

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL ASSOCIATION OF
CONSUMER ADVOCATES, INC.

Plaintiff,

v.

GEMINI TRUST COMPANY LLC,

Defendants.

Case No: 1:24-cv-2356

**PLAINTIFF NATIONAL ASSOCIATION OF
CONSUMER ADVOCATES, INC.'S MOTION TO REMAND**

Plaintiff National Association of Consumer Advocates, Inc. (“NACA”) respectfully requests that the Court remand this proceeding to the Superior Court of the District of Columbia. NACA filed this action pursuant to the District of Columbia Consumer Protection Procedures Act (“CPPA”), which permits nonprofit public organizations to bring an action on behalf of a consumer or a class of consumers to seek relief from unlawful business practices. NACA alleges that Defendant Gemini Trust Company LLC’s (“Gemini”) User Agreement is unlawful under the CPPA because it violates and purports to waive the protections of the Electronic Funds Transfer Act (“EFTA”). The complaint alleges a single count under the CPPA and seeks to enjoin Gemini from enforcing the User Agreement in the District of Columbia. Gemini removed this case to federal court, asserting that NACA has Article III standing under the doctrine of associational standing even though NACA has not brought this suit on behalf of its own members; and arguing incorrectly that this state-law action confers federal question jurisdiction. For the reasons set forth in the accompanying Memorandum of Law, both of Gemini’s arguments fail. Accordingly, Gemini has not satisfied its heavy burden to show that federal jurisdiction is proper. NACA requests that the Court grant this motion and return this case to Superior Court, and award its fees for time incurred opposing Gemini’s improper removal.

Dated: September 13, 2024

Respectfully Submitted,

/s/ Katherine M. Aizpuru

Katherine M. Aizpuru (DC Bar No. 1022412)

Peter Silva (DC Bar No. 1010483)

TYCKO & ZAVAREEI LLP

2000 Pennsylvania Avenue, NW, Suite 1010

Washington, DC 20006

Telephone: (202) 973-0900

Facsimile: (202) 973-0950

kaizpuru@tzlegal.com

psilva@tzlegal.com

VARNELL & WARWICK, P.A.

Janet R. Varnell, FBN: 0071072 (pro hac vice
to be filed)

400 N. Ashley Drive, Suite 1900

Tampa, FL 33602

Telephone: (352) 753-8600

Facsimile: (352) 504-3301

jvarnell@vandwlaw.com

SCHLANGER LAW GROUP, LLP

Daniel A. Schlanger

(pro hac vice forthcoming)

60 East 42nd Street, 46th Floor

New York, NY 10165

Telephone: 212.500.6114

Facsimile: 646.612.7996

dschlanger@consumerprotection.net

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

NATIONAL ASSOCIATION OF
CONSUMER ADVOCATES, INC.

Plaintiff,

v.

GEMINI TRUST COMPANY LLC,

Defendants.

Case No: 1:24-cv-2356

**MEMORANDUM IN SUPPORT OF PLAINTIFF NATIONAL ASSOCIATION OF
CONSUMER ADVOCATES, INC.'S MOTION TO REMAND**

TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	FACTUAL BACKGROUND.....	2
A.	Gemini’s cryptocurrency business and lax security practices harm District of Columbia consumers.	2
B.	Gemini’s unlawful User Agreement violates the CPPA because it contains illegal provisions contravening EFTA.	3
C.	NACA, a nonprofit public interest organization dedicated to consumer protection, brought this action to protect D.C. consumers from Gemini’s violations of the CPPA.....	5
III.	LEGAL STANDARD.....	6
IV.	ARGUMENT.....	6
A.	Remand is required because Gemini fails to demonstrate Article III standing.....	7
1.	NACA’s basis for standing in Superior Court is statutory, which itself does not confer Article III standing.....	7
2.	Gemini has not shown that NACA has associational standing on behalf of its members.	11
a.	Gemini has not shown that NACA bears the indicia of a “membership organization” for purposes of associational standing.....	12
b.	Gemini has not shown that any NACA member would have standing to sue in their own right.....	16
c.	Associational standing does not exist where an organization brings suit on behalf of non-members.	18
B.	Remand is required because Gemini fails to demonstrate that this state-law action confers federal question jurisdiction.	19
1.	Only a very narrow category of state-law cases assert “substantial” federal questions giving rise to federal jurisdiction.	20
2.	Gemini has not shown that NACA’s CPPA claims raise a “substantial federal issue” within the meaning of <i>Grable</i>	21
V.	NACA requests attorneys’ fees and costs.	25
VI.	CONCLUSION.....	27

TABLE OF AUTHORITIES

CASES

<i>A.G. v. Riverside Christian Ministries, Inc.</i> , 2023 WL 6443118 (S.D. Fla. Oct. 3, 2023).....	23
<i>AARP v. U.S. Equal Emp. Opp. Comm’n</i> , 226 F. Supp. 3d 7 (D.D.C. 2016).....	7, 11
<i>Allergan, Inc. v. Ferrum Ferro Cap., LLC</i> , 2015 WL 12670417 (C.D. Cal. Dec. 28, 2015).....	24
<i>Am. Legal Found. v. F.C.C.</i> , 808 F.2d 84 (D.C. Cir. 1987).....	passim
<i>Animal Legal Defense Fund v. Hormel Foods Corp.</i> , 258 A.3d 174 (D.C. 2021)	8, 9, 15, 16
<i>Ballard v. District of Columbia</i> , 813 F. Supp. 2d 34 (D.D.C. 2011).....	6
<i>Beyond Pesticides v. Dr Pepper Snapple Grp., Inc.</i> , 2019 WL 2744685 (D.D.C. July 1, 2019).....	10
<i>Burton v. Coburn</i> , 2005 WL 607912 (D.D.C. Mar. 16, 2005).....	26
<i>Caterpillar Inc. v. Williams</i> , 482 U.S. 386 (1987).....	6, 20
<i>Center for Inquiry Inc. v. Walmart</i> , 283 A.3d 109 (D.C. 2022)	9, 15, 16
<i>Chamber of Commerce of U.S. v. E.P.A.</i> , 642 F.3d 192 (D.C. Cir. 2011).....	16, 17
<i>Clean Label Project Found. v. Garden of Life, LLC</i> , 2021 WL 4318099 (D.D.C. Sept. 23, 2021).....	10
<i>Conservative Baptist Ass’n of Am., Inc. v. Shinseki</i> , 42 F. Supp. 3d 125 (D.D.C. 2014).....	17, 18
<i>District of Columbia v. Walters</i> , 319 A.2d 332 (D.C. 1974)	8
<i>Doe v. Stincer</i> , 175 F.3d 879 (11th Cir. 1999)	14, 15
<i>Downey v. Ambassador Dev., LLC</i> , 568 F. Supp. 2d 28 (D.D.C. 2008).....	6
<i>Earth Island Inst. v. BlueTriton Brands</i> , 2022 D.C. Super. LEXIS 11, No. 2021 CA 003027 B (D.C. Super. Ct. June 7, 2022)	9

