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)*

REPLY BRIEF FOR APPELLANTS

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INTRODUCTION

The CPPA is the nation's broadest consumer-protection statute, designed to be interpreted liberally, to provide maximum standing to public interest organizations, and to remedy all forms of improper trade practices, regardless of whether those practices are specifically enumerated in the statute.

> "The Consumer Protection Procedures Act is a comprehensive statute designed to provide procedures and remedies for a broad spectrum of practices which injure consumers." While the CPPA enumerates a number of specific unlawful trade practices, *see* D.C. Code § 28-3904, the enumeration is not exclusive. A main purpose of the CPPA is to "assure that a just mechanism exists to remedy ***all*** improper trade practices." D.C. Code § 28-3901 (b)(1) (emphasis added).

Dist. Cablevision Ltd. P'ship v. Bassin, 828 A.2d 714, 722-23 (D.C. 2003) (citations omitted to *Atwater v. D.C. Dep't of Consumer & Reg. Affairs*, 566 A.2d 462, 465 (D.C. 1989)); *see also Osbourne v. Capital City Mortg. Corp.*, 727 A.2d 322, 325-26 (D.C. 1999) ("The CPPA's extensive enforcement mechanisms apply not only to the unlawful trade practices proscribed by § 28-3904, but to all other statutory and common law prohibitions.").

Something pernicious is happening in this case, something injurious to the interests of consumers who should be able to rely on the nation's broadest consumer-protection statute. Defendant-Appellee Washington Gas Light Company ("WGL"), a large and very profitable corporation providing utility services to D.C. consumers, wishes to be able to make misleading statements without any threat of being called

to account for them. WGL, this lawsuit contends, has been deceiving D.C. consumers about the effects of natural gas in order to further its own interests by selling those consumers more natural gas. (Compl. ¶ 5-8; A7.) Plaintiffs-Appellants, who are public interest organizations (ClientEarth, U.S. PIRG Education Fund, and Environment America Research & Policy Center), filed this CPPA action pursuant to D.C. Code Section 28-3905(k)(1)(D), the mechanism by which the legislature has empowered public interest organizations to protect consumer rights. Plaintiffs seek injunctive and declaratory relief to stop WGL from making misleading representations about the environmental and other effects of the natural gas it markets. (Compl. ¶ 21; A7.) No money damages are sought.

From the moment the action was filed, WGL has fought against any possibility that its representations about natural gas could face a neutral trier of fact. WGL first moved for partial dismissal pursuant to the Anti-SLAPP Act, D.C. Code § 16-5501 *et seq*., contending that the modest nonprofit Plaintiffs have the ability to squelch the speech of a mega-corporation.[1] WGL now seeks to vaporize not only this action but any realistic chance of any consumer protection proceeding in any

[1] The Superior Court heard WGL's Anti-SLAPP motion and Motion to Dismiss together on April 14, 2023. (Transcript 2:19-22; A970; *see also id*. 30:1-2; A977.) Ultimately, Judge Dayson granted the Motion to Dismiss and so did not reach the issues argued in the Anti-SLAPP motion. (Order at 1; A984.)

forum. In order to do so, WGL would have the Court accept a two-part statutory argument.

- Although public interest organizations are granted statutory standing under the CPPA, they cannot sue WGL, because as a jurisdictional matter, the CPPA can never be applied to a public utility.

WGL reaches this conclusion by turning the decision in *Gomez v. Independence Management of Delaware, Inc.*, 967 A.2d 1276 (D.C. 2009), on its head, contending that the Court's *Gomez* decision had nothing to do with the identity of the party bringing the lawsuit, when actually it did. Then WGL quietly replies on another punch, this one designed to ensure that no such action can reemerge in any forum.

