may not rewrite NACA's complaint to transform this action into a representative action on behalf of NACA's membership . . .". NACA Mem. at 18–19. The first statement misrepresents controlling law, and the second one misrepresents Gemini's basis for removal.

(a) **Hunt** ***and its progeny compel the finding of associational standing.***

The Supreme Court held in *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333 (1977), that Article III associational standing can be based on the organization's claims brought on behalf of its non-member constituents who possess the indicia of membership. The D.C. Court of Appeals and this Court have adhered to *Hunt* and applied its rationale to find associational standing under circumstances similar to this case. *See, e.g., Flyers Rts. Educ. Fund, Inc. v. United States Dep't of Transp'n*, 957 F.3d 1359, 1362 (D.C. Cir. 2020) ("Although the constituents of the organization do not elect the leadership, … there is a sufficient amount of interaction to influence the organization's activities.," giving rise to associational standing); *Sec. Indus. & Fin. Mkts. Ass'n v. United States Commodity Futures Trading Comm'n,* 67 F. Supp. 3d 373, 410 (D.D.C. 2014) ("Although *Hunt* applied its 'indicia of membership' test to a non-traditional organization that lacked formal members, the Court can divine no reason why the ['indicia of membership'] test should not also apply to traditional trade associations that purport to represent, in addition to their formal members, the interests of informal members as well").

NACA's disregard for the controlling precedent in *Hunt* and its progeny is puzzling, and the authorities cited by NACA are inapposite. The out-of-state cases on which NACA relies do not even reference the "indicia of membership" test. NACA Mem. at 18–19 (citing *Ohio State*

Troopers Ass'n, Inc. v. Point Blank Enterprises, Inc., 2019 WL 9093460 (S.D. Fla. June 21, 2019) (no mention of the "indicia of membership" test); *In re: Takata Airbag Prods. Liab. Litig.*, 2016 WL 1266609 (S.D. Fla. Mar. 11, 2016) (same); *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 2017 WL 2539451 (S.D. Tex. Feb. 15, 2017) (same)). And *Am. Legal Found. v. F.C.C.*, 808 F.2d 84 (D.C. Cir. 1987), is easily distinguishable, as explained on pages 7–8 *infra*.

(b) Removal is based on NACA's claims on behalf of non-member constituents as expressly pled in the Complaint.

Contrary to NACA's assertions, Gemini does not have to show that "any NACA [formal] member would have standing to sue in their own right," and Gemini does not "dictate that NACA bring this lawsuit on behalf of its [formal] members." NACA Mem. at 16, 19.

Gemini has made its position clear in the Notice of Removal: Article III standing is based on the interests of a discrete set of NACA's *non-member* constituents whose interests NACA seeks to vindicate according to NACA's well-pleaded Complaint and representations on NACA's website. *See* Compl. ¶ 4, ECF No. 1-2 ("NACA brings this suit to enforce the CPPA in light of Gemini's refusal to follow the law and the resulting harm that has affected District of Columbia consumers."); *id*. at ¶ 63 ("NACA brings this action on behalf of all District of Columbia Gemini users who have been subject to Gemini's unfair and deceptive trade practices as described herein."); *accord* NACA Mem. at 10 ("NACA is proceeding on behalf of D.C. consumers"); *id.* at 11–12 ("NACA has brought this action on behalf of all D.C. consumers who use Gemini's platform"); *id*. at 19 (action brought "to vindicate the rights of D.C. consumers who were subjected to Gemini's bad acts"); *see also* ECF No. 1 at ¶¶ 34–36 (citing evidence of consumer involvement with NACA). These constituents, although not formal members of NACA, possess sufficient indicia of membership to give rise to NACA's Article III associational standing under *Hunt* and its progeny, as explained in more detail below.

3. NACA and its constituents meet the "indicia of membership" test.

To establish associational standing, the following showing must be made: 1) NACA's "members" would have standing to sue in their own right; 2) the interests at stake are germane to NACA's purpose; and 3) neither the claim asserted, nor the relief requested requires the participation of individual NACA "members" in the lawsuit. *Hunt*, 432 U.S. at 343. Non-member constituents who possess the indicia of membership in the organization qualify as "members" of an organization for purposes of this inquiry. *Id*. at 343–44.

