No. 25-CV-0789

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

GEMINI TRUST COMPANY, LLC,

Defendant-Appellant,

v.

NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, INC.,

Plaintiff-Appellee.

Appeal from the Superior Court of the District of Columbia
Civil Division No. 2024-CAB-003999 (Hon. Maribeth Raffinan)

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RULE 26.1 DISCLOSURE STATEMENT

Pursuant to Rule of Appellate Procedure 26.1, National Association of Consumer Advocates states that it has no parent corporation and there is no publicly held corporation that owns 10% or more of their stock.

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ISSUES PRESENTED

Whether the Superior Court correctly held that NACA could not be compelled to arbitrate claims when it never agreed to arbitrate and its right to sue arises from statute rather than contract.

JURISDICTIONAL STATEMENT

The Court has jurisdiction pursuant to D.C. Code § 16-4427(a)(1).

INTRODUCTION

This appeal presents a straightforward question: Can a company compel arbitration against a plaintiff that never agreed to arbitrate and whose right to sue arises from statute rather than contract? The answer is no.

Nevertheless, Gemini Trust Co., LLC ("Gemini") sought to force the National Association of Consumer Advocates ("NACA") into arbitration based on agreements NACA never reviewed, never agreed to, and never adopted. Gemini's position does not square with the text of the Consumer Protection Procedures Act ("CPPA") authorizing this lawsuit or the Supreme Court's arbitration jurisprudence, which has repeatedly emphasized that arbitration agreements are nothing more than ordinary contracts and entities that do not sign the arbitration agreements are not bound by them.

The CPPA explicitly grants public interest organizations like NACA the right to bring consumer-protection lawsuits on behalf of the interests of a group of consumers. D.C. Code § 28-3905(k)(1)(D). This enforcement mechanism is complementary to, but separate from, the private right of action for individual consumers. *See* D.C. Code § 28-3905(k)(1)(A); *Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174 (D.C. 2021) (confirming that organizations that satisfy the prerequisites under Section 28-3905(k)(1)(D) need not satisfy other bases for standing). Gemini's motion, and this appeal, rests on the erroneous premise that the

scope of a public-interest organization's standing under Section 28-3905(k)(1)(D) is limited by an individual consumer's private contractual obligations. But it is not so limited, because, as the Superior Court held, "the CPPA confers standing . . . to litigate on behalf of consumer interests generally." App. 399. A public-interest organization's claims, therefore, need not map precisely onto any specific consumer's claims, and any particular consumer's private contractual obligations cannot cabin the organization's statutory right to sue. *See Earth Island Institute v. Coca-Cola Co.*, 321 A.3d 654, 663 (D.C. 2024). Rather, as set forth below, and consistent with the role of the public-interest organization as a stand-in attorney general under the CPPA, this Court has held that a public-interest organization can act on behalf of consumers under Section 28-3905(k)(1)(D), so long as it can identify a group of consumers with whose interests the public-interest organization shares a nexus. *Id.* at 662.

Gemini also argues that the Federal Arbitration Act preempts the CPPA. Not so. State laws that do not "disfavor" arbitration are not preempted merely because they do not require arbitration in every instance. *See, e.g.*, *Noohi v. Toll Bros., Inc.*, 708 F.3d 599, 612-13 (4th Cir. 2013). The CPPA does not favor or disfavor arbitration. It has no bearing on whether Gemini may force consumers to sign arbitration agreements in order to use its products. And the FAA has no applicability where no agreement to arbitrate was ever formed. Accordingly, Gemini's preemption

argument also fails.

Gemini has spent nearly two years avoiding the merits of this litigation—first by way of a failed attempt at removal, and now by seeking to compel NACA to arbitrate. Its obstructive tactics should end here. Plaintiff requests that the Court affirm the Superior Court and remand for further proceedings.

FACTS AND STATEMENT OF THE CASE

NACA brought this lawsuit to protect the interests of D.C. consumers from a predatory adhesion contract that improperly purports to waive the consumer protections of the Electronic Fund Transfer Act ("EFTA"). Gemini, a cryptocurrency company, requires users to agree to a User Agreement ("UA") that unlawfully shifts the risk of fraud and loss to consumers, in violation of EFTA. These unconscionable terms give rise to a violation of the CPPA, which protects D.C. consumers from illegal contracts. NACA seeks declaratory and injunctive relief.

At every avenue, Gemini has sought to avoid litigating the merits of its unlawful UA. Instead, it has sought to delay this case through procedural means for nearly two years. First, Gemini sought to remove this action to federal court, despite that it is well settled that public-interest organizations acting under Section 28-3905(k)(1)(D) lack Article III standing. The federal court correctly remanded. *Nat'l Ass'n of Consumer Advocates v. Gemini Tr. Co.*, 757 F. Supp. 3d 59 (D.D.C. 2024).

Following remand, Gemini moved to compel arbitration despite that NACA

had never agreed to arbitrate any claims against Gemini. Ignoring that the CPPA's standing provisions for public-interest organizations are separate and distinct from its standing provisions for individual consumers, Gemini argued incorrectly that NACA's claims were derivative of consumers' claims and subject to its arbitration defense.

The Superior Court (Raffinan, J.) denied the motion in a thorough, well-reasoned order. First, relying on Supreme Court precedent, Judge Raffinan explained that the motion should be denied because NACA had never agreed to arbitration. App. 395-97. *See EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002) (holding that a contract between an employer and an employee to arbitrate employment disputes did not bar third parties from seeking relief on behalf of an employee). Next, Judge Raffinan assessed and disposed of Gemini's argument that NACA's role was "purely to stand in the place of individual consumers." Instead, the Court explained that the public-interest-organization-standing provisions of the CPPA confer standing to proceed "not as a mere representative," but for the purpose of promoting the interests of consumers more broadly. App. 396-99. The Court also rejected Gemini's argument that the existence of an arbitration agreement meant that a consumer could not "bring an action" within the meaning of the CPPA, noting that such an agreement "does not automatically and absolutely preclude the consumer from bringing suit." *Id.* at 400-02. Finally, Judge Raffinan concluded that the FAA

did not preempt NACA's claims. *See id.* at 402-07. Judge Raffinan reached this conclusion because preemption would "turn[] what is effectively a forum selection clause into a waiver of a nonparty's statutory remedies"—a proposition the Supreme Court has rejected. *Id.* at 403 (quoting *Waffle House*, 534 U.S. at 295).