- It is the Public Service Commission (the "Commission" or "PSC") that has jurisdiction over a consumer-protection (misrepresentation) action against a public utility—although a public interest organization (like each Plaintiff here) lacks any mechanism by which to bring that action.[2]

This second point is crucial to WGL's plan to avoid answering for its marketing statements, because as the legislature has recognized, individual consumers lack the resources and incentive to hire attorneys and prove misrepresentation. *See, e.g.*, Comm. on Public Servs. and Consumer Affairs Memorandum on Bill 19-0581 (Nov. 28, 2012) ("Alexander Report"), at 6 (recognizing that public interest organizations have special suitability for promoting consumer interests in "situations where it is

[2] WGL now tries to backtrack on statements it made in previous cases and liberally construe the Commission's mandate in Title 34, to claim that in fact a nonprofit organization can pursue a complaint. This position is addressed *infra*, Part II.

not feasible for the affected consumers to do so personally"). Realistically speaking, WGL's preferred statutory approach ensures that it can continue misleading consumers without repercussion; indeed, WGL's preferred approach creates a statutory vacuum from which these claims would never emerge, leaving consumer interests unrepresented.

As set forth in this Reply, ***first***, the key question on appeal is whether Gomez dictates that nonprofit organizations be treated like the Department[3] when serving as plaintiffs—not whether persons subject to PSC regulation are among the enumerated entities listed in D.C. Code Section 28-3903(c)(2)(B). Properly framing the issue, the arguments in respondent's brief fail. ***Second***, WGL is arguing for a schema that contravenes both legislative intent and the principles of statutory interpretation on which WGL itself has previously relied. ***Third***, there are no alternative grounds for affirming the Superior Court's decision, nor are the arguments WGL raises even properly before the Court.

ARGUMENT

I. On *Gomez.*

Nowhere does the CPPA say, "This Act does not apply to public utilities," or, "No action under this Act may be brought against a public utility." Instead, the

[3] "Department" refers now to the Department of Licensing and Consumer Protection, successor to the Department of Consumer and Regulatory Affairs mentioned in § 28-3903(c)(2)(B). (Br. 12 n.3.)

relevant provision frames the issue as one of standing, of who can bring a CPPA action against a public utility: "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 relevant question in *Gomez* was about the identity of the plaintiff: should an individual plaintiff be treated the same as the Department for purposes of suing a landlord? *See, e.g.*, *Gomez,* 967 A.2d at 1286 ("Nevertheless, appellant argues that we should allow private parties to apply the CPPA to landlord-tenant relations. We reject this reasoning . . . ."). The Court, for a variety of reasons, answered that an individual plaintiff should be treated like the Department when it comes to suing a landlord, and therefore should not be permitted to bring the suit. *See id.* at 1287 (holding that because "the Council did not repeal the express limitations on DCRA activities set forth in D.C. Code § 28-3903(c)," there was no indication that the Council intended "to expand the reach of the CPPA" as plaintiff suggested).

WGL's strategy is to turn that question on its head and focus ***entirely*** on the identity of the defendant, without any consideration for the identity of the plaintiff. From this flipping of *Gomez*, WGL puts the wrong question before the Court: "Does the CPPA apply to 'persons subject to regulation by the Public Service Commission of the District of Columbia'?" (Opp. 8; *see also id.* 2 ("The precise issue [on appeal] is the CPPA's exemption of public utilities.").) This maneuver allows WGL to

suggest that Plaintiffs are challenging the *Gomez* holding[4] or arguing for the Court to reverse itself.[5] But Plaintiffs are doing no such thing. Instead, Plaintiffs argue for the proper application of *Gomez* to legislative developments that came after the decision was rendered. The actual issue on appeal is targeted and follows from *Gomez*'s necessary focus on the identity of the plaintiff: does *Gomez* dictate that the CPPA's limitation on Department suits against public utilities be extended to also encompass also nonprofit organizational suits against public utilities?[6]

Gomez does not decide that question. The question did not arise on the facts of *Gomez*, and as Plaintiffs indicated, nonprofit organizational suits of this type were legislatively fixed ***after*** the Court considered whether individual consumers should be treated like the Department when serving as plaintiffs. Plaintiffs also demonstrated that, under the reasoning of *Gomez* or otherwise, nonprofit

[4] *E.g.*, Opp. 7 ("In the instant case, another group of plaintiffs challenges *Gomez*'s well-established holding.").

[5] *E.g.*, Opp. 7 ("That direct application of *Gomez* is all that is needed to affirm the Superior Court and resolve this appeal. *Gomez* is controlling precedent, and this Court accordingly should affirm the Superior Court's dismissal based on it alone."), Opp. 16 ("Plaintiffs err when they claim *Gomez* does not apply here because 'Gomez is not a consumer protection case,' but rather 'a "Sales [*sic*] Act case.'").

