Appeal No. 25-CV-0789

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

GEMINI TRUST COMPANY, LLC,
Appellant,
v.

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, INC.,
Appellee.

On Appeal from the Superior Court of the District of Columbia Civil Case No. 2024-CAB-003999
(The Honorable Maribeth Raffinan)

BRIEF FOR APPELLANT

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RULE 28(a)(2) STATEMENT

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Appellant Gemini Trust Company, LLC is not a "nongovernmental corporate party" and thus this Court's Rule 26.1 does not require any disclosure with respect to it.

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INTRODUCTION

Appellee is a self-styled group of attorneys and consumer advocates that brought this action not to remedy any harm to itself or the group's members, but rather sued "*on behalf of*" consumers in the District. App. 18 (¶ 63) (emphasis added). In the proceedings below, however, the superior court afforded Appellee a remedy that is unavailable to any of the consumers whose interests it purports to represent. That result is not authorized by statute, conflicts with applicable federal law, and defies common sense. The order below should be reversed.

Appellee National Association of Consumer Advocates, Inc. (NACA) brought this lawsuit against Appellant Gemini Trust Company, LLC alleging that Gemini's User Agreement—*i.e.*, Gemini's private contract with its customers—violates the D.C. Consumer Protection Procedures Act (CPPA), D.C. Code § 28-3901 *et seq.* NACA did not sue on its own behalf. Rather, NACA invoked D.C. Code § 28-3905(k)(1)(D), which permits a "public interest organization" to bring an action "on behalf of the interests of a consumer or a class of consumers" and to "represent those interests" in the litigation. D.C. Code § 28-3905(k)(1)(D)(i), (ii). Significantly, the statute permits the organization to sue only "if the consumer or class could bring an action" for the same relief. D.C. Code § 28-3905(k)(1)(D)(i). Thus, as this Court has recognized, "the text of the public interest organization provision explicitly ties itself to the private right of action for individual consumers," *Client Earth v.*

Washington Gas Light Co., 343 A.3d 21, 31 (D.C. 2025), and confines the organization's standing to cases where it can "identify 'a consumer or a class of consumers' that could bring suit *in their own right*," *Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174, 185 (D.C. 2021) (emphasis added) (quoting D.C. Code § 28-3905(k)(1)(D)(i)).

NACA's lawsuit invokes this carefully circumscribed form of standing, but does not recognize its express limitations. The User Agreement, which all Gemini Users executed, includes a provision expressly requiring that "any controversy, claim, or dispute arising out of or relating to this User Agreement . . . be settled solely and exclusively by binding arbitration." App. 130 (¶ 8); App. 305. Gemini therefore moved to compel arbitration of NACA's lawsuit, arguing that NACA, as the Users' representative, was required to arbitrate its CPPA claims just as Users would be if they were named as plaintiffs.

The superior court acknowledged that, if NACA were "stand[ing] in place of" the Gemini Users, NACA would be "required to go to arbitration," because "individuals who agree to arbitrate should not be permitted to evade the consequences of their own contractual obligations by assigning (and funneling) their claims to a representative." App. 400. But the court nonetheless denied Gemini's motion on the startling ground that NACA—which, it bears repeating, expressly brought suit "*on behalf of* all District of Columbia Gemini users," App. 18 (¶ 63)

(emphasis added)—is not actually suing in a representative capacity. Accordingly, the superior court held, NACA can sue on behalf of Gemini users but is free of the arbitration requirement that would unquestionably bind the very Gemini users whose "interests" NACA is claiming to assert.

That conclusion is unsustainable. The CPPA's text and structure make clear that a public interest organization suing under Section 28-3905(k)(1)(D) does so in a purely representative capacity. Indeed, in this case, NACA has affirmatively disclaimed any cognizable injury of own. Its claim is therefore entirely derivative of the claim that NACA alleges *Gemini Users* have under the CPPA. And this Court's decisions have explained that public interest organizations invoking this statute have "representational standing," *Animal Legal Def. Fund*, 258 A.3d at 181, and are on "equal footing" with the consumers whom they purport to represent, *Client Earth*, 343 A.3d at 31. The superior court's decision—which privileges public interest organizations by exempting them from arbitration agreements that would be binding in a suit brought by individual consumers—is irreconcilable with that settled understanding. It should be reversed.

JURISDICTION

The superior court entered an order denying Gemini's motion to compel arbitration on August 7, 2025. App. 389-408. Gemini timely filed a notice of appeal from that decision on August 18, 2025. App. 409-10. The jurisdiction of this Court

rests on D.C. Code § 16-4427(a)(1), which provides that "[a]n appeal may be taken from . . . [a]n order denying . . . a motion to compel arbitration."

STATEMENT OF THE ISSUE

Whether the superior court erred in holding that NACA, a public interest organization that seeks to bring suit under the CPPA "on behalf of the interests" of Gemini's Users and may bring such a claim only if the Gemini Users "could bring an action" for the same relief under the CPPA, D.C. Code § 28-3905(k)(1)(D)(i), is permitted to pursue this litigation in court even though Gemini's Users are bound by agreements to arbitrate claims against Gemini seeking the same relief.

STATUTORY PROVISION INVOLVED

D.C. Code § 28-3905 provides in pertinent part:

Complaint procedures.

* * * * *

(k)(1)(A) A consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District.

