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 A JUDGMENT OF THE
SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

THE DISTRICT OF COLUMBIA'S BRIEF AS AMICUS CURIAE IN SUPPORT OF APPELLEE

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INTRODUCTION AND INTEREST OF AMICUS CURIAE

The Consumer Protection Procedures Act (CPPA), D.C. Code § 28-3901 *et seq.*, is the foundation of the District's consumer protection law. As the D.C. Council made clear in enacting the CPPA, its purposes are to "assure that a just mechanism exists to remedy all improper trade practices" and to "promote, through effective enforcement, fair business practices throughout the community." *Id.* § 28-3901(b).

The Office of the Attorney General for the District of Columbia (OAG) plays a leading role in enforcing the CPPA. But the District's consumer protection efforts also rely on public interest organizations like the National Association of Consumer Advocates (NACA) bringing suit under the CPPA's private attorney general provision. That statute permits a "public interest organization" to bring an action for relief from an unlawful trade practice "on behalf of the interests of a consumer or a class of consumers." *Id.* § 28-3905(k)(1)(D)(i). In cases like this one, public interest organizations supplement OAG's enforcement with their litigation resources, industry knowledge, and ties to the community. And they vindicate the public's right to truthful information from merchants where individual consumers might have more difficulty bringing suit.

Given its strong interest in effective enforcement of the CPPA, the District files this brief as amicus curiae in support of appellee NACA. Adopting Gemini's

reading of the CPPA would jeopardize the comprehensive enforcement scheme that the Council crafted, treating public interest organizations—which should act as private attorneys general—as if they were bound by the contractual obligations that often prevent consumers from asserting claims in court. The Court should affirm, making clear that consumer arbitration agreements do not negate public interest organizations' ability to enforce the CPPA.

SUMMARY OF ARGUMENT

1. Public interest organizations provide valuable support for OAG's enforcement of the CPPA by filing suit as private attorneys general. Over decades of amendments to the CPPA, the Council repeatedly carved out larger roles for public interest organizations to bolster the District's enforcement efforts. Most relevant here, the Council designed the 2013 amendments to bypass traditional bases for standing and empower public interest organizations to sue in circumstances where consumers might be unable. The Council thus recognized that public interest organizations vindicate the broader public interest when they marshal their resources and expertise to enforce the District's consumer protection laws. That unique role is especially valuable for industries where arbitration agreements are commonplace, preventing injured consumers from bringing an action in court.

2. Neither the CPPA itself nor District common law forbid a public interest organization from bringing suit against a defendant-merchant simply because the defendant's customers have signed arbitration agreements.

Beginning with the CPPA, public interest organizations' statutory standing to sue requires that a consumer be able to "bring an action" against the same defendant and unlawful trade practice—but not that the consumer be able to do so in the same forum. The ordinary legal meaning of "bring an action" applies to actions in any forum, including arbitration. Moreover, in the surrounding statutory context, the Council repeatedly specified requirements for plaintiffs to sue under the CPPA and various other statutes. But it conspicuously declined to require that the consumer be able to bring an action "in court." What is more, the CPPA's structure links suits by public interest organizations to OAG through unique stay and notice provisions, further distinguishing their role from suits by injured consumers. Finally, the legislative history of the public interest organization provision indicates the Council's intent to grant such organizations broad standing to bring suit, even where consumers might not be able or willing.

Next, common-law contract principles do not bind NACA to consumers' arbitration agreements. It is black-letter law that contracts, including arbitration agreements, do not bind nonparties. Gemini invokes assignment and subrogation as exceptions to that principle. Yet it cites not one decision of a D.C. court applying

its assignment theory. Regardless, there is no allegation here that Gemini users manifested their intent to assign their claims to NACA. And NACA never subrogated itself to users' claims against Gemini by satisfying them. Instead, NACA seeks to vindicate—as a private attorney general—the public's statutory right under the CPPA to truthful information from merchants, not any contractual right.

3. As a last resort, Gemini turns to the Federal Arbitration Act (FAA). But time and again, the Supreme Court has made clear that the FAA preserves parties' freedom to contract and, in doing so, hews to traditional common-law principles of contract. Those principles do not bind NACA to an arbitration clause to which it never agreed. Nor do they rehabilitate Gemini's meritless assignment, subrogation, and estoppel arguments.