[6] *See* Br. 4 (Questions Presented) ("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?").

organizations should not be treated like the Department when serving as plaintiffs. (Br. 11-16.)

Adding to that argument about the logical progression of the law post-*Gomez*, one may look to the interplay of this Court's decisions with legislative action—which makes clear that there is no reason to believe that the CPPA means to treat individual plaintiffs and public interest organizational plaintiffs alike. To the contrary, the equation of organizational plaintiffs with individual plaintiffs was the very impetus for the 2012 CPPA amendments that codified public interest organizational standing. In *Grayson v. AT&T Corp.*, 15 A.3d 219, 247 (D.C. 2011), the Court held that the CPPA retains an injury-in-fact requirement for individual plaintiffs. "Although *Grayson* involved suits by individuals, in its wake, uncertainty [arose] regarding whether its holding also applies to suits by non-profit organizations, including those organized and operating to promote the interests of consumers," leading to "a chilling effect on non-profit public interest organizations litigating cases in the public interest." Alexander Report, at 2, 4. The legislature stepped in to clarify, through the 2012 amendments, that nonprofit and public interest organizational plaintiffs are ***not*** to be treated identically to individual plaintiffs when it comes to bringing CPPA lawsuits. What WGL seeks to do now is to stretch the Court's *Gomez* holding—which said nothing of the ability of public interest organizational plaintiffs to use the CPPA to stop a utility provider from

deceiving consumers—to cover those plaintiffs. This would be a chilling effect indeed.

According to WGL, "Plaintiffs also claim that amendments in 2012 and 2018 effectively overruled *Gomez*." (Opp. 22 (citing Br. 14-23.) Plaintiffs did not, and do not, claim that *Gomez* has been superseded by statute (except to the extent the 2018 amendments added subsection § 28-3905(k)(6) regarding landlord-tenant relations). Instead, Plaintiffs demonstrated:

1. The 2012 CPPA amendments that created public interest standing pursuant to subsection 28-3905(k)(1)(D), which could not have been foreseen at the time *Gomez* was decided, counsel against extending *Gomez* and equating public interest plaintiffs with individual consumers or the Department. (Br. 17-21.)
2. The 2018 CPPA amendments underscored the legislature's intent that the CPPA be applied as liberally as possible, and did not suggest that nonprofit or public interest standing would be as limited as individual consumer standing is pursuant to subsection 28-3903(c)(2)(B). (Br. 21-23.)

See Animal Legal Def. Fund v. Hormel Foods Corp., 258 A.3d 174, 184 (D.C. 2021) ("*Hormel*") ("[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.") (citing *In re M.M.D.*, 662 A.2d 837, 847 n.11 (D.C. 1995); A. Scalia & B. Garner, Reading Law: The Interpretation of Legal Texts, 256 (2012)). WGL's response to these points is, yet again, to rely on a construction of *Gomez* being entirely about the identity of the defendant, and not one bit about the identity of the plaintiff. WGL writes: "The 2012 amendments thus significantly expanded ***who can sue*** under the

CCPA. But, critically for this case, they did not touch on the distinct question of ***who can be sued*** under the CPPA." (Opp. 23.) This point is crucial, because, again, *Gomez* actually was also about "who can sue" under the CPPA, and WGL here admits that the legislature did subsequently intend to expand "who can sue" under the CPPA. (*Id.*)

WGL inserts a word into its reading of the CPPA when describing how the 2012 amendments fit within the CPPA generally. According to WGL, "while the 2012 amendments allow public interest organizations to bring CPPA claims on behalf of consumers, those organizations can ***only*** do so 'if the consumer or class could bring an action under subparagraph (A).'" (Opp. 23 (emphasis added) (quoting D.C. Code § 28-3905(k)(1)(D)(i)).) Subsection (k)(1)(D), however, does not actually include the word "only," and WGL is improperly implying a limitation where none belongs. That is, subsection (k)(1)(D) states that a public interest organization may "bring an action seeking relief from the use by any person of a trade practice in violation of a law of the District if the consumer or class [it seeks to represent] could bring an action under subparagraph (A) of this paragraph for relief from such use by such person of such trade practice." "If," but ***not*** "***only*** if." WGL would have the Court believe that a public interest organization's action depends on a consumer's ***standing*** to bring a subparagraph (A) action. But without a doubt, subsection (k)(1)(D) is not tied to a consumer's standing. *Grayson* holds