In its motion to remand, NACA expressly concedes that the second and third prongs of the *Hunt* test are met. NACA Mem. at 18 n. 2. Consequently, Gemini stands on its Notice of Removal with respect to these points. The only remaining issues involve the first prong, *i.e.*, whether NACA's constituents on whose behalf NACA is suing would have standing to sue in their own right, and whether these constituents meet the "indicia of membership" test.

These two issues further collapse into one because NACA does not dispute that the consumers on whose behalf it is bringing the lawsuit could sue in their own right. Indeed, NACA cannot challenge consumers' standing to sue because NACA's own standing to sue is wholly derivative of its constituents' standing. D.C. Code §§ 28-3905(k)(1)(D)(i) (a public interest organization may sue on behalf of the interests of consumers only "if the consumer or class could bring an action [under the CPPA]").

In sum, NACA's lengthy arguments boil down to whether NACA's constituents possess the indicia of membership sufficient to confer Article III associational standing. They do. NACA's motion to remand misinterprets the law and ignores NACA's own public statements and submissions to this Court.

(a) NACA's constituency is sufficiently discrete.

NACA attacks its constituency as too "open-ended" and potentially comprising "any consumer anywhere." NACA Mem. at 13 (relying on *Am. Legal Found.*, 808 F.2d at 80).

The fatal fallacy in this argument is its faulty premise: the relevant constituency is not all consumers. Instead, it is the consumers *on whose behalf NACA brings this lawsuit*—*i.e.*, Gemini users who reside in the District of Columbia and who could themselves bring an action against Gemini for violations of the CPPA. Compl. ¶ 63, ECF No. 1-2. This constituency is a "discrete, stable group of persons with a definable set of common interests" that gives rise to associational standing. *AARP v. United States Equal Emp. Opportunity Comm'n*, 226 F. Supp. 3d 7, 17 (D.D.C. 2016) (Bates, J.).

Indeed, courts have found associational standing based on much broader types of constituencies. *See, e.g., id*. (constituency defined as individuals over age 50); *see also Univ. Legal Servs., Inc. v. St. Elizabeths Hosp.*, 2005 WL 3275915, at *4 (D.D.C. July 22, 2005) (constituency defined as individuals with mental illness); *Doe v. Stincer*, 175 F.3d 879, 885–86 (11th Cir. 1999) (same); *Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1096–97 (9th Cir. 2021) (constituents consisted of public employees concerned about exposure to environmental risk at work); *Cath. League for Religious & C.R. v. City & Cnty. of San Francisco*, 624 F.3d 1043, 1048 (9th Cir. 2010) (*en banc*) (constituency defined as Catholics in San Francisco); *NAACP v. Harris*, 567 F. Supp. 637, 640 (D. Mass. 1983) (constituency defined as "all the black people in metropolitan Boston"). After this Court decided *AARP*, the D.C. Circuit reaffirmed that "associational standing" may reach organizations that "[do] not have 'members' of th[e] sort" that are "common" in "professional associations, labor unions, social clubs and the like." *Flyers Rts. Educ. Fund, Inc.*, 957 F.3d at 1361.

Plaintiff's reliance on *American Legal Foundation* is misplaced. There, a nonprofit media law center—characterized as a "media watchdog" with the mission to "promote media fairness and accountability" sought to represent "all members of the public who regularly watch ABC News (and other network news broadcasts)." 808 F. 2d at 87–88, 90. *American Legal Foundation* did not constrain associational standing in a way that precludes standing here, and as the D.C. Circuit itself has recognized the holding of *American Legal Foundation* for what it is—an unsurprising and logical conclusion that "[v]iewers who merely watched the news regularly were not members of a media watchdog group for associational standing purposes." *Flyers Right Education Fund, Inc.*, 957 F.3d at 388.

Unlike the "completely open-ended," potentially nationwide, constituency asserted in *American Legal Foundation*, the more discrete constituency that NACA seeks to represent here—*i.e.*, Gemini users who reside in the District of Columbia and who could bring a claim for violation of the CPPA against Gemini—is limited, objectively definable, and ascertainable. Compl. ¶ 63, ECF No. 1-2; D.C. Code § 28-3905(k)(1)(D)(i) (a public interest organization may sue on behalf of the interests of consumers only "if the consumer or class could bring an action under [the CCPA]"). Accordingly, the constituency on whose behalf NACA has brought this lawsuit is sufficiently discrete to support associational standing.

