

No. 25-CV-0789

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**IN THE DISTRICT OF COLUMBIA  
COURT OF APPEALS**

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**GEMINI TRUST COMPANY, LLC,**  
Defendant-Appellant,

v.

**NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, INC.,**  
Plaintiff-Appellee.

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

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**BRIEF FOR AMICI CURIAE  
LEGAL AID DC, PUBLIC JUSTICE, NATIONAL CONSUMER LAW CENTER AND  
STETSON CONSUMER ADVOCACY SOCIETY  
IN SUPPORT OF APPELLEE**

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## **CORPORATE DISCLOSURE STATEMENT**

Pursuant to D.C. Court of Appeals Rule 26.1, amici curiae make the following disclosures:

Legal Aid is a nonprofit organization incorporated in the District of Columbia. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

Public Justice, P.C. is a nonprofit, public interest legal organization. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

National Consumer Law Center, Inc. is a nonprofit organization incorporated in Massachusetts. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

The Stetson Consumer Advocacy Society is a student organization based at Stetson University College of Law. It is not a nongovernmental corporation or partnership. No disclosure is required under Rule 26.1(a).

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## **INTEREST OF AMICI CURIAE**

Amicus Legal Aid DC is the District's oldest and largest civil legal services organization, providing free legal advice and representation to D.C. residents with no or low income. Legal Aid is a nonprofit organization that, among other things, advocates for the rights of consumers and often seeks to vindicate the rights of consumers as a public interest organization.

Amicus Public Justice is a national public interest advocacy organization that fights against abusive corporate power and predatory practices, the assault on civil rights and liberties, and the destruction of the earth's sustainability. The organization maintains an Access to Justice Project that pursues high-impact litigation and advocacy efforts to remove procedural obstacles that unduly restrict the ability of consumers, workers, and people whose civil rights have been violated to seek redress in the civil court system. Towards that end, Public Justice has a longstanding practice of fighting against the unlawful use of mandatory arbitration clauses that deny consumers their day in court.

Amicus National Consumer Law Center (NCLC) is a non-profit organization that, since 1969, has worked for consumer justice and economic security for low income and other disadvantaged people in the U.S. through its expertise in policy analysis and advocacy, publications, litigation, expert witness services, and training. NCLC publishes a 21-volume Consumer Credit and Sales Legal Practice Series, including *Unfair and Deceptive Actions and Practices* (11th ed. 2025), and has particular expertise concerning state consumer protection laws like the DCCPA. NCLC has conducted numerous trainings on consumer protection laws in more than 20 states and testifies regularly before Congress, federal agencies, and state legislative bodies

on consumer protection topics. NCLC frequently appears as amicus curiae in consumer law cases throughout the country.

Amicus Stetson Consumer Advocacy Society is a student organization based at Stetson University College of Law that regularly investigates and advocates against deceptive marketplace practices. The Society frequently relies on statutory enforcement mechanisms similar to those created by the District of Columbia Consumer Protection Procedures Act (CPPA), D.C. Code § 28-3905 et seq.

Amici have a strong interest in ensuring that legislatively created consumer protection regimes remain enforceable. If the rule urged by Gemini were adopted, companies could effectively eliminate CPPA enforcement by public interest organizations simply by inserting arbitration clauses into consumer contracts. That outcome would fundamentally undermine the statutory enforcement model adopted by the D.C. Council.

All parties have consented to the filing of this amicus brief. Amici submit this brief to provide the Court with broader doctrinal and institutional context that may assist its consideration of the issues presented. No party or party's counsel authored this brief in whole or in part, and no person other than amici and their counsel made a monetary contribution to its preparation or submission.

## SUMMARY OF ARGUMENT

The trial court correctly denied Gemini’s motion to compel arbitration. Gemini seeks to compel arbitration against a party that never agreed to arbitrate. The Federal Arbitration Act (“FAA”) does not permit that result.

Amici write to develop three points.

**First**, arbitration is strictly a matter of consent. The Supreme Court has said so repeatedly and emphatically. *See, e.g., Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639, 651 (2022); *Lamps Plus, Inc. v. Varela*, 587 U.S. 163, 170 (2019). NACA is not a party to Gemini’s User Agreement. It did not sign it. It is not a third-party beneficiary of it. It is not in privity with any consumer who signed it. It does not seek to enforce any provision of it. NACA is a complete stranger to the contract containing the arbitration clause. There is, accordingly, no agreement to arbitrate between these parties, and the inquiry should end there.