(B) An individual may, on behalf of that individual, or on behalf of both the individual and the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District when that trade practice involves consumer goods or services that the individual purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.

(C) A nonprofit organization may, on behalf of itself or any of its members, or on any such behalf and on behalf of the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District, including a violation involving consumer goods or services that

the organization purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.

(D)(i) Subject to sub-subparagraph (ii) of this subparagraph, a public interest organization may, on behalf of the interests of a consumer or a class of consumers, bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District if the consumer or class could bring an action under subparagraph (A) of this paragraph for relief from such use by such person of such trade practice.

(ii) An action brought under sub-subparagraph (i) of this subparagraph shall be dismissed if the court determines that the public interest organization does not have sufficient nexus to the interests involved of the consumer or class to adequately represent those interests.

* * * * *

STATEMENT OF THE CASE AND THE FACTS

A. Gemini's User Agreement

Gemini operates an online platform that allows users to buy, sell, transfer, and store cryptocurrencies. App. 7 (¶ 1), 129 (¶ 3). To access Gemini's platform, potential users must create and register a Gemini account and agree to the terms of the User Agreement. App. 7 (¶ 2), 129-30 (¶¶ 3, 5). As part of that process, potential users are presented with a disclosure that reads: "By clicking the 'Create account' button, you agree to Gemini's USER AGREEMENT and PRIVACY POLICY." App. 129 (¶ 5); App. 134. That text appears directly above the "create account" button that potential users press to continue with the registration process. App. 129 (¶ 5); *see also* App. 134. The phrases "USER AGREEMENT" and "PRIVACY POLICY" are capitalized, underlined, and hyperlinked to the full text of the

respective documents on Gemini's website so that a potential user can read and review the documents before proceeding. App. 134. Every Gemini User with an address in the District of Columbia has accepted the User Agreement. App. 130 (¶ 7); *see also* App. 135-251.

The User Agreement has always included an arbitration requirement, which states that "[the User] and Gemini agree and understand that any controversy, claim, or dispute arising out of or relating to this User Agreement or [the User's] relationship with Gemini—past, present, or future—shall be settled solely and exclusively by binding arbitration." App. 130-31 (¶ 8); *see also* App. 305. The User Agreement also includes an express waiver of class and representative actions, which reads:

> You and Gemini agree to arbitrate solely on an individual basis, and agree and understand that this User Agreement does not permit class action or private attorney general litigation or arbitration of any claims brought as a plaintiff or class member in any class or representative arbitration proceeding or litigation.

App. 131 (¶ 9); *see also* App. 311 (bold text). And the User Agreement includes a choice of-law clause selecting New York law to govern all actions arising out of or related to the User Agreement. App. 305.

B. This Litigation

1. In June 2024, NACA brought this action under the CPPA "on behalf of all District of Columbia Gemini users who have been subject to Gemini's [allegedly]

unfair and deceptive trade practices." App. 18 (¶ 63). Broadly speaking, NACA alleged that the User Agreement violates the CPPA because, NACA claims, the User Agreement violates the federal Electronic Funds Transfer Act (EFTA), 15 U.S.C. § 1693 *et seq.* *See* App. 8, 11-17 (¶¶ 3, 26-52, 55-58). More particularly, NACA alleged that the User Agreement misrepresents the Gemini Users' rights and obligations relating to unauthorized access to their accounts and violates the EFTA, which thereby creates unfair and deceptive trade practices under the CPPA. *See* App. 18 (¶ 67). NACA sought an order permanently enjoining Gemini from enforcing the challenged provisions of the User Agreement, a declaration that those provisions violate the EFTA and CPPA, and an award of NACA's reasonable attorney's fees and costs. App. 19 (¶ 70).

NACA is not itself a Gemini User and therefore does not assert any injury of its own resulting from the allegedly unlawful provisions of the Gemini User Agreement. Accordingly, NACA has not pursued a claim under the CPPA's individual private cause of action for injured consumers. *See* D.C. Code § 28-3905(k)(1)(A) ("A consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District."); *see also Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174, 184-85 (D.C. 2021) (explaining that subparagraph (A)'s individual cause of action tracks the conventional Article III standing requirement of an injury in fact).

Instead, NACA asserted its claim under D.C. Code § 28-3905(k)(1)(D), which creates a form of representational standing for statutorily defined "public interest organizations" that is expressly tied to the individual cause of action created by subparagraph (A). *See* App. 17 (¶¶ 57, 61). In particular, subparagraph (D) provides that:

> a public interest organization may, on behalf of the interests of a consumer or a class of consumers, bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District if the consumer or class could bring an action under subparagraph (A) of this paragraph for relief from such use by such person of such trade practice.

D.C. Code § 28-3905(k)(1)(D)(i); *see also* D.C. Code § 28-3901(a)(15) (defining "public interest organization" to mean "a nonprofit organization that is organized and operating, in whole or in part, for the purpose of promoting interests or rights of consumers"). Expressly recognizing the representative capacity in which a public interest organization may sue, the statute tethers the public interest organization's standing to its ability to further the interests it purports to represent by requiring dismissal if the court "determines that the public interest organization does not have sufficient nexus to the interests involved of the consumer or class to *adequately represent those interests*." D.C. Code § 28-3905(k)(1)(D)(ii) (emphasis added). In such an action, moreover, any monetary remedies recovered are directed "to the consumer," D.C. Code § 28-3905(k)(2), rather than to the public interest organization or the public at large.