ARGUMENT

I. OAG Relies On Public Interest Organizations To Complement Its Enforcement Of The CPPA.

The CPPA's twin purposes are to "assure that a just mechanism exists to remedy all improper trade practices" and to "promote, through effective enforcement, fair business practices throughout the community." D.C. Code § 28-3901(b). OAG spearheads that enforcement: if it has "reason to believe that any person is using or intends to use any . . . practice in violation of [the CPPA], and if it is in the public interest," OAG may bring an action in the Superior Court to enjoin the unlawful practice and seek restitution, civil penalties, economic damages, and

attorney's fees. *Id.* § 28-3909(a), (b). OAG has thus enforced the CPPA against "large pharmaceutical companies, local immigration providers, usurious lenders," and other corporate wrongdoers. Consumer Protection Clarification and Enhancement Amendment Act of 2018, Report on Bill 22-185 before the Comm. of the Whole, Council of the District of Columbia, at 2 (Mar. 20, 2018). As of 2022, OAG's efforts have delivered "more than $35 million in restitution back to consumers" and "collected more than $88 million in payments and penalties." Consumer Protection Procedures Amendment Act of 2022, Hearing on Bill 24-658 before the Comm. of the Whole, Council of the District of Columbia, Statement of Adam Teitelbaum, Dir., OAG Off. of Consumer Protection, at 3 (Nov. 3, 2022).

But given resource limitations, OAG cannot fulfill the CPPA's purpose of "remedy[ing] all improper trade practices" without concurrent enforcement by public interest organizations. D.C. Code § 28-3901(b)(1). The CPPA's legislative history illuminates the importance of suits by public interest organization. Earlier iterations of the CPPA provided for enforcement only by the District government or consumers themselves. *See* Consumer Protection Procedures Act, Report on Bill 1-253 before the Comm. on Pub. Serv. and Consumer Affs., Council of the District of Columbia, at 10-11, 15-17, 23 (Mar. 24, 1976). Then, in 2000, the Council amended the CPPA to allow a public interest organization or other private litigant to bring an enforcement action on behalf of "itself, its members, or the general public." Fiscal

Year 2001 Budget Support Act of 2000, D.C. Law 13-172, § 1402(d)(1), 47 D.C. Reg. 6308, 6349 (Aug. 11, 2000). It did so in direct response to "fiscal and personnel problem[s]" at the former Department of Consumer and Regulatory Affairs that undermined public enforcement. Fiscal Year 2001 Budget Support Act of 2000, Report on Bill 13-679 before the Comm. on Consumer and Regul. Affs., Council of the District of Columbia, at 4 (Apr. 26, 2000). Under the new scheme, "[p]ublic interest organizations w[ould] be able to bring additional resources to consumer protection enforcement in the District, contributing private and donated funds," while the government would continue targeting "areas where enforcement by private priorities w[ould] not be sufficient." *Id.*

In 2013, the Council again amended the CPPA to broaden standing for public interest organizations. The amendments responded to this Court's holding in *Grayson v. AT & T Corp.*, 15 A.3d 219 (D.C. 2011) (en banc), that the CPPA lacked "a clear expression of an intent" to depart from Article III standing requirements for private plaintiffs. *Id.* at 244-45. The Council believed that the decision had a "chilling effect" on public interest organizations "litigating cases in the public interest." Consumer Protection Amendment Act of 2012, Report on Bill 19-581 before the Comm. on Pub. Servs. and Consumer Affs., Council of the District of Columbia, at 2 (Nov. 28, 2012). The 2013 amendments to the CPPA abrogated *Grayson* by authorizing public interest organizations to sue "on behalf of the interest

of a consumer or a class of consumers." *Id.* at 2, 6; *see* Consumer Protection Act of 2012, D.C. Law 19-282, § 2(b)(3), 60 D.C. Reg. 2132, 2133 (Feb. 22, 2013) (codified at D.C. Code § 28-3905(k)(1)(D)(i)). That language "clarif[ied]" that public interest organizations "may act as private attorneys general for the public," as they had before *Grayson*. Report on Bill 19-581, *supra*, at 2. The Council thus intended the 2013 amendments to confer on "public interest organizations . . . the full extent of standing as may be recognized by the District of Columbia courts," including "bases for standing that the D.C. courts have not yet had occasion to recognize at all." *Id.* at 6; *see Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174, 184 (D.C. 2021). That broad source of standing reflected public interest organizations' "special suitability for promoting [consumers'] interests through court action," especially "where it is not feasible for the affected consumers to do so personally." Report on Bill 19-581, *supra*, at 6.