This appeal followed.

SUMMARY OF ARGUMENT

I. NACA never agreed to arbitrate its claims.

First, the Court may affirm the Superior Court because NACA never formed an arbitration agreement with Gemini. As a species of contract, arbitration agreements are "interpreted and governed by normal principles of contract law." *Menna v. Plymouth Rock Assur. Corp.*, 987 A.2d 458, 463 (D.C. 2010) (quoting *2200 M St. LLC v. Mackell*, 940 A.2d 143, 150 (D.C. 2007)). "Because arbitration becomes mandatory only by mutual consent of the parties, there must be an agreement between them . . . which provides for arbitration." *Id.* And while the FAA applies to actual agreements to arbitrate, it does not—and cannot—create an obligation to arbitrate where no agreement exists in the first place. *See Granite Rock Co. v. Int'l Bhd. of Teamsters*, 561 U.S. 287, 302, (2010).

EEOC v. Waffle House, cited by Judge Raffinan, is squarely on point here. There, the Supreme Court held that the EEOC could not be compelled to arbitrate because it was not a signatory to the arbitration contract and had an independent

statutory basis for bringing suit. *Waffle House*, 534 U.S. at 294. *Waffle House* is controlling.

II. Individual consumers' purported arbitration agreements do not bind NACA.

Second, individual consumers' purported arbitration agreements do not bind NACA because its claims arise from separate statutory standing under D.C. Code § 28-3905(k)(1)(D). Rather than derivative rights, the CPPA confers independent enforcement authority upon public interest organizations. The history of the CPPA shows that the D.C. Council intended for public-interest organizations to have broad statutory enforcement authority that did not depend on consumers' individual acts or agreements.

Contrary to Gemini's arguments, the CPPA does not say that public-interest organizations inherit the contractual restrictions of individual consumers. If the D.C. Council had intended such a sweeping limitation, it would have stated so explicitly. Instead, the D.C. Court of Appeals has repeatedly interpreted the CPPA broadly, emphasizing its role in empowering organizations like NACA to challenge unlawful business practices even before harm has occurred.

Given the practicalities inherent in the idea of a public-interest organization acting as a stand-in attorney general, it makes no sense that an organization's ability to sue should be curtailed by any consumer's individual ability to prevail in a CPPA

lawsuit. In any event, this Court's holding in *Earth Island Institute v. Coca-Cola Co.*, 321 A.3d 654, forecloses such an outcome.

Additionally, consumers may "bring an action" even if they have signed an arbitration agreement, so the "bring an action" language in Section 28-3905(k)(1)(D) also does not prevent this lawsuit. The CPPA does not say that NACA is subject to all the procedural limitations that might apply to individual consumers. Instead, it merely requires that the conduct challenged by NACA must be actionable under the CPPA—which it is—and that NACA has a sufficient stake in the "controversy to obtain a judicial resolution." *Animal Legal Def. Fund*, 258 A.3d at 183.

Further, if construed as Gemini asks, the agreement between Gemini and each consumer would be an impermissible waiver of NACA's substantive statutory rights and would effectively repeal Section 28-3905(k). No private agreement between Gemini and consumers can deprive NACA of the substantive rights that the D.C. Council conferred upon public-interest organizations to protect the public. *Cf. Cole v. Burns Intern. Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) (explaining that an agreement purporting to waive substantive protections would be unenforceable).

Finally, the fact that the purported waiver of NACA's substantive rights appears in an arbitration agreement doesn't render it enforceable. The FAA "does not require courts to enforce contractual waivers of substantive rights and remedies." *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 653 (2022).

III. There is no preemption

The FAA only preempts state law when state law "disfavors arbitration," *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011), or disfavors contracts that "have the defining features of arbitration agreements," *Kindred Nursing Ctrs. Ltd. v. Clark*, 581 U.S. 246, 251 (2017). Here, Section 28-3905(k)(1)(D) does not disfavor arbitration; it has nothing to do with arbitration. Section 28-3905(k)(1)(D) confers statutory standing on public-interest organizations to prosecute unlawful trade practices—it does nothing to alter any valid arbitration agreements between signatories. And because NACA's claim is not based on a contractual relationship between it and Gemini, allowing NACA's suit to proceed does nothing to disfavor any validly entered arbitration agreement.

IV. In the alternative, the arbitration agreement is unenforceable.

The Court may affirm the Superior Court on the alternative basis that Gemini's arbitration provision is unenforceable both because it does not provide notice and because it is unconscionable.[1] The provision is procedurally unconscionable because it is a contract of adhesion that lacks meaningful notice. *See Cullinane v. Uber Techs., Inc.*, 893 F.3d 53, 62 (1st Cir. 2018). It is substantively unconscionable because it imposes excessive costs and restrictions on consumers while limiting their

[1]The Court may apply a legal theory other than that applied by the trial court and rest affirmance on any ground that finds support in the record. *See Franco v. District of Columbia*, 3 A.3d 300, 307 (D.C. 2010).

legal remedies. *See Ruiz v. Millennium Square Residential Ass'n*, 156 F. Supp. 3d 176, 182 (D.D.C. 2016).

STANDARD OF REVIEW

The Superior Court's decision is reviewed de novo. *Bank of Am., N.A. v. District of Columbia*, 80 A.3d 650, 667 (D.C. 2013).

ARGUMENT

I. NACA never agreed to arbitrate its claims.

Arbitration is not a law unto itself. Before a court can enforce an arbitration agreement, it must find that an agreement between the parties exists in the first place. *See Coinbase, Inc. v. Suski*, 602 U.S. 143, 148 (2024) (explaining that the threshold inquiry in an arbitration dispute is "What have *these* parties agreed to?" (emphasis added)). Here, the parties have agreed to nothing. NACA never signed or agreed to Gemini's UA, never received any benefits conferred by Gemini's UA, and asserts no claims arising out of any rights or obligations created by Gemini's UA. Instead, NACA's claim is expressly about the contract *itself* violating the law. As such, NACA is not bound by Gemini's purported arbitration agreement and cannot be compelled to arbitrate its claim.

As a species of contract, arbitration agreements are "interpreted and governed by normal principles of contract law." *Menna*, 987 A.2d at 463 (quoting *Mackell*, 940 A.2d at 150). "Because arbitration becomes mandatory only by mutual consent

of the parties, there must be an agreement between them . . . which provides for arbitration." *Id. See also First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995) ("a party who has not agreed to arbitrate will normally have a right to a court's decision about the merits of its dispute"); *Steelworkers v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960) ("arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit").