2. Gemini removed this action to the U.S. District Court for the District of Columbia. *See National Ass'n of Consumer Advocs. v. Gemini Tr. Co.*, 757 F. Supp. 3d 59, 61 (D.D.C. 2024). The district court, however, held that it had no jurisdiction because "NACA lacks Article III standing to sue on behalf of D.C.-based Gemini users," *id.* at 64, and therefore remanded the action to the superior court, *see id.* at 65. Pursuant to 28 U.S.C. § 1447(d), that decision was not appealable. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 229-30 (2007).

3. Following remand, Gemini answered NACA's complaint, App. 86-97, and thereafter moved to compel arbitration, App. 97-348. In that motion, Gemini argued that, although NACA had not itself executed an arbitration agreement with Gemini, NACA was pursuing its claim in a purely representational capacity on behalf of the Gemini Users. This conclusion followed, Gemini explained, from D.C. Code § 28-3905(k)(1)(D)'s requirements that any such action (i) be "on behalf of the interests" of Gemini Users and (ii) proceed only to the extent the Users could themselves "bring an action" to remedy the same alleged violations of the CPPA. Those express statutory constraints, Gemini argued, required that NACA likewise be bound by the Gemini User Agreement's arbitration obligation. App. 114-16.

The superior court denied Gemini's motion. *See* App. 389. The court held that NACA is not bound to the arbitration clause and thus required to arbitrate its claim because (i) NACA is not a party to the User Agreement; and (ii) the CPPA confers

standing on NACA to bring suit in its own right on behalf of consumers' interests rather than as the consumers' representative. App. 395-401. The superior court acknowledged that, if NACA were standing in the place of the Users—as their representative—then NACA would be required arbitrate, because "individual consumers who agree to arbitrate should not be permitted to evade the consequences of their own contractual obligations by assigning (and funneling) their claims to a representative." App. 396. The court concluded, however, that NACA was not litigating "as a mere representative or assignee of the individual users . . . but rather in its own right on behalf of consumer interests generally." App. 401. The court also concluded that, despite the Gemini Users' agreements to arbitrate, the Users nonetheless "could bring an action" under the CPPA, D.C. Code § 28-3905(k)(1)(D)(i), on the theory that Users could (improperly) *file* such an action, at which point it would be incumbent upon Gemini to move to compel arbitration. App. 400.

Gemini timely noticed an appeal from the superior court's order denying Gemini's motion to compel arbitration. App. 409-10; *see also* D.C. Code § 16-4427(a)(1) (authorizing an immediate appeal from "[a]n order denying . . . a motion to compel arbitration").

SUMMARY OF ARGUMENT

A. NACA is required to arbitrate its CPPA claim against Gemini because the Gemini Users that NACA purports to represent are bound by agreements to arbitrate any CPAA claims against Gemini seeking the same relief. Under the CPAA, a public interest organization steps into the shoes of an individual consumer or a class of consumers to litigate in a purely representative capacity. Because NACA's claim is entirely derivative of the Gemini Users' claims, NACA is also required to arbitrate.

B. The superior court's rationale for adopting a contrary conclusion lacks merit.

1. The text and structure of the CPAA, along with this Court's precedent, make clear that the CPAA's "public interest organization provision" is "explicitly tie[d] . . . to the private right of action for individual consumers." *Client Earth v. Washington Gas Light Co.*, 343 A.3d 21, 31 (D.C. 2025). Because NACA is invoking "representational standing," *Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174, 181 (D.C. 2021), it must abide by the arbitration agreements of the parties it is seeking to represent.

2. The superior court erred in concluding that the Gemini Users' "could bring an action" under the CPAA because they might violate their arbitration agreements by filing a complaint in court, at which point Gemini would be required to move to compel arbitration. Nothing about that reasoning undermines the fundamentally

representational nature of NACA's standing in this case. And if the superior court's reading were accepted, it would produce anomalous consequences far beyond the arbitration context by allowing a public interest organization to sue even when all consumers subject to a challenged practice have settled and released their claims.

3. In all events, the superior court's reading of the CPAA would be preempted by the FAA. At bottom, the superior court's construction of Section 28-3905(k)(1)(D) authorizes a *de facto* assignment of consumers' claims, *minus* application of the FAA's arbitration mandate. The FAA's federal policy in favor of arbitration is incompatible with this kind of obvious circumvention.

STANDARD OF REVIEW

The superior court's decision denying Gemini's motion to compel arbitration is reviewed de novo. *See Bank of Am., N.A. v. District of Columbia*, 80 A.3d 650, 667 (D.C. 2013).

