No. 23-cv-826

In the

District of Columbia Court of Appeals

CLIENT EARTH, *et al.*,

Appellants,

v.

WASHINGTON GAS LIGHT COMPANY,

Appellee.

Appeals from the Superior Court of the District of Columbia, Civil Division No. 2022 CA003323 B *(Hon. Danya A. Dayson, Judge)*

BRIEF FOR APPELLANTS

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RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule of Appellate Procedure 26.1, Plaintiffs-Appellants ClientEarth USA, Inc., U.S. PIRG Education Fund, and Environment America Research & Policy Center each state that they have no parent corporation, and there is no publicly held corporation that owns 10% or more of their stock.

RULE 28(a)(2) DISCLOSURE STATEMENT

Pursuant to Rule of Appellate Procedure 28(a)(2), Plaintiffs-Appellants state that the following Parties and counsel were involved in this matter in the trial court and appellate proceeding:

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JURISDICTIONAL STATEMENT

Plaintiffs-Appellants brought a District of Columbia Consumer Protection Procedures Act ("CPPA") claim pursuant to D.C. Code § 28-3905(k)(1)(D). The Superior Court, which had jurisdiction pursuant to D.C. Code § 28-3905(k)(2), granted Defendant-Appellee's motion to dismiss *in toto* by Order dated August 31, 2023. Plaintiffs-Appellants timely filed a notice of appeal from that Order and judgment on September 29, 2023. This Court holds jurisdiction pursuant to D.C. Code § 11–721 and D.C. Rules of Appellate Procedure 3 & 4.

INTRODUCTION

Plaintiffs-Appellants ClientEarth USA, Inc., U.S. PIRG Education Fund, and Environment America Research & Policy Center ("Plaintiffs"), which are nonprofit public interest organizations, brought this action on behalf of D.C. consumers pursuant to the CPPA. The public interest organizations alleged that Defendant-Appellee Washington Gas Light Company ("WGL"), a utility provider, has increased sales and profits by misrepresenting the properties of its natural gas products (specifically, their purported environmental benefits) to consumers. WGL filed an anti-SLAPP motion against Plaintiffs, arguing that it has a First Amendment right to express opinions about natural gas. The Superior Court, by the Hon. Danya A. Dayson, received briefing and heard oral argument on that motion, but ultimately did not reach the anti-SLAPP arguments. Instead, the Superior Court granted WGL's

separate Rule 12(b)(6) motion to dismiss. Relying on *Gomez v. Independence Management of Delaware, Inc.*, 967 A.2d 1276 (D.C. 2009), the Superior Court held that D.C. Code § 28-3903(c)(2)(B), which precludes the Department of Licensing and Consumer Protection from bringing litigation where activities are regulated by the Public Service Commission, should also be read to bar litigation by public interest organizations.

Plaintiffs contend that the Superior Court made three errors in dismissing their action. ***First***, *Gomez* does not compel such an expansive interpretation of § 28-3903(c)(2)(B). At the time this Court decided *Gomez*, the CPPA did not yet provide standing for public interest organizations to act on behalf of the general public, and the expansion of *Gomez* to this new type of action contravenes the legislative intent behind the 2012 CPPA amendments. ***Second***, the Superior Court read § 28-3903(c)(2)(B), by its own terms, too expansively. Effectively, the Superior Court created an exemption for all forms of consumer-facing salesmanship by defendants who are subject to any form of PSC regulation—even though the Superior Court acknowledged, as it had to, that PSC regulation does not address the conduct at issue. ***Third***, the Superior Court created unnecessary conflicts between statutes. By deferring to PSC action, the Superior Court ordered Plaintiffs to go exhaust administrative remedies that ***do not exist*** for these litigants. The Superior Court also set D.C. Code § 28-3905(k)(2), which sets mandatory venue for a private CPPA

claim in Superior Court, at odds with D.C. Code § 34-605(a), which sends any appeal of a PSC decision to this Court. A better reading of § 28-3903(c)(2)(B) is available that obviates both these conflicts.

Plaintiffs recognize that this case presents issues of first impression and urge the Court to recognize that the Superior Court's decision has sent this important consumer-protection action into a litigation and administrative vacuum. The public interest CPPA device was created in recognition that litigation is cost-prohibitive for individual consumers affected by conduct like WGL's advertising. The dismissal of nonprofit organizations who are willing to expend their own resources on consumers' behalf offends both legislative intent and justice. More importantly for this brief, the dismissal was unnecessary under this Court's precedent.

Accordingly, Plaintiffs request reversal of the dismissal and remand of their action to Superior Court for further proceedings.

STATEMENT OF THE ISSUES

This appeal asks whether D.C. Code § 28-3901(15) public interest organizations can bring a CPPA claim on behalf of the general public for marketing misrepresentations against a utility company regulated by the Public Service Commission. The Superior Court dismissed the case based upon its interpretation t**hat** D.C. Code § 28-3903, which addresses whether the Department of Licensing and Consumer Protection could bring such a CPPA claim, also precludes these

public interest Plaintiffs from pursuing the action, despite the organizations enjoying explicit standing under D.C. Code § 3905(k)(1)(D).

QUESTIONS PRESENTED

(1) Did the Superior Court err in holding that D.C. Code § 28-3903, which precludes the Department of Licensing and Consumer Protection from bringing enforcement actions against PSC-regulated entities, also precludes suit brought by public interest organizations pursuant to D.C. Code § 28-3905(k)(1)(D), where the provisions authorizing such a suit do not contain any similar limitation?

(2) If the Superior Court's reading of § 28-3903 was erroneous, would the action still be subject to dismissal, based on WGL's assertion that even public interest plaintiffs need to exhaust administrative remedies before the PSC?

STATEMENT OF THE FACTS

Three nonprofit, public interest organizations[1]—ClientEarth, U.S. PIRG Education Fund, and Environment America Research & Policy Center—brought suit against WGL, an indirect wholly owned subsidiary of a Canadian corporation, AltaGas Ltd., for violations of the CPPA, D.C. Code § 28-3901 *et seq.* Acting on behalf of the general public of the District of Columbia, Plaintiffsi allege that WGL,

[1] WGL does not challenge that all three Plaintiffs are nonprofit organizations pursuant to D.C. Code § 28-3901(a)(14) and public interest organizations pursuant to D.C. Code § 28-3901(a)(15).

to its own tremendous profit, misleadingly markets its natural gas as a "clean," "sustainable," and "carbon neutral" alternative to traditional fossil fuels and does so in order to appeal to the growing constituency of environmentally minded consumers in the District. (Compl. ¶ 7; A13.) Plaintiffs further allege that WGL is aware that natural gas is not a "clean," or "sustainable" source of energy, but instead a fossil fuel comprised primarily of methane, which has a substantially greater negative effect on the environment than carbon dioxide. (*Id.* ¶ 8; A14.) Plaintiffs do not seek damages; they request declaratory and injunctive relief, asking the Superior Court to declare that the misleading statements are in violation of the CPPA, and to enjoin WGL from continuing to make the misleading representations to D.C. consumers.

STATEMENT OF THE CASE

WGL first filed a special motion for partial dismissal under the District of Columbia's Anti-SLAPP statute, D.C. Code § 16-5501 *et seq.*, arguing that WGL enjoys a First Amendment right to present what it contends are the benefits of natural gas. (Def.'s Special Mot. Dismiss at 9-14; A48-53; Def's Reply Special Mot. Dismiss at 3-5; A892-894.) Plaintiffs opposed that motion on the grounds that, *inter alia*, (1) the speech at issue is plainly commercial, aimed at selling more of WGL's natural gas to consumers, and (2) the Anti-SLAPP Act is not intended to protect major energy companies against small-budget public interest organizations representing consumers. (Pls.' Mem. Opp. Def.'s Special Mot. Dismiss at 11-15;

A820-A825.) While the Anti-SLAPP motion was pending, WGL filed a separate motion to dismiss the action entirely on the grounds that the Superior Court lacked jurisdiction over this case because WGL, as a public utility company, is subject to oversight exclusively by the District of Columbia's Public Service Commission (the "PSC" or "Commission"). (Def.'s Mot. Dismiss at 1, 6; A837, A842; Def.'s Reply Mot. Dismiss at 1, 3; A963, A965.) Plaintiffs opposed that motion, arguing that PSC regulation of ***some*** of WGL's practices and procedures does not exempt WGL's ***entire*** business from the purview of the CPPA. (Pls.' Mem. Opp. Def.'s Mot. Dismiss at 2, 4-6; A910, A912-A914.) The Superior Court heard oral argument on both motions on April 14, 2023. (*See* Tr. (Apr. 14, 2023); A970-A983.) On August 31, 2023, the Honorable Danya A. Dayson issued an Order granting the motion to dismiss *in toto*, holding (1) that WGL is exempt from CPPA litigation pursuant to D.C. Code § 28-3903, which should be read to apply both to cases brought by the Department of Licensing and Consumer Protection ("DLCP" or "the Department") and those brought by private parties (Order 7-10; A990-A993); and (2) as such, the court lacked subject matter jurisdiction (*id.* 12; A995). Because the Superior Court dismissed based on those holdings, it did not reach the Anti-SLAPP motion or WGL's additional arguments.