**Second**, NACA’s authority to bring this action derives from an independent statutory grant under the CPPA, D.C. Code § 28-3905(k)(1)(D), not from any individual consumer’s contractual rights. The CPPA grants a robust right of action to organizations acting as Private Attorneys General. *See* D.C. Code § 28-3905(k)(1)(A)-(B). The D.C. Court of Appeals has held that subsection (k)(1)(D) confers standing on public interest organizations to litigate on behalf of consumer interests generally, not as representatives standing in consumers’ shoes. *Earth Island Institute v. Coca-Cola Co.*, 321 A. 3d 654 (D.C. Ct. App. 2024). NACA’s suit is therefore akin to an enforcement action brought by a government agency or attorney general, both of which are universally understood to be unaffected by arbitration agreements between defendants and

individuals. The Supreme Court’s decision in *EEOC v. Waffle House, Inc.*, 534 U.S. 279 (2002), confirms this principle.

*Third*, a growing body of federal appellate authority confirms that arbitration agreements cannot be used to extinguish statutory enforcement mechanisms. The Seventh, Tenth, and Third Circuits have all held that where a statute authorizes representative actions for systemic relief, arbitration clauses cannot prohibit those actions because doing so would constitute a prospective waiver of statutory rights. The Supreme Court denied certiorari in two of those cases. The same principle applies here: the CPPA creates a statutory right to bring organizational enforcement actions, and private arbitration agreements cannot nullify that right.

The judgment of the trial court should be affirmed.

## ARGUMENT

### **I. Arbitration Is Strictly a Matter of Consent, and NACA Never Consented to Arbitrate**

The foundational principle of the FAA is that arbitration is a matter of consent and contract. The Supreme Court has stated this rule with unmistakable clarity and remarkable frequency:

“Arbitration is strictly ‘a matter of consent.’” *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 299 (2010) (quoting *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 479 (1989)); “[A]rbitration is simply a matter of contract between the parties.” *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943 (1995); “Arbitration is a matter of contract and consent.” *Coinbase, Inc. v. Suski*, 602 U.S. 143, 148 (2024); “[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis

for concluding that the party *agreed* to do so.” *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 684 (2010) (emphasis in original); “Consent is the ‘foundational FAA principle.’” *Lamps Plus, Inc. v. Varela*, 587 U.S. 163, 170 (2019) (quoting *Stolt-Nielsen*, 559 U.S. at 684); “[T]he FAA’s ‘policy favoring arbitration’ does not authorize federal courts to invent special, arbitration-preferring procedural rules. . . . The policy is to make arbitration agreements as enforceable as other contracts, but not more so.” *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022); “The FAA does not require parties to arbitrate a dispute unless they have agreed to do so.” *Bank of America, N.A. v. District of Columbia*, 80 A.3d 650, 667 (D.C. 2013) (citing *Volt*, 489 U.S. at 478).

Arbitration is a matter of contract, and this is a bedrock principle.

NACA did not agree to arbitrate any dispute with Gemini. NACA is not a party to the User Agreement. The record contains no evidence that NACA manifested any intent to be bound by the User Agreement or its arbitration clause. There is no allegation that NACA signed, clicked through, or otherwise assented to the User Agreement. There is no allegation that NACA is a third-party beneficiary of the User Agreement. There is no allegation that NACA is in privity with Gemini.

Critically, NACA is not seeking to enforce any provision of the User Agreement. Its claims arise entirely under the CPPA, D.C. Code § 28-3905(k)(1)(D). NACA’s theory of liability is that the User Agreement itself contains terms that violate the CPPA and the federal Electronic Funds Transfer Act. See Complaint ¶¶ 26-52, 67. NACA challenges the contract; it does not rely upon it. There is no basis in law or equity to bind NACA to the arbitration clause of the very contract it alleges is unlawful.

Gemini’s argument that NACA should be bound by the arbitration clause because it brings suit “on behalf of” consumers who signed the User Agreement conflates two fundamentally different things: the contractual relationships between Gemini and its individual users, and the statutory enforcement authority conferred on NACA by the D.C. Council. The FAA protects the former. It has nothing to say about the latter. As the Supreme Court has explained:

[N]othing in the statute authorizes a court to compel arbitration of any issues, or by any parties, that are not already covered in the agreement. The FAA does not mention enforcement by public agencies; it ensures the enforceability of private agreements to arbitrate, but otherwise does not purport to place any restriction on a nonparty’s choice of a judicial forum.