ARGUMENT

THE SUPERIOR COURT ERRED BY REFUSING TO ENFORCE THE GEMINI USER AGREEMENT'S ARBITRATION CLAUSE

A. Because NACA Seeks To Bring Suit As A Representative Of The Gemini Users, It Is Bound By The Gemini Users' Arbitration Agreements

Under the Federal Arbitration Act, contractual agreements to arbitrate are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. The FAA thus establishes—

and requires courts to enforce—"a national policy favoring arbitration when the parties contract for that mode of dispute resolution." *Preston v. Ferrer*, 552 U.S. 346, 349 (2008) (internal quotation marks omitted).[1]

This case arrives before this Court on the assumption that the arbitration clause in Gemini's User Agreement would require arbitration if a Gemini User brought a CPPA claim on exactly the same facts as NACA alleges here. The arbitration clause requires arbitration of "any controversy, claim, or dispute arising out of or relating to this User Agreement or [the User's] relationship with Gemini—past, present, or future." App. 130 (¶ 8); App. 305. And although NACA pressed a (meritless) challenge to the enforceability of the arbitration clause, App. 376-77, the superior court did not reach that question in its order resolving Gemini's motion to compel arbitration.

NACA's own complaint acknowledges that it brought this suit in a purely representative capacity "on behalf of all District of Columbia Gemini users who have been subject to Gemini's [allegedly] unfair and deceptive trade practices." App. 18 (¶ 63). That understanding is consistent with—indeed, required by—D.C. Code § 28-3905(k)(1)(D), which this Court has described as creating a form of

[1] As the superior court observed, *see* App. 372, the FAA supplies the rule of decision here because, under D.C. law, "[a] provision for mandatory binding arbitration within a consumer arbitration agreement is void and unenforceable except to the extent federal law provides for its enforceability," D.C. Code § 16-4403(d).

"representational standing." *Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174, 181 (D.C. 2021). Under that provision, NACA is bringing suit "*on behalf of the interests of* a consumer or a class of consumers," and NACA's suit may proceed only if the represented "consumer or class *could bring an action*" to challenge the same trade practice. D.C. Code § 28-3905(k)(1)(D)(i) (emphasis added). Further underscoring the representative nature of a public interest organization's standing, the CPPA requires dismissal "if the court determines that the public interest organization does not have sufficient nexus to the interests involved of the consumer or class to *adequately represent those interests*." D.C. Code § 28-3905(k)(1)(D)(ii) (emphasis added). The statutory intent is thus clear: NACA has standing to sue here only in a *representative* capacity on behalf of Gemini Users.

Because NACA is proceeding as the Gemini's Users' representative, it is bound by their agreement to arbitrate their claims against Gemini. *See Travelers United, Inc. v. Hilton Worldwide Holdings, Inc.*, No. 2023-CAB-5813, slip op. 9 (D.C. Super. Ct. Jan. 13, 2025) (holding that public interest organization was bound by consumers' forum-selection agreements, because otherwise "a plaintiff could avoid a valid forum selection clause simply by having a representative nonparty file the action" (quoting *Net2phone, Inc. v. Superior Ct.*, 109 Cal. App. 4th 583, 589 (Cal. Ct. App. 2003)), appeal pending, No. 25-CV-0079 (docketed Jan. 23, 2025).

That conclusion is grounded in basic contract law, which provides that "an assignee never stands in any better position than his assignor" and "is subject to all the equities and burdens which attach to the property assigned because he receives no more and can do no more than his assignor." *International Ribbon Mills, Ltd. v. Arjan Ribbons, Inc.*, 325 N.E.2d 137, 139 (N.Y. 1975); *see also, e.g.*, *Government Emps. Ins. v. Grp. Hospitalization Med. Servs.*, 602 A.2d 1083, 1086 (D.C. 1992) (noting that "[a] subrogee acquires *no greater rights* than those possessed by the subrogor" (internal quotation marks omitted)).

The principle has been repeatedly applied in cases like this one, where a plaintiff attempts to litigate derivatively on behalf of another party who has agreed to arbitrate the underlying claim. *See, e.g.*, *In re Labatt Food Serv., L.P.*, 279 S.W.3d 640, 646 (Tex. 2009) (because wrongful death action was "entirely derivative of the decedent's rights," plaintiff beneficiaries "st[oo]d in [decedent's] legal shoes and [we]re bound by his agreement"); *Ballard v. Southwest Detroit Hosp.*, 327 N.W.2d 370, 371 (Mich. 1982) (wrongful death action governed by decedent's arbitration agreement because the "action brought by the personal representative is a derivative one, and the representative in effect stands in the shoes of the decedent").[2] Indeed,

[2] Courts' treatment of arbitration agreements in the wrongful-death context is particularly illuminating. In some states, courts have understood their wrongful-death statutes to confer an *independent* cause of action on the decedent's beneficiaries. *See GGNSC Admin. Servs., LLC v. Schrader*, 140 N.E.3d 397, 402 (Mass. 2020) (collecting authorities). On that understanding, the beneficiaries are

the principle is so well-settled that, although NACA argued below that it is not properly understood to be a representative of the Gemini Users, NACA has never disputed that a representative litigant is bound by the arbitration obligation of the underlying party it seeks to represent. *See* App. 360-62.