The role that public interest organizations now play in helping OAG enforce the CPPA is vital in several ways. For one, OAG lacks the resources to "target every bad actor in the city." At-Risk Tenant Protection Clarifying Amendment Act of 2018, Report on Bill 22-170 before the Comm. on the Judiciary & Pub. Safety, Council of the District of Columbia, Statement of Jennifer Lavallee, Supervising Att'y, D.C. Legal Aid Society, at 23-24 (Sept. 20, 2018); Report on Bill 13-679, *supra*, at 6. Participation by public interest organizations also "raise[s] awareness,

legitimate[s] goals, [and] mobilize[s] support" for key consumer protection issues. Deborah L. Rhode, *Public Interest Law: The Movement at Midlife*, 60 Stan. L. Rev. 2027, 2041 (2008).

Moreover, the Council had good reason to recognize public interest organizations' "special suitability" to protect consumers' interests. Report on Bill 19-581, *supra*, at 6. Given their industry expertise and close ties to the public, these organizations have a strong awareness of the issues affecting consumers and can "bring unique perspectives and insights to consumer protection." Report on Bill 19-581, *supra*, at 25 (report of the Antitrust and Consumer Law Section of the D.C. Bar). NACA, for instance, "advocates against consumer abuses both federally and locally in the District," bringing its insights about electronic fund transfer fraud and contracts of adhesion to suits like this one. App. 8-9 (Compl. ¶¶ 8-9). And because public interest organizations are "not motivated by profit," they are uniquely positioned to address harms that "would not necessarily bring sufficient monetary return" to individual plaintiffs or their attorneys. Report on Bill 19-581, *supra*, at 25. Accordingly, public interest organizations have brought CPPA claims challenging a variety of harmful practices, from deceptive advertising to unfair user agreements. *See, e.g.*, *Praxis Project v. Coca Cola Co.*, No. 2017-CA-4801 (D.C. Super. Ct.); *Client Earth v. Wash. Gas Light Co.*, No. 2022-CA-3323 (D.C. Super. Ct.). In doing so, they have delivered substantial benefits to the public. *See, e.g.*,

Report on Bill 19-581, *supra*, at 2 n.1 (describing the National Consumer League's suit against Kellogg Company resulting in Kellogg donating $200,000 to charities and 8,000 cases of cereal to local food banks).

The value of public interest organizations' enforcement of the CPPA is heightened by the pervasiveness of arbitration agreements like those at issue here. Most e-commerce transactions are subject to consumer arbitration agreements. *See, e.g.*, Kate Hamaji et al., Ctr. for Popular Democracy & Econ. Pol'y Inst., *Unchecked Corporate Power* 10 (2019), https://perma.cc/4Z3V-NX25; Imre Stephen Szalai, *The Prevalence of Consumer Arbitration Agreements by America's Top Companies*, 52 U.C. Davis L. Rev. Online 233, 234, 241 n.18 (2019). And the vast majority of large companies using consumer arbitration agreements include class waivers. Szalai, *supra*, at 238. With class arbitration off the table, a consumer's only recourse is to bring claims in individual arbitration. But "[s]tudies have found that almost no one pursues individual arbitration." J. Maria Glover, *Mass Arbitration*, 74 Stan. L. Rev. 1283, 1305 (2022). That should come as little surprise: "[i]n many cases, just the filing fee for the arbitration demand can exceed the value of any individual claim," making claims "economically irrational" to pursue. *Id.* at 1329.

Consumer arbitration agreements thus demonstrate the stakes of protecting public interest organizations' ability to vindicate consumer interests even where

consumers cannot "do so personally," as the Council intended. Report on Bill 19-581, *supra*, at 6.

II. A Public Interest Organization's CPPA Claims Are Not Defeated By An Arbitration Agreement To Which It Is Not A Party.

A. A Public Interest Organization's Statutory Standing To Assert A CPPA Claim Does Not Require That A Consumer Be Able To Bring An Action In The Same Forum.