And while the FAA applies to actual agreements to arbitrate, it does not—and cannot—create an obligation to arbitrate where no agreement exists in the first place. *See Granite Rock Co.*, 561 U.S. at 302 (the pro-arbitration policy of the FAA does not "override[] the principle that a court may submit to arbitration **"**only those disputes ... that the parties have agreed to submit") (quoting *First Options*, 514 U.S. at 943); *Bank of Am.*, 80 A.3d at 667 ("The FAA does not require parties to arbitrate a dispute unless they have agreed to do so.") (citing *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 478 (1989)). Instead, as the Supreme Court has made clear, "§ 4 of the FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that arbitration proceed *in the manner provided for in the parties' agreement*." *Volt,* 489 U.S. at 474-75 (emphasis in original) (cleaned up). Because NACA has no contractual agreement—either directly or as a third party—with Gemini, Gemini's purported arbitration agreement does not govern NACA's claim.

Under District law, an entity's rights can be altered by a contract only when they are a party to the contract or they are a third-party beneficiary of the contract. *Cf. Fort Lincoln Civic Ass'n v. Fort Lincoln New Town Corp.*, 944 A.2d 1055, 1064 (D.C. 2008). But NACA is neither a party to nor a third-party beneficiary of Gemini's UA. As a threshold matter, "contractual rights are *in personam* rights that bind only the parties to the contract." *Papageorge v. Zucker*, 169 A.3d 861, 865 (D.C. 2017). Here, Gemini does not dispute that NACA is not a party to the contract. Nor does Gemini dispute that NACA is not a third-party beneficiary to the contract. Instead, Gemini advances an argument that gestures at beneficiary law without ever explaining how NACA is a beneficiary of Gemini's UA. *See* Appellant's Br. at 15-16. That is because NACA is not.

EEOC v. Waffle House, cited by Judge Raffinan, is squarely on point here. There, the Supreme Court held that the EEOC could not be compelled to arbitrate because it was not a signatory to the arbitration contract and had an independent statutory basis for bringing suit. *Waffle House*, 534 U.S. at 294. The Court held that "nothing in the [FAA] authorizes a court to compel arbitration of any issue, or by any parties, that are not already covered in the agreement." *Id*. at 289. The Court was clear: "It goes without saying that a contract cannot bind a nonparty." *Id*. at 294.

Perhaps most significantly, the Court in *Waffle House* recognized that if it were to compel arbitration over the EEOC's objection, this would "undermine the

detailed enforcement scheme created by Congress . . .” *Id*. at 296. Instead, courts must assume the EEOC, in deciding which cases to bring, is seeking to “vindicate a public interest,” even when an EEOC action proposes only victim-specific relief. *Id*. In essence, courts cannot look behind the curtain and try to guess whether an enforcement agency is acting on behalf of particular individuals or for the public good at large; courts must assume the latter. *See id*. To hold otherwise and allow arbitration clauses to block certain types of statutory suits would permit courts to undermine enforcement mechanisms created by legislatures. *See id*.

Similarly in *Air Line Pilots Assoc*., the Supreme Court held that non-union members who were not bound by the union membership agreement that contained an arbitration clause could not be compelled to arbitrate their claims. *Air Line Pilots Assoc. v. Miller,* 523 U.S. 866, 876 (1998) (“Ordinarily, arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.”) (cleaned up).

Under *Waffle House* and *Air Line Pilots Association*, neither of which Gemini addresses, NACA cannot be forced into an arbitration it never agreed to. *See Waffle House*, 534 U.S. at 294; *Air Line Pilots Assoc.*, 523 U.S. at 876; *Bailey v. Fed. Nat’l Mortg. Ass’n*, 209 F.3d 740, 746-47 (D.C. Cir. 2000) (refusing to compel plaintiff’s claims to arbitration where plaintiff had not agreed to arbitrate); *Jung v. Ass’n of Med. Colleges*, 300 F. Supp. 2d 119, 156 (D.D.C. 2004) (“It also seems self-evident

that entities that are not parties to a contract containing an arbitration agreement are not entitled to arbitrate their disputes."). And, under *Waffle House*, allowing the arbitration clause to block a statutory suit by NACA—especially when NACA did not agree to arbitrate—would undermine the consumer-protection enforcement mechanism created by the D.C. Council. *See Waffle House*, 534 U.S. at 296.

Because NACA was not a party to Gemini's UA, and because NACA is not a beneficiary of the purported arbitration agreement, NACA cannot be compelled to arbitrate its claim against Gemini

II. Individual consumers' purported arbitration agreements do not bind NACA.

Individual consumers' purported arbitration agreements do not bind NACA because its standing to pursue CPPA claims, which arises under D.C. Code § 28-3905(k)(1)(D), does not derive from any individual consumer's contract with Gemini. That is, NACA's statutorily-based standing to prosecute unlawful practices allows it to sue Gemini regardless of any arbitration agreement between Gemini and a given D.C. consumer. Thus, NACA is not acting as a stand-in for any particular consumer, but as a private attorney general. That distinguishes this case from the representative scenarios that Gemini raises in its brief, Appellant's Br. at 15-16, and confirms that the Superior Court correctly denied Gemini's motion. Unlike those executors and assignees discussed in Gemini's brief, NACA's standing to bring this action arises from a separate statute conferring independent enforcement authority

on public-interest organizations; NACA's standing is not limited to the contours of any particular consumer's rights. *See, e.g.*, *Earth Island Institute*, 321 A.3d at 663 (concluding that public-interest-organization plaintiff was not required to identify any specific consumer whom it was representing).