The Superior Court's dismissal Order is the subject of this appeal.

STANDARD OF REVIEW

This Court reviews the Superior Court's findings of law *de novo*. *See In re Estate of Curseen v. Ingersoll*, 890 A.2d 191, 193 (D.C. 2006). Because these are questions of statutory construction, the Court looks to be intent of the lawmakers. *See Chase v. Public Defender Serv.*, 956 A.2d 67, 70 (D.C. 2008). Statutes must be interpreted "to avoid absurd results and obvious injustice." *In re Bright Ideas Co.*, 284 A.3d 1037, 1050 (D.C. 2022) (internal citations and quotations omitted).

ARGUMENT

D.C. Code § 28-3905 provides the procedures by which an action for violation of the CPPA may be brought. Subsections 28-3905(a) through (e), and (h), set forth the mechanism for filing and pursuing a complaint with the Department of Licensing and Consumer Protection (also called simply "the Department" within the CPPA). Subsections 28-3905(f) and (g) state the procedures to be followed if the Department, pursuant to subsection (e), transmits the complaint to the Office of Adjudication. Subsection 28-3905(i) provides that, following dismissal of or decision on a complaint by the Department or the Office of Adjudication, an aggrieved party may appeal to this Court of Appeals. Subsection 28-3905(j) allows the administrative agencies to take immediate action prior to an appeal.

Subsection 28-3905(k), by contrast to all the foregoing, provides for private rights of action to be brought in D.C. Superior Court. Mandatory venue is set by

§ 28-3905(k)(2), which states that the claim "***shall*** be brought in the Superior Court of the District of Columbia" (emphasis added). Subsections 28-3905(k)(1)(A) and (B) govern actions brought by consumers, either individually or in a representative capacity. Subsections 28-3905(k)(1)(C) and (D) are unique to the CPPA among all consumer protection statutes nationwide. Subsection 28-3905(k)(1)(C) grants standing to "nonprofit organizations"[2] to bring actions to remedy CPPA violations, so long as the organization has some interest in the action, such as purchasing the goods at issue to test their properties:

> A nonprofit organization may, on behalf of itself or any of its members, or on any such behalf and on behalf of the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District, including a violation involving consumer goods or services that the organization purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.

D.C. Code § 28-3905(k)(1)(C). Subsection 28-3905(k)(1)(D) throws the net even wider and permits "public interest organizations" to bring any action a consumer could bring, so long as the public interest organization has sufficient nexus to the consumers it seeks to represent:

> **(i)** Subject to sub-subparagraph (ii) of this subparagraph, a public interest organization may, on behalf of the interests of a consumer or a class of consumers, bring an action seeking relief from the use by any

[2] Subsection 28-3901(a)(14) defines a "nonprofit organization" as "a person who: (A) Is not an individual; and (B) Is neither organized nor operating, in whole or in significant part, for profit." Plaintiffs to this action are nonprofit organizations but pleaded standing based on § 28-3905(k)(1)(D), not § 28-3905(k)(1)(C).

> person of a trade practice in violation of a law of the District if the consumer or class could bring an action under subparagraph (A) of this paragraph for relief from such use by such person of such trade practice.
>
> **(ii)** An action brought under sub-subparagraph (i) of this subparagraph shall be dismissed if the court determines that the public interest organization does not have sufficient nexus to the interests involved of the consumer or class to adequately represent those interests.

D.C. Code § 28-3905(k)(1)(D). Subsection 28-3901(a)(15) defines a "public interest organization" as "a nonprofit organization that is organized and operating, in whole or in part, for the purpose of promoting interests or rights of consumers." Plaintiffs to this action are public interest organizations who pleaded standing under § 28-3905(k)(1)(D) and brought their action "on behalf of the general public, *i.e.*, D.C. consumers who purchase natural gas and may be targeted by Defendant's marketing claims." (Compl. ¶ 20; A26; *see also id.* ¶ 18; A24.)

The Superior Court's order dismissing Plaintiffs' case turns on a separate CPPA provision, D.C. Code § 28-3903(c)(2)(B), which states: "The Department may not . . . apply the provisions of section 28-3905 to . . . (B) persons subject to regulation by the Public Service Commission of the District of Columbia." Plaintiffs contend that the Superior Court, interpreting this provision in a § 28-3905(k)(1)(D) action as question of first impression, made two errors.

First, the Superior Court held that, because the ***Department*** may not apply § 28-3905 to PSC-regulated person, nor may a public interest organization (like Plaintiffs here) do so. The Superior Court relied on the holding of *Gomez,* 967 A.2d

1276, but this analysis failed to account for (1) the identity of Plaintiffs here, or (2) the legislative developments since *Gomez*. That error is the subject of Part I of this Argument.

Second, the Superior Court held that § 28-3903(c)(2)(B)'s exemption applies not just to conduct actually regulated by the PSC, but to ***any activity*** in which the subject might engage, regardless of whether the PSC has oversight of that activity. That error, which if left in place will lead to absurdities that lack support from the legislative history of the CPPA, is the subject of Part II of this Argument.

Because of these two errors, the Superior Court did not reach WGL's argument that no CPPA action can lie until Plaintiffs exhaust administrative remedies before the PSC. In so doing, the Superior Court created a conflict between two statutes, both in terms of jurisdiction (public interest plaintiffs have CPPA standing but no standing before the PSC) and in terms of venue (a CPPA action must originate in Superior Court but appeal from a PSC decision goes to this Court of Appeals). That error is the subject of Part III of this Argument.

For each of these reasons, Plaintiffs ask the Court to reverse the Order of the Superior Court granting WGL's motion to dismiss, and to remand the case for further proceedings.

I. The Superior Court Erred in Holding That *Gomez* Governs This Suit Brought by Public Interest Organizations.

By its language, § 28-3903(c)(2)(B) would appear to affect only an action brought to and in the Department of Licensing and Consumer Protection: "The ***Department*** may not . . . apply the provisions of section 28-3905 to . . . persons subject to regulation by the Public Service Commission of the District of Columbia." Supporting this interpretation is the fact that, as set forth *supra*, enforcement procedures within the Department (or by the Department's referral, within the Office of Adjudication) are ***wholly separate*** from private claimant procedures, which find venue exclusively in D.C. Superior Court. (Again, Department and Office of Adjudication procedures appear in § 28-3905(a) through (j), and private claimant procedures, whether brought by a consumer or a nonprofit or public interest organization, appear in § 28-3905(k). The statute provides no relation or cross-reference between § 28-3905(a) through (j) and § 28-3905(k).) Subsection 28-3903(c)(2)(B) is silent on whether a public interest organization, acting under § 28-3905(k)(1)(D), may apply the provisions of § 28-3905 to persons subject to PSC regulation.

The Superior Court, however, held that, because the Department cannot apply the provisions of § 28-3905 to a PSC-regulated company like WGL, these public interest plaintiffs must be precluded from bringing a private right of action in Superior Court. This constrained reading of § 28-3903(c)(2)(B) arose from the

Superior Court's interpretation of *Gomez*. As set forth below, *Gomez* by its own terms does not dictate such a reading of § 28-3903(c)(2)(B), and the Superior Court failed to account for legislative developments in the fifteen years since *Gomez*—including the fact that a § 28-3905(k)(1)(D) public interest action like this one did not even exist at the time this Court rendered the *Gomez* decision.

A. *Gomez* Does Not Govern a Public Interest Organization's CPPA Claim.

The facts underlying *Gomez* were these: The landlord defendant sold an apartment building, which housed the plaintiff tenants, without offering the tenants a chance to buy their units. *Gomez*, 967 A.2d at 1279. The tenants sued the property management company for violation of the Rental Housing Conversion and Sale Act ("Sale Act") and added an additional claim for violation of the CPPA. *Id.* This Court's decision was that the CPPA was ***not*** meant to address violations of the Sale Act:

> We find no evidence in the plain language of the CPPA that the legislature intended it to apply in these circumstances. Allegations that the defendants failed to comply with the Sale Act do not fit naturally within the thirty-some detailed examples of unfair trade practices set forth in D.C. Code § 28-3904 (2001). Tellingly, some portions of § 3904 make it a violation of the CPPA for any person to "violate any provision" of several other statutes, but these subsections conspicuously fail to mention the Sale Act at all.