<i>Empire Healthchoice Assurance, Inc. v. McVeigh</i> , 547 U.S. 677 (2006).....	20, 21, 22, 24, 25
<i>Exxon Mobil Corp. v. Allapattah Servs., Inc.</i> , 545 U.S. 546 (2002).....	6
<i>Flavell v. Jim Yong Kim</i> , 2022 WL 670271 (D.D.C. Mar. 7, 2022).....	6
<i>Flyers Rights Educ. Fund, Inc. v. U.S. Dep’t of Transp.</i> , 957 F.3d 1359 (D.C. Cir. 2020).....	11, 14
<i>Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.</i> , 463 U.S. 1 (1983).....	20
<i>Freedom Watch, Inc. v. McAleenan</i> , 442 F. Supp. 3d 180 (D.D.C. 2020).....	17
<i>Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.</i> , 528 U.S. 167 (2000).....	11
<i>Gettman v. Drug Enf’t Admin.</i> , 290 F.3d 430 (D.C. Cir. 2002).....	12, 14
<i>Grable & Sons Metal Products, Inc. v. Darue Engineering & Manufacturing</i> , 545 U.S. 308 (2005).....	passim
<i>Great N. Ry. Co. v. Alexander</i> , 246 U.S. 276 (1918).....	19
<i>Gunn v. Minton</i> , 568 U.S. 251 (2013).....	passim
<i>Hunt v. Wash. State Apple Advert. Comm’n</i> , 432 U.S. 333 (1977).....	12, 15, 16
<i>In re: Takata Airbag Prods. Liab. Litig.</i> , 2016 WL 1266609 (S.D. Fla. Mar. 11, 2016).....	18
<i>Johnson-Brown v. 2200 M St. LLC</i> , 257 F. Supp. 2d 175 (D.D.C. 2003).....	26
<i>La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency</i> , 2017 WL 2539451 (S.D. Tex. Feb. 15, 2017)	19
<i>Lujan v. Defs. of Wildlife</i> , 504 U.S. 555 (1992).....	8
<i>Martin v. Franklin Cap. Corp.</i> , 546 U.S. 132 (2005).....	25, 26
<i>McKinney v. U.S. Dep’t of Treasury</i> , 799 F.2d 1544 (Fed. Cir. 1986).....	18
<i>MobilizeGreen, Inc. v. Community Found. for Nat’l Cap. Region</i> , 101 F. Supp. 3d 36 (D.D.C. 2015).....	22

<i>N.Y. Ctr. for Foreign Policy Affairs v. U.S. Dep't of State</i> , 2024 WL 3400122 (D.D.C. July 12, 2024).....	16, 17
<i>Nat'l Consumers League v. Gen. Mills, Inc.</i> , 680 F. Supp. 2d 132 (D.D.C. 2010).....	6
<i>Nero v. Uphold HQ, Inc.</i> , 688 F. Supp. 3d 134 (S.D.N.Y. 2023).....	24
<i>North v. Smarsh, Inc.</i> , 160 F. Supp. 3d 63 (D.D.C. 2015).....	20
<i>Ohio State Troopers Ass'n, Inc. v. Point Blank Enterprises, Inc.</i> , 2019 WL 9093460 (S.D. Fla. June 21, 2019).....	18
<i>Oregon Advocacy Center v. Mink</i> , 322 F.3d 1101 (9th Cir. 2003)	14, 15
<i>Organic Consumer Ass'n v. Smithfield Foods, Inc.</i> , 2020 D.C. Super. LEXIS 28, No. 2020 CA 2566 B (D.C. Super. Ct. Dec. 14, 2020)	9
<i>Organic Consumers Ass'n v. Noble Foods, Inc.</i> , 2020 D.C. Super. LEXIS 13, No. 2020 CA 002009 B (D.C. Super. Ct. Aug. 25, 2020).....	9
<i>Pa. Psychiatric Soc'y v. Green Spring Health Servs.</i> , 280 F.3d 278 (3d Cir. 2002).....	18
<i>Pharm. Rsch. & Mfrs. of Am. v. Dep't of Health & Human Servs.</i> , 656 F. Supp. 3d 137 (D.D.C. 2023).....	17
<i>Public Citizen, Inc. v. Trump</i> , 297 F. Supp. 3d 6 (D.D.C. 2018).....	17
<i>Republic of Venezuela v. Philip Morris Inc.</i> , 287 F.3d 192 (D.C. Cir. 2002).....	6
<i>Rider v. Uphold HQ, Inc.</i> , 657 F. Supp. 3d 491 (S.D.N.Y. 2023).....	24
<i>Rios v. Friendly Hills Bank</i> , 2017 WL 3530348 (C.D. Cal. Aug. 16, 2017).....	23
<i>Smith v. Kansas City Title & Trust Co.</i> , 255 U.S. 180 (1921).....	24, 25
<i>Spokeo, Inc. v. Robins</i> , 578 U.S. 330 (2016).....	9
<i>Summers v. Earth Island Institute</i> , 555 U.S. 488 (2009).....	16
<i>Town of Chester, N.Y. v. Laroe Ests., Inc.</i> , 581 U.S. 433 (2017).....	8
<i>TransUnion LLC v. Ramirez</i> , 141 S. Ct. 2190 (2021).....	10

<i>Travelers United, Inc. v. Hilton Worldwide Holdings, Inc.</i> , No. 23-cv-3584-BAH, slip op. (D.D.C. June 7, 2024)	12, 14
<i>United States v. Texas</i> , 599 U.S. 670 (2023).....	7
<i>Viasat, Inc. v. F.C.C.</i> , 47 F.4th 769 (D.C. Cir. 2022).....	11, 12
<i>Warth v. Seldin</i> , 422 U.S. 490 (1975).....	7
<i>Washington Legal Foundation v. Leavitt</i> , 477 F. Supp. 2d 202 (D.D.C. 2007).....	12
<i>WE Charity v. Canadian Broad. Corp.</i> , 2023 WL 4198670 (D.D.C. June 7, 2023).....	19
<i>Wheeler v. Panini America, Inc.</i> , 2022 WL 17039208 (D.D.C. Nov. 17, 2022)	10
<i>Woodford v. Yazam Inc.</i> , 2023 WL 8083975 (D.D.C. Nov. 21, 2023)	10
<i>Yuille v. Uphold HQ Inc.</i> , 686 F. Supp. 2d 323 (S.D.N.Y. 2023).....	24

STATUTES

28 U.S.C. § 1331	20
28 U.S.C. § 1447	25
28 U.S.C. § 1447(c)	6, 26
D.C. Code § 28-3901	4
D.C. Code § 28-3904	4, 5
D.C. Code § 28-3904(e-1)	4
D.C. Code § 28-3904(r)	4
D.C. Code § 28-3905(k)(1)(C).....	16
D.C. Code § 28-3905(k)(1)(D)	9, 10, 16
D.C. Code § 28-3905(k)(1)(D)(i).....	5, 7, 8, 15

OTHER AUTHORITIES

Consumer Protection Act of 2012, Report on Bill 19-0581 (Nov. 28, 2012).....	8
--	---

I. INTRODUCTION

The District of Columbia protects consumers from unfair trade practices, including unlawful contracts, through the Consumer Protection Procedures Act (CPPA).

Yet, Gemini Trust Company, LLC (“Gemini”), a cryptocurrency trading platform, requires District of Columbia residents who wish to use its services to agree to a User Agreement (“UA”) that contains numerous illegal and unenforceable provisions. Specifically, Gemini purports to require D.C. consumers to agree to waive key rights under the Electronic Funds Transfer Act (“EFTA”), a federal statute that protects consumers from the risk of fraud in electronic funds transfers, including the right to be reimbursed by Gemini for unauthorized transactions, and the right to a host of important disclosures and procedural protections. The CPPA prohibits agreements containing such unlawful provisions.

The CPPA allows public interest organizations to sue on behalf of D.C. consumers to stop unlawful trade practices. Plaintiff National Association of Consumer Advocates Inc. (NACA), a non-profit, public interest organization with its headquarters in the District, brought this action in the Superior Court for the District of Columbia to enforce the CPPA and enjoin Gemini’s unlawful practices.

Gemini seeks removal to federal court. Removal is improper and this case should be remanded. To succeed on removal, Gemini has the burden of establishing that NACA or its members have alleged an injury sufficient to demonstrate standing under Article III of the Constitution. Gemini has made no such showing.

Nor has Gemini carried its burden to show that subject matter jurisdiction over this case exists. While NACA’s CPPA claim involves a federal statute, Gemini has not shown that interpretation of a single company’s user agreement raises “substantial” federal issues sufficient to support federal jurisdiction under *Grable & Sons Metal Products, Inc. v. Darue Engineering &*

Manufacturing, 545 U.S. 308 (2005) (“*Grable*”).