A. The CPPA confers independent enforcement authority on public-interest organizations.

First, Judge Raffinan correctly held that NACA's role goes beyond that of a mere stand-in for individual consumers. The legislative history of the CPPA confirms that public-interest organizations acting under Section 28-3905(k)(1)(D) act as government enforcers rather than proxies for consumers. The CPPA is a broad consumer protection statute, meant to "assure that a just mechanism exists to remedy all improper trade practices." *District of Columbia v. Facebook, Inc.*, 340 A.3d 1, 4 (D.C. 2025). To achieve this important statutory purpose, the CPPA incorporates four independent forms of standing for private lawsuits, each set out in D.C. Code § 28-3905(k)(1): first, cases by individual consumers on behalf of themselves or the general public, *id.* § 28-3905(k)(1)(A); second, cases by individuals for purposes of testing consumer goods or services, *id.* § 28-3905(k)(1)(B); third, cases by nonprofit organizations on behalf of themselves or their members, *id.* § 28-3905(k)(1)(C); and fourth, cases by public interest organizations "on behalf of a consumer or a class of consumers . . . if the consumer or class could bring an action under subparagraph (A)," *id.* § 28-3905(k)(1)(D). NACA, a public-interest organization, brings this

action pursuant to the fourth category. Notably, a public-interest organization acting pursuant to § 28-3905(k)(1)(D) need not stand in the shoes of the consumer or show that it has the same rights and responsibilities of a particular "consumer" or "class." Rather, a plaintiff is simply required to show that the public-interest organization has a "nexus to the interests involved" sufficient to "adequately represent those interests." *Id.* § 28-3905(k)(1)(D)(ii).

The history of the CPPA shows that the D.C. Council intended for public-interest organizations to have broad statutory enforcement authority that did not depend on consumers' individual acts or agreements. The Council enacted this statute in response to concerns raised by the D.C. Bar and others about the inadequacies in consumer protection in the District. See *Margolis v. U-Haul Intern., Inc.*, 2009 WL 5788369, at *5-7 (D.C. Super. Dec. 17, 2009) (explaining that the CPPA arose out of a community need for more consumer-protection enforcement, particularly after the Council suspended the enforcement activity of the Department of Consumer and Regulatory Affairs due to budget issues). In response to this public pressure, the D.C. Council enacted the CPPA, which the Council later amended to allow public-interest organizations to bring suit even where they were not themselves injured. *See generally Animal Legal Def. Fund*, 258 A.3d at 182-85 (describing legislative history of Section 28-3905(k)(1)(D)).

The D.C. Council was careful to ensure that public-interest organizations like

NACA could "act as private attorneys general for the public under circumstances that ensure the organization has a sufficient stake *of its own* to pursue the case with appropriate zeal." *See* Report on Bill 19-0581, D.C. Council Comm. On Pub. Servs. & Cons. Aff., at 2 (Nov. 28, 2012) (emphasis added). The Council recognized that organizations like NACA "can have a special suitability for promoting" consumer interests "*through court action* in appropriate circumstances, and may be able to do so in situations where it is not feasible for the affected consumers to do so personally." *Id.* at 6 (emphasis added). The Council further evinced its specific intent that this statutory enforcement authority should be broadly interpreted:

> Subparagraph (D) is intended to reach, for [public interest organizations], the full extent of standing as may be recognized by the District of Columbia courts. This may include bases for standing that . . . the D.C. courts have not yet had occasion to recognize . . . . Subparagraph (D) is intended to explicitly and unequivocally authorize the court to find that a public interest organization has standing beyond what would be afforded under subparagraphs (A)-(C), beyond what would be afforded under a narrow reading of prior D.C. court decisions, and beyond what would be afforded in a federal case under a narrow reading of prior federal court decisions on federal standing.

Id. In this way, the Council explicitly created broad statutory enforcement authority for public-interest organizations that did not depend on consumers' individual acts or agreements.

B. The rights conferred by the CPPA on public-interest organizations are not derivative or representational of consumers' rights.

Despite Gemini's arguments, the CPPA does not say that public-interest organizations inherit the contractual restrictions of individual consumers. If the D.C. Council had intended such a sweeping limitation, it would have stated so explicitly. Instead, the D.C. Court of Appeals has repeatedly interpreted the CPPA broadly, emphasizing its role in empowering organizations like NACA to challenge unlawful business practices even before harm has occurred. *Animal Legal Def. Fund*, 258 A.3d at 186 (plaintiff adequately identified the class of consumers it sought to represent as District of Columbia consumers who "have been or will be misled"); *see also, e.g.*, *Center For Inquiry v. Walmart*, 283 A.3d 109, 115 (D.C. 2022).

Nevertheless, Gemini argues that, by allowing public-interest organizations 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), the CPPA reduces the role of the public-interest organization to a mere "representative"—like an agent or assignee. But no statutory language, case law, or other relevant authority provides any support for this construction.

Instead, *Earth Island Institute v. Coca-Cola Company*, which Gemini also disregards, makes clear that the key factor for public-interest organization standing is whether the organization "has a 'sufficient nexus to the interests involved of the consumer or class to adequately represent those interests.'" *Earth Island*, 321 A.3d

at 662 (quoting D.C. Code § 28-3905(k)(1)(D)(ii)). That factor is satisfied here.

Similarly, Gemini also argues that NACA must identify a particular consumer or group of consumers on whose behalf NACA has filed its suit. Appellant's Br. at 22-23. But this was squarely rejected by *Earth Island*, where the court said the public-interest organization was not required to identify a particular consumer who had "seen the precise mélange of statements that Earth Island has pieced together in advancing its suit." *Id.* at 663. Instead, all that was required was to identify a group of consumers with whose interests the public-interest organization shared a nexus. *See id.* And the conclusion in *Earth Island* that a public-interest organization can represent the interests of a broad class of consumers without identifying particular consumers is wholly consistent with the role of the public-interest organization as a stand-in attorney general. Just as the Office of the Attorney General can act on behalf of consumers without regard to their individualized obligations and defenses, so too can a public-interest organization deputized under Section 28-3905(k)(1)(D).

Gemini also argues that NACA's standing is "representational," using a term cherry-picked from *Animal Legal Defense Fund*, but that case does not help Gemini. Gemini asserts that the phrase "representational standing" suggests that the standing of a public-interest organization is derivative of consumers' standing, but that is not what *Animal Legal Defense Fund* says. The Court there made clear that Section 28-3905(k)(1)(D) was intended to confer "maximum standing" to public-interest

organizations, such that the organizations could act "without pursuing any independent interest of" individuals. *See Animal Legal Def. Fund*, 258 A.3d at 183-84. The Court relied on legislative history making clear that "Subparagraph (D) is intended to explicitly and unequivocally authorize the court to find that a public interest organization has standing *beyond what would be afforded under subparagraphs (A)-(C)*," i.e., the individual consumer provision described in Section 28-3905(k)(1)(A). *Id.*at 184 (quoting Consumer Protection Act of 2012, Report on Bill 19-0581, at 6 (Nov. 28, 2012)) (emphasis added). In other words, *Animal Legal Defense Fund* establishes that public interest organizations have broad rights to sue; it says nothing about derivative standing, arbitration, or any other issue for which Gemini cites it.