B. The Superior Court's Contrary Reasoning Is Meritless

In addressing Gemini's motion to compel arbitration, the superior court acknowledged that, "[i]f NACA's role in bringing its claims is purely to stand in place of individual consumers who are parties to the [Gemini User Agreement], then it would appear that NACA is required to go to arbitration." App. 396. The court

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generally not bound by the decedent's arbitration agreement. *See id.* By contrast, statutes in other states create a *derivative* cause of action tied to the decedent's underlying claim for the injury that caused his death, in which case beneficiaries are held to be bound by a decedent's arbitration obligation. *See id.*; *see also id.* at 403-06 (construing Massachusetts's statute to create a derivative cause of action that is subject to a decedent's arbitration agreement). States in the latter category have reached that conclusion based on the particular language of their statutes, even though the overriding intent of any wrongful-death statute is to provide compensation to the beneficiaries for a real harm that they suffer from a decedent's death. The Texas Supreme Court, for example, has explained that "damages for a wrongful death action are for the exclusive benefit of the beneficiaries and are meant to compensate them for their own personal loss." *In re Labatt Food Serv., L.P.*, 279 S.W.3d at 646. The court nonetheless held that Texas's statute, which allows beneficiaries to pursue a claim "only if the individual injured would have been entitled to bring an action for the injury if the individual had lived," Tex. Civ. Prac. & Rem. Code § 71.003(a), creates an "entirely derivative cause of action" that is subject to a decedent's arbitration agreement. *In re Labatt Food Serv., L.P.*, 279 S.W.3d at 646. Here, because NACA is pursuing a derivative cause of action and has not suffered any real-world harm at all, it follows *a fortiori* that NACA is bound by the arbitration obligations of the Gemini Users that NACA seeks to represent.

agreed that "individual consumers who agree to arbitrate should not be permitted to evade the consequences of their own contractual obligations by assigning (and funneling) their claims to a representative who brings a judicial suit premised on the individual users' rights under the User Agreement." *Id.*

The court nonetheless denied Gemini's motion because it concluded that "the CPPA confers standing on NACA to litigate on behalf of consumer interests generally such that NACA is not standing in the shoes of individual users of Gemini's platform." App. 399. And the court concluded that NACA had properly identified a "consumer or class" that "could bring an action" for the same relief. D.C. Code § 28-3905(k)(1)(D)(i). The court reasoned that, because Gemini's Users could (improperly) *file* a suit in court in the face of their agreement to arbitrate, the statute was satisfied. App. 400 & n.1. Those rationales for permitting NACA to evade the User Agreement's arbitration clause do not withstand scrutiny.

1. Statutory text and precedent confirm that a public interest organization has only representational standing under the CPPA

The CPPA offers no support for the superior court's internally inconsistent conclusion that NACA may sue "in its own right on behalf of consumer interests generally." App. 401. This Court "starts with the plain language of the statute because we assume that the intent of the lawmakers is to be found in the language that they used." *Client Earth*, 343 A.3d at 24 (internal quotation marks and brackets

omitted). Here, the language of Section 28-3905(k)(1)(D) makes abundantly clear that NACA is proceeding in a purely representative capacity.

The statute in question authorizes NACA litigate "*on behalf of* the interests of a consumer or a class of consumers." D.C. Code § 28-3905(k)(1)(D)(i) (emphasis added). As a matter of plain meaning, the words "on behalf of" contemplate that NACA is suing not in its own right but as the *representative* of the consumers. *See Black's Law Dictionary* 184 (10th ed. 2014) (defining "on behalf of" as "in the name of, on the part of, as the agent or *representative* of") (emphasis added). Indeed, subparagraph (D)'s operative language stands in contrast to the immediately preceding provision, which recognizes a cause of action by which "a nonprofit organization may, on behalf of *itself* or any of its *members*, or on any such behalf and on behalf of the *general public*, bring an action seeking relief from the use of a trade practice in violation of a law of the District." D.C. Code § 28-3905(k)(1)(C) (emphasis added). Thus, the statute's drafters plainly knew how to articulate when an organization is suing for injury to itself, but did not do so in subparagraph (D).[3]

[3] The statute's clear demarcation between (i) injury to an organization or its members and (ii) injury to others highlights the contradiction inherent in the superior court's reasoning that subparagraph (D) authorizes NACA to sue "in its own right on behalf of consumer interests generally." App. 401. By claiming that NACA is suing "in its own right," the court appears to have reasoned that NACA is asserting some injury independent of that suffered by the consumers. Yet in the very next phrase, the court acknowledges that NACA is suing "on behalf of consumer interests." As explained above, subparagraph (D) applies only where the organization is not claiming injury to itself or its members. The superior cannot have

Were the phrase "on behalf of" not clear enough, subparagraph (D) makes NACA's right to litigate fundamentally *derivative* of the legal rights of a consumer or class that injured by a violation of the CPPA: NACA's suit may proceed only if "the consumer or class could bring an action" under the CPPA for the same relief. D.C. Code § 28-3905(k)(1)(D)(i). As this Court has explained, "the text of the public interest organization provision explicitly ties itself to the private right of action for individual consumers." *Client Earth*, 343 A.3d at 31. If the statute sought to grant NACA standing to assert its own injury—rather than as a representative for consumers' injuries—it makes little sense to include a requirement that NACA's cause of action be entirely coterminous with the consumer's cause of action. To the contrary, by ensuring that a public interest organization can go to court only and on such terms as the underlying consumer can go to court, subparagraph (D) authorizes suit in a classic representative capacity.

And there is still more statutory evidence supporting that conclusion. Not just any public interest organization can invoke subparagraph (D) to sue on behalf of the interests of consumers; only an organization with "a sufficient nexus to the interests of the consumer or class to adequately *represent* those interests" may sue. D.C. Code

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it both ways: if the asserted injury is to NACA "in its own right," it does not belong under subparagraph (D), and if the claims are "on behalf of consumers" who did business with Gemini, it may proceed under (D) but is by definition a "representative" action and thus subject to the arbitration requirement.