(b) NACA's constituents play a sufficient role in NACA's decision-making and activities.

NACA also attacks the level of its constituents' involvement with NACA. But the District of Columbia Circuit Court of Appeals has expressed in no uncertain terms that it is "quite doubtful" the "indicia of membership" test established in *Hunt* was meant to be exhaustive. *See Flyers Rts. Educ. Fund, Inc.*, 957 F.3d at 1361–62; *AARP v. United States Equal Emp. Opportunity Comm'n*, 267 F. Supp. 3d 14, 23 (D.D.C. 2017) (Bates, J.) (recognizing "the associational standing cases are not specific about what it means for members to 'play a role in' the leadership of an organization, the financing of an organization, or in guiding the activities of an organization"); *see also Or. Advocacy Ctr. v. Mink*, 322 F.3d 1101, 1111 (9th Cir. 2003) (finding associational standing despite constituents not having all the indicia of membership that existed in *Hunt*).

This Court's earlier application of the *Hunt* test in *Securities Industry and Financial Markets Association* is consistent with *Flyers Rights Education* and is particularly persuasive due to the material similarities with this case. *Sec. Indus. & Fin. Mkts. Ass'n*, 67 F. Supp. 3d 373. There, financial trade associations sought to challenge some of CFTC's policy statements on behalf of the associations' formal U.S.-based member financial institutions, as well as its non-member, legally distinct, foreign affiliate institutions. *Id*. at 401–02. As is the case here, there was no dispute regarding the second and third prongs of *Hunt*. *Id*. at 400.

To begin, this Court noted it could "divine no reason why the [*Hunt* test] should not also apply to traditional trade associations that purport to represent, in addition to their formal members, the interests of informal members as well." *Id*. at 410. In determining whether the non-members were functionally members of the associations, this Court relied on the associations' own statements that "[i]n their regulatory, legislative, and litigation roles, [plaintiff associations] advocate on behalf of the interests of both formal members as well affiliated entities," and informal members "can participate in the associations' decision-making processes by providing input on formal regulatory or legal filings, attending associational meetings with regulatory officials and legislators, . . . , and sitting on and voting in association working groups, committees, and task forces." *Id*. at 410–11. Like the trade associations, NACA has formal and informal members. Additionally, like the non-members in *Securities Industry and Financial Markets Association*, NACA's constituents may not be listed on the formal membership rolls, but the constituents "play a role" in NACA sufficient to support associational standing. *AARP*, 226 F. Supp. at 17. This includes consumers' participation in NACA's advocacy campaigns, NACA litigating on their behalf, and consumers' stories influencing NACA's conversations with policymakers. *See* ECF No. 1 at 9–12. NACA does not (and cannot) dispute any of these jurisdictional facts.

Moreover, unlike *American Legal Foundation* where the court was troubled that the foundation "may have [had] reasons for instituting a suit other than to assert rights of its supporters," 808 F.2d at 90, such concern is not present here. In contrast, NACA's stated purpose of this lawsuit is to serve as the "voice" and "vindicate the rights of D.C. consumers who were subjected to Gemini's bad acts." Compl. ¶ 8, ECF No. 1-2; NACA Mem. at 19. NACA also concedes the group of consumers on whose behalf NACA brings this lawsuit "will be the beneficiaries of this litigation." NACA Mem. at 13.

But simultaneously, in its motion to remand, NACA tries to portray itself merely as a group of lawyers and distance itself from consumers. This disingenuous attempt is unavailing. Consumers are the very origin, reason, and meaning behind NACA's very existence and behind the law practice of each and every one of NACA's formal members.[2] The success and viability of NACA and its entire formal membership depend on and are directly intertwined with the success of consumer claims they bring.[3] "This financial nexus between the interests of [NACA and its formal members] and its [non-member] constituents coalesces with the other factors [such as

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[2] *See* Join NACA, NACA, https://www.consumeradvocates.org/join/ ("Our members are attorneys and advocates who represent consumers. If this describes you, become a member!") (last visited September 27, 2024).