In sum, despite the clear state-law basis of the claims, Gemini improperly removed this action to federal court, failing to meet its burden to establish either Article III standing or federal question jurisdiction. NACA requests that the Court return this case to Superior Court, and award attorneys’ fees to NACA for time spent opposing this improper removal.

II. FACTUAL BACKGROUND

A. Gemini’s cryptocurrency business and lax security practices harm District of Columbia consumers.

Gemini’s deficient security practices harm D.C. consumers and leave them at tremendous financial risk. Every day, millions of consumers entrust Gemini with their digital assets; as one of the world’s largest cryptocurrency companies, Gemini routinely processes over \$156 million in cryptocurrency trades within a 24-hour period. Compl. ¶ 15. As cryptocurrency has exploded in value, criminal enterprises have followed the headlines—regularly targeting cryptocurrency platforms, including Gemini, for theft, scams, and other illegal activity. *Id.* ¶ 19. To protect consumers’ assets, it is imperative for platforms like Gemini to implement powerful security measures that prevent and deter hacking, theft, and fraud.

To lure and retain customers, Gemini tells consumers it recognizes the importance of appropriate cybersecurity protocols, noting on its website that has “Industry Leading Security Controls” and promising users a “safe and secure experience.” *Id.* ¶¶ 24-25. Gemini boasts that it is “Certified,” “Regulated,” and “Licensed,” and that it “prioritize[s] the security” of user assets. *Id.* ¶ 16. Yet, contrary to its promises, Gemini repeatedly compromises user security.

Because Gemini’s security protocols are not adequate, many consumers, including residents of the District of Columbia, have suffered losses from their crypto accounts due to theft, hacking, and fraud. *Id.* ¶¶ 21-23. D.C. residents have filed complaints with the Consumer Financial

Protection Bureau (“CFPB”) describing how they lost cryptocurrency when threat actors gained access to their accounts and made unauthorized transactions. *Id.* ¶¶ 21-22. When consumers complain to Gemini, Gemini simply denies them access to their digital assets while purportedly reviewing their accounts—without sharing progress of their review with the consumer. *Id.* ¶ 23.

B. Gemini’s unlawful User Agreement violates the CPPA because it contains illegal provisions contravening EFTA.

Gemini’s UA includes provisions that unlawfully shift the risk of fraud to consumers. Instead of protecting consumers’ cryptocurrency and providing a “safe and secure experience,” Gemini instead burdens consumers, including those in the District of Columbia, with a UA that protects Gemini at their expense. *Id.* ¶ 26. Gemini attempts to protect itself from the risk of fraud, at the expense of its customers, with a UA that shifts the risk of financial fraud from Gemini to its customers. But its UA accomplishes this by violating federal law.

EFTA, and its implementing regulations (“Reg. E”), require financial institutions like Gemini to bear the primary responsibility for unauthorized transfers from a financial account. *Id.* ¶¶ 43-48. The EFTA also specifically prohibits the creation of “writing[s] or other agreement[s]” that purport to waive “any right conferred or cause of action created” under EFTA. 15 U.S.C. § 1693l. But contrary to EFTA’s requirements, Gemini’s UA requires users to agree (among other things) that:

- Gemini “cannot be held liable for unauthorized access or other loss” resulting from “transmission” of login information to third parties;
- the user, not Gemini, is “solely responsible” for the security of their account;
- Gemini is “not responsible for” unauthorized account access; and
- Gemini’s liability is limited to the value of cryptocurrency at the time of the loss.

Compl. ¶¶ 29-34.

The UA also impermissibly requires users to agree that:

- they use Gemini “at their own risk”;
- they only have three days to challenge any communication;
- it is their “sole responsibility” to monitor transactions; and
- Gemini cannot be held responsible for “any other circumstances” beyond its “reasonable control.”

Id.

Finally, Gemini purports to require users to “indemnify” Gemini for legal costs and expenses for “any” litigation regarding their accounts and prohibits users from transferring assets from Gemini until any “anticipated or actual” regulatory or legal actions are resolved. *Id.* ¶¶ 37-38. All these provisions are purported waivers of EFTA, and thus violate § 1693l, to the detriment of D.C. residents who seek to use the Gemini platform. The same provisions would also violate EFTA if enforced.

Fortunately, District of Columbia law prohibits companies like Gemini from forcing D.C. residents to agree to such unlawful contracts. The CPPA ensures that a “just mechanism exists to remedy all improper trade practices,” utilizing extensive enforcement mechanisms to protect D.C. consumers from a wide range of unfair and deceptive business practices. D.C. Code §§ 28-3901, 28-3904. As relevant here, the CPPA prohibits any person from representing that a transaction “confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law,” and to “make or enforce unconscionable terms or provisions of sales or leases.” *Id.* § 28-3904(e-1), (r). Thus, the CPPA prohibits institutions like Gemini from purporting to require customers to agree to contract provisions that violate EFTA, like those contained in the UA, and from enforcing such provisions against them.

The CPPA also explicitly provides that a violation occurs regardless of “whether or not any consumer is in fact misled, deceived, or damaged” by the unlawful practice. *Id.* § 28-3904. Accordingly, an organization like NACA may bring an action like this one to vindicate D.C. consumers’ rights by declaring an unlawful agreement invalid and prohibiting its enforcement, regardless of whether any consumer was actually “misled, deceived, or damaged.” *Id.*

C. NACA, a nonprofit public interest organization dedicated to consumer protection, brought this action to protect D.C. consumers from Gemini’s violations of the CPPA.

NACA is a nonprofit public interest organization dedicated to consumer protection. NACA’s membership of approximately 1,500 consists overwhelmingly of consumer protection attorneys (rather than consumers broadly). Consistent with its mission of protecting consumers, NACA brought this lawsuit to enjoin Gemini from enforcing its unlawful UA against D.C. consumers in violation of the CPPA. The CPPA gives NACA the right to bring an action “on behalf of the interests of a consumer or a class of consumers” to “seek[] relief from the use . . . of a trade practice in violation of the law of the District.” D.C. Code § 28-3905(k)(1)(D)(i). The complaint alleges that, in direct violation of the CPPA, the UA is rife with representations that purport to “confer[] or involve[] rights, remedies, or obligations which it does not have or involve, or which are prohibited by law,” in that the UA contradicts federal law governing financial institutions like Gemini (EFTA). The complaint further alleges that the UA violates the CPPA because it represents the transaction conferred or involved rights, remedies, or obligations which it did not have or involve, or which were prohibited by law: the numerous provisions contradicting and purporting to waive rights available under EFTA. The CPPA provides a mechanism for NACA to seek an injunction prohibiting Gemini from enforcing the UA’s illegal provisions, and this action seeks to do just that.

III. LEGAL STANDARD

By design, federal courts are “courts of limited jurisdiction. They possess only that power authorized by Constitution and statute.” *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552 (2002). Accordingly, “[w]hen it appears that a district court lacks subject matter jurisdiction over a case that has been removed from a state court, the district court *must* remand the case.” *Republic of Venezuela v. Philip Morris Inc.*, 287 F.3d 192, 196 (D.C. Cir. 2002) (emphasis added) (citing 28 U.S.C. § 1447(c)).

A party may move to remand an action because the removing party has not adequately pled federal subject matter jurisdiction. *See* 28 U.S.C. § 1447(c); *see also Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987) (“Only state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant.”). And the party opposing remand “bears the burden of establishing that subject matter jurisdiction exists in federal court.” *Flavell v. Jim Yong Kim*, 2022 WL 670271, at *2 (D.D.C. Mar. 7, 2022) (quoting *Downey v. Ambassador Dev., LLC*, 568 F. Supp. 2d 28, 30 (D.D.C. 2008)). Where propriety of removal is unclear, courts construe removal jurisdiction “strictly, favoring remand.” *Ballard v. District of Columbia*, 813 F. Supp. 2d 34, 38 (D.D.C. 2011).