Thus, *Animal Legal Defense Fund* confirms that standing under Section 28-3905(k)(1)(D) extends "beyond" what is available under Section 28-3905(k)(1)(A)—further evidence that NACA's enforcement authority is independent of, not derivative of, an individual consumer's standing. *Id.* at 184.

C. A public-interest organization's right to sue under the CPPA is separate from individualized obligations and defenses.

Given the practicalities inherent in the idea of a public-interest organization acting as a stand-in attorney general, it makes no sense that the organization's ability to sue should be curtailed by any consumer's individual ability to prevail in a CPPA lawsuit. For example, if organizations were required to identify a harmed individual,

which party should choose the referential consumer? If Gemini's interpretation of the CPPA were accepted, every defendant sued by a public-interest organization would choose a consumer subject to all kinds of defenses as their preferred measuring stick: a consumer with claims only outside the statute of limitations; a consumer who owes money to the defendant and is subject to a defense of setoff; a consumer who signed a version of the applicable terms of service with a choice of law provision more favorable to the defendant; a consumer who signed an arbitration agreement. And the public-interest organization plaintiffs would, in turn, face a new requirement nowhere articulated in the statute: to identify a consumer whose experience precisely matches the facts pleaded in the complaint, and who is not subject to a single defense. This Court's holding in *Earth Island* forecloses such an outcome; and the CPPA contains no such requirements. Imposing this type of requirement by judicial revision would nullify Section 28-3905(k)(1)(D) and collapse it into Section 28-3905(k)(1)(A).

The various versions of Gemini's UA that have existed over time illustrate this conundrum. Gemini nowhere explains how the Court is to decide *which* consumer's purported agreement to arbitrate binds NACA. While Gemini claims broadly that all versions of its UA contain an arbitration agreement, its arbitration agreements have changed over time such that there is no clarity as to what version would be binding if Gemini prevails. As of January 26, 2021, for example, Gemini's UA required

signatories to arbitrate their agreements before JAMS, but its current version requires arbitration before National Arbitration and Mediation. Is NACA required to arbitrate before JAMS because one consumer agreed to arbitrate there, or before National Arbitration and Mediation because other consumers agreed to that version? Gemini does not explain, nor could it: since NACA is not standing in for any particular consumer, no particular consumer's agreement can or should require NACA to arbitrate anything.

Moreover, public-interest organizations—unlike the agents, assignees, and executors that Gemini describes—cannot bind consumers simply by virtue of their role. NACA has no right, for example, to enter into new contracts on behalf of D.C. Gemini users, as an executor could contract on behalf of an estate. NACA is not seeking damages for any individual breach of the UA or asking the Court to enforce the UA against Gemini, as an assignee could enforce a contract. By bringing this action, NACA is not enforcing any consumer's individual rights at all; it is acting in a role akin to that of a government enforcer. Unlike a shareholder derivative suit, subrogation claim, or executor action, NACA's standing is created by statute and exists regardless of whether an individual consumer sues. The examples that Gemini gives—each of which involves a party explicitly seeking to enforce the individual rights of another—have no relevance to the independent statutory authority that empowers NACA to act here.

A federal court interpreting District law applied similar logic in *Equal Rights Center v. Uber Techs., Inc.*, 525 F.Supp. 3d 62 (D.D.C. 2021) in which it found that arbitration agreements did not preclude an action by a nonprofit membership organization on behalf of its members. *Id.* at 81. The court explained that the proposed representative action did not require individual participation that would be affected by the existence, or absence, of arbitration agreements. *See id.* Moreover, since the plaintiff only sought "declaratory and injunctive relief on behalf of its members," which "do not require individualized proof," consumers' individual arbitration agreements had no bearing on the outcome. *Id.* Although NACA's CPPA claims arise under a different cause of action, the same reasoning applies. There is no requirement of individualized participation by consumers in this action such that arbitration agreements would bear on NACA's right to proceed.

D. Consumers may "bring an action" even if they have signed an arbitration agreement.

Section 28-3905(k)(1)(D)(i) further provides that a public-interest organization may act "if the consumer or class could bring an action," and Gemini asserts this means that its arbitration agreements are binding against NACA. Not so. The CPPA does not say that NACA is subject to all the procedural limitations that might apply to individual consumers. Instead, it merely requires that the conduct challenged by NACA must be actionable under the CPPA—which it is—and that NACA has a sufficient stake in the "controversy to obtain a judicial resolution."

Animal Legal Def. Fund, 258 A.3d at 183. NACA can sue in court if a consumer or class of consumers could "bring an action" in any forum.

Gemini's argument relies on a false premise, because even if every consumer had agreed to its arbitration provision, and even if it were enforceable, the arbitration clause merely governs the forum in which they can sue—not whether they can bring an action. *See Preston v. Ferrer*, 552 U.S. 346, 359 (2008) ("By agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral ... forum." (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628 (1985). Indeed, the Supreme Court has held that a statutory reference to the right to bring "an action" is consistent with requirement to arbitrate. *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 100-02 (2012) (noting that a "provision's repeated use of the terms 'action,' 'class action', and 'court'" did not prevent arbitration and that "contractually required arbitration of claims satisfies the statutory prescription of civil liability in court"). And Gemini's own UA refers to a "court action" when it wants to refer to actions brought in court and an "arbitration action" when it wants to refer to actions brought in arbitration.[2]

[2] In arguing now against the understanding of the meaning of the term "an action" reflected in its own contract, Gemini relies on *Bd. of Trs. of Univ. of D.C. v. Joint Rev. Comm. On Educ. In Radiologic Tech.*, 114 A.3d 1279, 1286 (D.C. 2015). But *Joint Rev. Comm. On. Educ*. did not address arbitration at all, finding only that a third-party complaint constituted a "civil action" for purposes of removing Higher Education Act claims to federal court.