[3] *See* Membership Criteria, NACA, https://www.consumeradvocates.org/membership/become-a-member/membership-criteria/ ("To be eligible for NACA membership, an attorney must not presently be performing services for any client on a matter in which the client's interests are adverse to the interests of a consumer or consumers, must not have performed such services within at least the last six months before applying to become a NACA member, and must have no intention of performing such services in the future.") (last visited September 27, 2024).

constituents' involvement in NACA's activities and decision-making] to 'assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Hunt*, 432 U.S. at 345 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). In sum, NACA's attempt to improperly narrow associational standing is at odds with the controlling precedent and should be rejected.[4]

4. The Court should permit jurisdictional discovery.

Should the Court find the current record insufficient to resolve the issue of Article III standing, Gemini requests that it be given an opportunity to pursue limited jurisdictional discovery. This would further clarify the relationship between NACA and the District of Columbia consumers allegedly harmed by Gemini and will also answer the question of whether any of NACA's formal members fall within the class of constituents whose interests NACA represents in this lawsuit. The D.C. Court of Appeals "ha[s] held many times that, 'if a party demonstrates that it can supplement its jurisdictional allegations through discovery, then jurisdictional discovery is justified." *Urquhart-Bradley v. Mobley*, 964 F.3d 36, 48 (D.C. Cir. 2020) (remanding the case to district court with a mandate to grant jurisdictional discovery); *GTE New Media Servs. Inc. v. BellSouth Corp.*, 199 F.3d 1343, 1351 (D.C. Cir. 2000) (same); *Nat. Res. Def. Council v. Pena*, 147 F.3d 1012, 1014, 1024 (D.C. Cir. 1998) (holding jurisdictional discovery permissible where

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[4] Many of NACA's arguments lack clarity. For example, NACA appears to suggest that Gemini has a burden to show that the two or three consumers identified in the Complaint, Compl. ¶¶ 21–22, ECF No. 1-2, actively participate in NACA's activities. NACA Mem. 17. To the extent this is in fact NACA's argument, this Court already rejected the exact same one: "[an identified member] has as much right to participate in the activities that the Court identified as any other member of [the association], and courts do not appear to analyze to what extent an identified member partakes in membership activities in determining whether an organization has associational standing." *AARP*, 267 F. Supp. 3d at 23.

"the record suggests at least one way in which the appellees *may* be able to establish their standing") (emphasis in original)).

Here, NACA takes great pains in its memorandum to avoid telling the Court about its interactions and relationship with its constituents. NACA also carefully avoids denying that any of its formal members are Gemini users and opts instead for arguing that Gemini has failed to meet its burden on removal. Jurisdictional discovery will aid with supplementing jurisdictional allegations on the following topics:

a. <u>NACA's communications and engagement with the District of Columbia consumers</u>. According to NACA's website, NACA regularly invites these consumers to participate in advocacy campaigns, share their stories of consumer harm, and provide input that shapes NACA's activities and priorities. Discovery will demonstrate how NACA's policy initiatives, legal strategies, and advocacy efforts are influenced by the stories and experiences of these consumers allegedly affected by Gemini's User Agreement.

b. <u>NACA's role in legislative and policy efforts</u>. NACA plays an active role in legislative efforts and policy discussions regarding consumer protection laws, including the EFTA at issue in this case. Discovery will show how NACA has acted as a voice for the District of Columbia consumers allegedly affected by Gemini's User Agreement in these forums, further evidencing the influence of its constituents on its organizational mission and litigation efforts.

c. <u>The participation of the District of Columbia consumers in NACA's organizational governance and funding</u>. Even if District residents are not formal members of NACA, jurisdictional discovery could reveal informal but significant participation by the District of Columbia consumers in NACA's funding and decision-making processes, through direct communications or participation in campaigns and initiatives that shape the organization's activities.

d. NACA's formal membership list. While Gemini believes the Gemini users on whose behalf NACA has brought this lawsuit have the requisite indicia of a formal member for purposes of associational standing, NACA's formal membership list may reveal identities of formal members of NACA who are both District of Columbia residents and Gemini users, and thus would further support NACA's Article III standing.

The above requested discovery is highly relevant to the "indicia of membership" and Article III standing issues. Accordingly, this Court should allow limited jurisdictional discovery.

B. NACA's Claims Give Rise to Federal Question Jurisdiction.

NACA also contends that Gemini has failed to establish this case involves a federal question satisfying 28 U.S.C. § 1331. But NACA concedes that all but one of the applicable requirements have been met, mischaracterizes the law governing the one contested remaining requirement, and lacks any persuasive argument once the legal standards are correctly interpreted.