Interpreting the CPPA "starts with the plain language of the statute." *Lucas v. United States*, 305 A.3d 774, 777 (D.C. 2023) (internal quotation marks omitted). The CPPA permits a "public interest organization" to bring "an action seeking relief" from an unlawful trade practice "on behalf of the interests of a consumer or a class of consumers" so long as two conditions are met. D.C. Code § 28-3905(k)(1)(D)(i). First, the "consumer or class" must be able to "bring an action under subparagraph (A) of this paragraph for relief from such use by such person of such trade practice." *Id.* Subparagraph (A) in turn provides that "[a] consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District." *Id.* § 28-3905(k)(1)(A). Second, the public interest organization must have a "sufficient nexus to the interests involved of the consumer or class to adequately represent those interests." *Id.* § 28-3905(k)(1)(D)(ii).

Here, Gemini does not dispute that NACA has the required "nexus," contending instead that NACA fails the first condition because Gemini users cannot "bring an action." *See* Appellant's Br. 24. Under the plain text of the CPPA,

however, a consumer may "bring an action" even if the only forum in which they can do so is arbitration. To "bring an action" simply means "[t]o sue" or to "institute legal proceedings." *Bring an Action, Black's Law Dictionary* 231 (10th ed. 2014). And to "institute legal proceedings" does not require that the forum be a court. *See id.* at 1398 (defining "legal proceeding" as "[a]ny proceeding authorized by law and instituted in a court *or tribunal* to acquire a right or enforce a remedy" (emphasis added)); *accord Goldman, Sachs & Co. v. Golden Empire Schs. Fin. Auth.*, 764 F.3d 210, 216-17 (2d Cir. 2014) (arbitrations are "proceedings"); *Goldman, Sachs & Co. v. City of Reno*, 747 F.3d 733, 746 (9th Cir. 2014) (same); *UBS Fin. Servs., Inc. v. Carilion Clinic*, 706 F.3d 319, 329 (4th Cir. 2013) (same); *Associated Builders Corp. v. Ratcliff Constr. Co.*, 823 F.2d 904, 906 (5th Cir. 1987) (same).

No doubt, as Gemini protests, courts often refer to an action being brought in court. *See* Appellant's Br. 24. "[B]ut the fact that the phrase [i]s commonly used in a particular context does not show that it is limited to that context." *U.S. Postal Serv. v. Konan*, 146 S. Ct. 736, 743 (2026) (internal quotation marks omitted). The CPPA contemplates that consumers will, as a general matter, bring actions in court, but it nowhere forecloses the possibility of doing so in arbitration instead.

The remainder of the sentence confirms that the specific forum is irrelevant: "the consumer or class" must be able to "bring an action . . . for relief from such use by such person of such trade practice." D.C. Code § 28-3905(k)(1)(D)(i). The

Council thus specified several features of the public interest organization's action: it must target the same use of the same trade practice by the same defendant against which a consumer would be able to "bring an action." Gemini surmises from this that "NACA's cause of action [is] entirely coterminous with the consumer's cause of action." Appellant's Br. 19. But nowhere did the Council additionally require that that the consumer or class be able to "bring an action" in "such *forum*"—that is, in the same forum as the public interest organization. That choice implicates "the common-sense principle that 'when a legislature makes express mention of one thing, the exclusion of others is implied.'" *Odeniran v. Hanley Wood, LLC*, 985 A.2d 421, 427 (D.C. 2009) (quoting *Council of D.C. v. Clay*, 683 A.2d 1385, 1390 (D.C. 1996)).

A forum-agnostic reading also accords with the "statute's grammar." *Long v. United States*, 312 A.3d 1247, 1259 (D.C. 2024). The CPPA requires only that a consumer be able to "bring *an* action," not *the* action that the public interest organization seeks to bring. D.C. Code § 28-3905(k)(1)(D)(i) (emphasis added). "When used as an indefinite article, 'a'"—or here, "an"—"means '[s]ome undetermined or unspecified particular.'" *McFadden v. United States*, 576 U.S. 186, 191 (2015) (quoting *Webster's New International Dictionary* 1 (2d ed. 1954)). By contrast, "the definite article 'the'" connotes a "specific" item. *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys.*, 603 U.S. 799, 817 (2024). For instance, if the

CPPA instead referred to "*the* cause of action," that might more naturally indicate "the plaintiff's cause of action." *See id.* The Council chose, however, to specify "an action" and not "the action." D.C. Code § 28-3905(k)(1)(D)(i). In doing so, it declined to require that a consumer be able to "bring an action" in the exact same way as the plaintiff public interest organization, other than the features it expressly prescribed.