§ 28-3905(k)(1)(D)(ii) (emphasis added). The statute thus explicitly identifies the "representative" role in which an organization may proceed. To the same end, any monetary recovery in a CPPA suit is distributed to the underlying consumers, *see* D.C. Code. § 28-3905(k)(2)(A), further reinforcing the conclusion that consumers remain the real parties in interest in NACA's suit.

The superior court invoked (App. 399) the CPPA's definition of "public interest organization" as "a nonprofit organization that is organized and operating, in whole or in part, for the purpose of promoting interests or rights of consumers." D.C. Code § 28-3901(a)(15). But that provision serves to define the scope of organizations that may qualify to sue as a plaintiff under Section 28-3905(k)(1)(D). It does not transform the role of public organizations when they bring suit: They pursue their claims on a representative basis, "*on behalf of the interests* of a consumer or a class of consumers." D.C. Code § 28-3905(k)(1)(D)(i) (emphasis added). Indeed, the superior court's implicit suggestion that a public organization brings suit to vindicate some injury to its own institutional mission cannot be squared with the arguments that NACA successfully made to the federal district court following removal, when NACA denied the existence of Article III standing by stressing that it "has alleged no injury to itself" and instead "alleges certain injuries to D.C. consumers." App. 77; *see also* App. 50 (arguing that the CPPA "allows public interest organizations to bring actions on behalf of consumers without the

need to demonstrate the type of injury required under Article III"); *National Ass'n of Consumer Advocs. v. Gemini Tr. Co.*, 757 F. Supp. 3d 59, 61 (D.D.C. 2024) (noting the parties' agreement that NACA could not "invoke organizational standing to sue on its own behalf").

The superior court also erred by attaching dispositive significance to the fact that public interest organizations are empowered to bring suit "on behalf of the *interests* of a consumer or a class of consumers," D.C. Code § 28-3905(k)(1)(D)(i) (emphasis added), rather than "on behalf of a consumer or class of consumers." *See* App. 399. The superior court did not explain why litigating on behalf of another party's *interests* is any less representative in nature than litigating on behalf of another party *simpliciter*. And in fact both phrasings' use of the key language "on behalf of" connotes a representative role: "*on behalf of* the interests of a consumer or a class of consumers" simply means "*in the name of, on the part of, as the agent or representative* of the interests of a consumer or a class of consumers." *See Black's Law Dictionary* 184 (10th ed. 2014).

Moreover, there is no support for the superior court's suggestion that this language relieves NACA of the need to "map its claims onto the claims of individual users that, if brought by those users on their own, would be subject to the User Agreement's arbitration clause." App. 399. Under the CPPA, a public interest organization may litigate "on behalf of the interests of a consumer or a class of

consumers" only if "*the* consumer or class"—that is, the precise party or parties whose interests the public interest organization seeks to represent—"could bring an action" for the same relief. D.C. Code § 28-3905(k)(1)(D)(i) (emphasis added). The CPPA's use of the definite article—"*the* consumer or class"—thus requires a direct mapping between the public interest organization's claim and the injured consumer's or class's claim, thereby making clear that the public interest organization's claim is derivative of the underlying consumer's claim.

This Court has expressly described the standing theory that NACA invokes here as "representational standing." *Animal Legal Def. Fund*, 258 A.3d at 181. When a public interest organization invokes such representational standing, moreover, the organization litigates "without pursuing *any* independent interest of the organization or its members." *Id.* at 183 (emphasis added). In other words, the public interest organization's role is purely representational: it is stepping into the underlying consumer's shoes to represent the consumer, not pursuing an independent claim of its own.

This Court has also described these public interest organizations as on "equal footing" with the consumers they purport to represent. *Client Earth*, 343 A.3d at 31. To that end, this Court has explained that a public interest organization must "*identify* 'a consumer or a class of consumers' that could bring suit in their own right." *Animal Legal Def. Fund*, 258 A.3d at 185 (emphasis added) (quoting D.C.

Code § 28-3905(k)(1)(D)). The Court's elucidation of that requirement cannot be squared with the superior court's view that a public interest organization brings suit "in its own right on behalf of consumer interests generally," App. 401—rather than as a representative of *identifiable* consumers who could pursue an action for the same relief under the CPPA.

Finally, this Court's decisions also undermine the superior court's suggestion (App. 399) that there is a meaningful difference between subparagraph (D)'s reference to bringing suit "on behalf of *the interests of* a consumer or a class of consumers," D.C. Code § 28-3905(k)(1)(D)(i) (emphasis added), and the alternative formulation "on behalf of a consumer or class of consumers" that the court believed would have confirmed NACA's representative role. In describing subparagraph (D)'s operation, this Court has referred to a public interest organization's identification of "the class of consumers it seeks to represent," *Animal Legal Def. Fund*, 258 A.3d at 186, and explained that subparagraph (D) "gives public interest organizations standing to bring suit on behalf of the District's consumers or a class of consumers" when the statutory conditions are satisfied, *Earth Island Inst. v. Coca-Cola Co.*, 321 A.3d 654, 662 (D.C. 2024). This Court's phrasing—which speaks of an organization representing consumers or litigating on their behalf, while eliding subparagraph (D)'s reference to *the interests of* a consumer or class—demonstrates

that the statutory language on which the superior court focused does not alter subparagraph (D)'s meaning.