IV. ARGUMENT

Absent a showing of *both* Article III standing *and* subject matter jurisdiction, this case cannot be litigated in federal court. *See, e.g., Nat’l Consumers League v. Gen. Mills, Inc.*, 680 F. Supp. 2d 132, 136 (D.D.C. 2010). Here, Gemini’s removal notice of removal (“NOR”) fails to plead facts establishing that NACA has suffered an injury-in-fact sufficient to confer standing under Article III. Gemini also has not demonstrated that this state-law action, which requires the Court to determine whether Gemini’s UA violates D.C. consumer protection law, establishes federal question jurisdiction. Accordingly, this case should be remanded to Superior Court.

A. Remand is required because Gemini fails to demonstrate Article III standing.

For removal to be proper and this case to proceed in federal court, Gemini must show that NACA has standing under Article III. *Warth v. Seldin*, 422 U.S. 490, 502 (1975). Gemini has not made this showing. First, NACA’s basis for standing in Superior Court arises under CPPA subsection 28-3905(k)(1)(D)(i), which neither requires nor confers Article III standing. That provision allows public interest organizations to bring actions on behalf of consumers without the need to demonstrate the type of injury required under Article III of the Constitution. Since Gemini cannot show that the CPPA itself creates Article III standing, it must demonstrate Article III standing exists for some other reason. Gemini hangs its hat on associational standing, which is appropriate where an organization wants to litigate on behalf of its members because its members have suffered an injury. *See AARP v. U.S. Equal Emp. Opp. Comm’n*, 226 F. Supp. 3d 7, 15 (D.D.C. 2016). But NACA has not alleged, and Gemini has not shown, that NACA’s membership is part of the constituency that would benefit from this lawsuit or that any NACA member has standing under Article III. Since Gemini’s arguments for Article III standing are not legally viable, this case must be remanded to Superior Court.

1. NACA’s basis for standing in Superior Court is statutory, which itself does not confer Article III standing.

For removal to be proper and this case to proceed in federal court, Gemini must show that NACA has standing under Article III. *See United States v. Texas*, 599 U.S. 670, 675 (2023). But, as the complaint makes clear, NACA’s basis for standing in Superior Court is CPPA subsection 28-3905(k)(1)(D)(i). *See* Compl. ¶ 61. That provision of the CPPA does not create or require Article III injury-in-fact.

Article III standing requires a showing (1) of the existence of an “injury in fact” that is both “concrete and particularized” and “actual or imminent, not conjectural or hypothetical;” (2) that

the injury is fairly traceable to the defendant’s challenged actions; and (3) that it is “likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.” *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). “Absent such a showing, exercise of its power by a federal court would be gratuitous and thus inconsistent with the Art. III limitation.” *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017) (citations omitted).

The requirements to proceed in the Superior Court of the District of Columbia are different. D.C. Courts, “established by Congress pursuant to Article I, are not bound by the requirements of Article III.” *District of Columbia v. Walters*, 319 A.2d 332, 338 n.13 (D.C. 1974). While D.C. courts “generally follow Article III’s guidance,” they do so for prudential reasons that are subject to override by the D.C. Council. *Animal Legal Defense Fund v. Hormel Foods Corp.*, 258 A.3d 174, 181 (D.C. 2021).

The D.C. Council chose to override the prudential Article III standing requirement when it enacted CPPA subsection 28-3905(k)(1)(D)(i), which enables public interest organizations to seek relief on behalf of consumers in certain circumstances regardless of whether or not the organization itself has suffered an Article III injury-in-fact. *See* D.C. Code §§ 28-3905(k)(1)(D)(i) (enabling public interest organizations “on behalf of the interests of a consumer or a class of consumers [to] bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District” in certain circumstances). As the D.C. Council explained, “Subparagraph (D) is intended to reach . . . the full extent of standing as may be recognized by the District of Columbia courts. . . . This may include bases for standing . . . **beyond what would be afforded in a federal case under a narrow reading of prior federal court decisions** on federal standing.” Consumer Protection Act of 2012, Report on Bill 19-0581, at 4 (Nov. 28, 2012) (emphasis added). And relying on that report, in 2021, the D.C. Court of Appeals clarified that

“the Council intended public interest organizations bringing suit under (k)(1)(D) to be free from any requirement to demonstrate their own Article III standing.” *Hormel Foods Corp.*, 258 A.3d at 184; *see also Center for Inquiry Inc. v. Walmart*, 283 A.3d 109 (D.C. 2022) (“If an entity such as [Center for Inquiry] meets the CPPA statutory test governing public interest organization standing, it has standing to sue ‘without regard to whether it also satisfies traditional Article III standing requirements.’” (quoting *Hormel Foods Corp.*, 258 A.3d at 179)).

Consistent with this history, courts have found violation of statutory rights sufficient for public interest organizations to pursue CPPA claims in Superior Court even if the organization has not, itself, suffered Article III injury-in-fact. *See, e.g., Earth Island Inst. v. BlueTriton Brands*, 2022 D.C. Super. LEXIS 11, No. 2021 CA 003027 B, at *8-9 (D.C. Super. Ct. June 7, 2022) (stating subsection (k)(1)(D) “is intended to ‘confer maximum standing’ to public interest organizations”) (cleaned up).¹

But Supreme Court precedent is clear that statutory standing, such as that the D.C. Council created under subsection 28-3905(k)(1)(D), *does not* create an injury-in-fact under Article III. Rather, “Article III standing requires a concrete injury even in the context of a statutory violation.” *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016). Thus, a plaintiff does not automatically satisfy the injury-in-fact requirement whenever a statute grants a person a statutory right to bring suit. *See id.* at 341-42 (holding that a plaintiff cannot establish Article III standing simply by alleging a violation of a statute “divorced from any concrete harm”); *see also TransUnion LLC v.*

¹ *See also Organic Consumers Ass’n v. Noble Foods, Inc.*, 2020 D.C. Super. LEXIS 13, No. 2020 CA 002009 B, at *8 (D.C. Super. Ct. Aug. 25, 2020) (deprivation of “statutory right to bring a CPPA action” constituted “an injury-in-fact . . . sufficient to establish standing” in Superior Court); *Organic Consumer Ass’n v. Smithfield Foods, Inc.*, 2020 D.C. Super. LEXIS 28, No. 2020 CA 2566 B, at *12 (D.C. Super. Ct. Dec. 14, 2020) (organization had standing to pursue CPPA claim in Superior Court based on “statutory violation”).

Ramirez, 141 S. Ct. 2190, 2205 (2021) (reaffirming that Article III permits only plaintiffs “who have been concretely harmed by a defendant’s statutory violation” to proceed in federal court).

Under these precedents, CPPA claims cannot proceed in federal court absent a demonstration of “concrete injury” that satisfies Article III. *See, e.g., Woodford v. Yazam Inc.*, 2023 WL 8083975, at *6 (D.D.C. Nov. 21, 2023) (concluding that the “plaintiff cannot meet the irreducible constitutional minimum of standing by alleging merely that defendant violated the C[P]PA . . . without also alleging a [resulting] concrete injury” (cleaned up)); *Wheeler v. Panini America, Inc.*, 2022 WL 17039208, at *6 (D.D.C. Nov. 17, 2022) (“Even assuming that defendant’s [conduct] amounts to statutory violations of D.C. and federal law, that injury is too abstract to satisfy Article III standing’s injury-in-fact requirement.”).