For its part, Gemini infers from the statute's requirement that "*the* consumer or class" be able to "bring an action" that the public interest organization must identify "the precise party or parties whose interests [it] seeks to represent." Appellant's Br. 21-22 (quoting D.C. Code § 28-3905(k)(1)(D)(i)). That is incorrect. A public interest organization can bring a suit "on behalf of the interests of a . . . class of consumers" without needing to identify individual consumers. D.C. Code § 28-3905(k)(1)(D)(i). Indeed, this Court recently permitted a public interest organization to bring a CPPA suit on behalf of the interests of "the general public of the District of Columbia." *Earth Island Inst. v. Coca-Cola Co.*, 321 A.3d 654, 662 (D.C. 2024). In any event, Gemini does not explain why a requirement to identify an individual consumer would make an organization's claim "derivative of" that consumer's specific claim, rather than simply on behalf of that consumer's "interests" more generally. *See* Appellant's Br. 22. Notably, while public interest organizations can sue "on behalf of *the interests of* a consumer or a class of

consumers," neighboring provisions limit a plaintiff to suing "on behalf of that individual" or "on behalf of" that organization or its members. *Compare* D.C. Code § 28-3905(k)(1)(D)(i) (emphasis added), *with id.* § 28-3905(k)(1)(B)-(C). The Council's conspicuous choice of an indirect locution when it could easily have repeated the direct language located nearby evinces its intent to grant public interest organizations a more flexible basis for standing. *See Ctr. for Inquiry Inc. v. Walmart, Inc.*, 283 A.3d 109, 117 (D.C. 2022) ("[W]hile CFI has not shown a nexus to or relationship with any particular consumers, the statute makes it enough that CFI has a 'nexus to the *interests* involved of the consumer.'" (quoting D.C. Code § 28-3905(k)(1)(D)(ii))).

What the CPPA's plain text indicates, its "context[,] structure," and "evident legislative purpose" confirm. *Lumen Eight Media Grp., LLC v. District of Columbia*, 279 A.3d 866, 874 (D.C. 2022) (quoting *In re G.D.L.*, 223 A.3d 100, 104 (D.C. 2020)). *First*, start with the surrounding statutory context: over a dozen statutes in the D.C. Code are explicit when referring to a litigant's ability to "bring an action in the Superior Court of the District of Columbia." *E.g.*, D.C. Code §§ 3-1210.10 (enforcement of laws against unlawful health occupation practices), 7-2341.26 (emergency medical services laws), 28-4525 (cigarette sales below cost), 31-5606.03 (securities laws), 32-103 (wrongful discharge). And other statutes speak clearly when the litigant must "bring in action in a court" and not some other forum,

like arbitration or an agency. *See, e.g.*, *id.* §§ 31-2351.10 ("bring an action in any court of competent jurisdiction"), 31-5031.22 ("bring an action in a court of competent jurisdiction"), 7-705.02 ("bring an action in court"), 44-1004.03 (same), 50-502 (same). By Gemini's lights, each of these textual references to bringing an action in "court" must be mere surplusage, since to "bring an action" necessarily means to do so in court. *See* Appellant's Br. 24. Yet as a general rule, "courts avoid a reading that renders some words altogether redundant." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012).

Gemini points instead to the CPPA's requirement that the public interest organization "have sufficient nexus to the interest involved of the consumer or class to adequately represent those interests." Appellant's Br. 14, 19 (emphasis deleted) (quoting D.C. Code § 28-3905(k)(1)(D)(ii)). From this, Gemini gleans that "NACA has standing to sue here only in a *representative* capacity on behalf of Gemini Users." Appellant's Br. 14. But that does not follow. The nexus requirement simply ensures that the organization has sufficient "aptitude or zeal" to prosecute the suit. *Animal Legal Def. Fund*, 258 A.3d at 187 (citing Report on Bill 19-581, *supra*, at 6). For example, this Court deemed an animal welfare organization to have "sufficient nexus" where its goal of "ensur[ing] that meat-eating consumers have 'accurate information' . . . align[ed] with consumers' interests in truthful advertising," and "at least some meat consumers also care[d] about ethical

considerations." *Id.* That flexible inquiry hardly limits public interest organizations to pursuing the exact claims and objectives a consumer would. Indeed, "promoting the interests of consumers" need not be the organization's "exclusive or even primary purpose." *Id.* at 186.