2. The possibility that Gemini Users could violate their agreement to arbitrate does not confer any right to litigate upon NACA

The superior court separately erred in concluding that the possibility that Gemini users could violate their arbitration agreement, file a complaint in the superior court, and be immediately compelled to an arbitral forum, meant they could "bring an action" under the CPPA. App. 400-01. An "action" is generally understood to mean a *judicial* proceeding. *See Board of Trs. of Univ. of D.C. v. Joint Rev. Comm. on Educ. in Radiologic Tech.*, 114 A.3d 1279, 1286 (D.C. 2015); *Black's Law Dictionary* 35 (10th ed. 2014). Arbitration is not a judicial proceeding, and beginning an arbitration dispute—the only thing the Users have the contractual right to do—is therefore not "bring[ing] an action." *See 2200 M St. LLC v. Mackell*, 940 A.2d 143, 150-52 (D.C. 2007); *McDonald v. City of W. Branch, Mich.*, 466 U.S. 284, 287-88 (1984).

The possibility that the Gemini Users could violate their contractual obligation does not change the analysis. Indeed, courts have held that filing or persisting in litigation in the face of a binding arbitration clause (or a forum-selection clause more broadly) can expose a plaintiff to sanctions. *See, e.g.*, *Smith v. Martin*, No. CIV.A.02-1624, 2004 WL 5577682 *1, *4 (D.D.C. Jan. 28, 2004); *Jayhawk Invs., L.P. v. Jet USA Airlines, Inc.*, No. 98-2153, 1999 WL 588195 *1 (D. Kan. June

8, 1999). The notion that engaging in sanctionable litigation misconduct should be equated with "bring[ing] an action," in order to permit NACA to evade the User Agreement's arbitration clause, simply makes no sense. Yet that is precisely the upshot of the superior court's reasoning.

More fundamentally, the superior court misunderstood the role that the requirement that "the consumer or class could bring an action," D.C. Code § 28-3905(k)(1)(D)(i), plays in the statutory scheme. Even if it were true that Gemini Users could "bring an action" in some narrow technical sense, that statutory requirement unmistakably "ties [the public interest provision] to the private right of action for individual consumers." *Client Earth*, 343 A.3d at 31. In other words, by expressly tying a public interest organization's ability to bring suit to individual consumers' claims, the statutory text confirms that a representative litigant such as NACA *stands in the shoes* of the consumers it purports to represent. For all of the reasons explained above, it follows that NACA must pursue its representative claim in the arbitral forum agreed to by the consumers it seeks to represent.

In departing from that common-sense conclusion, the superior court stated that "[t]he mere existence of an arbitration clause . . . does not automatically and absolutely preclude the consumer from bringing suit," in the sense that, "as with any other contractual right, arbitration can be waived by choice or conduct of the other party to the transaction or agreement . . . who is otherwise entitled to invoke

arbitration." App. 400. Rather, the court reasoned, it would be "incumbent upon Gemini to move to compel arbitration" of any individual consumer's lawsuit filed in violation of the consumer arbitration agreement with Gemini. *Id.* But the court offered no reason to think that a consumer can "bring an action" unless its ability to bring suit has been "automatically and absolutely preclude[d]," and of course it is virtually always "incumbent" upon a defendant to take some action in order to obtain dismissal of a lawsuit. The superior court's mistaken reasoning therefore cannot be confined to the arbitration context. It would allow consumers to avoid *any* limitation on their ability to sue, even including a complete settlement and release of a consumer's claims under the CPAA, through the simple expedient of funneling their claims through a public interest organization. After all, "release" is an affirmative defense that must be asserted by the defendant in an answer, *see* D.C. Super. Ct. R. 8(c), not a self-executing barrier to filing suit in the first instance. The rule adopted by the superior court would therefore produce deeply anomalous consequences well beyond the arbitration context.

3. The superior court's reading of Section 28-3905(k)(1)(D) would be preempted by the FAA

The CPPA's plain meaning—which confirms that NACA is proceeding solely in a representative capacity—compels reversal. But if that were not enough, the superior court's conclusion that NACA can proceed in court despite the Gemini

Users' arbitration obligation should be reversed because it is incompatible with the FAA.

In general, a state law that "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" is preempted by the federal statute it impedes. *Arizona v. United States*, 567 U.S. 387, 399 (2012); *Merrell Dow. Pharms, Inc. v. Oxendine*, 649 A.2d 825, 828 (D.C. 1994) (explaining that conflict preemption occurs when a state law "obstructs the federal purpose"). In the arbitration context, in particular, courts "must be alert to new devices and formulas" that would resurrect the "judicial antagonism" towards arbitration that led Congress to adopt the FAA in the first place. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 509 (2018) (internal quotation marks omitted).

The superior court's reading of Section 28-3905(k)(1)(D) is exactly that: a creative new way to disfavor and avoid arbitration. In all respects except arbitration, NACA seeks to proceed—as the statute requires—as a representative of the Users. *See Animal Legal Def. Fund*, 258 A.3d at 183 (explaining NACA can proceed only if "the consumer or class of consumers [is] capable of bringing suit in their own right"). Put another way, the superior court's construction of the statute creates a peculiar species of injury that is at the same time *derivative* of a private individual's contractual relationship but simultaneously *immune* from the one aspect of that contract—arbitration—that the plaintiff wishes to avoid.