Thus, while the CPPA authorizes plaintiffs like NACA to bring suit in D.C. Superior Court without demonstrating Article III standing, subsection 28-3905(k)(1)(D) does not, on its own, confer standing to proceed in federal court. *See Beyond Pesticides v. Dr Pepper Snapple Grp., Inc.*, 2019 WL 2744685, at *1 (D.D.C. July 1, 2019). Here, Gemini has not shown that the complaint alleges injury-in-fact sufficient to confer standing under Article III, nor has Gemini itself pled that NACA suffered such injury. The complaint does not allege that NACA ever signed the unlawful UA or was otherwise injured by Gemini’s practices. Rather, NACA is proceeding on behalf of D.C. consumers—a statutory basis that, alone, is insufficient under Article III. *See, e.g., Clean Label Project Found. v. Garden of Life, LLC*, 2021 WL 4318099, at *8 (D.D.C. Sept. 23, 2021) (dismissing case because organization seeking relief under CPPA failed to assert injury-in-fact and lacked Article III standing). And as shown below, Gemini’s proposed basis for Article III standing, associational standing, also fails.

2. Gemini has not shown that NACA has associational standing on behalf of its members.

Without any other basis to remove this case to federal court, Gemini incorrectly argues that NACA has associational standing on behalf of its members. But associational standing requires a demonstration that an organizations members have standing to sue in their own right, which doesn't exist here. This type of standing is found where an organization wants to litigate on behalf of its injured members because the organization and its membership share a common interest. *See AARP*, 226 F. Supp. 3d at 15 (D.D.C. 2016) (“[W]here an organization itself has not suffered an injury, but its members have, the organization may bring suit on behalf of its members.”). Associational standing is not what NACA has pleaded in its complaint, and Gemini has not plausibly alleged associational standing in its removal papers. Since Gemini has not shown an Article III injury-in-fact through associational standing, this case must be remanded.

Associational standing requires several showings. An organization bringing suit on behalf of its members must, as a starting point, “have the indicia of a traditional membership association.” *Viasat, Inc. v. F.C.C.*, 47 F.4th 769, 781 (D.C. Cir. 2022). Next, the organization must plausibly allege that (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. *Flyers Rights Educ. Fund, Inc. v. U.S. Dep’t of Transp.*, 957 F.3d 1359, 1361 (D.C. Cir. 2020) (citing *Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000)). Associational standing does not apply to organizations that bring actions for the benefit of non-members. *See Am. Legal Found. v. F.C.C.*, 808 F.2d 84, 89 (D.C. Cir. 1987).

Here, Gemini has not demonstrated the requisite indicia of a traditional membership organization or that NACA’s members have standing to sue in their own right. And, NACA has

brought this action on behalf of all D.C. consumers who use Gemini’s platform, not just its members. Gemini cannot show that associational standing exists.

a. Gemini has not shown that NACA bears the indicia of a “membership organization” for purposes of associational standing.

Gemini has not shown that NACA bears the traditional indicia of a “membership organization” for purposes of associational standing. Since Gemini bears the burden of showing removal is proper, Gemini must overcome this “threshold requirement.” *See Travelers United, Inc. v. Hilton Worldwide Holdings, Inc.*, No. 23-cv-3584-BAH, slip op. at 19-21 (D.D.C. June 7, 2024) (finding an advocacy group lacked associational standing because the removing party did not show it bore the traditional indicia of a membership organization). Its failure to do so ends the associational standing inquiry.

Being a “membership organization” for purposes of associational standing means more than just having members. *See Washington Legal Foundation v. Leavitt*, 477 F. Supp. 2d 202, 209 (D.D.C. 2007); *Travelers United*, slip op. at 19-21. Rather, the organization must serve a “discrete, stable group of persons with a definable set of common interests,” whose interests are represented in the litigation. *Am. Legal Found. v. FCC*, 808 F.2d 84, 90 (D.C. Cir. 1987). The inquiry “turns on considerations such as whether members finance the organization, guide its activities, or select its leadership.” *Viasat*, 47 F.4th at 781; *see also Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 344 (1977) (requiring that beneficiaries of associational standing bear the “indicia of membership in an organization” in that they elect organizational leadership, serve on its board, and finance its activities). “In *Viasat*, for example, the D.C. Circuit found that an environmental group, which provided ‘no insight into how it relates with its members,’ fell short of meeting this element.” *Travelers United*, slip op. at 19 (citing *Viasat*, F.4th at 781). *See also Gettman v. Drug Enf’t Admin.*, 290 F.3d 430, 435 (D.C. Cir. 2002) (finding magazine lacked associational standing

given absence of evidence that the readers and subscribers who would benefit from the suit “played any role in selecting its leadership, guiding its activities, or financing its activities”).

As discussed above, NACA’s membership consists virtually entirely of consumer protection lawyers. Thus, its members and the group of consumers who will be the beneficiaries of this litigation if successful are not the same group of people. Recognizing this, Gemini argues that NACA’s members include prominent attorneys who “broadly represent and are knowledgeable about the needs of its constituents.” NOR ¶ 33. Because NACA’s members are not the “discrete, stable group of persons with a definable set of common interests” on whose behalf the lawsuit has been brought, Gemini is forced to argue s that “[n]o purpose would be served by requiring NACA constituents to enroll as formal members.” NOR ¶ 32. But this is insufficient under applicable law.

If Gemini’s argument is correct, NACA’s “constituency” could comprise any consumer anywhere. But the D.C. Circuit has rejected the argument that an “open-ended” constituency can satisfy associational standing. *Am. Legal Foundation*, 808 F.2d at 90 (finding no associational standing where organization’s “open-ended” constituency could “purport to serve all who read newspapers, watch television, or listen to the radio”). Gemini cannot reconcile its admission that NACA’s members are not consumers and that its “constituency” is widespread and diverse with the foundational requirement that an organization serve a discrete and stable group to benefit from associational standing.

Gemini also alleges that NACA invites its members to share their stories with NACA and invites D.C. residents to sign up for its listserv. NOR ¶¶ 34-36. But these allegations fall short of the “indicia of membership” that courts in this Circuit require. True, NACA members overwhelmingly represent consumers. But the associational standing doctrine does not

contemplate that the federal courts could or should be open to an organization like NACA any time a litigation concerns any consumer anywhere, simply because NACA's attorney membership represents consumers or because NACA has invited them to share their clients' stories. *See Travelers United*, slip op. at 21 ("Plaintiff's mission and membership numbers are simply irrelevant to the inquiry of how plaintiff *relates* with its members."). Gemini has not shown and cannot show that this lawsuit is related to NACA's members other than tangentially.

Gemini relies on *Flyers Rights Education Fund*, but that case is distinguishable. There, the party seeking federal jurisdiction (the plaintiff) presented evidence of how airline passengers became members; that the organization was structured to "enable[] FlyersRights members to have direct input, and member input guides the organization's activity"; that "a majority of FlyersRights funding c[ame] directly from its members" (and that many members had contributed); and that FlyersRights "frequently" polled members to determine what issues and actions to pursue. *Flyers Rights Education Fund, Inc.*, 957 F.3d at 1362. Unlike the organization in *Flyers Rights*, Gemini has not presented evidence of the relationship between NACA, its membership, and this lawsuit. Its vague allegations that NACA members are knowledgeable about consumer issues and can share stories with NACA through NACA's website do not plausibly allege that the consumers who stand to benefit from this litigation control NACA's activities.

Although Gemini also cites two out-of-circuit cases to support its argument that a membership organization need not have members to satisfy associational standing, cases like *American Legal Foundation* and *Gettman* are controlling. Moreover, *Oregon Advocacy Center v. Mink* and *Doe v. Stincer* are distinguishable. In both cases, the organizations served specialized segments of the community, disabled individuals, who were the primary beneficiaries of the organizations' activities. *Oregon Advocacy Center v. Mink*, 322 F.3d 1101, 1111-12 (9th Cir.