Second, the CPPA's structure reinforces that public interest organizations' standing to sue is not identical to that of consumers. This Court interprets statutes "as a symmetrical and coherent regulatory scheme" to "fit, if possible, all parts into an harmonious whole." *O'Rourke v. D.C. Police & Firefighters' Ret. & Relief Bd.*, 46 A.3d 378, 383 (D.C. 2012) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000)). Here, two features of the CPPA suggest that the Council designed public interest organization suits to operate more like private attorney general suits than like representative suits on particular consumers' behalf. First, the CPPA provides that "[c]ommencement of an action by" OAG stays claims made "by a public interest organization or on behalf of the general public" based on the same matter. D.C. Code § 28-3905(k)(7)(A). Second, a public interest organization must "provide notice to" OAG within ten days of filing an action. *Id.* § 28-3905(k)(7)(B). The stay and notice provisions work together to ensure that the District's elected Attorney General may, by filing his own suit, exercise control over CPPA claims brought by public interest organizations in their role as private attorneys general. Of course, these two provisions do not cloak public interest organizations with all of

OAG's powers and responsibilities. But the Council's choice to apply these OAG-specific requirements to public interest organizations demonstrates its intent to treat them more like private attorneys general than like individual injured consumers. It follows, then, that the Council sought to distinguish such organizations' standing to sue from that of other private litigants.

Finally, were more needed, the broad remedial purpose underlying the Council's amendments to the CPPA counsels against Gemini's crabbed reading. *Lumen Eight Media Group*, 279 A.3d at 874 (noting the relevance of legislative history and the "consequences of adopting a given interpretation" (internal quotation marks omitted)). The Council was clear that the CPPA "shall be construed and applied liberally to promote its purpose." D.C. Code § 28-3901(c); *see Saucier v. Countrywide Home Loans*, 64 A.3d 428, 442 (D.C. 2013). And it expressly provided that the CPPA's purposes are to "assure that a just mechanism exists to remedy all improper trade practices" and to "promote, through effective enforcement, fair business practices throughout the community." D.C. Code § 28-3901(b).

As recounted, one way the Council aimed to achieve that "effective enforcement" was by granting "public interest organizations . . . the full extent of standing as may be recognized by the District of Columbia courts." *Id.*; Report on Bill 19-581, *supra*, at 6. By thus restoring such organizations' role as private attorneys general, the Council intended to undo *Grayson*'s "chilling effect" on their

"litigating cases in the public interest." Report on Bill 19-581, *supra*, at 2. Far from confining public interest organizations' standing to that of consumers, the Council thus intended that they pursue "court action" even "where it is not feasible for the affected consumers to do so personally." *Id.* at 6. As the Committee Report elaborated, the private attorney general provision in "[s]ubparagraph (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" the private suit provisions in "subparagraphs (A)-(C)." *Id.*; *see* D.C. Code § 28-3905(k)(A) to (D).

The CPPA's legislative history thus rebuts any suggestion that the Council intended to restrict public interest organizations' standing to that of consumers. Yet under Gemini's reading, public interest organizations would be helpless to enforce it in an industry where arbitration agreements are ubiquitous. "This makes no sense, and it would render the entitlement to sue an empty one." *District of Columbia v. Reid*, 104 A.3d 859, 868 (D.C. 2014). The Court should decline to read the CPPA's private attorney general provision to require an "implausible result[]" that would undermine rather than "promote its purpose." *Id.*; D.C. Code § 28-3901(c).

B. A Public Interest Organization Asserting A CPPA Claim Is Not Bound By An Arbitration Agreement To Which It Is Not A Party.

Gemini further asserts that, even if NACA has standing to assert its CPPA claims, those claims are subject to the arbitration clause in Gemini's User Agreement ("UA"). Appellant's Br. 12-16. But "[i]t goes without saying that a contract cannot

bind a nonparty." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294 (2002); *accord Charlton v. Mond*, 987 A.2d 436, 441 (D.C. 2010). District common law recognizes only a few, narrow exceptions to that foundational rule of contract law. *See Oehme, van Sweden & Assocs., Inc. v. Maypaul Trading & Servs. Ltd.*, 902 F. Supp. 2d 87, 97-100 (D.D.C. 2012); *Arthur Andersen LLP v. Carlisle*, 556 U.S. 624, 632 (2009) (instructing courts to determine "whether the relevant state contract law recognizes" a particular "ground for enforcing contracts against third parties").