that the CPPA retains an Article III injury-in-fact requirement for individual consumer plaintiffs. *See Grayson*, 15 A.3d at 232 n.29. After *Grayson*, the Council amended the CPPA to specify that a public interest organizational plaintiff need not suffer injury-in-fact. *See Hormel*, 258 A.3d at 183 ("Two additional points make that intent particularly clear. First, (k)(1)(D) would be pointless if it incorporated Article III's restrictions."). WGL's sleight of hand would create an impossibility: an amendment specifically to eliminate the injury-in-fact requirement but resting upon a requirement of injury-in-fact.

The 2018 CPPA amendments removed the prohibition on the Department or individual consumers suing landlords under this statute. WGL argues that the amendments' silence about nonprofit or public interest plaintiffs means the legislature meant to imply that subsection 28-3903(c)(2)(B) limitations definitely encompass those plaintiffs. (Opp. 26.) The problem with WGL's argument is that the legislature had not created statutory standing for those plaintiffs at the time *Gomez* was decided, and so the legislature would have had no reason to assume that subsection 28-3903(c)(2)(B) would preclude nonprofit or public interest plaintiffs from bringing an action. Consequently, the legislature would have had no reason to amend the CPPA beyond the addition of subsection 28-3905(k)(6) regarding landlord-tenant relations. The 2018 amendments are simply further evidence of the Council's intent that the CPPA be applied as liberally as possible, particularly when

those amendments are coupled with the earlier statement of "the Council's intentions for maximum standing" for public interest organizations. Alexander Report, at 6.

WGL frames the Court's post-*Gomez* opinions as dispositive of the question now before the Court. This framing, however, requires WGL to fall back on its distorted description of the issue now before the Court:

> Returning to the dispositive question in this case—whether the CPPA applies to 'persons subject to regulation by the Public Service Commission of the District of Columbia,' D.C. Code § 28-3903(c)(2)(B)—the Court will find these precedents leave little, if anything, to be decided anew. *Gomez*, *Pietrangelo*, *Falconi-Sachs*, and *Sizer* already did that work.

(Opp. 15.) Then WGL points out, repeatedly, that subsequent decisions have affirmed *Gomez*. (*E.g.*, Opp. 13 ("The Court then rejected a more frontal assault on *Gomez* in *Falconi-Sachs* . . . ."), 14 ("The Court's most recent opportunity to reaffirm *Gomez* came in *Sizer* . . . .").) Not much need be said on that point, because the litigants are in agreement: the Court has repeatedly upheld its *Gomez* holding. Plaintiffs do not ask the Court to overturn *Gomez* now. That is WGL's suggestion, not Plaintiffs. (*See* Br. 25 ("Nor have Plaintiffs argued that *Gomez* (or its corollary *Falconi-Sachs*) was wrongly decided . . . .").) Instead, when the question on appeal is properly stated—does *Gomez* dictate that the CPPA's limitation on Department suits against public utilities be extended to encompass public interest organizational suits against public utilities?—it is apparent that *Gomez* need not be overturned. The cases cited by WGL do not address the question now before the Court. *See Sizer v.*

Lopez Velasquez, 270 A.3d 299, 302 (D.C. 2022) (deciding whether 2018 addition of specific cause of action against landlords applied retroactively); *Falconi-Sachs v. LPF Senate Square, LLC*, 142 A.3d 550, 554-55 (D.C. 2016) (reiterating that CPPA did not (pre-2018) give individual consumer an action for landlord-tenant relations); *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 715 (D.C. 2013) (affirming that CPPA does not give individual consumer an action for deficient professional services by attorney).[7]

II. On the Question of CPPA Versus Commission Jurisdiction.

The plaintiffs in *Gomez* had recourse outside their CPPA claim. *Gomez* was primarily a Sale Act case, and important to the decision was that their rights under that statute survived: "[T]here is no compelling reason to shoehorn the allegations made here into the ill-fitting language of the CPPA because . . . the Sale Act also contains its own detailed provisions for implementation and enforcement." *Gomez*, 967 A.2d at 1285. WGL writes off this fact as irrelevant to its policy argument. (Opp.