Id. at 1285. The Court then further held that private plaintiffs are precluded from applying the CPPA to landlord-tenant relations. *See id.* at 1286. The Court's

reasoning was that the 2000 Amendments to the CPPA, passed nine years before *Gomez*, had removed the express link between the Department of Consumer and Regulatory Affairs (DCRA)'s jurisdiction and CPPA jurisdiction over landlord-tenant cases.[3] *See id.* at 1287-88 ("Nothing in the plain language of the statute or its legislative history indicates that the legislature intended such a dramatic expansion of the Act.").

Three independent reasons establish that *Gomez* does not create a wholesale carveout of PSC-regulated entities from CPPA liability and does not apply to the case here.

First, *Gomez* is not a consumer protection case; this Court's primary holding in *Gomez* is that *Gomez* is a ***Sales Act*** case—not a deceptive advertising case—and the CPPA was not meant to apply to violations of ***the Sales Act***. *See id.* at 1285-86. ("[T]he language and legislative history of the CPPA point to the opposite conclusion—that it was never intended to apply to this situation."). The *Gomez* opinion is silent on whether its primary holding would apply to consumer deception

[3] The DCRA was a predecessor agency to the Department of Licensing and Consumer Protection (DLCP), which is the entity now charged with investigating and enforcing the CPPA. *See* https://dlcp.dc.gov/ (last visited Apr. 8, 2024). In 2022, the DCRA was split into two separate entities, the Department of Buildings (which handles building inspections, zoning administration, and code compliance), and the DLCP. *See* D.C. Code § 10-561.02; *see also The Transition*, The District's Newest Agencies, https://dcratransition.dc.gov/ (last visited Apr. 8, 2024). For continuity, this brief refers to both the DCRA and the DLCP as the "Department."

actions generally, as opposed to an action arising from conduct regulated by another statute (in that case, the Sales Act). Indeed, the Court in *Gomez* noted that the plaintiffs failed to "base [the CPPA] claim on any ***separate acts or omissions*** [from the Sales Act violation] that might constitute unfair trade practices." *Id.* at 1284-85 (emphasis added). This point distinguishes *Gomez* from the case at bar. Plaintiffs here do not challenge the scope of WGL's utility work under the PSC, which is the conduct actually regulated by Title 34; instead, this matter is about deceptive marketing practices targeted at D.C. consumers. No decision has interpreted *Gomez*, which challenged conduct explicitly regulated under the Sales Act, to preclude private actions against PSC-regulated entities for conduct ***not*** addressed by Title 34 (or indeed by any statute other than the CPPA).

Second, this action, unlike *Gomez*, is not like a Department action. Actions by individuals, charging specific individualized harms, are conceptually very different from claims to vindicate the rights of the public at large. As noted *supra*, the three Plaintiffs to this action—Client Earth, U.S. PIRG Education Fund, and Environment America Research & Policy Center—are nonprofit, public interest organizations. They do not claim any injury to their own interests. Instead, consistent with this Court's decision in *Animal Legal Defense Fund v. Hormel Foods Corp.*, 258 A.3d 174, 182-83 (D.C. 2021) ("*ALDF*"), they plead standing under § 28-3905(k)(1)(D) and have brought their action "on behalf of the general public, *i.e.*,

D.C. consumers who purchase natural gas and may be targeted by Defendant's marketing claims." (Compl. ¶ 20; A26.) As described above, the process by which the Department handles a CPPA claim is set forth in D.C. Code § 28-3905(a) through (e) and (h). Those are procedures for an ***individual*** to bring a complaint to the Department: "A case is begun by filing with the Department a complaint plainly describing a trade practice and stating ***the complainant's*** (and, if different, ***the consumer's***) name and address, the name and address (if known) of the respondent, and such other information as the Director may require." D.C. Code § 28-3905(a) (emphasis added). In that way, a Department action resembles the pleading filed in *Gomez*, which was brought by individuals on their own behalf, *i.e.*, a tenants' association formed by residents of the building at issue. *See Gomez*, 976 A.2d at 1279. At the time of *Gomez*, § 28-3903(c)(2)(A) provided, "The Department may not . . . apply the provisions of section 28-3905 to [] landlord-tenant relations." *Id.* at 1286 n.10. The Court logically held that, if the tenants' association could not bring its action to the Department, then nor could those individuals bring the action to the Superior Court. Subsection 28-3905(k)(1)(D), which governs this type of collective action, is not bound by what can be brought to the Department. It rests upon a statutorily created form of standing, it must be brought in Superior Court, *see* D.C. Code § 28-3905(k)(2), and there is ***no*** provision for it to be brought to the Department, *see infra*. *Gomez*, therefore, is not applicable precedent in this context.

Third, the Court's subsidiary holding in *Gomez* was that the tenants could not attach a CPPA claim onto a Sales Act claim if the Department was similarly unable to do so. *Id.* But the Court did not determine how ***private attorney general actions*** brought by nonprofit organizations would be affected, which is hardly surprising, as this particular form of nonprofit standing was not created until three years after *Gomez*, with the 2012 amendments to the CPPA. *See infra*, Part I.B. Nor has any court since *Gomez* addressed that question. The history of the radical amendments that created this type of public interest action are addressed in more depth *infra*, Part I.B, regarding legislative action and case law over the last fifteen years. For purposes of interpreting the *Gomez* decision itself, the Superior Court erred in believing *Gomez* dictated dismissal of this action, because a § 28-3905(k)(1)(D) action did not exist when *Gomez* was decided.

In sum, nothing in this Court's *Gomez* opinion—which declined to allow a CPPA action for conduct made actionable by another statute, and which considered the effect of § 28-3903(c)(2)(B) on an individual consumer action, not a public interest action—compels its application here. Just as importantly, as set forth in Part I.B. below, both the post-*Gomez* legislative history of the CPPA and the subsequent caselaw suggest that the Superior Court erred in holding itself bound by *Gomez* to deny these Plaintiffs their day in court.

B. The Legislative Intent Behind the Post-*Gomez* CPPA Amendments Supports Superior Court Jurisdiction.

Plaintiffs, three public interest organizations, bring this action on behalf of the general public of the District of Columbia. As set forth below, the standing for this action was created by the 2012 amendments to the CPPA and did not exist when *Gomez* was decided. The legislature certainly knew of the *Gomez* decision—indeed, it responded to *Gomez* by removing the CPPA exemption for landlords from Department actions—but despite several subsequent CPPA amendments, the legislature took no action to expand *Gomez* to the newly created § 28-3905(k)(1)(C) and (D) actions. Nor does any of this Court's decisions suggest that § 28-3903(c)(2)(A) should bar this action.

1. D.C. Council Action That Created a § 28-3905(k)(1)(D) Public Interest Action Does Not Suggest That § 3903(c)(2)(A) Should Apply to Such a Claim.

The Court is aware of the extraordinary nature of public interest standing under § 28-3905(k)(1)(D), having decided two seminal decisions in the last three years interpreting the provision. *See Ctr. for Inquiry, Inc. v. Walmart, Inc.*, 283 A.3d 109 (2022); *ALDF*, 258 A.3d 174; *see also In re Bright Ideas Co.*, 284 A.3d at 1042 n.4 (citing *ALDF* analysis). Public interest standing under the CPPA arose in the wake of the Court's 2011 decision in *Grayson v. AT&T Corp.*, 15 A.3d 219 (D.C. 2011), which interpreted the legislature's prior (2000) amendments to the CPPA. The Court in *Grayson* made three important holdings regarding CPPA standing:

(1) that the District has traditionally "followed" federal standing jurisprudence (*i.e.*, the requirements of Article III), *see id.* at 235 n.38 (D.C. 2011);

(2) that "the CPPA retains our injury-in-fact standing requirement," *id.* at 232 n.29; and

(3) that "the Council of the District of Columbia did not disturb or override our constitutional standing requirement in amending the CPPA in 2000," *id.* at 224.

Essential to this "disturb or override" holding was the Court's finding that there was not "any mention of this court's constitutional standing requirement" in either (1) the D.C. Council committee reports on the 2000 amendments or (2) the tapes of the related committee hearings. *Id.* at 242-43. The Court thus invited the legislature to be "explicit" if it intended to affect traditional standing requirements under the CPPA. *Id.* at 242.