Moreover, as Judge Raffinan correctly observed, the mere existence of an arbitration clause that governs the consumer's claim does not automatically and absolutely preclude the consumer from bringing suit. *See* App. 400. Gemini's argument presumes the validity and enforceability of its agreement, and that it would prevail on a motion to compel arbitration. But Gemini puts the cart before the horse. An arbitration agreement may be unenforceable or unconscionable, as many are (and as NACA argued in the alternative). Or, like any other contractual right, arbitration could be waived by choice or conduct of the other party, as defendants often do. *See, e.g.*, *Morgan v. Sundance, Inc.*, 596 U.S. 411, 417-19 (2022) (discussing waiver analysis in federal forum). Should any consumer seek to sue Gemini in Superior Court, it would be incumbent upon Gemini to *either* move to compel arbitration (where it may not ultimately prevail) *or* decide to litigate in court. And if Gemini moved to compel arbitration, it would presumably need to overcome the consumer's individualized arguments around formation and enforceability. Arbitration is not a foregone conclusion even if an arbitration agreement exists.

This is particularly true given that the District's Revised Uniform Arbitration Act ("RUAA") does not even compel dismissal of a Superior Court action where

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Gemini's other citation, *2200 M Street*, 940 A.2d 143, also does not say that arbitration is not "an action" under the CPPA. Instead, the Court merely analyzed whether "the present disputes—namely, actions for injunctive relief and for damages" fell within the scope of a particular arbitration provision. *Id.* at 151.

arbitration is properly invoked. Rather, the RUAA provides that the action will be stayed—evidencing the Council's view that the Superior Court's subject-matter jurisdiction over the underlying claim is undisturbed. *See* D.C. Code § 16-4407(f). The RUAA therefore confirms that if Gemini chose not to invoke its arbitration agreement against a consumer, the claim could proceed. *See id.; see also Viking River Cruises*, 596 U.S. at 653 (explaining that an arbitration clause is a type of forum selection clause such that "by agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute," and merely "submits to their resolution in an arbitral forum") (cleaned up).

In sum, Gemini's argument fails here, too. Consumers' arbitration agreements with Gemini are not binding against NACA, despite Gemini's attempt to read in limitations and procedural considerations that do not exist in the CPPA or relevant caselaw.

E. Individual consumers cannot waive NACA's substantive right to bring CPPA claims.

Before the Superior Court, Gemini argued that NACA could not bring CPPA claims because consumers had supposedly waived the right to bring a representative action. Its argument went beyond simply asking the Court to compel arbitration; instead, Gemini repeatedly argued that NACA had no right to bring this action at all because the arbitration provision required users to arbitrate individually. *See* App.114 (arguing that the arbitration agreement "precludes" all representative

actions); *id.* at 119 (arguing that consumers "waive[d]" the right to bring private attorney general actions); *id.* at 16 (explaining that Gemini intends to "preclud[e] NACA from suing . . . because Gemini Users can, and do, arbitrate the EFTA claims"). Though it avoids that framing before this Court, the arguments are so concerning that they bear mentioning.

If construed as Gemini asks, the agreement between Gemini and each consumer would be an impermissible waiver of NACA's substantive statutory rights and would effectively repeal Section 28-3905(k). *See, e.g.*, *Mitsubishi Motors Corp.*, 473 U.S. at 637 n.19 ("[I]n the event the choice-of-forum and choice-of-law clauses operated in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . we would have little hesitation as condemning the agreement as against public policy."); *Hengle v. Treppa*, 19 F.4th 324, 334-35 (4th Cir. 2021) ("[W]here an arbitration agreement prevents a litigant from vindicating federal substantive statutory rights, courts will not enforce the agreement."). But no private agreement between Gemini and consumers can deprive NACA of the substantive rights that the D.C. Council conferred upon public-interest organizations to protect the public. *Cf. Cole*, 105 F.3d at 1482 (explaining that an agreement purporting to waive substantive protections would be unenforceable).

Courts recognize that substantive statutory rights that protect the public generally cannot be waived. *See, e.g.*, *Cole*, 105 F.3d at 1482; *Owens v. Intern. Bus.*

Machine Corp., 2024 WL 2991203, at *3 (D.C. Cir. June 14, 2024) (recognizing that "individuals may not waive substantive antidiscrimination rights guaranteed by the ADEA"); *Vahey v. Gen. Motors Corp.*, 2012 WL 9390844, at *5-6 (D.D.C. Mar. 1, 2012) (noting plaintiff could not waive substantive rights under the Uniformed Services Employment and Reemployment Act of 1994 by private agreement). *Cf. Wash. Hosp. Ctr. v. D.C. Dep't of Emp't Servs.*, 983 A.2d 961, 968 (D.C. 2009) (citing D.C. statute prohibiting parties from agreeing to waive the right to compensation).

Gemini has cited no law or case to support the position that D.C. courts or the CPPA permit a business and its customers to waive by private agreement the substantive right of a non-signatory organization to bring an action under Section 28-3905(k)(1)(D). And there is no reason to believe that the D.C. Council intended for a carveout allowing private parties to circumvent the CPPA in this way. Indeed, permitting an individual consumer or other private party to contract away the rights of non-signatory third parties like NACA to bring public-interest actions under the CPPA could effectively repeal the CPPA. Any consumer could purport to agree—separate altogether from an arbitration agreement—to waive his or her statutory rights under the CPPA, and by Gemini's logic, that agreement would be enforceable against NACA and "preclude" this lawsuit. But that is not what the law allows. *See First Am. Corp. v. Al-Nahyan*, 2 F. Supp. 2d 58, 64 n.7 (D.D.C. 1998) (noting that parties generally cannot waive statutory rights where "a question of public policy is

involved, or where rights of third parties, which the statute was intended to protect, are involved"); *cf. Air Line Pilots Ass'n, Intern. v. Northwest Airlines, Inc.*, 199 F.3d 477, 484-85 (D.C. Cir. 1999) (explaining that while individuals may bargain away certain of their own rights, unions may not bargain away the rights of those they represent). Instead, accepting Gemini's argument would allow corporations to contract their way out of all CPPA-enforcement suits brought by public-interest organizations, an outcome that no court has endorsed.

Gemini's argument would also create a dangerous loophole, allowing businesses to insulate themselves from this type of CPPA enforcement simply by including arbitration clauses in consumer contracts. This outcome would directly contradict the legislative intent of the CPPA, which was designed to ensure that deceptive trade practices can be challenged "through court action" even when individual consumers face barriers to litigation. *See* Report on Bill 19-0581, D.C. Council Comm. On Pub. Servs. & Cons. Aff., at 6 (Nov. 28, 2012). As the Supreme Court recognized in *Waffle House*, allowing private arbitration agreements to block public-enforcement actions would undermine the regulatory structure designed to protect consumers. *See* 534 U.S. at 296.