[7] ***If*** the Court were to find that *Gomez* should be expanded to cover these Plaintiffs, then Plaintiffs would contend, in the alternative, that the specific conduct in which WGL engaged is not exempted from CPPA lawsuits by anyone. The PSC's actual charge is to ensure that "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." D.C. Code § 1-204.93. WGL's deliberately misleading consumers about the effects of natural gas to sell more product does not fit within that regulatory scheme. WGL acknowledges this question of applicability is unsettled, and that the Court "has not yet had occasion to consider a CPPA consumer deception action against a defendant that otherwise engages in PSC-regulated conduct." (Opp. 17 (quoting Br. 24).)

16-17.) But the consequences of statutory interpretation do matter.[8] If Plaintiffs cannot bring their action to Superior Court, the action will not be brought, and WGL will be able to continue selling natural gas to D.C. consumers by misrepresenting its properties.

WGL contends that "Plaintiffs are free to raise these same kinds of issues before the Commission." (Opp. 29.) But that appears incorrect as to both jurisdiction and standing. To begin, at issue in Formal Case No. 1167, which Plaintiffs cite in their Opening Brief (Br. 42-43; *see also* Opp. 33-34), was how to interpret the Commission's enabling statutes to determine its powers. (A933, Brief of Washington Gas in Formal Case No. 1167, 1.) WGL, there, asserted that the PSC's power is limited to its enumerated powers, which are expressly stated and "empowered by statute." (*Id.*) WGL then argued for a plain-meaning approach to statutory interpretation, which according to WGL led to a conclusion that the PSC's enabling statutes "do not encompass the power to mandate electrification in an effort to meet environmental goals, or prohibit gas service" (*Id.* at 6), which were the

[8] *See, e.g.*, *J.P. v. District of Columbia*, 189 A.3d 212, 219 (D.C. App. 2018) ("Our task is to determine the interpretation of both provisions that best harmonizes them, taking into account their language; their context; their place in the overall statutory scheme; their evident legislative purpose; and the principle that statutes should not be construed to have irrational consequences.") (citing *Lopez-Ramirez v. U.S.*, 171 A.3d 169 (D.C. App. 2017); *Office of the People's Counsel v. Pub. Serv. Comm'n*, 163 A.3d 735, 740 (D.C. 2017) ("We consider not only the bare meaning of the word but also its placement and purpose in the statutory scheme. Statutory interpretation is a holistic endeavor.").

actions at issue in that matter.[9] WGL acknowledged that the PSC possesses "incidental powers" but argued for narrow interpretation of them, limiting the "incidental powers" to only what was necessary to "execute powers" that "the statute explicitly gives it." (*Id.* at 9 (citing D.C. Code § 34-403; *Wash. Gas Light Co. v. PSC*, 982 A.2d 691, 718 (D.C. 2009).)

The District Charter that provides "the scope and purpose of the Commission" does not, expressly or otherwise, grant the PSC the power to regulate deceptive advertising claims brought by nonprofit organizations, *i.e.*, the rights enumerated in the CPPA. *See* D.C. Code § 1-204.93.[10] WGL conveniently shifts its approach here to argue that, far from a plain-meaning finding of narrow and explicit powers, the Court should find D.C. Code Section 34-402 to be an "implicit exception" to Section 28-3905(k)(2) (Opp. 36-37), and should cobble together various provisions of Title 34 to create PSC jurisdiction to hear CPPA claims (*id.* at 30-31). WGL then suggests that D.C. Council has set up some sort of integrated system wherein the

[9] WGL's (former) "plain-meaning" approach is supported by this Court's decisions. *See, e.g.*, *Kelly v. District of Columbia Dep't of Emp't Servs.*, 214 A.3d 996, 1008 (D.C. 2019) *citing Nat'l Geographic Soc'y v. District of Columbia Dep't of Emp't Servs.*, 721 A.2d 618, 620 (D.C. 1998).

[10] *Cf. Formal Case No. 1130, Modernizing the Energy Delivery System for Increased Sustainability – MEDSIS Staff Report*, Pub. Serv. Comm'n, https://dcpsc.org/getmedia/6048d517-1d9d-4094-b0f4-384f19a11587/MEDSISStaffReport.aspx (last visited June 20, 2024) ("[S]tates' regulatory oversight is generally limited to retail sales of electric energy and the distribution of electric energy.").