NACA accurately acknowledges that even when a plaintiff alleges a state cause of action, the claim "arises under" federal law within the meaning of § 1331 "if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn v. Minton*, 568 U.S. 251, 258 (2013). It is undisputed that this test provides the governing legal framework. NACA Mem. at 20–21. NACA also acknowledges that the state claims that it alleges—violations of the CPPA—depend entirely on NACA establishing that a federal law, the EFTA, applies to cryptocurrency accounts. NACA Mem. at 21. Thus, the scope of that federal statute is dispositive, and NACA's claims under the CPPA derive exclusively from a claimed violation of federal law.

Under NACA's theory, the CPPA simply tacks on a state cause of action for a violation of the federal EFTA.

Given that reality, NACA concedes three of the four requirements identified in *Gunn*: NACA does not contest whether the EFTA applies to a cryptocurrency account "necessarily raises" a question of federal law. NACA Mem. at 21. NACA cannot dispute that the EFTA's application to cryptocurrency accounts is "actually disputed" in this suit. And NACA does not contest that the application of the EFTA to cryptocurrency accounts is "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." Indeed, if there is any disruption to the federal-state balance here, that derives not from having a federal court decide a question of federal law that is dispositive in this case, but rather from having a state cause of action do nothing more than provide a state remedy for an asserted violation of the EFTA.

1. The EFTA's application to cryptocurrency easily raises a "substantial" issue of federal law.

NACA's claim that there is no federal question turns exclusively, therefore, on NACA's assertion that whether the EFTA applies to cryptocurrency accounts raises no "substantial" question of federal law. But NACA does not dispute that cryptocurrencies now involve trillions of dollars, and that Gemini in particular has over $200 billion in trading volume worldwide. In describing the legal authority that interprets the EFTA's application to a trillion-dollar industry, NACA identifies the same three district court opinions addressing the legal framework for EFTA's application to cryptocurrency accounts that Gemini did in its Notice of Removal—two opinions by Judge Cote, *Nero v. Uphold HQ Inc.*, 688 F. Supp. 3d 134 (S.D.N.Y. 2023); *Rider v. Uphold HQ, Inc.*, 657 F. Supp. 3d 491 (S.D.N.Y. 2023), and one opinion by Judge Liman, *Yuille v. Uphold HQ Inc.*, 686 F. Supp. 3d 323 (S.D.N.Y. 2023). Judges Liman and Cote reached different conclusions about the legal standards under the EFTA and whether a cryptocurrency account falls within the EFTA, and of course, neither opinion is controlling. *See, e.g., Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.") (citation omitted).

As a result, NACA's position reduces to claiming that no substantial question of federal law is raised by questions of first impression in applying a statute enacted in 1978, the EFTA, to a new trillion-dollar industry that is rapidly growing. "To state the argument is to refute it." *American Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 61 (1999). The test for what constitutes a "substantial" issue of federal law is not so extreme as to exclude such an issue. "[F]ederal-question jurisdiction will lie over state-law claims that implicate significant federal issues." *Grable & Sons Metal Prods. V. Darue Eng'g & Mfg.*, 545 U.S. 308, 312 (2005). Indeed, for over "100 years," federal courts have exercised jurisdiction in cases presenting a substantial federal question based on a state-law cause of action. *Id.*

Section 1331's grant of jurisdiction for claims "arising under" federal law echoes Article III. *Id.* at 320 n.* (Thomas, J., concurring). When Congress enacted § 1331 in 1875, the Supreme Court had already settled for decades that Article III "permit[s] Congress to extend federal jurisdiction to any case of which federal law potentially 'forms an ingredient.'" *Franchise Tax Bd. of California v. Constr. Laborers Vacation Tr. for S. California*, 463 U.S. 1, 8 n.8 (1983) (quoting *Osborn v. Bank of U.S.*, 22 U.S. 738, 823 (1824)). The phrase "arising under" in § 1331 invokes a broad grant of jurisdiction. State causes of action that implicate federal law "were perhaps the paradigm 'arising under' cases" that at the time of enactment of § 1331 were understood as proper federal actions. Ann Woolhandler & Michael G. Collins*,* Federal Question Jurisdiction and Justice Holmes, 84 Notre Dame L. Rev. 2151, 2153 (2009).