The following year, the legislature responded, explicitly, with amendments to the CPPA. The Committee behind the 2012 amendments decided to create new avenues to standing for nonprofit and public interest organizations, as described in its November 18, 2012 legislative memorandum: "The stated purpose of Bill 19-0581, the 'Consumer Protection Amendment Act of 2012,' is to amend Title 28 of the District of Columbia Code . . . to provide explicit new authorization for non-profit organizations and public interest organizations to bring suit under the District's consumer protection statute." Comm. on Public Servs. and Consumer Affairs Memorandum on Bill 19-0581 (Nov. 18, 2012) ("Alexander Report"), at 1.

According to the Committee, the amendments created new paths to organizational standing and were intended as a response to the "chilling effect" of *Grayson* on litigation by nonprofit and public interest organizations:

> While *Grayson* did not discuss litigation brought by non-profit public interest organizations, the decision had a chilling effect on non-profit public interest organizations litigating cases in the public interest. Bill 19-581 clarifies that non-profit organizations and public interest organizations may 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.

Id. at 2; *see also id.* at 4 ("The bill responds to *Grayson* by being more explicit about the types of suits the Council intends to authorize.").[4] Subsection 28-3905(k)(1)(D), under which these Plaintiffs proceed, is designed to effect "maximum standing" for public interest organizations, including "bases for standing that the D.C. courts have not yet had occasion to consider." *Id.* at 6.

D.C. Council did not pass any corresponding amendments to clarify individual consumers' standing to bring a CPPA action without injury. The legislative response to *Grayson* focused on codifying the rights of nonprofit

[4] The Fiscal Impact Statement concerning the 2012 amendments noted that the bill "***creates*** a right of action for non-profit organizations to bring suit under the District's consumer protection statutes on their own behalf, ***or*** if their public interest activities have been impaired. It also establishes jurisdiction for these claims and remedies for damages." Memorandum from Natwar M. Ganghi, Chief Financial Officer on Bill 19-581 Fiscal Impact Statement to the Honorable Philip H. Mendelson, Chairman of the Council of the District of Columbia (Nov. 20, 2012) (emphasis added); Alexander Report at 72-73.

organizational plaintiffs. Essentially, the legislature underscored how "non-profit public interest organizations litigating cases in the public interest," Alexander Report at 2, are ***different*** plaintiffs from individuals pursuing their private interests, as was the case in *Gomez*. The Council in 2012 was certainly aware of the *Gomez* decision and—if it believed the *Gomez* reasoning extended to public interest plaintiffs—could have stated that § 28-3903(c)(2)(A) precludes the newly deputized litigants from filing suit in Superior Court. The Council did not do so, and instead gave "maximum standing" to public interest plaintiffs. *Cf. Sundberg v. TTR Realty, LLC*, 109 A.3d 1123, 1129 (D.C. 2015) (holding that CPPA is remedial statute that must be "construed and applied liberally to promote its purpose") (internal citation and quotations omitted).

These 2012 amendments also affect the applicability of the decisions from this Court that WGL relied on before the Superior Court, like *Caulfield v. Stark*, 893 A.2d 970, 977 n.9 (D.C. 2006) (noting that *Childs v. Purll*, 882 A.2d 227, 238 (D.C. 2005), "construed the italicized language to mean that where the [CPPA] limits the jurisdiction of the [DCRA], the scope of the cause of action created by § 28–3905(k)(1) is similarly limited"). Prior to the 2012 amendments, there was no specific nonprofit or public interest standing under § 28-3905(k)(1), only the description of a private action in general. As such, the reference to § 28-3905(k)(1) in the pre-*Gomez*, pre-*Grayson*, and pre-amendment *Caulfield* and *Childs* decisions

is akin to generic "CPPA standing." *Caulfield*, *Childs*, and the similar *Diamond v. Davis*, 680 A.2d 364, 365-66 n.2 (D.C. 1996), all (like *Gomez*) were brought by individuals personally aggrieved by the conduct at issue. That is not the same as an action brought on behalf of the general public under the CPPA.

2. The Legislature Amended the CPPA Twice More Without Suggesting § 3903(c)(2)(A) Would Apply to a § 3905(k)(1)(D) Action.

In its 2000 CPPA amendments, nine years before *Gomez*, the legislature had deleted a phrase that explicitly subjected private litigants to the same limitation as the Department in bringing a section 3905 action. The Court in *Gomez* disregarded that deletion as an aberration arising from suspension of the Department's operations when the 2000 amendments passed: "Because the DCRA was not enforcing the CPPA at that time, it made no sense when rewriting this section to preserve the language which linked the scope of the private action to the jurisdiction of the DCRA." *Gomez*, 967 A.2d at 1287. Key to the Court's holding was an understanding that, although § 28-3903(c)(2)(A) was now silent about private rights of action in the enumerated contexts (landlord-tenant relations, PSC regulation, clergy professional activity, etc.), "there is no indication whatsoever that the Council intended [with the 2000 amendments] to expand the reach of the CPPA." *Id.*

Subsequently, the D.C. Council indicated that the Court's position was too expansive: in 2018, the Council clarified that ***only*** the Department should be

precluded from applying the CPPA to landlord-tenant relations. D.C. Law 22-206 (the At-Risk Tenant Protection Clarifying Amendment Act of 2018) responded to *Gomez*'s primary holding—*i.e.*, that the CPPA was not intended to reach Sales Act violations—by adding § 28-3905(k)(6) to provide: "The right of action established by this subsection shall apply to trade practices arising from landlord-tenant relations." Then, in addition, § 28-3909 was amended to clarify that the AG also could exercise this new right: "The Attorney General for the District of Columbia may apply the provisions and exercise the duties of this section to landlord-tenant relations." D.C. Code § 28-2909(d); *cf. Nikolic v. Salama*, No. 2019 CA 003488 B, 2020 D.C. Super. LEXIS 2, at *17-18 (Feb. 5, 2020) (explaining 2018 CPPA amendments). The Council thus responded to *Gomez* by clarifying that it ***did*** mean to expand the scope of the CPPA. Indeed, both the Council's 2012 amendments (which created Plaintiffs' cause of action here) and its 2018 amendments sought to underscore the Council's intent that the CPPA be "applied liberally to promote its purpose." D.C. Code § 28-3901(c).[5] Neither expansion suggested that a public interest organization cannot represent consumers if the company making the challenged representations also engages in other conduct that is regulated by the PSC. The CPPA does not state that this restriction applies to nonprofit or public

[5] The 2018 amendments, for example, changed actionable "Unlawful trade practices" to the more expansive "Unfair or deceptive trade practices."

interest standing, and the restriction specifically falls under a section of the CPPA titled "Powers of the consumer protection agency." D.C. Code § 28-3903.[6] It runs contrary to legislative intent for the CPPA to limit individual, non-agency rights to pursue CPPA claims. *See, e.g.*, *Baltimore v. District of Columbia*, 10 A.3d 1141, 1146 (D.C. 2011) ("[T]he primary rule is to ascertain and give effect to legislative intent. . . .there is wisely no rule of law forbidding resort to explanatory legislative history[.]" (citations omitted)).

3. This Court's Decisions Do Not Compel the Application of *Gomez* to a Public Interest Action.

The Superior Court stated, "the Court of Appeals has previously rejected attempts to expand the CPPA's reach to areas it is explicitly precluded by D.C. Code §28-3903, which includes 'persons subject to regulation by the Public Service Commission of the District of Columbia.' D.C. Code §28-3903(c)(2)(B)." (Order at 8; A991.) For this holding, the Superior Court relied entirely and exclusively on *Gomez*. For the reasons set forth above, *Gomez* does not compel the Superior Court's holding. For the reasons set forth below, nor does any of the other decisions cited by WGL to the Superior Court. Plaintiffs understand the issue now before the Court to be a question of first impression. This Court has specifically noted categories of

[6] The Superior Court, apart from this case, has interpreted limitations on the Department's authority to bring a particular claim under the CPPA "by its express terms" to "only appl[y] to the [Department]." *Nikolic*, 2020 D.C. Super. LEXIS 2, at *17.

cases excluded from the purview of the CPPA. *See, e.g.*, *Stone v. Landis Constr. Co.*, 120 A.3d 1287, 1291-92 (D.C. 2015) (holding that loss of potential employment is not actionable under CPPA); *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 715 (D.C. 2013) (holding that professional services are excluded from scope of CPPA); *cf. Barkley v. D.C. Water & Sewer Auth.*, Nos. 2013 CA 003811 B, 2013 CA 003813 B, 2013 CA 003814 B, 2013 CA 003855 B, 2016 D.C. Super. LEXIS 1, at *30-31 (Jan. 13, 2016) (holding that individual plaintiffs lacked private right of action for "personal injury of a tortious nature" under CPPA). The Court has not yet had occasion to consider a CPPA consumer deception action against a defendant that otherwise engages in PSC-regulated conduct, and particularly not one brought by a public interest organization.