F. The purported waiver of NACA's rights is not enforceable regardless of whether it appears in an arbitration agreement.

The fact that the purported waiver of NACA's rights under Section 28-3905(k)(1)(D) appears in an arbitration agreement does not alter this logic. The FAA "does not require courts to enforce contractual waivers of substantive rights and remedies." *Viking River Cruises*, 596 U.S. at 653. *See also Cedeno v. Sasson*, 100 F.4th 386, 395 (2d Cir. 2024) (explaining that the Supreme Court "has repeatedly recognized the general principle that provisions within an arbitration agreement that prevent a party from effectively vindicating statutory rights are not enforceable"). Rather, an enforceable arbitration agreement "does not alter or abridge substantive rights; it merely changes how those rights will be processed." *Id.* Thus, even where a party agrees to arbitrate a statutory claim, the party does not "forgo the substantive rights afforded by [] statute; it only submits to their resolution in an arbitral forum." *Id.* (quoting *Preston v. Ferrer*, 552 U.S. 346, 359 (2008)). *See also, e.g.*, *McNeill v. Intern. Bus. Machine Corp.*, 2023 WL 7214668, at *3 (D.D.C. Nov. 2, 2023) ("[I]n agreeing to arbitrate his ADEA claims, he did not waive any of the substantive rights afforded to him by that statute.").

Courts have refused to enforce arbitration agreements that interfere with the effective vindication of statutory rights. *See, e.g.*, *Smith v. Bd. of Directors of Triad Mfg., Inc.,* 13 F.4th 613, 623 (7th Cir. 2021) ("[W]e hold only that the 'effective vindication' exception bars application of the plan's arbitration provision to claims

under § 1132(a)(2)”)*; see also Harrison v. Envision Mgmt. Holding, Inc. Bd. of Directors*, 59 F.4th 1090, 1101 (10th Cir. 2023), cert. denied, 144 S. Ct. 280 (2023) (invalidating arbitration provisions that “effectively prevent [the consumer] from vindicating many of the statutory remedies that he seeks in his complaint under ERISA § 502(a)(2)”).[3]

Viking River Cruises is instructive. There, the Supreme Court considered and rejected the argument that Gemini makes here—that an arbitration agreement can waive altogether the substantive right to bring a representative action under a duly enacted state law. *See Viking River Cruises*, 596 U.S. at 662. While the defendant was entitled to compel the plaintiff’s claims to arbitration, the provision purporting to waive representative claims “was invalid [under California law] if construed as a wholesale waiver of [Private Attorney General Act] claims.” *Id.* And the Court held that the Federal Arbitration Act did not preempt the aspect of California law rendering that “wholesale waiver” invalid. *See id.* at 662-63.[4]

Here, Gemini ignores the Supreme Court’s instruction in *Viking River Cruises*

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[3] *See also, e.g.*, *Hengle*, 19 F.4th at 335 (noting that courts have refused to enforce arbitration agreements that limit a party’s substantive claims in order to prevent them from bringing federal claims (citing *Williams v. Medley Opportunity Fund II, LP*, 965 F.3d 229, 238 (3d Cir. 2020))); *Blair v. Rent-a-Center, Inc.*, 928 F.3d 819, 828-29 (9th Cir. 2019) (declining to enforce an arbitration provision that purported to waive the right to seek public injunctive relief in any forum).

[4] Since there was no mechanism for a court to adjudicate the remaining claims (for harms the plaintiff herself had not experienced), those claims could be dismissed. *See id.* Here, in contrast, the CPPA provides a mechanism for adjudication of NACA’s claims.

that arbitration agreements that purport to waive substantive rights should not be enforced. Gemini instead asks the Court to enforce an arbitration agreement that purports to *waive altogether* the right to bring a representative action. In fact, the purported waiver here goes well beyond the waiver in *Viking River Cruises* because if Gemini is right, then D.C. consumers have waived not only *their* rights but also the rights of nonsignatories, like NACA, to sue under Section 28-3905(k)(1)(D). Gemini asks the court to enforce its arbitration agreement in a way that "preclude[s]" NACA from bringing suit in favor of individual consumers bringing EFTA claims in arbitration. App. 120. Gemini's argument cannot be reconciled with *Viking River Cruises*, which makes clear that the Federal Arbitration Act does not require such wholesale waivers of substantive statutory rights.[5]

III. There is no preemption.

The trial court was correct when it found that the FAA did not preempt Section 28-3905(k)(1)(D) as "there is no conflict between the CPPA's 'public interest organization' standing and the FAA" because NACA is not a party to the arbitration agreement and the CPPA authorizes NACA to sue to "'vindicate the public interest, not simply provide make-whole relief' for the aggrieved individual consumers."

[5] Judge Raffinan concluded that *Viking River Cruises* was inapposite, both because NACA is not a party to the UA and because the CPPA's separate conferral of standing is broader than standing under the California statute. App. 404 n.2. Appellee agrees that the CPPA is broader than the Private Attorneys General Act of California, but contends that *Viking River Cruises* supports its position that enforcing Gemini's purported waiver runs afoul of the Supreme Court's arbitration jurisprudence.

App. 402, 404. Gemini's arguments to the contrary are without merit as they misstate the law of preemption under the FAA and NACA's vested statutory role under the CPPA.

The FAA only preempts state law when state law "disfavors arbitration," *Concepcion*, 563 U.S. at 341, or disfavors contracts that "have the defining features of arbitration agreements," *Kindred Nursing Ctrs.*, 581 U.S. at 251. Here, Section 28-3905(k)(1)(D) does not disfavor arbitration; it has nothing to do with arbitration.

Instead, this provision confers statutory standing on public-interest organizations to prosecute unlawful trade practices. *See generally Animal Legal Def. Fund*, 258 A.3d at 182-85. This standing "leaves undisturbed" any "bilateral arbitration" agreements that may exist between consumers and Gemini. *Blair*, 928 F.3d at 829 (state law not preempted by FAA because consumer claims could still be brought in arbitration); *compare Generational Equity LLC v. Schomaker*, 602 F. App'x 560, 562-63 (3d Cir. 2015) (Pennsylvania statute barring unregistered foreign businesses from using state court for any purpose was an "obstacle" to the FAA because it prevented enforcement of arbitration award).