2. NACA misreads the *Grable* exception.

In arguing that the novel, dispositive questions of federal law at issue here are not "substantial," NACA relies on an inaccurate characterization of Supreme Court precedent. NACA contends that "[o]ne 'extremely rare' exception" for federal question jurisdiction "is the so-called *Grable* test, which applies only to a 'special and small category of cases.'" NACA Mem. at 20 (quoting *Empire Healthchoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 699 (2006); *North v. Smarsh, Inc.*, 160 F. Supp. 3d 63, 77 (D.D.C. 2015)). But *Empire Healthchoice* never said that the standard for what counts as a "substantial" question of federal law is satisfied only under "extremely rare" circumstances. In fact, the words "extremely rare" do not appear in *Empire Healthchoice*.

Meanwhile, although NACA does not acknowledge it, the Supreme Court did use the phrase "extremely rare" in *Gunn*, but the Court was making a point that is totally irrelevant to NACA's argument. In *Gunn* the Supreme Court observed that, as one would expect, "when federal law creates the cause of action asserted," that will satisfy § 1331. 568 U.S. at 257. A federal cause of action raises a federal question. *Gunn* then went on to observe that, surprisingly, there are "extremely rare exceptions" where a federal cause of action does not satisfy § 1331. *Id*. (citing *Shoshone Mining Co. v. Rutter*, 177 U.S. 505 (1900)). But that odd exception implies nothing at all about *Grable*.

Admittedly, the district court case that NACA cites, *North v. Smarsh, Inc.*, garbles this point and suggests that *Gunn*'s reference to what is "extremely rare" applied to the *Grable* exception, 160 F. Supp. 3d at 77, but that is just a misreading of *Gunn*. The case that *Gunn* cited when using the phrase "extremely rare" was *Shoshone Mining Co.*, and that case is the "best-known example" of "cases that do not invoke federal question jurisdiction even though *federal* *law creates the claim being asserted*" and hence "*federal law created a right to sue*." 13D Charles Alan Wright *et al.*, Federal Practice & Procedure, § 3562 (3d ed. 2023) (emphasis added).

The Supreme Court has observed that there is a "special and small category" of cases where a state cause of action will satisfy § 1331 when the state claim depends on federal law—the circumstance at issue here—but the phrase "special and small" does not aid NACA. Notably, *Gunn* went on to describe the requirements for that category, using the four-part test listed above. *Gunn*, 568 U.S. at 258. Nothing in *Gunn* suggested that the phrase "special and small" somehow further narrowed *Gunn*'s test for what counts as a "substantial" federal question when that question is (a) necessarily raised by a state claim, (b) actually disputed, and (b) would not disrupt the federal-state balance approved by Congress when a federal court resolves the question.

3. The Supreme Court never limited *Grable* to constitutional challenges and agency actions.

NACA also suggests that the Supreme Court has somehow limited the *Grable* standard to two scenarios—where "(1) the federal government [has a] direct interest in the availability of a federal forum to vindicate its own administrative actions, and (2) the constitutional validity of an act of Congress" is at stake. NACA Mem. at 22. But *Gunn* identified those two circumstances as "illustration[s]," not an exhaustive enumeration of what counts as a "substantial" question of federal law. *Gunn*, 568 U.S. at 261. Indeed, if what counts as a substantial question were limited to those two categories, *Gunn* would have been decided very differently. At issue in *Gunn* was a claim that a state legal malpractice claim arose under federal law because the malpractice dealt with federal patent law. But the Supreme Court did not reject that there was jurisdiction for a federal question because no federal agency was involved or because no constitutional question was at stake. Instead, the Court examined whether the federal patent issues would be "important" to "the parties alone." *Id.* at 261. The "'fact-bound and situation specific' effects" of the patent dispute in *Gunn* did not have sufficiently wide implications beyond the parties and were "not sufficient to establish federal arising under jurisdiction." *Gunn*, 568 U.S. at 263 (citing *Empire Healthchoice Assurance, Inc.*, 547 U.S. at 701). The questions of first impression that NACA's suit raises about the meaning of statutory terms in the EFTA are readily distinguishable from the patent disputes considered in *Gunn* that would be relevant to the parties only. NACA's own filings demonstrate that they believe their claims will control EFTA's application to an entire industry. *See* ECF No. 12 at 1 ("NACA seeks declaratory and injunctive relief to ensure that Gemini *and other financial institutions* comply with state and federal law.") (emphasis added).