Before the Superior Court, WGL argued based on two of this Court's decisions. ***First***, WGL cited *Falconi-Sachs v. LPF Senate Square, LLC*, 142 A.3d 550 (D.C. 2016). (Def.'s Mot. Dismiss at 10; A846; Def.'s Reply Mot. Dismiss at 2; A964.) The *Falconi-Sachs* plaintiff alleged that a rental late payment fee was deceptive, attempting to state claims for CPPA violation, fraud, negligence, and unjust enrichment. *See Falconi-Sachs*, 142 A.3d at 553. This Court, affirming in part and reversing in part a dismissal of all claims, reiterated that the CPPA does not create an action for landlord-tenant relations. *See id.* at 554-55. *Falconi-Sachs* followed *Gomez* and predated the 2018 CPPA amendments, which clarified that

individual consumers are not precluded from bringing a CPPA action in the area of landlord-tenant relations. *See supra*. ***Second***, WGL relied on a footnote from *Sizer v. Velasquez*, 270 A.3d 299 (D.C. 2022). (Def's Reply Mot. Dismiss 4; A966.) The *Sizer* plaintiffs sued their tenants for breach of lease, and the tenants tried to counterclaim with a CPPA action. *See Sizer*, 270 A.3d at 302. The question put before this Court was whether the 2018 amendments, which explicitly mention private rights of action for landlord-tenant cases, could be applied retroactively. The Court held against retroactive application. The footnote upon which WGL relied was this one:

> To the extent [defendants/counter-plaintiffs] argue that *Falconi-Sachs* and *Gomez* were wrongly decided—and in fact that a private right of action to challenge deceptive practices by landlords has existed since 2000—we are bound by precedent and have no authority to revisit these decisions. *See M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).

Sizer, 270 A.3d at 305 n.6. The question of whether the 2018 amendments apply retroactively has no bearing on the case at bar. Nor have Plaintiffs argued that *Gomez* (or its corollary *Falconi-Sachs*) was wrongly decided or based their arguments upon a resemblance between a 2022 public interest action against a utility company and a pre-2019 individual or AG action against a landlord. To the contrary, Plaintiffs have demonstrated that the differences in those types of actions (as set forth above), and the fact that the public interest plaintiff device is a newer creation, make the *Gomez*

line, including *Sizer*, inapposite. (Pls.' Mem. Opp. Def.'s Mot. Dismiss 5-6; A913-914).

II. Dismissal Cannot Be Supported by WGL's Alternative Argument Before the Superior Court, That PSC Regulation Encompasses All Conduct in Which an Energy Company Might Engage.

The Superior Court acknowledged that the PSC is ***not*** an entity designed to hear a claim that an energy company is willfully deceiving D.C. consumers about the benefits of its products: "the Public Service Commission was conceived of to regulate matters concerning the provision of services, such as bills and rates, rather than large scale consumer protection complaints." (Order at 8; A991 (citing D.C. Code § 1-204.93, which charges PSC with "insur[ing] every public utility doing business within the District of Columbia is required to furnish service and facilities reasonably safe and adequate and, in all respects, just and reasonable").) Nevertheless, the Superior Court felt bound by D.C. Code § 34-301, which provides for generalized jurisdiction of the PSC over gas companies, and stated that WGL must be fully "exempt from the enforcement procedures detailed in § 28-3905 of the CPPA" in favor of PSC regulation. (Order at 7; A990.) As set forth in this Part, WGL's argument that PSC regulation covers the conduct alleged in this case contravenes the (admittedly limited) applicable precedent and creates absurd results. Nor, based on the statutory language, is such an interpretation necessary. To the extent that § 28-3903(c)(2)(B) applies to an action brought by public interest

plaintiffs—as set forth *supra*, Plaintiffs believe that it does not apply—the exemption should be limited to the conduct actually regulated by the PSC and would not support dismissal here.

A. Precedent Is Limited But Suggests That Advertising Misrepresentations to Consumers Are Not Subject to CPPA Exemption.

As the Superior Court recognized, the question for decision was whether PSC's generalized jurisdiction over utility companies must preempt CPPA application to those companies for behavior that the PSC does ***not*** regulate. (Order at 8; A991.) WGL cited *Pietrangelo*, 68 A.3d 697, to the Superior Court, purportedly as applicable precedent. (Def.'s Mot. Dismiss at 10, A846; Def's Reply Mot. Dismiss at 4; A966.) Brought by an individual litigant, *Pietrangelo* concerned an allegation of deficient professional services by attorneys. In line with *Gomez*, the court affirmed that, even for an individual consumer, these particular professional services are excluded from CPPA litigation. *See Pietrangelo*, 68 A.3d at 715 (interpreting D.C. Code § 28-3903(c)(2)(C), which states, "The Department may not . . . apply the provisions of section 28-3905 to . . . professional services of clergymen, lawyers, and Christian Science practitioners engaging in their respective professional endeavors").

The case now before the Court does not challenge whether the CPPA should apply to activities regulated by another entity, such as the attorney services at issue

in *Pietrangelo*. The question now at bar is whether the CPPA should apply to actions that do ***not*** fall within the regulated services. The far closer analogy, therefore, is *Scull v. Groover*, 76 A.3d 1186, 1197 (Md. 2013).[7] *Scull* interpreted a provision of the Maryland consumer protection statute that exempted certain forms of professional conduct: "This title does not apply to: (1) The professional services of a . . . medical or dental practitioner." Md. Comm. Law § 13-104(1). The *Scull* plaintiff brought a consumer protection action challenging the billing practices of a health maintenance organization ("HMO"). The trial court dismissed the action, holding that § 13-104(1) exempted all conduct by the HMO, a "medical practitioner." The Court of Appeals reversed, holding that patient billing, while clearly undertaken by a medical practitioner, was ***not*** part of the "professional services" referred to in the statute:

> In sum, the exclusion in CL §13-104(1) applies only to the actual professional services of a physician. The commercial aspects of a medical practice, such as compliance with laws concerning who may be billed and how, are not exempt from the Consumer Protection Act. When those billing practices involve unfair or deceptive practices, as defined in the Consumer Protection Act, the medical practice may be subject to a private action brought by a person injured by the violation.

[7] This Court looks to Maryland law when District precedent is lacking. *See, e.g.*, *Hill v. Maryland Cas. Co.*, 620 A.2d 1336, 1337 n.3 (D.C. 1993) ("We have held that when there are no District cases squarely on point and in the absence of appellate or other authority in this jurisdiction, this court may give Maryland law special attention because the District was carved out of Maryland and derives its common law from the State.") (citations and quotations omitted)).

Id at 1197-98. This holding easily extends to the conduct alleged here. Plaintiffs do not allege that WGL has improperly set rates or engaged in some form of conduct necessary to its professional services, *i.e.*, the provision of energy, at certain rates, within the District. Instead, Plaintiffs challenge WGL's "commercial aspects," specifically, its promising consumers a "clean," "sustainable," and "carbon neutral" alternative to traditional fossil fuels in order to increase its own profits. (Compl. ¶ 7; A13.) *Scull* suggests that such conduct is not exempt from the CPPA's prohibition on misrepresenting products or services for sale. *See* D.C. Code § 28-3904 (enumerating conduct that violates CPPA).[8]

[8] A suitable analogy might also be Food & Drug Administration preemption in the area of food labeling. The FDA regulates food labels extensively, and the Federal Food, Drug, and Cosmetic Act provides for preemption. *See* 21 U.S.C. § 343-1(a); *cf. Toxin Free USA v. J.M Smucker Co.*, No. 2019 CA 3192 B, 2019 D.C. Super. LEXIS 15, at *13 (Nov. 6, 2019) (denying motion to dismiss, finding that an assertion that defendants must adhere to standards that conflict with federal labeling requirements would be preempted, but plaintiff's argument is that the labels separately violate the CPPA). Yet, District precedent recognizes that misrepresentations about the non-regulated properties of a food can be subject to CPPA challenge. *See ALDF*, 258 A.3d at 194 (in action brought by public interest organization, finding it "perfectly possible [] to comply with federal labeling laws and the CPPA" and that misrepresentations about food's properties fall outside federally regulated conduct, and thus within the purview of CPPA); *see also, e.g.*, *GMO Free USA v. ALDI Inc.*, No. 2021 CA 001694 B, 2022 D.C. Super. LEXIS 1 (Feb. 16, 2022) ("sustainable" representation about fish products); *Organic Consumers Ass'n v. Tyson Foods, Inc.*, No. 2019 CA 004547 B, 2021 D.C. Super. LEXIS 7 (Mar. 31, 2021) (variety of representations about animal welfare on meat products).