*EEOC v. Waffle House, Inc.*, 534 U.S. 279, 289 (2002). NACA is a nonparty. The FAA places no restriction on its choice of forum.

Moreover, there is no equitable estoppel argument available to Gemini. Equitable estoppel may bind a nonsignatory to an arbitration clause where the nonsignatory “received a direct benefit” from the contract or where its claims are “inherently inseparable” from the contract. See *Stolt-Nielsen*, 559 U.S. at 681 (“[P]arties may specify with whom they choose to arbitrate their disputes.”). Neither condition is met here. NACA received no benefit from the User Agreement. And NACA’s CPPA claims are not founded in the User Agreement; they allege that the User Agreement violates applicable law. NACA is distant from and wholly unconnected to the arbitration agreements between Gemini and its users. Its action is akin to a government enforcement proceeding, brought by a stranger to the contract who alleges that the contract’s terms are unlawful.

## **II. NACA’s Statutory Enforcement Authority Is Independent of Individual Consumers’ Contractual Rights**

Gemini’s central argument is that NACA must be treated as standing in the shoes of individual consumers who are party to the User Agreement, and that those consumers’ agreement to arbitrate must therefore flow to NACA. This argument misunderstands the nature of NACA’s authority under the CPPA. Under the CPPA a membership organization has standing to bring suit on behalf of its members when: “(a) its members would otherwise have standing to sue in their own right; (b) the interests [the organization] seeks to protect are germane to the organization’s purpose . . . .” *Travelers United, Inc. v. Hyatt Hotels Corp.*, 761 F.Supp.3d 97, 110 (2025) (citing *Hunt v. Washington State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977)). Thus, standing under the CPPA is afforded to membership organizations independently meeting the criteria; standing does not flow from or depend on individual consumer plaintiffs.

The CPPA enumerates four distinct categories of plaintiffs eligible to bring suit, each with different standing requirements. D.C. Code § 28-3905(k)(1)(A)-(D). Subsection (A) authorizes suit by a consumer. Subsection (B) authorizes “tester” standing for individuals who purchased goods to evaluate them. Subsection (C) authorizes suit by a nonprofit organization on behalf of itself or its members. Subsection (D), at issue here, authorizes suit by a “public interest organization” “on behalf of the interests of a consumer or a class of consumers.” Each category must be given independent effect. See *Grayson v. AT&T Corp.*, 15 A.3d 219, 238 (D.C. 2011) (a statute must be read “not rendering any provision superfluous”).

The D.C. Court of Appeals has squarely addressed the nature of standing under subsection (k)(1)(D). In *Animal Legal Defense Fund v. Hormel Foods Corp.*, 258 A.3d 174 (D.C. 2021), the

court held that the D.C. Council’s addition of subsection (k)(1)(D) conferred expansive standing on qualifying organizations. *Id.* at 183-85. The court noted that this provision “excised the requirement that the suit be brought on behalf of the organization or its members” as required under subsection (C), and instead “empowered” organizations “to bring suits ‘on behalf of the interests of a consumer or a class of consumers’ without pursuing any independent interest of the organization or its members.” *Id.* at 182-83 & n.5 (emphasis in original). A qualifying organization is one “organized and operating, at least in part, for the purpose of promoting interests or rights of consumers.” D.C. Code § 28-3901(a)(15); *Animal Legal Defense Fund*, 258 A.3d at 185.

This standing provision is broader than what Article III would require. Notably, D.C. Superior Court is not an Article III tribunal, and the D.C. Council is not bound by the constraints of Article III standing doctrine. “While [the D.C. Court of Appeals] nonetheless generally adhere to Article III's strictures, that prudential judgment is subject to legislative override, and as we have previously explained, the [D.C. City] Council has supplanted Article III's standing requirements in the CPPA.” *Earth Island Institute v. Coca-Cola Co.*, 321 A.3d 654, 662 (2024) (internal citations omitted). In fact, the CPPA “enshrines the [D.C. City] Council’s desire to confer maximum standing to public interest organizations. *Id.* At 662. (internal citations omitted).