NACA also mischaracterizes the Supreme Court's rulings about when a federal constitutional challenge raised in a state claim satisfies § 1331. In finding that a constitutional challenge to a federal statute raised by a state cause of action satisfied § 1331, the Supreme Court explained that this "classic example" of jurisdiction under § 1331 did not reflect some special rule for constitutional challenges, but instead turned on a point that applies fully here—namely, that "the importance of the question" reached well beyond "the parties alone." *Gunn*, 568 U.S. at 261 (citing *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921)). In short, NACA tries to convert a century-old rule construing the words "arising under" into one with brute limitations that neither fit Supreme Court precedent nor are explicable by the standards Congress adopted with § 1331.[5] NACA's claims readily satisfy § 1331.

C. NACA's Request for Attorneys' Fees.

NACA's request for attorneys' fees under 28 U.S.C. § 1447(c) should be denied.

[5] NACA does not contest Gemini's point in its notice of removal that whether NACA's claims raise a substantial federal question must be determined without regard to defenses that might apply to the claim, such as a right by Gemini to compel arbitration. *See, e.g., D.C. v. Exxon Mobil Corp.*, 89 F.4th 144, 154 (D.C. Cir. 2023).

Gemini's assertion of Article III standing is grounded in a reasonable interpretation of existing case law. *See, e.g., Earth Island Inst. v. BlueTriton Brands*, 583 F. Supp. 3d 105, 112 (D.D.C. 2022) (concluding the removal was not without an objectively reasonable basis, given the absence of clear, controlling case law).

From this Court's own decisions, the law on the relevant issues lacks a bright-line rule. *Flyers Rts. Educ. Fund, Inc.*, 957 F.3d 1359, 1361–62 (court found "quite doubtful" that "the list of 'indicia' identified in *Hunt* was meant to be exhaustive"); *AARP*, 226 F. Supp. 3d at 16 ("There appears to be a gap in the associational standing case law about when or how the indicia of membership inquiry should be applied."); *AARP*, 267 F. Supp. 3d at 23 (recognizing "the associational standing cases are not specific about what it means for members to 'play a role in' the leadership of an organization, the financing of an organization, or in guiding the activities of an organization").

Gemini's removal is also based on a legitimate interpretation of federal question jurisdiction because, as NACA openly admits, the only basis for NACA's CPPA claim is the federal EFTA. *See, e.g.*, *Grable & Sons Metal Products, Inc.*, 545 U.S. at 315 ("[I]t is plain that a controversy respecting the construction and effect of the [federal] laws is involved and is sufficiently real and substantial.") (citations omitted); NACA Mem. at 21. In other words, NACA is not entitled to any relief unless this Court finds the Gemini User Agreement violates the EFTA.

If Gemini's removal was so "objectively unreasonable," it begs the question why NACA needed to submit a 27-page long memorandum in support of its motion to remand. And NACA's bold assertion that Gemini is "exploiting removal as a way to encumber nonprofit organizations" is unfounded. Gemini is absolutely within its rights to seek access to federal court based on its strong, well-reasoned, and amply-supported arguments of Article III associational standing and federal question jurisdiction. NACA is not entitled to its costs and expenses incurred in moving for remand.

III. Conclusion

Gemini's Notice of Removal establishes NACA's Complaint sufficiently alleges Article III standing to proceed in federal court. NACA represents a specialized segment of the community—Gemini users who reside in the District of Columbia and who are subject to allegedly unlawful user agreements in violation of the EFTA. The interests NACA seeks to protect are germane to its purpose of advocating for consumer rights, and the relief sought in this case does not require the participation of individual members.

This case also presents an important question of federal law because the only basis for NACA's purported state law claim is the applicability of the federal EFTA to cryptocurrency transactions.

Accordingly, this Court should deny NACA's Motion to Remand.

IV. Request for Oral Hearing

Defendant Gemini Trust Company, LLC respectfully requests an oral argument on NACA's Motion to Remand.

Dated: September 27, 2024

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CERTIFICATE OF SERVICE

This is to certify that on September 27, 2024 a true and correct copy of the foregoing was served on the counsel of record for Plaintiff listed below, via ECF:

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