The *Scull* reading of subsection 28-3903(c)(2)(B) underscores the critical distinction between *Gomez* and this case. *Gomez* was about a violation of the Sales Act, which the tenant plaintiffs sought to extend to a consumer misrepresentation. Plaintiffs here, by contrast, do not allege that WGL is guilty of violating Title 34 or any statute ***other*** than the CPPA; their pleading enumerates multiple ways in which WGL has violated the CPPA itself through, willful deception of District consumers. (Compl. ¶¶ 7-12, 38-48, 49, 59-60, 71, 79, 84; A8-A9, A15-A19, A21, A23, A25-A26.) This conduct represents precisely what the *Gomez* panel found lacking in in a Sales Act case:

> We find no evidence in the plain language of the CPPA that the legislature intended it to apply in these circumstances. Allegations that the defendants failed to comply with the Sale Act do not fit naturally within the thirty-some detailed examples of unfair trade practices set forth in D.C. Code § 28-3904 (2001).

Gomez, 967 A.2d at 1285. This is an important distinction. If Plaintiffs were alleging that WGL breached the 2018 joint settlement agreement approved by the PSC as a condition of its merger with AltaGas, or violated the CleanEnergy D.C. Omnibus Amendment Act (or other matter with which the PSC is concerned), the reasoning of *Gomez* might apply. But that is not what this case is about. Plaintiffs are alleging a violation of the CPPA for misrepresentations made to consumers, plain and simple.

B. The Superior Court's Sweeping Interpretation of § 28-3903(c)(2)(B) Leads to Absurd Results.

A statute may not be interpreted to create absurd results. *See, e.g.*, *D.C. Office of Tax & Revenue v. Sunbelt Bev., LLC*, 64 A.3d 138, 145 (D.C. 2013); *Peoples Drug Stores v. District of Columbia*, 470 A.2d 751, 754 (D.C. 1983) (en banc). The Superior Court's holding that WGL is exempt from CPPA liability—no matter what conduct is at issue, and whether the PSC is actually empowered to regulate that conduct—does create such absurd results. For example:

- Suppose that WGL knows that one of its maintenance vehicles is defective but intentionally conceals those defects and sells the vehicle to a third-party buyer who happens to be a WGL utility customer. If the Superior Court is correct that Title 34 (which says nothing about vehicle sales) covers all of WGL's conduct, that purchaser is left without consumer-protection recourse for WGL's intentional misconduct.

- Suppose that WGL, in an effort to keep its customer base, tells consumers that it is supplying them with natural gas only of United States origin, while in fact knowingly selling them Canadian gas instead. Such conduct is a clear violation of D.C. Code § 28-3904(t), yet the Superior Court would leave the consumers wholly without recourse, because Title 34 does not cover this conduct.

- Many of the representations at issue in this action also bear the name of AltaGas, WGL's Canadian parent. If the Superior Court is correct that § 34-605 precludes a CPPA claim against a PSC-regulated entity, then AltaGas can tell D.C. consumers any lie about energy products and insulate itself from CPPA liability simply by adding WGL's name to the advertising, without changing who is behind the misrepresentations, or ultimately who profits from them.

In this regard, it should be noted that even in the context of landlord-tenant relations (pre-2018 CPPA amendments), the Superior Court did not read *Gomez* to preclude

any CPPA claim that arises between a landlord and tenant. Consideration was given to whether the plaintiffs would absurdly be denied a remedy before the Court, with particular attention to whether other groups could bring the claim. In *Chaney v. Capitol Park Associates*, No. 2012 CA 005582 B, 2013 D.C. Super. LEXIS 2 (Mar. 11, 2013), for instance, the Superior Court denied a motion to dismiss the plaintiff-tenants' CPPA claim against their landlord. The case concerned a parking facility, and court reasoned that any parking facility customer could sue this defendant, who was landlord of both the parking facility and a related apartment complex. Denying a CPPA remedy solely to parking facility users who also happened to be tenants in the landlord's building, the *Chaney* court noted, would be unjust. *See id.* at *4. In essence, the Superior Court in the case at bar took the opposite path and eliminated any potential remedy by creating a rule that a plaintiff must bring a CPPA claim to the PSC. That new rule has exactly the type of unjust consequences that Judge Johnson sought to avoid in *Chaney*. As set forth below, this unfair interpretation—and the absurdities that follow—is not necessary from the statutory language.

C. Statutory Language Does Not Suggest That Only the PSC May Address Conduct in Which a Regulated Entity Engages.

As to statutory language, the Superior Court appeared to agree with WGL's argument that, because WGL falls under the general jurisdiction of the PSC, *see* D.C. Code § 34-301, it is impossible for WGL to engage in any conduct that could

be actionable under the CPPA. This does not comport with a reading of the entire statutory scheme. Pursuant to § 34-301, these are the powers of the Commission:

> The Commission shall, within its jurisdiction:
>
> **(1)** Have general supervision of all gas companies and electrical companies . . . .
>
> **(2)** Investigate and ascertain, from time to time, the quality and quantity of gas supplied by persons or corporations . . . .
>
> **(3)** Have power by order to fix from time to time standards for determining the purity or the measurement of the illuminating power of gas to be manufactured, distributed, or sold by persons or corporations for lighting, heating, or power purposes, and to prescribe from time to time the efficiency of the electric transmission or distribution system . . . .

Sections 34-302 through 34-306 then set out certain parameters for this enforcement, *i.e.*, the Commission's jurisdiction:

- approval of construction or gas or electric plant (§ 34-302);
- purchases of distribution transformers (§ 34-302.01);
- inspection of meters (§ 34-303);
- charges in suits to collect for gas or electricity furnished (§ 34-304);
- appointment and removal of inspectors (§ 34-305); and
- transfer of books to the Commission (§ 34-306).

This jurisdiction does not cover all activity in which WGL engages; notably absent is any power of the Commission to investigate the allegations of this case, namely, that WGL is boosting its profits by misrepresenting to consumers the quality and properties of the natural gas it sells. ***If*** the PSC's enabling statute really created jurisdiction expansive enough to exempt a regulated entity from CPPA liability, then consumer misrepresentation would be among the parameters in §§ 34-302 through

34-306, or alternatively, there would be no need for enumerated categories, because the Commission's jurisdiction would truly be "general."

D.C. Code § 34-402 allows the Commission to "enforce the provisions of this subtitle as well as all other ***laws relating to public utilities***" (emphasis added). The CPPA, however, is a general consumer protection statute, ***not*** a law "relating to public utilities," and Plaintiffs have not challenged WGL's compliance with the provisions of Title 34 or any other law directed at public utilities. Before the Superior Court, WGL tried to muddle this point with citation to D.C. Code § 34-1671.01(3), a summary provision titled "Findings," which cites legislative intent that customers be "protected from unfair, deceptive, fraudulent, and anticompetitive practices, including practices such as cramming, slamming, and providing deceptive information regarding billing terms and conditions of service." That provision, like the rest of Title 34, is directed at the provision of energy and water, not at marketing or salesmanship. More importantly for the questions at bar, the Findings do not refer to, much less purport to expand, the PSC's jurisdiction.