The D.C. Court of Appeals has recognized this: *Animal Legal Defense Fund* held that subsection (k)(1)(D) was intended to confer standing “beyond the scope of” prior subprovisions and prior federal court decisions that had imposed Article III requirements. 258 A.3d at 184 (citing D.C. Council Committee Report). The federal district court confirmed this understanding in the present case when it remanded to D.C. Superior Court precisely because NACA did not satisfy Article III standing, while recognizing that NACA’s statutory standing under the CPPA was a separate question for the D.C. courts. *See Nides v. DVC Industries, Inc.*, 334 A.3d 1134, 1137-38

(D.C. 2025) (discussing the distinct standing bases within § 28-3905(k)(1)). In the D.C. courts, membership organizations have standing under the CPPA when “the organization can demonstrate: (1) a direct conflict between the challenged conduct and the organization's mission, and (2) a consequent drain on the organization's resources resulting from this direct conflict.” *Clean Label Project Foundation v. Garden of Life, LLC*, 2021 WL 4318099 (D.C.D.C. 2021) (internal citations omitted).

The textual distinction between subsection (k)(1)(D) and the other standing provisions is critical. Subsection (k)(1)(D) is the only category that permits suit “on behalf of the *interests*” of consumers, as opposed to “on behalf of” an individual consumer, an organization, or its members. Compare D.C. Code § 28-3905(k)(1)(D)(i), *with* § 28-3905(k)(1)(A)-(C). As the Court of Appeals observed, “[w]here the legislature implements a significant change in language, as it did when it created (k)(1)(D), courts presume a significant change in meaning.” *Animal Legal Defense Fund*, 258 A.3d at 184. This language means NACA is not standing in the shoes of individual users and need not map its claims onto the claims of individual consumers. It is exercising its own independent statutory right to litigate on behalf of consumer interests generally.

This expanded standing provision reflects the D.C. Council’s recognition of a practical reality that amici confront daily: the consumers most harmed by unlawful trade practices are often the least able to bring suit on their own. Many of the individuals affected by deceptive and unfair marketplace conduct have low or no income and face life circumstances that make pursuing a lawsuit an impossibility, not merely an inconvenience. Companies frequently know this and structure their practices to exploit consumers who lack the time, resources, or legal sophistication to seek redress. By authorizing public interest organizations to bring enforcement actions on behalf of consumer interests, the D.C. Council ensured that the most vulnerable consumers would not be

left without a remedy simply because they cannot individually shoulder the burden of litigation. See *Animal Legal Defense Fund*, 258 A.3d at 184 (citing D.C. Council Committee Report explaining that subsection (k)(1)(D) was designed to expand standing beyond the scope of the prior subprovisions). To permit arbitration clauses to foreclose organizational enforcement under subsection (k)(1)(D) would be to strip this protection from the very consumers who need it most.

This is why consumers' agreement to arbitrate does not "flow" to NACA. Gemini's argument assumes NACA is exercising consumers' contractual rights and must therefore accept consumers' contractual limitations. But NACA is not exercising anyone's contractual rights. It is exercising its own statutory authority. The arbitration clause is a defense that attaches to the contractual relationship between Gemini and each individual user. NACA has no contractual relationship with Gemini. Its authority derives from the CPPA, not from the User Agreement.

This statutory enforcement model is not unique. For example, the Supreme Court recognized the same principle in *EEOC v. Waffle House* when it held that the EEOC's enforcement authority derived from Title VII, not from any employment contract, and could not be limited by an arbitration agreement between the employer and employee. 534 U.S. at 291-92. Even before *Waffle House*, in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28, 32 (1991), the Court noted that "arbitration agreements will not preclude the EEOC from bringing actions seeking class-wide and equitable relief." The Court emphasized that the EEOC was "the master of its own case" and that the statutory text "unambiguously authorize[d] it to proceed in a judicial forum." *Waffle House*, 534 U.S. at 291-92.

Another example is that state attorneys general are universally understood to be unbound by arbitration agreements in consumer contracts when they bring enforcement actions under state

consumer protection statutes. See *People ex rel. Cuomo v. Coventry First LLC*, 915 N.E.2d 616, 619 (N.Y. Ct. App. 2009) (arbitration agreement between defendants and their alleged victims does not bar the Attorney General from pursuing victim-specific judicial relief); Prentiss Cox, *Public Enforcement Compensation and Private Rights*, 100 Minn. L. Rev. 2313, 2323-30 (2016) (describing the independent enforcement authority of state attorneys general under consumer protection statutes). The AG's authority derives from statute, not from the consumers' contracts. The same is true of NACA's authority under subsection (k)(1)(D).