Here, Gemini argues only that NACA "brought this suit in a purely representative capacity," suggesting that NACA is either consumers' "assignee" or "subrogee." Appellant's Br. 13-15, 29 (internal quotation marks omitted). It is neither. Begin with assignment: Gemini cites not a single decision of a D.C. court in support of that theory. And other jurisdictions uniformly require, at minimum, "[t]hat the obligee manifest an intention to transfer the right to another person." 29 Richard A. Lord, *Williston on Contracts* § 74:3 (4th ed. Supp. 2025) (quoting *Restatement (Second) of Contracts* § 324 (A.L.I. 1981)). Gemini does not explain how "all District of Columbia Gemini users" whose interests NACA represents here manifested their intent to assign their rights to NACA. Appellant's Br. 15; App. 18 (Compl. ¶ 63). Subrogation is even further afield. As this Court has explained, "[s]ubrogation is the substitution of one person to the position of another, an obligee, whose claim he has satisfied." *Stevenson v. HSBC Bank USA, Nat'l Ass'n*, 324 A.3d

295, 305 (D.C. 2024) (quoting *E. Sav. Bank, FSB v. Pappas*, 829 A.2d 953, 957 (D.C. 2003)). Suffice to say, NACA has not "satisfied" consumers' claims against Gemini. *Id.*

At bottom, both of Gemini's theories misapprehend the nature of NACA's claims here. Rather than asserting rights that any individual consumer has somehow conferred on it, NACA seeks to vindicate the public's "enforceable right" under the CPPA to "truthful information from merchants about consumer goods and services." D.C. Code § 28-3901(c); App. 16-17 (Compl. ¶¶ 55, 59-60). Specifically, NACA alleges that Gemini violated the CPPA when it "represented" that its UA waives consumers' anti-fraud "rights" and "remedies" despite the federal Electronic Fund Transfer Act "prohibit[ing]" such waivers. App. 18 (Compl. ¶¶ 51-52, 67). And that statutory right is violated "whether or not any consumer is in fact misled" into agreeing to Gemini's contract. D.C. Code § 28-3904.

Pivoting, Gemini asserts that "any monetary recovery in a CPPA suit is distributed to the underlying consumers." Appellant's Br. 20. Not so. Public interest organizations may also seek remedies on their own behalf: attorney's fees and punitive damages. *See* D.C. Code § 28-3905(k)(2)(B), (C). The same is true when OAG enforces the CPPA. *See id.* § 28-3909(a)-(b) (authorizing OAG to seek "restitution of money or property" to consumers and "civil penalt[ies]" and

"attorneys' fees" for the District). Yet that does not mean OAG is somehow bound by consumers' arbitration agreements. *See Waffle House*, 534 U.S. at 294-96.

Gemini nonetheless insists that public interest organization plaintiffs like NACA "step[] into the underlying consumer's shoes to represent the consumer." Appellant's Br. 22. But as described above, *see supra* pp. 10-18, the CPPA contemplates that public interest organizations be able to sue even where a consumer could not. Organizations bringing suit in this way certainly vindicate "the interests of a consumer or a class of consumers," as the CPPA requires. D.C. Code 28-3905(k)(1)(D)(i). Yet as the Superior Court explained, they also vindicate "consumer interests generally" in rooting out harmful trade practices and holding corporate wrongdoers to account, in this way "act[ing] as private attorneys general for the public." App. 399; Report on Bill 19-581, *supra*, at 2.

III. The FAA Does Not Preempt The CPPA's Independent Cause Of Action For Public Interest Organizations.

The FAA "reflects the fundamental principle that arbitration is a matter of contract." *Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 67 (2010). "[S]tate law is preempted to the extent it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA." *Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 183 (2019) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 352 (2011)). Courts must therefore "place arbitration agreements on equal footing with other contracts," but the FAA "does not require parties to arbitrate when

they have not agreed to do so." *Waffle House*, 534 U.S. at 293 (internal quotation marks omitted). Rather, "the question of who is bound by" an arbitration agreement is answered by "background principles of state contract law." *GE Energy Power Conversion France SAS, Corp. v. Outokumpu Stainless USA, LLC*, 590 U.S. 432, 437 (2020) (internal quotation marks omitted); *see Coinbase, Inc. v. Suski*, 602 U.S. 143, 149 (2024) ("As always, traditional contract principles apply."). Under those principles, "parties cannot be coerced into arbitrating a claim, issue, or dispute 'absent an affirmative contractual basis for concluding that the party *agreed* to do so.'" *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 660 (2022) (quoting *Lamps Plus*, 587 U.S. at 185).