A comparison with the statutory language at issue in *Gomez* demonstrates why the Superior Court read § 28-3903(c)(2)(B) too broadly. *Gomez* interpreted a provision stating, "The Department may not . . . apply the provisions of section 28-3905 to [] landlord-tenant relations." *Gomez*, 976 A.2d at 1286 n.10 (citing D.C. Code § 28-3903(c)(2)(A)). The language is sweeping: any claim within the entire

purview of "landlord-tenant ***relations***," independent of any other agency or oversight, is removed from CPPA purview. The provision upon which WGL relies is quite different: "The Department may not . . . apply the provisions of section 28-3905 to . . . persons subject to regulation by the Public Service Commission of the District of Columbia." D.C. Code § 28-3903(c)(2)(B). The statute does not purport to include the entire field of relations between consumers and energy providers. Instead, the provision refers to "regulation" by the PSC. When the legislature uses different words, it must be assumed to have a different meaning in mind. *See Ruffin v. United States*, 76 A.3d 845, 854 (D.C. 2013); *see also, e.g.*, *In re A.O.T.*, 10 A.3d 160, 164 n.14 (D.C. 2010) ("Absent indications to the contrary, we normally infer that where the words of a later statute differ from those of a previous one on the same or a related subject, the Congress must have intended them to have a different meaning.") (international citations and quotations omitted). When the legislature made the exemption contingent on PSC regulation, it could not have meant to capture all "relations" between consumers and energy providers, or it would have used the same language. Logic would suggest that the difference lies in what is actually regulated by the PSC—the exemption covers defendants insofar as they are

subject to PSC regulation, but not in all consumer-facing conduct in which they engage, because much of that conduct falls outside of PSC regulation.[9]

III. The Superior Court's Reasoning Necessitates a Conflict Between Two Statutes Where None Needs to Exist.

The Superior Court correctly acknowledged that its duty to avoid interpreting statutes in a manner that creates conflict between them:

> [W]here there are potential conflicts between the plain language either within or between statutes, courts "have a duty to make 'every effort' to reconcile allegedly conflicting statutes and to give effect to the language and intent of both, as long as doing so does not deprive one of the statutes of its essential meaning." *District of Columbia v. Smith*, 329 A.2d 128, 130 (D.C. 1974). "The cardinal principle of statutory construction is to save and not to destroy." *Teachey v. Carver*, 736 A.2d 998, 1004 (D.C. 1999) (quoting *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 30 (1937)).

(Order at 6-7; A989-A990.) *See also, e.g.*, *Children's Hosp. Ass'n v. Azar*, 300 F. Supp. 3d 190, 207 (D.D.C. 2018) ("Because the Court must 'give effect, if possible,

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[9] The Superior Court read this language in reverse, holding that the language of regulation was meant to make the utility exemption ***more*** expansive than the range of "landlord-tenant relations," not less restrictive:

> D.C. code §28- 3903(c)(2)(A) and (C) both prohibit the application of the CPPA to subject matter areas—landlord and tenant relations and the professional services of identified classes of parties. In contrast, D.C. code §28-3903(c)(2)(B) prohibits the application of the CPPA to a class of parties—that is, "persons subject to regulation by the Public Service Commission of the District of Columbia," without limitations on the subject matter related to that prohibited class.

(Order at 10; A993.) On a practical level, this would appear to conflict with the Superior Court's acknowledgment that "the Public Service Commission was conceived of to regulate matters concerning the provision of services, such as bills and rates, rather than large scale consumer protection complaints." (*Id*. at 8; A991.)

to every clause and word of a statute,' *see United States v. Menasche*, 348 U.S. 528, 538-39 (1955), and because defendants' interpretation of the statute would render portions of the statutory language superfluous, the Court rejects defendants' reading of the statute . . . ."). Yet, the Superior Court's order necessitates such a conflict, by creating a vacuum between Superior Court jurisdiction and Court of Appeals jurisdiction, and by ordering a statutorily deputized plaintiff to pursue an action in a forum in which it lacks standing.

Five provisions of the D.C. Code are intertwined in the Superior Court's holding on where this consumer-protection challenge belongs:

- § 28-3905(k)(1)(D), which, as set forth *supra*, allows a public interest organization with "sufficient nexus" to consumers to bring a CPPA claim on behalf of the general public;

- § 28-3905(k)(2), which provides mandatory venue for a CPPA claim in D.C. Superior Court: "Any claim under this chapter [the CPPA] shall be brought in the Superior Court of the District of Columbia . . .";

- § 34-605(a), which sends any appeal of a PSC decision to this Court of Appeals: "The District of Columbia Court of Appeals shall have jurisdiction to hear and determine any appeal from an order or decision of the Commission. . . . Any such appeal shall be heard upon the record before the Commission, and no new or additional evidence shall be received by the said Court"; and

- § 34-1671.01, which states an intent to "[a]uthorize the Public Service Commission to adopt complaint procedures," and § 34.1671.03, which states that the Commission "shall adopt regulations or issue orders to . . . [e]stablish procedural rules for complaints, investigations, and dispositional hearings."

WGL argued to the Superior Court that the public interest Plaintiffs had brought their action to the incorrect forum, and that Title 34 creates a jurisdictional bar to this litigation unless the plaintiff first exhausts administrative remedies. (Def.'s Mot. Dismiss at 3-5; A839-841.) The Superior Court agreed and held that jurisdiction over this action lies only with the PSC. (Order at 9-11; A992-A994.)

This cause of action exists exclusively because the D.C. Council amended § 28-3905(k)(1) to add (k)(1)(D), which deputizes public interest organizations (like Plaintiffs), even without injury to their own interests, to bring an action on behalf of D.C. consumers who are subjected to misleading advertising. Thus, this action does not exist apart from the CPPA, which as the Court held in *ALDF*, 258 A.3d 174, relieves the public interest plaintiff of the burden of showing injury to its own interests. WGL, as the party arguing against the Superior Court's jurisdiction, bore the burden of proving that Title 34 would place the action, in the first instance, before the PSC. *See, e.g.*, *Savage v. United States DOJ*, No. 21-1057, 2022 U.S. Dist. LEXIS 134521, at *12 (D.D.C. July 28, 2022) ("The defendant 'bear[s] the burden of proving 'that an administrative remedy was available and that [the plaintiff] failed to pursue it.'") (internal citations omitted). WGL could not succeed in that showing, and the Superior Court erred in ceding jurisdiction, because (1) the Superior Court's Order created a conflict between § 34-605(a) and § 28-3905(k)(2), effectively sending the action into a litigation vacuum; and (2) the correct interpretation, which

creates no conflict, recognizes the limited and discretionary nature of PSC jurisdiction.

A. The Superior Court's Order Would Set Statutory Provisions at Odds.

The Superior Court's Order effectively ceded jurisdiction of this complaint to the PSC, which would mean that that the public interest organizations must first exhaust administrative remedies. The Order, thus, fosters two statutory conflicts.

First, the only basis for this claim is § 28-3905(k)(1)(D),which gives the public interest organization Plaintiffs the right to act on behalf of the general public. *See Ctr. for Inquiry*, 283 A.3d at 115-16; *ALDF*, 258 A.3d at 184.[10] The statutorily created standing arises from D.C. Council's express intention to remove any "chilling effect" on the rights of public interest organizations to litigated cases in the public interest. *See* Alexander Report at 2. This underscored the Council's desire to affect "maximum standing" for public interest organizations, *id.* at 6, to that the CPPA could be "applied liberally to promote its purpose." D.C. Code § 28-3901(c). Title 34, on the other hand, does not accord any standing for a public interest organization to act on behalf of consumers. *See* D.C. Code § 34-1671.10(c) ("The

[10] Subsection 28-3905(k)(1)(C) addresses traditional forms of organizational standing more akin to *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). Subsection (k)(1)(C) also allows for nonprofit organizational standing based on "tester" status, *i.e.*, the purchase of goods or services to test their properties. "Tester" standing is not a viable option for a case like this, as the misrepresented good—natural gas—is sold on a contract basis.

Commission shall, by regulation or order, establish procedures for complaints and for resolving disputes between the gas company, natural gas suppliers, and ***customers***.") (emphasis added).

WGL's alternative argument for dismissal would require Plaintiffs to exercise administrative remedies that do not exist for them. *See, e.g.*, *Schweiker v. Chilicky*, 487 U.S. 412, 445 (1988) ("The exhaustion requirement, however, does not apply where 'there is no hearing, and thus no administrative remedy, to exhaust.'" (internal citation omitted)); *Hettinga v. United States*, 560 F.3d 498, 503 (D.C. Cir. 2009) ("this court . . . set a high bar for determining that a statute requiring exhaustion is jurisdictional: 'In order to mandate exhaustion, a statute must contain '[s]weeping and direct' statutory language indicating that there is no federal jurisdiction prior to exhaustion." (internal citation omitted)). If this ground is accepted for dismissal, a conflict arises between § 28-3905(k)(1)(D), which deputizes these public interest organizations to act, and Title 34, which provides no manner for them do so. Without the opportunity for plaintiffs like these nonprofits to pursue a CPPA action, ***no*** relief for consumers will be reasonably possible[11]—

[11] The legislature notes that pursuing a CPPA action for misrepresentation is typically cost-prohibitive for individual consumers. *See* Alexander Report at 6. This can be no less true in pursuing a PRC complaint, especially in the context of seeking injunctive relief, not damages.

contravening the stated purpose of the 2012 amendments to expand the reach of the CPPA and recourse for consumers. *See, e.g.*, Alexander Report at 3-4.