2003); *Doe v. Stincer*, 175 F.3d 879, 886 (11th Cir. 1999). Here, in contrast, Gemini has not identified any “specialized segment” of the community, other than “consumers” generally, whom NACA serves and who would benefit from this litigation. The records in both cases showed that the organizations had enacted detailed grievance procedures for potential clients and that disabled people comprised a majority of their board and advisory councils, thereby demonstrating the constituency’s control over the organizations’ activities “in a very real sense.” *OAC*, 322 F.3d at 1112; *Doe*, 175 F.3d at 886. Gemini has made no equivalent showing of control over NACA’s activities by the primary beneficiaries of this lawsuit; its conclusory statement that consumers can “influence” NACA’s activities by sharing stories and receiving email updates does not rise to the same level of impact as majority board membership and grievance procedures—even if such activities satisfied the test under *American Legal Foundation*, which they would not.

Finally, contrary to Gemini’s assertion, NOR ¶ 32, NACA need not satisfy the indicia of a membership organization test to establish standing under the CPPA. While NACA must demonstrate a “sufficient nexus to the interests involved of the consumer or class” it seeks to represent, D.C. Code § 28-3905(k)(1)(D)(i), that test differs significantly from the indicia of membership inquiry under *Hunt* and its progeny. The “sufficient nexus” test does not turn on issues like whether the membership of an organization is involved in selecting its leadership, directing its activities, or financing its operations. Rather, that test ensures only that the organization “has a sufficient stake in the action to pursue it with the requisite zeal and concreteness,” which can be true regardless of whether an organization even *has* members. *See Hormel Foods Corp.*, 258 A.3d at 187 (finding nexus where organization alleged that had undertaken organizations, filing regulatory actions, and bringing or participating in legal challenges, without reference to members’ involvement in the organization); *Center for Inquiry*, 283 A.3d at 116 (finding nexus where

organization demonstrated “mission-driven opposition to homeopathy as pseudoscience” despite bringing suit “on behalf of the general public” rather than a discrete membership).

Instead, the D.C. Court of Appeals has made clear that a public interest organization need not show a nexus to “any particular consumers,” so long as it has a “nexus to the *interests* involved.” *Id.* at 117. And since a different provision of the CPPA, § 28-3905(k)(1)(C), “already expressly empowers a nonprofit organization to bring suit on behalf of itself or its members,” so “(k)(1)(D) would be pointless if it incorporated Article III’s restrictions.” *Hormel Foods Corp.*, 258 A.3d at 183. Thus, NACA can satisfy the prerequisites for standing under the CPPA without demonstrating indicia of a traditional membership organization under *Hunt*.

b. Gemini has not shown that any NACA member would have standing to sue in their own right.

Associational standing also fails because Gemini has not shown that any NACA member would have standing to sue in their own right. Even if an organization bears the traditional indicia of membership, associational standing only exists where an organization’s own members have suffered injury and the organization sues on their behalf. *Chamber of Commerce of U.S. v. E.P.A.*, 642 F.3d 192, 200 (D.C. Cir. 2011) (holding that the party seeking standing must “specifically identify members who have suffered the requisite harm”) (citing *Summers v. Earth Island Institute*, 555 U.S. 488, 496-98 (2009)).

As Gemini has not identified, or even plausibly alleged, any member of NACA who was or would be injured by Gemini’s alleged CPPA violations, it cannot show that Article III standing exists. *Chamber of Commerce*, 642 F.3d at 200 (“Because the Chamber has not identified a single member who was or would be injured . . . , it lacks standing to raise this challenge.”); *see also N.Y. Ctr. for Foreign Policy Affairs v. United States Dep’t of State*, 2024 WL 3400122, at *8 (D.D.C.

July 12, 2024) (finding no associational standing without demonstration that “alleged members would have standing to sue in their own right”); *Pharm. Rsch. & Mfrs. of Am. v. Dep’t of Health & Human Servs.*, 656 F. Supp. 3d 137, 149 (D.D.C. 2023) (explaining that the party advocating standing must show at least one specifically-identified member has suffered an injury-in-fact); *Public Citizen, Inc. v. Trump*, 297 F. Supp. 3d 6, 19 (D.D.C. 2018) (finding no standing where proponent “failed to meet their burden of plausibly alleging or proffering facts that, if accepted as true, would establish that they have standing to sue”); *Freedom Watch, Inc. v. McAleenan*, 442 F. Supp. 3d 180 (D.D.C. 2020) (finding no standing where organization did not “plausibly establish[] standing for one or more members”).

Although the Complaint describes D.C. consumers who signed Gemini’s unlawful UA, NACA has not alleged, and Gemini has not shown, that these consumers are part of NACA’s 1,500-person nationwide membership (most of whom are consumer protection lawyers). *See* Compl. ¶¶ 10, 21-22. The existence of assorted third-party consumers with Article III standing to assert claims against Gemini does not confer associational standing upon NACA. *See, e.g., Conservative Baptist Ass’n of Am., Inc. v. Shinseki*, 42 F. Supp. 3d 125, 134 (D.D.C. 2014) (“because [individuals as to whom complaint alleges harm] are not members of [the Conservative Baptist Association of America], it lacks associational standing to bring a claim on their behalf”); *see also Chamber of Commerce*, 642 F.3d at 200 (the existence of nonmembers with possible standing did not confer standing on Chamber of Commerce, even though it was acting on their behalf). In *Conservative Baptist*, the proponent of standing asserted that two individuals who were endorsed by the organization were harmed by the defendant’s actions. Yet there was no showing that either individual “participate[d] in selecting CBAA’s leadership or that they play a role in guiding or financing CBAA’s activities.” *Id.* at 133. Their mere “association with the churches

that comprise[d]” the organization in question was not sufficient evidence of their “membership” in the organization. *Id.* at 134. Likewise here: the fact that D.C. residents harmed by Gemini’s illegal UA are “consumers” does not establish that they “participated in selecting” the leadership of NACA, guided NACA’s activities, or financed those activities. *See id.* Since Gemini has not plausibly alleged the consumers referenced in the complaint are NACA members, it has not met its burden to show that associational standing exists.²

c. Associational standing does not exist where an organization brings suit on behalf of non-members.

Finally, Gemini has not and cannot shown that associational standing is appropriate where an organization like NACA brings suit to vindicate the rights of non-members.

A party seeking to establish associational standing cannot do so where the organization is acting on behalf of non-members. *See Am. Legal Found.*, 808 F.2d at 89.³ Thus, an action by an organization like NACA on behalf of consumers generally is not a proper predicate for associational standing. *See, e.g., Ohio State Troopers Ass’n, Inc.*, 2019 WL 9093460, at *8 (no associational standing where putative class was “not limited to [organizations’] members”); *In re: Takata Airbag Prods. Liab. Litig.*, 2016 WL 1266609, at *6 (S.D. Fla. Mar. 11, 2016) (“ARA [Automotive Recyclers Association] has not adequately alleged facts to support associational standing” because “most importantly, the Complaint does not limit the automotive recycler

² NACA does not dispute that the interests it seeks to vindicate in this lawsuit are germane to its purposes or that individualized participation by members is not required.

³ *See also Pa. Psychiatric Soc’y v. Green Spring Health Servs.*, 280 F.3d 278, 287 (3d Cir. 2002) (“Because the patients are not members of, or otherwise directly associated with, the [organization], [it] does not have associational standing to assert their claims.”); *McKinney v. U.S. Dep’t of Treasury*, 799 F.2d 1544, 1556 n.33 (Fed. Cir. 1986) (“The court correctly concluded that ILA [International Longshoremen’s Association] does not have [associational] standing to assert the interests of non-ILA members.”); *Ohio State Troopers Ass’n, Inc. v. Point Blank Enterprises, Inc.*, 2019 WL 9093460, at *8 (S.D. Fla. June 21, 2019) (“The law is clear that an association does not have associational standing to represent nonmembers[.]”).

putative classes only to ARA’s members” or “assert that all automotive recyclers are members of ARA”); *La Union Del Pueblo Entero v. Fed. Emergency Mgmt. Agency*, 2017 WL 2539451, at *20 (S.D. Tex. Feb. 15, 2017) (union did not have associational standing “to seek relief benefiting nonparties, regardless of whether they are [union] members”).