Commission fully reviews the actions of all public utility companies, even (apparently) commercial statements about natural gas's environmental properties. (Opp. 37.) D.C. Council was clear, however, when it enacted the CPPA that consumer-deception claims are to be brought in Superior Court. *See* D.C. Code § 28-3905(k)(2). No such explicit language allows a deceptive marketing claim on behalf of consumers to be brought before the Commission. Unlike PSC jurisdiction, CPPA jurisdiction is intended to be liberally construed, *see* D.C. Code § 28-3901(c), and public interest standing was created specifically to allow organizations to represent consumers, for whom pursuing a claim may be cost prohibitive. *See* Alexander Report 6. WGL offers no explanation of why the Council would then add roadblocks to consumer relief via "implicit" interpretations of PSC powers.

As to Plaintiffs' opportunity to seek relief from the Commission, WGL tosses two more arguments into the mix: Municipal Regulation Title 15, Section 101.1, and the Office of People's Counsel. WGL points to Section 101.1, which allows the filing of a complaint to the PSC by "any person," and to Section 199, which defines "person" to include an organization. (Opp. 33.) WGL neglects to mention Section 101.4 of the same procedures, which limits what the PSC may investigate: "The Commission may investigate at any time any matter germane to its jurisdiction." As set forth above, using environmental representations to sell more natural gas is not germane to PSC jurisdiction. Moreover, of the many Title 34

provisions WGL attempts to cobble into jurisdictional and standing arguments, only one, D.C. Code Section 34-1671.10(c), mentions complaints: "The Commission shall, by regulation or order, establish procedures for complaints and for resolving disputes between the gas company, natural gas suppliers, and customers." Because complaint procedures are to be for resolving complaints between utilities and ***customers***, the "person" of Municipal Regulation Title 15 Section 101.1 must refer to any type of ***customer***, whether individual or organizational.[11] It does not include public interest organizations who are not customers, so it does not include Plaintiffs here, who are not WGL customers and seek to act on behalf of District consumers rather than themselves.

Lastly, WGL argues that "the Office of the People's Counsel ("OPC') provides an ultimate backstop that ensures these types of consumer complaints may be brought before the Commission." (Opp. 34.) The problems with this argument

[11] The Public Service Commission's website accommodates only customers to file complaints. *Utility Consumer Complaints, Mediation, and Inquiries*, PUB. SERV. COMM'N, https://complaints.dcpsc.dc.gov/en-US/ (last visited June 13, 2024). It provides a "file a complaint" button, which navigates the user to a form titled "Customer Complaint Form," *Customer Complaint Form*, Pub. Serv. Comm'n, https://complaints.dcpsc.dc.gov/en-US/new-complaint/ (last visited June 13, 2024). The website lacks any form or guidance for noncustomers, such as Plaintiffs, to file complaints. Consistent with this, Plaintiffs searched the PSC's e-docket, the library of PSC administrative materials available on LEXIS, and all available cases or administrative materials discussing Section 34-1671.10(c) and found that since 2005, the year Title 34 was enacted, there has been no example of a public interest organization being permitted to pursue a complaint before the PSC.

are myriad. First, an OPC complaint may be had by "[a]nyone who is an account holder" for the services at issue.[12] Plaintiffs here do not claim to be natural gas account holders. Second and third, OPC's authority is discretionary and co-existent with PSC jurisdiction (which is lacking, *see supra*); OPC "***may*** file a complaint under any provision of [Title 34 Chapter 16C]." D.C. Code § 34-16710.10(b) (emphasis added); *see also Office of People's Counsel v. Pub. Serv. Comm'n*, 477 A.2d 1079, 1082 (D.C. 1984) ("*OPC v. PSC*") ("The People's Counsel may represent petitioners before the PSC who complain in matters of rates or services; may investigate services, rates, and property valuations of public utilities . . . .") (citations and internal quotations omitted). Fourth, the availability of a public advocate does not foreclose other avenues to relief, like CPPA relief. *See* D.C. Code § 34-1671.12. Fifth, the OPC is limited in scope and resources. *See OPC v. PSC*, 477 A.2d at 1087 ("Had the Congress intended [OPC] to have virtually unlimited operating resources . . . it would not have expected [OPC] to have to use great selectivity in serving as consumers' advocates."). Lawsuits brought by specific statutory authorization should not be determined on the hope that the OPC might, for the first time, use its limited resources to expand its advocacy to deceptive commercial speech.