The "traditional principles" of state contract law recognize only narrow circumstances where courts may enforce arbitration agreements against nonparties: "assumption, piercing the corporate veil, alter ego, incorporation by reference, third-party beneficiary theories, waiver[,] and estoppel." *Arthur Andersen*, 556 U.S. at 631-32 (quoting 21 Richard A. Lord, *Williston on Contracts* § 57:19, at 183 (4th ed. 2001)). To the extent Gemini's references to assignment and subrogation are "third-party beneficiary theories," they fail for the reasons explained. *See id.* at 632 (internal quotation marks omitted); *supra* pp. 18-21; *see also Silberberg v. Becker*, 191 A.3d 324, 332 (D.C. 2018) ("Third-party beneficiary status requires that the contracting parties had an express or implied intention to benefit directly the party

claiming such status." (internal quotation marks omitted)). The FAA thus does not alter the outcome that ordinary common-law principles dictate.

Taking a different tack, Gemini contends that "NACA cannot have it both ways" by "cherry-pick[ing] beneficial contract terms while ignoring" the arbitration clause, seemingly reviving an estoppel argument it made below. Appellant's Br. 27-29 (quoting 21 Richard A. Lord, *Williston on Contracts* § 57:19 (4th ed. Supp. 2025)); *see* App. 123-24. As before, Gemini cites not one D.C. court decision recognizing that theory. That is perhaps because there do not appear to be "any District of Columbia cases applying the doctrine of equitable estoppel to nonsignatories to an arbitration agreement." *Oehme*, 902 F. Supp. 2d at 98 n.8. Its argument therefore lacks merit. As Gemini's preferred contract law treatise admonishes, "the court must expressly consider whether the relevant state contract law recognizes the particular principle as a ground for enforcing contracts against third parties." 21 Richard A. Lord, *Williston on Contracts* § 57:19 (4th ed. Supp. 2025). After all, "not all jurisdictions consider the intertwining nature of the claims to be, on its own, a sufficient basis for equitable estoppel." *Id.*

In any event, Gemini's estoppel argument fails even on its own terms. NACA does not "cherry-pick beneficial terms while ignoring other provisions [because] it would prefer not to be governed by" them. Appellant's Br. 28 (quoting 21 Richard A. Lord, *Williston on Contracts* § 57:19 (4th ed. Supp. 2025)). Just the opposite,

NACA alleges that the other provisions of the UA are *also* unenforceable here, namely because they purport to waive consumers' anti-fraud rights despite an "anti-waiver provision" in federal law. App. 16 (Compl. ¶¶ 51-52) (internal quotation marks omitted). Regardless, NACA only directly asserts the public's statutory right under the CPPA to "truthful information from merchants"—not any particular consumers' contractual rights. D.C. Code § 28-3901(c); *see supra* p. 20.

The Supreme Court reached a similar result in *Waffle House*. In that case, the Court held that the FAA did not bar a public agency from bringing an action under Title VII for "victim-specific relief" like backpay, despite the employee signing an arbitration agreement. *Waffle House*, 534 U.S. at 282-85. The Court reasoned that the agency "never agreed to arbitrate" and "ha[d] independent statutory authority to vindicate the public interest" regardless of whether the employee intended to bring suit. *Id.* at 290-91. True enough, the employee could limit the agency's recovery, such as by "accept[ing] a monetary settlement." *Id.* at 296. But that would be by virtue of "ordinary principles of res judicata, mootness, or mitigation," not because the agency's claims were somehow "merely derivative" and a "proxy" for the employee's claims. *Id.* at 297-98. *Waffle House*'s logic applies much the same to the public interest organizations here, who act as private attorneys general to vindicate consumers' interests. Indeed, the Council has described both public interest organizations and OAG as bringing CPPA claims "in the public interest."

Report on Bill 19-581, *supra*, at 2; D.C. Code § 28-3909(a). *Contra* Appellant's Br. 30-31.

CONCLUSION

The Court should affirm the judgment of the Superior Court.

Respectfully submitted,

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