None of Gemini's arguments change this outcome. First, Section 28-3905(k)(1)(D) is not a "new device[] or formula[]" that is antagonistic to arbitration as cautioned against in *Epic Systems Corporation v. Lewis*, 584 U.S. 497, 509 (2018). *See* App. 117. There, employee-plaintiffs sought to invalidate arbitration agreements

which they had entered into with their employer that barred collective actions. *See Epic*, 584 U.S. at 505-510. Here, NACA has not entered into any arbitration agreement, and Section 28-3905(k)(1)(D) leaves undisturbed valid arbitration agreements between signatories. Second, NACA's claims are not entirely based on the contractual relationship between Gemini and consumers, and NACA is not effectively litigating as an assignee of Gemini Users' claims. The CPPA provides NACA its own independent statutory right to sue, and NACA cannot bind individual consumers in any matter. *Supra*, II.A & II. B. Third, NACA is not "cherry-pick[ing] beneficial contract terms" because it does not seek to enforce the terms in the UA. App. 123. Instead, it seeks injunctive relief preventing Gemini from engaging in unfair and deceptive practices including using and enforcing terms in the UA that violate the law.

The Supreme Court has made clear that the FAA's "policy favoring arbitration" does not allow a court to "devise novel rules to favor arbitration over litigation." *Morgan*, 596 U.S. at 418. But that is what Gemini requests here: it asks that this Court find D.C.'s statutory consumer-protection scheme unenforceable because some consumers under its purview may be parties to arbitration agreements and stand to obtain relief without going to arbitration. The Supreme Court has cautioned against judicial invention of any such "arbitration-preferring procedural rule[]." *Id.* Therefore, this Court may reject this argument.

IV. In the alternative, the arbitration clause is unenforceable.

The Court may affirm the Superior Court on the alternative basis that Gemini's arbitration provision is unenforceable both because it does not provide notice and because it is unconscionable.[6] The provision is procedurally unconscionable because it is a contract of adhesion that lacks meaningful notice. *See Cullinane.*, 893 F.3d at 62. It is substantively unconscionable because it imposes excessive costs and restrictions on consumers while limiting their legal remedies. *See Ruiz*, 156 F. Supp. 3d at 182.

First, Gemini's online sign-up process does not provide reasonable notice of the arbitration agreement. The Superior Court found that Gemini did not carry its burden to show that consumers who sign up for its services are bound by the arbitration agreement (or delegation clause). App. 400. The court record contains a single, undated page showing this sign-up provision. Gemini has made no showing that any specific consumer agreed to that sign-up provision, nor has it offered any evidence that a proxy consumer viewed and agreed to this provision (Gemini has not, in fact, identified any proxy consumer). *See* App. 129-130 (Thomas Decl.), App. 134 (undated screenshot of sign-up page that is not linked to any particular consumer), App. 136-251 (list of D.C. consumers unaccompanied by individualized

[6] The Court may apply a legal theory other than that applied by the trial court and rest affirmance on any ground that finds support in the record. *See Franco v. District of Columbia*, 3 A.3d 300, 307 (D.C. 2010).

evidence of what anyone actually saw or agreed to).

Even assuming that the undated sign-up page that Gemini filed in Superior Court is the version that would be binding on NACA, should the Court credit Gemini's arguments, that screenshot does not prove that anyone created an enforceable contract to arbitrate. The purported "notice" of a "dispute resolution" provision on the sign-up page does not mention arbitration and, depending on the resolution of a user's phone or computer screen, may not even be visible at the end of the overly long sign-up form. Then, the arbitration provision is buried at the bottom of the lengthy UA, and the waivers of class and representative actions do not appear until three pages later. This visual flow does not provide reasonable notice of the arbitration agreement. *See, e.g.*, *Chabolla v. ClassPass Inc.*, 129 F.4th 1147, 1154 (9th Cir. 2025) (rejecting arbitration agreement where purchase flow did not put consumers on notice of arbitration).

Moreover, there are numerous and distracting fields to fill out on the same sign-up form containing any purported "notice" of arbitration. *See Kauders v. Uber Technologies, Inc*., 159 N.E.3d 1033, 1052-55 (Mass. 2021) (holding deficient notice of online consent to arbitration rendered agreement unenforceable where specific placement of statement explaining connection between creating account and agreeing to terms, "which would encourage opening and reviewing the terms," was displayed less prominently than other information on screen; notice more likely

sufficient where "the nature, including the size, of the transaction" suggests a contract is being entered into, [and] where "the notice conveys the full scope of the terms and conditions"). As the *Kauders* court explained, "[p]ut succinctly the presence of other terms on the same screen with a similar or larger size, typeface, and with more noticeable attributes diminished the hyperlink's capability to grab the user's attention." *Id.* at 1053 (citation omitted)*; see also, e.g.*, *Berman v. Freedom Fin. Network, LLC*, 30 F.4th 849, 856-57 (9th Cir. 2022) (rejecting arbitration agreement where cluttered final screen prevented notice and mutual assent); *Starke v. SquareTrade, Inc.*, 913 F.3d 279, 288-95 (2d Cir. 2019) (same); *Nicosia v. Amazon.com, Inc.*, 834 F.3d 220, 235–238 (2d Cir. 2016) (same).

Second, it would be unconscionable to enforce the arbitration agreement, which, whether described as a click-wrap, browse-wrap, scroll-wrap, or sign-in wrap, was a contract of adhesion. "Whether an arbitration agreement is unconscionable is primarily a question of state contract law." *Ruiz*, 156 F. Supp. 3d at 180. In the District of Columbia, a party seeking to avoid a contract because of unconscionability must prove two elements: an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. *Id*. (citing *Curtis v. Gordon*, 980 A.2d 1238, 1244 (D.C.2009)). Reasonable Gemini users would not understand that by simply clicking the online button that allowed them to create an account, they were agreeing to waive

rights granted to them under both District of Columbia and federal law, including the right to have their disputes heard as class actions and before juries in court. Thus, Gemini users had no meaningful choice, and the contract terms unreasonably favored Gemini.

CONCLUSION

For the foregoing reasons, this Court should affirm the Superior Court's decision in its entirety. NACA respectfully requests the opportunity to present oral argument.

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Respectfully submitted,

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