[12] *Consumer Complaint FAQs: Who may have a complaint?*, Office of the People's Counsel, https://opc-dc.gov/consumer-assistance/consumer-complaint-faqs/ (last visited June 21, 2024).

III. On the "Alternative Grounds" for Dismissal.

WGL's "multiple alternative grounds" for affirming dismissal (Opp. 35) are easily disposed of.

First, as to the argument that the PSC is the exclusive forum for these deceptive marketing claims (Opp. 36-37), the PSC's mandate does not cover these types of claims, and no mechanism exists for a public interest organization to complain. *See supra*.

Second, as to the argument that Plaintiffs are challenging noncommercial speech that is not covered by the CPPA, this is a question of fact[13] that the Superior Court did not reach and, therefore, is not properly before this Court.[14] If the question were reviewable, Plaintiffs would point out that the speech is plainly commercial; as discussed in the papers before the Superior Court (Pls.' Mem. Opp. Def.'s Mot. Dismiss at 11-12; A919-A920), the statements "were in an advertising format,"

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[13] Indicative of this, WGL makes pages of fact arguments (Opp. 38-43), apparently expecting this Court to parse its websites and sit through YouTube videos and determine the commercial or noncommercial nature of the speech.

[14] *See, e.g.*, *DeMarco v. U.S.*, 415 U.S. 449, 450 n.* (1974) ("[F]actfinding is the basic responsibility of district courts, rather than appellate courts."); *Ellison v. U.S. Postal Serv.*, 84 F.4th 750, 760 (7th Cir. 2023) (remanding because "the district court did not reach this fact-sensitive question"); *Scotty's Contr. & Stone v. U.S.*, 326 F.3d 785, 787 (6th Cir. 2003) ("We decline the government's invitation to make initial findings of fact . . . ."); *Garber v. State*, 687 So.2d 2, 4 (Fla. Dist. Ct. App. 1996) ("These are factual questions the trial court did not reach, as far as can be told from its order. Without expressing any view on how these factual questions should be resolved, we remand for the trial court to determine . . . .").

"referred to a specific product," and stemmed from "economic motivation," *i.e.*, selling more natural gas at WGL's profit. *Lona's Lil Eats, LLC v. Doordash, Inc.*, No. 20-cv-06703-TSH, 2021 U.S. Dist. LEXIS 8930, at *21 (N.D. Cal. Jan. 18, 2021).

Third, as to the argument that Plaintiffs' challenge to statements made on WGL customer bills is moot, this also is a question of fact that the Superior Court did not reach, and so not properly before the Court. If the question had been reached and WGL's version of the facts had been accepted, Plaintiffs would argue that the issue should nevertheless remain live. Plaintiffs' Complaint seeks declaratory as well as injunctive relief. (Compl. at 24; A30.) "One party's voluntary cessation of a challenged practice does not moot a case unless subsequent events make it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur." *In re Bright Ideas Co.*, 284 A.3d 1037, 1040 (D.C. App. 2022). Moreover, courts possess discretionary authority to reach the merits of a "seemingly moot controversy," which they exercise "in cases that present an important and recurring issue that would otherwise tend to evade review." *Peyton v. U.S.*, 299 A.3d 552, 555 (D.C. 2023). WGL's allegedly discontinued billing statements, likely still in household circulation, "extend well beyond the rights of the specific parties" to the general public, *Pendleton v. D.C. Bd. of Elections & Ethics*, 449 A.2d 301, 303 n.1

(D.C. 1982), and without judicial review, WGL is free to, and based on history likely will, repeat these statements.

CONCLUSION

For all the foregoing reasons, and those set forth in their Opening Brief on Appeal, Plaintiffs-Appellants respectfully request that the judgment of the Superior Court dismissing their action be reversed, and that the case be remanded to the Superior Court for further proceedings.

Date: June 24, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on June 24, 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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