The trial court correctly recognized this analogy. See Order at 16. Although NACA is not a government agency, its ability to bring suit is authorized by statute and is not subject to the control or consent of individual consumers. See *Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 323 (1980) (holding EEOC was not required to meet Rule 23 requirements where it brought an enforcement action in its own name pursuant to statutory authority). NACA, like the EEOC and like a state attorney general, brings this action to vindicate the public interest, not simply to provide individual relief. Cf. *Waffle House*, 534 U.S. at 296. See also Stephanie Bornstein, *Public-Private Co-Enforcement Litigation*, 104 Minn. L. Rev. 811, 865-67 (2019) (explaining how institutional enforcers exercising statutory authority are not bound by procedural limitations that attach to individual claimants, including mandatory arbitration agreements).

### **III. Arbitration Agreements Cannot Extinguish Statutory Rights to Bring Representative Enforcement Actions**

*Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), which Gemini cites, actually makes the point for NACA. The Supreme Court there held that arbitration cannot be used to take away statutory rights, including state statutory rights, and including rights to bring representative-

type actions. The Court stated: “Nothing in the FAA establishes a categorical rule mandating enforcement of waivers of standing to assert claims on behalf of absent principals.” *Id.* at 657. The Court explained that it had “never held that the FAA imposes a duty on States to render all forms of representative standing waivable by contract.” *Id.* And the Court concluded: “These principles do not mandate the enforcement of waivers of representative capacity as a categorical rule.” *Id.* at 657–658. That is precisely what Gemini seeks here: a ruling that NACA’s statutory right to bring a representative organizational enforcement action under § 28-3905(k)(1)(D) must yield to an arbitration clause in a contract NACA never signed.

The federal courts of appeals have taken *Viking River Cruises* at its word. In a now-consistent line of ERISA cases, multiple circuits have held that where a statute authorizes representative actions on behalf of a plan for plan-wide relief, arbitration clauses cannot prohibit those representative actions.

In *Smith v. Board of Directors of Triad Manufacturing, Inc.*, 13 F.4th 613 (7th Cir. 2021), the Seventh Circuit held that an arbitration provision was unenforceable because it prohibited plan-wide remedies that ERISA expressly authorized. The court explained that the provision constituted a “prospective waiver of a party’s right to pursue statutory remedies.” *Id.* at 621-22. The court stressed the critical distinction: “[T]he problem with the plan’s arbitration provision is its prohibition on certain plan-wide remedies, not plan-wide representation.” *Id.* at 622.

The Tenth Circuit followed in *Harrison v. Envision Management Holding, Inc. Board of Directors*, 59 F.4th 1090 (10th Cir. 2023), *cert. denied*, 144 S. Ct. 280 (2023), holding the arbitration clause unenforceable because it purported to foreclose remedies “specifically authorized by Congress.” *Id.* at 1112. The Third Circuit reached the same result in *Henry v.*

*Wilmington Trust, N.A.*, 72 F.4th 499, 507 (3d Cir. 2023), *cert. denied*, 144 S. Ct. 328 (2023). The Supreme Court declined review in both cases, leaving these holdings undisturbed.

The principle is straightforward: where a legislature creates a statutory right to bring representative enforcement actions, private arbitration agreements cannot nullify that right. The CPPA's organizational enforcement provision, D.C. Code § 28-3905(k)(1)(D), is exactly such a statutory right. Accepting Gemini's position would extinguish it.

### CONCLUSION

NACA never agreed to arbitrate. It is not a party to the User Agreement, not a third-party beneficiary, not in privity, and not seeking to enforce any contractual right. Its authority to bring this action derives entirely from the CPPA, an independent statutory grant that is no more subject to private arbitration agreements than the enforcement authority of the EEOC or a state attorney general.

The FAA protects the right of contracting parties to resolve their disputes through arbitration. It does not authorize private parties to use arbitration clauses to extinguish statutory enforcement mechanisms created by legislatures and exercised by nonparties. A contrary rule would permit the functional repeal of § 28-3905(k)(1)(D) through the routine inclusion of arbitration clauses in consumer contracts.

The trial court correctly denied Gemini's motion to compel arbitration. The judgment should be affirmed.

Respectfully submitted,

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Dated: March 20, 2026

## **CERTIFICATE OF SERVICE**

I certify that on March 20, 2026, the foregoing was filed using the Court's electronic filing system. All participants in the case are registered electronic filing users and will be served electronically via that system.

/s/ Matthew K. Handley

Matthew K. Handley