An examination of NACA's complaint makes this discrimination even more clear. NACA's complaint is entirely based in the contractual relationship between Gemini and the Users. *See* App. 11-13 (¶¶ 26-38). NACA takes issue with many provisions of the User Agreement, contending that the provisions bind the Users to practices that are "deceptive" and "unfair." *E.g.*, App. 18 (¶ 63). The contractual relationship between Gemini and the Users is the cornerstone not only of NACA's causes of action but also of its assertion that it has met the requirement that it identify "'[a] consumer or class of consumers' that could bring suit in their own right"—the signatories of the User Agreement. *Animal Legal Defense Fund*, 258 A.3d at 185 (quoting § 28-3905(k)(1)(D)); *see* App. 363 ("NACA is challenging the legality of Gemini's contract."); App. 364 ("NACA's claim is expressly about the contract *itself* violating the law . . . ."). Indeed, NACA's action seeks, in substance, judicial reformation of the User Agreement: NACA seeks to enjoin enforcement of the contractual provisions it deems unacceptable, while leaving the remainder in place. *See* App. 19 (¶ 70.a-b).

NACA cannot have it both ways. A non-signatory can "bind [itself] to arbitration by . . . asserting claims that must be determined by reference to that contract," but it "may not cherry-pick beneficial contract terms while ignoring other provisions [because] it would prefer not to be governed by such as an arbitration clause." 21 *Williston on Contracts* § 57:19 (4th ed.); *see also Tepper Realty Co. v.*

Mosaic Tile Co., 259 F. Supp. 688, 692 (S.D.N.Y. 1966) ("Plaintiffs . . . cannot rely on the contract, when it works to their advantage, and repudiate it when it works to their disadvantage. To permit them to do so would not only flout equity, it would do violence, we think, to the congressional purpose underlying the Federal Arbitration Act."). Yet under NACA's reading, the CPPA authorizes NACA to do exactly that: NACA can claim injury by picking and choosing the terms of the contract that it alleges make out a CPPA violation, while disclaiming an essential contract term—the arbitration requirement—that it does not wish to honor.

More broadly, the superior court's construction of Section 28-3905(k)(1)(D) can be understood as authorizing a *de facto* assignment of consumers' claims, *minus* application of the FAA's arbitration mandate. Under the CPPA, NACA's claim is entirely derivative of the Gemini Users' claims for alleged violation of the CPPA. NACA does not contend that *it* has been injured at all—to the contrary, it has affirmatively disclaimed any such claim of injury to NACA itself. *See* pp. 20-21, supra. NACA's claim thus exists *if and only if* the Gemini Users would have an actionable claim for relief under the CPPA.

Under these circumstances, if there is any validity to the superior court's holding that NACA is litigating "in its own right," App. 401, rather than as a representative as a matter of D.C. law, NACA is effectively litigating as an assignee of Gemini Users' claims. There is plainly no other *real-world substance* to NACA's

putatively individual role, given the absence of any injury to NACA. But a statutory scheme that would so easily circumvent the FAA's mandate cannot be squared with the "national policy favoring arbitration when the parties contract for that mode of dispute resolution," *Preston*, 552 U.S. at 349. Thus, Section 28-3905(k)(1)(D) would be preempted insofar as it is read to permit a public interest organization to pursue litigation in court when the consumers whose interest it purports to represent would be required to arbitrate their claims.

The superior court held that the FAA did not preempt NACA's ability to bring suit in court based largely on the Supreme Court's decision in *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279 (2002). *See* App. 402-05. In *Waffle House*, the Court held that an employee's agreement to arbitrate employment-related disputes does not bar the EEOC from pursuing victim-specific judicial relief, such as back, reinstatement, and damages, in an enforcement action under the Americans with Disabilities Act of 1990. *See* 534 U.S. at 290-98. The Court reasoned that, in this setting, the "the agency may be seeking to vindicate a public interest, not simply provide make-whole relief for the employee, even when it pursues entirely victim-specific relief." *Id.* at 296.

But a public interest organization's role in litigating under the CPPA is very different. The organization is not litigating in the sovereign's capacity to pursue the public interest, in a way that (as with the EEOC) may happen to overlap in some

cases with a remedy for injury caused to a specific individual. Indeed, the CPPA *separately* authorizes the D.C. Attorney General to bring suit "in the name of the District of Columbia" to obtain an injunction prohibiting a violation of the CPAA and "requiring the violator to take affirmative action, including the restitution of money or property." D.C. Code § 28-3909(a). That provision does not tie the Attorney General's right of action to the claim of any individual consumer. By contrast, as explained above, the public interest organization is litigating as a representative of individual consumers and the public interest organization's claim is *entirely* derivative of the underlying consumer's claim. *See* pp. 12-27, *supra*. That dynamic readily distinguishes NACA's claim in this case from the EEOC claims at issue in *Waffle House*, and it makes clear that permitting NACA to proceed with its claim in court would serve only to circumvent the FAA.

CONCLUSION

The judgment of the superior court should be reversed.

Respectfully submitted.

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