Here, NACA has not alleged an action on behalf of its members. Gemini may not rewrite NACA’s complaint to transform this action into a representative action on behalf of NACA’s membership; rather, this action was properly brought under the CPPA to vindicate the rights of D.C. consumers who were subjected to Gemini’s bad acts. Compl. ¶ 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.”). Gemini’s burden is to show that standing exists on the basis of NACA’s well-pled complaint—not to dictate that NACA bring this lawsuit on behalf of its members when that is not what NACA has alleged. *WE Charity v. Canadian Broad. Corp.*, 2023 WL 4198670, at *10 (D.D.C. June 7, 2023) (“a plaintiff is the master of its own complaint”); *see also Great N. Ry. Co. v. Alexander*, 246 U.S. 276, 282 (1918) (“in the absence of a fraudulent purpose to defeat removal, the plaintiff may by the allegations of his complaint determine the status with respect to removability of a case”).

B. Remand is required because Gemini fails to demonstrate that this state-law action confers federal question jurisdiction.

Separate and apart from Article III standing, remand is also required because Gemini has failed to demonstrate that this state-law action confers federal question jurisdiction. Contrary to Gemini’s assertions, the complaint, which contains only a single cause of action under the CPPA, does not raise “substantial” or “novel” questions of federal law giving rise to federal question jurisdiction under *Grable*.

1. Only a very narrow category of state-law cases assert “substantial” federal questions giving rise to federal jurisdiction.

Absent diversity jurisdiction (which Gemini has not asserted), a case may proceed in federal court only where the case “arises under” federal law. 28 U.S.C. § 1331. Thus, under the well-pleaded complaint rule, “federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” *Caterpillar*, 482 U.S. at 392 (1987); *see also Gunn v. Minton*, 568 U.S. 251, 257-58 (2013) (“Most directly, a case arises under federal law when federal law creates the cause of action asserted.”). The rule “makes the plaintiff the master of the claim,” because, in drafting the complaint, the plaintiff may “choose to avoid federal jurisdiction by exclusive reliance on state law.” *Caterpillar*, 482 U.S. at 392. It is a “powerful doctrine” that “severely limits the number of cases in which state law ‘creates the cause of action’ that may be initiated in or removed to federal court.” *Franchise Tax Bd. of State of Cal. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 21 n.22 (1983).

One “extremely rare” exception is the so-called *Grable* test, which applies only to a “special and small category of cases.” *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). The *Grable* test provides that federal question jurisdiction may exist over a state law claim when “a well-pleaded complaint establishes that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.” *Bender v. Jordan*, 623 F.3d 1128, 1130 (D.C. Cir. 2010) (cleaned up). A “substantial question of federal law,” in turn, exists where 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) (citing *Grable*, 545 U.S. at 313-314).

That resolution of a federal question is “necessary” to resolution of the state law claims

does not, without more, establish the presence of a substantial question of federal law under *Grable*. See *Gunn*, 568 U.S. at 258-259 (finding no federal question jurisdiction even though resolution of a federal patent question was “necessary” to the state law proceeding). Instead, the Supreme Court has recognized that many traditional state law causes of action, including those turning on federal statutes, properly belong in state court. “A general rule of exercising federal jurisdiction over state claims resting on federal . . . statutory violations would . . . herald[] a potentially enormous shift of traditionally state cases into federal courts.” *Grable*, 545 U.S. at 319. And where cases involve substantial questions of state as well as federal law, federal jurisdiction is disfavored. See *Empire Healthchoice*, 547 U.S. at 701.

2. Gemini has not shown that NACA’s CPPA claims raise a “substantial federal issue” within the meaning of *Grable*.

Gemini has not shown that federal question jurisdiction exists because its notice of removal does not demonstrate that NACA’s CPPA claims raise a “substantial federal issue” within the meaning of *Grable*. See *Gunn*, 568 U.S. at 260-264 (concluding that actually-disputed federal issue, which was “necessary” to resolution of state law claims, was nevertheless not “substantial in the relevant sense”).

The complaint alleges that Gemini’s UA violates the CPPA because it contains provisions that violate EFTA. Thus, NACA does not dispute that resolution of whether Gemini is subject to EFTA and whether those contractual provisions are inconsistent with EFTA are “necessary” to NACA’s claims. These issues are also “actually disputed.” Nevertheless, “it is not enough that the federal issue be significant to the particular parties in the immediate suit; that will *always* be true when the state claim ‘necessarily raise[s]’ a disputed federal issue, as *Grable* separately requires.” *Gunn*, 568 U.S. at 260 (emphasis in original). Instead, the “substantiality” inquiry under *Grable* looks to the “importance of the issue to the federal system as a whole.” *Gunn*, 568 U.S. at 260; see

also *MobilizeGreen, Inc. v. Community Found. for Nat'l Cap. Region*, 101 F. Supp. 3d 36, 45 (D.D.C. 2015). According to the Supreme Court, the two paradigmatic examples of “substantial” federal questions arising from a state-law claim are (1) the federal government’s 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. *See Empire Healthchoice*, 547 U.S. at 700.

Here, where no government action or constitutional questions are in play, Gemini has not shown that resolution of whether its UA runs afoul of D.C. consumer protection law is important to the federal system as a whole. The complaint alleges that Gemini’s UA violates the CPPA because it contains illegal terms: those that are inconsistent with EFTA and which violate EFTA by purporting to waive its requirements. Yet to prevail, NACA need not prove that Gemini has violated EFTA with respect to any consumer. And while the Superior Court will need to decide whether Gemini is subject to EFTA, Congress has not mandated that *only* federal courts may decide such issues under EFTA. Federal courts generally assume that state courts are competent to adjudicate federal issues. *See Empire Healthchoice*, 547 U.S. at 701 (noting that state courts are “competent to apply federal law”). The fact that resolution of NACA’s CPPA claim requires a state court to consider a federal statute does not, itself, transform the issue into a “substantial” one. *See Gunn*, 568 U.S. at 261-64.

Gunn’s controlling analysis is instructive. There, the Supreme Court held that federal jurisdiction did not exist in a state-law malpractice claim arising from a patent case gone wrong, even though the state court would be required to adjudicate the hypothetical patent case in order to evaluate the legal malpractice claims. Although resolution of the patent law questions was necessary—and even though Congress conferred exclusive jurisdiction over patent issues in federal court—the Court made clear that the parties’ dispute was “substantial” under *Grable*. In so

doing, the Court rejected each argument that Gemini has raised here.

First, the court explained that allowing state courts to resolve these issues would not undermine the development of a uniform body of patent law. *Gunn*, 568 U.S. at 262. Rather, the state courts “could be expected to hew closely to the pertinent federal precedents,” which would apply had the hypothetical patent case occurred. *Id. See also, e.g., Rios v. Friendly Hills Bank*, 2017 WL 3530348, at *6 (C.D. Cal. Aug. 16, 2017) (noting that state courts interpreting federal statutes are likely to be guided by federal court interpretations of the law). Likewise here: the Superior Court can be expected to hew closely to the existing federal cases interpreting EFTA, which will be equally available to the court as they would if an individual consumer brought an EFTA case against Gemini in this forum.

Next, the *Gunn* Court noted that the “more novel questions of patent law” that could arise in the state court action would “at some point be decided by a federal court, . . . laying to rest any contrary state court precedent.” *Gunn*, 568 U.S. at 262. And if the issue did not arise “frequently” in federal court, it was “unlikely to implicate substantial federal issues.” *Id. See also A.G. v. Riverside Christian Ministries, Inc.*, 2023 WL 6443118, at *5 (S.D. Fla. Oct. 3, 2023) (rejecting federal jurisdiction where the state court claim would not “settle once and for all” a substantial federal question that would govern numerous cases). So too here: other federal courts are likely to continue to weigh in on whether cryptocurrency platforms like Gemini are subject to EFTA. And if the issue does not arise “frequently,” then it is “unlikely to implicate substantial federal issues” within the meaning of *Grable*. *See Gunn*, 568 U.S. at 262.