Second, this action is a § (k)(1)(D) CPPA claim, which ***must*** be brought first in D.C. Superior Court. The 2012 CPPA amendments that created the cause of action at bar "establish[ed] ***jurisdiction*** for these claims," Bill 19-581 Fiscal Impact Statement (Nov. 20, 2012) (emphasis added), which in the first instance lies ***exclusively*** with the Superior Court, D.C. Code § 28-3905(k)(2): "Any claim under this chapter shall be brought in the Superior Court of the District of Columbia[.]" Bringing the action in D.C. Superior Court is mandatory, not discretionary. *See Riggs Nat'l Bank v. District of Columbia*, 581 A.2d 1229, 1257 (D.C. 1990) ("the word 'shall' in a statute is mandatory"). On the other hand, any challenge to a decision of the PSC—where WGL argued this action must be sent—comes to ***this*** Court, not to Superior Court. *See* D.C. Code § 34-605(a) ("The District of Columbia Court of Appeals shall have jurisdiction to hear and determine any appeal from an order or decision of the Commission."); *cf.* D.C. Code § 2-510(a) (providing for Court of Appeals review of agency decisions in contested cases). Dismissal of this action based on PSC jurisdiction thus would set two jurisdictional provisions at odds:

- § 28-3905(k)(2), which provides that any public interest challenge for violation of § 28-3904 (outlining conduct made unlawful by the CPPA) first enters the judicial system at the Superior Court; and

- § 34-605(a), which provides that a claim exiting the PSC (under the Superior Court's reasoning, including a challenge for violation of § 28-3904) first enters the judicial system at the Court of Appeals.

Original judicial jurisdiction for a challenge cannot simultaneously lie with two courts. This is a conflict.

B. The Correct Interpretation Recognizes Limitations on PSC Jurisdiction and Creates No Conflict.

The foregoing conflicts between statutory provisions and resulting depravation of the public interest organizations' statutorily granted right to represent consumers, are easily avoidable by recognizing the limited and discretionary nature of PSC jurisdiction. Indeed, in another context, WGL itself has argued to this Court that the Commission's jurisdiction is limited and would not include this challenge to consumer misrepresentations.

1. PSC's Jurisdiction Is Limited, as WGL Has Argued to This Court.

PSC jurisdiction is limited, as WGL itself has argued to this Court. The limited nature of the PSC's adjudicatory authority does not extend to any "cause of action that traditionally was litigated in court":

> [T]he Public Service Commission too "is an administrative body possessing only such powers as are granted by statute. It may make only such orders as the act authorizes . . . ." We are accordingly hesitant to agree with the Commission's suggestion, in the absence of any express benison of either Congress or the Council, that it possesses the authority to adjudicate a cause of action that traditionally was litigated in court.

Wash. Gas Light Co. v. PSC, 982 A.2d 691, 718 (D.C. 2009) ("*WGL v. PSC*").[12] In the *WGL v. PSC* case, WGL argued that Title 34 grants a very limited jurisdictional scope for the Commission, encompassing only "two basic powers" that are not at issue here:

> The Commission's powers as an administrative body are strictly limited to those powers expressly granted by its enabling statutes . . . [and the statute] gives the Commission two basic powers: (1) the power to ensure that utilities furnish safe, adequate, just, and reasonable service; and (2) the power to ensure that rates for utility services are reasonable, just, and nondiscriminatory.

Washington Gas, brief in Formal Case No. 1167, at pp. 5-6 (Opp. Ex. A; A924). The two basic powers that WGL has admitted are the extent of the PSC's jurisdictional reach do not encompass Plaintiffs' allegations of widespread consumer deception about the nature of WGL's natural gas products. Instead, the statute is designed to

[12] *WGL v. PSC* was a rate proceeding, in which the PSC ordered WGL to produce its contract with a third party. WGL produced a redacted copy, and PSC, finding that WGL's reasons for withholding the full contract to be insufficient, imposed a penalty and $350,000 forfeiture on WGL, which appealed. The Court found that it had jurisdiction to consider whether PSC had the authority to impose the forfeiture under D.C. Code § 34-706(a) despite the exhaustion of remedies requirement of D.C. Code § 34-604(b). The Court held that extraordinary circumstances would exist if PSC lacked adjudicatory authority to impose the forfeiture, and thus, that it had subject matter jurisdiction over the appeal. The Court then turned to the merits to determine whether PSC had the authority to impose the forfeiture and answered "no": the express language of § 706(a), the statute in context, and the legislative history suggested that Superior Court, not PSC, possesses sole authority to enforce the provision. Ultimately, the Court held that PSC must maintain an action in Superior Court to enforce § 34-706(a) and recover a forfeiture penalty. The forfeiture order in favor of WGL, accordingly, was reversed.

enable the Commission to respond to matters such as rate challenges or individual customer disputes. *See, e.g.*, D.C. Code § 34-1671.10(c) ("The Commission shall, by regulation or order, establish procedures for complaints and for resolving disputes between the gas company, natural gas suppliers, and customers.").

Before the Superior Court, WGL argued that *Owens v. D.C. Water & Sewer Authority*, 156 A.3d 715 (D.C. 2017), should compel these public interest organizations to exhaust administrative remedies. But *Owens* in fact involved an individual customer's challenge to his water bill and services—*i.e.*, the type of complaint that might fall within Title 34's provisions—and was also brought against the government agency that was responsible for such disputes, the D.C. Water and Sewer Authority ("DC Water"). The *Owens* court recognized the "common law rule of long-standing that, in litigation ***involving a government agency***, 'no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted.'" *Id*. at 719-20 (cleaned up and emphasis added). WGL is not a government agency. WGL is a private, for-profit company, some of whose activities happen to be regulated by the PSC, a form of concurrent jurisdiction based on the type of activity. The statute in *Owens* specifically granted DC Water jurisdiction over the type of dispute that was at issue in the case, about water service and billing. Plaintiffs' deceptive-advertising Complaint, by contrast,

is not the sort of action that is covered by any of Title 34's provisions—the provisions that define the parameters of PSC jurisdiction.

2. PSC's Administrative Procedures Are Not Mandatory.

PSC jurisdiction is discretionary, not mandatory. Title 34 provides that the PSC "shall, by regulation or order, establish procedures for complaints and for resolving disputes between the gas company, natural gas suppliers, and customers." D.C. Code § 34-1671.10(c). The ***establishment*** of procedures, however, does not require that those procedures be used before litigation. PSC review is a procedural ***possibility***. *See, e.g.*, *WGL v. PSC*, 982 A.2d at 701 ("Even a statute expressly requiring exhaustion is considered non-jurisdictional 'unless Congress states in clear, unequivocal terms that the judiciary is barred from hearing an action until the administrative agency has come to a decision.'") (internal citations omitted); *Avocados Plus Inc. v. Veneman*, 370 F.3d 1243, 1248 (D.C. 2004) ("While the existence of an administrative remedy automatically triggers a non-jurisdictional exhaustion inquiry, jurisdictional exhaustion requires much more. In order to mandate exhaustion, a statute must contain 'sweeping and direct' statutory language indicating that there is no federal jurisdiction prior to exhaustion, or the exhaustion requirement is treated as an element of the underlying claim.").[13] Without "clear,

[13] The Court in *Avocados Plus Inc.* noted the important distinction between "non-jurisdictional exhaustion" that requires parties to seek administrative redress but also allows the courts, at their discretion, to intervene if the goals of administrative

unequivocal" terms to the contrary, the PSC's duty to establish dispute resolution procedures does not amount to exclusive jurisdiction over consumer protection claims, or establish that the legislature intended jurisdictional exhaustion within Title 34.

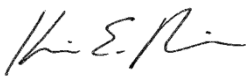
Finally, as set forth *supra*, Plaintiffs are not "gas compan[ies], natural gas suppliers, [or] customers" provided for in PSC dispute-resolution procedures. It would be absurd to believe the legislature intended these public interest organizations to exhaust administrative remedies that they have no standing to pursue.

CONCLUSION

For all the foregoing reasons, Plaintiffs-Appellants request that the August 31, 2023 Order of the Superior Court dismissing their action be reversed, and that the action be remanded for further proceedings.

Date: April 8, 2024

Respectfully submitted,



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exhaustion are not readily fulfilled by administrative options, and "jurisdictional exhaustion" that requires a statute to clearly mandate exhaustion. *Avocados Plus*, 370 F.3d at 1247-48. Title 34 does not create such a mandate.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on April 8, 2024. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system to all counsel of record:

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REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
   - Taxpayer-identification number
   - Driver's license or non-driver's' license identification card number
   - Birth date
   - The name of an individual known to be a minor
   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
     (2) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
     (3) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

/s/ Kim E. Richman
Signature

23-cv-826
Case Number(s)

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