Finally, the *Gunn* Court rejected the suggestion that the federal courts’ familiarity with patent law was a good reason to find standing. *Gunn*, 568 U.S. at 263 (“Nor can we accept the suggestion that the federal courts’ greater familiarity with patent law means that legal malpractice

cases like this one belong in federal court.”). And if that is true in a case involving patent law—to which, again, Congress has granted exclusive jurisdiction to the federal courts—then it is surely true in a case involving EFTA. *See id.*; *see also, e.g., Empire Healthchoice*, 547 U.S. at 683 (noting that federal courts “should await a clear signal from Congress” before treating traditionally state-law claims as “arising under” the laws of the United States). Moreover, the D.C. courts have greater expertise and interest in interpreting and applying the CPPA, and in seeing D.C. consumer protection laws properly enforced, than the federal system. *See Allergan, Inc. v. Ferrum Ferro Cap., LLC*, 2015 WL 12670417, at *8 (C.D. Cal. Dec. 28, 2015) (rejecting federal jurisdiction where “California Legislature enacted the three statutes that provide the sole basis for Plaintiffs’ claims” and noting that state courts had greater expertise on California unfair competition and other tort laws).

Gemini’s arguments do not compel a different conclusion. First, whether EFTA applies to a cryptocurrency exchange is not particularly “novel,” nor is it a question of first impression—even if those factors were sufficient to establish substantiality, which they are not. Several courts within the Southern District of New York have decided that question, albeit as to a different relatively minor cryptocurrency platform. *See Yuille v. Uphold HQ Inc.*, 686 F. Supp. 2d 323 (S.D.N.Y. 2023); *Rider v. Uphold HQ, Inc.*, 657 F. Supp. 3d 491 (S.D.N.Y. 2023); *Nero v. Uphold HQ, Inc.*, 688 F. Supp. 3d 134 (S.D.N.Y. 2023). In addition to the existing court cases, the CFPB is exploring the possibility of additional guidance. *See* NOR ¶ 14.

These circumstances are leagues apart from the circumstances of *Grable* and *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921), in which the Supreme Court found the existence of a “substantial” federal question because the issues raised in the lawsuit had broad implications for the federal government. In *Grable*, the plaintiff alleged that title to a parcel of land

was defective because the Internal Revenue Service had failed to provide a notice required under federal law; the meaning of the federal tax provision in question was an “important issue of federal law” that belonged in federal court because of the potential effects on millions of taxpayers and the federal government’s own “strong interest in the prompt and certain collection of delinquent taxes.” *Grable*, 545 U.S. at 315. In *Smith*, the plaintiff alleged that a defendant corporation could not lawfully buy government bonds that were issued unconstitutionally. The principal issue in the case was the federal constitutionality of the bond issue, raising a “serious federal issue.” *Smith*, 255 U.S. at 312-13. In both cases, the Court’s inquiry focused not on the interests of the litigants themselves, or even on particular industries, but on “the broader significance of the notice question for the Federal Government.” *Gunn*, 568 U.S. at 260.

Here, Gemini has not made any showing that the resolution of NACA’s claim has any significance for the federal government or the federal system as a whole. *See Empire Healthchoice*, 547 U.S. at 681 (finding no federal jurisdiction where the state law claim was not triggered by any action of the federal government, but by a state law personal-injury case). The federal government is not involved; no agency action is implicated; there is no likely follow-on effect with implications for issues of federal importance, like tax collection. *See Grable*, 545 U.S. at 315. Without that showing, Gemini has not shown that the narrow *Grable* exception applies or that this Court has subject matter jurisdiction.

V. NACA requests attorneys’ fees and costs.

28 U.S.C. § 1447 authorizes “just costs and any actual expenses, including attorney fees, incurred as a result of the removal.” Fees may be granted when the removing party “lacked an objectively reasonable basis for seeking removal.” *Martin v. Franklin Cap. Corp.*, 546 U.S. 132, 141 (2005). Even then, “district courts retain discretion to consider whether unusual circumstances warrant a departure from the rule in a given case” in furtherance of the purpose of fee-shifting

under Section 1447(c), which is to “reduce[] the attractiveness of removal as a method for delaying litigation and imposing costs on the plaintiff.” *See id.* at 140-41.

“Courts have uniformly held that ‘a relevant factor for imposing costs and expenses is whether the removing party contradicts well-settled law in attempting to remove the case to federal court.’” *Burton v. Coburn*, 2005 WL 607912, at *2 (D.D.C. Mar. 16, 2005) (citation omitted). Therefore, “if non-removability is obvious or contrary to well-settled law, courts regularly impose costs and expenses incurred as a result of the removal.” *Id.* (citation omitted); *see, e.g., Johnson-Brown v. 2200 M St. LLC*, 257 F. Supp. 2d 175, 181 (D.D.C. 2003) (granting costs and expenses where arguments in favor of applying corporate citizenship to LLC were “dubious at best, if not disingenuous”).

Here, Gemini’s proposed basis for Article III standing is objectively unreasonable from the face of NACA’s Complaint and/or contradicts well-established law. *Supra* § IV(A). Gemini’s argument that NACA has associational standing under Article III contradicts well-established law that an organization cannot assert associational standing when none of its members have been harmed and it brings claims on behalf of nonmembers. *Id.*

Because its arguments for Article III standing are contrary to NACA’s allegations and established law, Gemini lacks “an objectively reasonable basis for seeking removal.” *Martin*, 546 U.S. at 141; *Burton*, 2005 WL 607912, at *2. Standing is so fundamental to federal subject-matter jurisdiction that it was objectively unreasonable for Gemini to seek removal absent allegations supporting standing in NACA’s Complaint or any legally viable basis for federal standing. For this reason, the Court should award NACA reasonable fees and costs incurred in bringing its remand motion, as this is exactly the type of scenario that justifies such an award. If the Court nonetheless deems Gemini’s attempt at removal reasonable or a close call (it is not), it should still grant

NACA's request for fees and costs in order to deter companies from exploiting removal as a way to encumber nonprofit organizations that seek relief under state consumer protection statutes in state courts.

VI. CONCLUSION

D.C. consumer protection claims belong in D.C. courts. Gemini has not pled facts showing that associational standing—or any other kind of Article III standing—exists, which itself requires remand. And remand is separately warranted because Gemini has not shown that subject matter jurisdiction exists, since it has not demonstrated the existence of a substantial federal question. In the absence of jurisdiction and standing, this case cannot proceed in federal court. NACA respectfully requests that the Court grant this motion to remand and its attorneys' fees incurred in responding to the removal.

Dated: September 13, 2024

Respectfully Submitted,

/s/ Katherine M. Aizpuru

Katherine M. Aizpuru (DC Bar No. 1022412)

Peter Silva (DC Bar No. 1010483)

TYCKO & ZAVAREEI LLP

2000 Pennsylvania Avenue, NW, Suite 1010

Washington, DC 20006

Telephone: (202) 973-0900

Facsimile: (202) 973-0950

kaizpuru@tzlegal.com

psilva@tzlegal.com

Janet R. Varnell, FBN: 0071072 (pro hac vice to be filed)

VARNELL & WARWICK, P.A.

400 N. Ashley Drive, Suite 1900

Tampa, FL 33602

Telephone: (352) 753-8600

Facsimile: (352) 504-3301

jvarnell@vandwlaw.com

Daniel A. Schlanger

(pro hac vice forthcoming)

SCHLANGER LAW GROUP, LLP

60 East 42nd Street, 46th Floor
New York, NY 10165
Telephone: 212.500.6114
Facsimile: 646.612.7996
dschlanger@consumerprotection.net