No. 23-CV-0826

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 APPELLEE

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MAY 23, 2024

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule of Appellate Procedure 26.1, Appellee Washington Gas Light Company, by counsel, states that the following serves to identify and disclose the relationship between all parents, trusts, subsidiaries, and/or affiliates of Appellee that have issued shares or debt securities to the public or own more than 10% of Appellee's stock:

AltaGas Ltd. is traded as ALA on the Toronto Stock Exchange. ALA is the parent of AltaGas Services (U.S.) Inc., which is the parent of AltaGas Utility Holdings (U.S.) Inc., which is the parent of Wrangler 1 LLC, which is the parent of WGL Holdings, Inc., which is the parent of Wrangler SPE LLC, which is the parent of Washington Gas Light Company.

RULE 28(a)(2) DISCLOSURE STATEMENT

Pursuant to Rule of Appellate Procedure 28(a)(2), Washington Gas Light Company states that the following parties and counsel were involved in this matter in the trial court and/or in this appellate proceeding:

Plaintiff-Appellants

- ClientEarth USA, Inc.
- U.S. PIRG Education Fund
- Environment America Research & Policy Center

Defendant-Appellee

- Washington Gas Light Company

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JURISDICTIONAL STATEMENT

This case concerns Plaintiffs' appeal from a final Order from the District of Columbia Superior Court, dated August 31, 2023, granting Washington Gas Light Company's motion to dismiss. Plaintiffs filed a notice of appeal from that Order on September 29, 2023. This Court holds jurisdiction pursuant to D.C. Code § 11-721 and D.C. Rules of Appellate Procedure 3 and 4.

STATEMENT OF THE ISSUES

1. Did the Superior Court correctly dismiss Plaintiffs' Consumer Protection Procedures Act ("CPPA") claims against Washington Gas Light Company ("Washington Gas"), a public utility regulated by the D.C. Public Service Commission ("PSC" or "Commission"), by holding that D.C. Code § 28-3903(c)(2)(B) exempts the utility from such claims?

2. Alternatively, even if Plaintiffs could state a legally cognizable CPPA claim against Washington Gas, should the dismissal be affirmed because:
    a. Any such CPPA claims against Washington Gas may be pursued only at the Commission, not in the Superior Court; and/or
    b. Most of the challenged statements are not commercial speech and thus fall outside the reach of the CPPA, and the challenges to the remaining

statements are moot since Washington Gas is no longer engaging in those forms of speech?

STATEMENT OF THE CASE

Nature of the Case. This case presents a choice between two models of public utility regulation: the ordered, unitary model of Commission control over regulated utilities set forth in District of Columbia law or the chaotic, regulation-by-litigation approach Plaintiffs prefer. The precise issue is the CPPA's express exemption of public utilities. Plaintiffs seek a way around that well-established statutory exemption. Washington Gas seeks to uphold it and to channel Plaintiffs' complaints to the Commission, where they can be heard by the regulatory authority that exercises jurisdiction over public utilities like Washington Gas.

Course of Proceedings. Plaintiffs filed this action in July 2022, alleging that certain statements Washington Gas made in and regarding its Climate Business Plan, Natural Gas 101 handbook, and similar topics constitute "false and deceptive marketing of their natural gas products and services," in violation of the CPPA. A7, Compl. 1. Washington Gas thereafter moved for partial dismissal under the District of Columbia's Anti-SLAPP statute, D.C. Code § 16-5501 *et seq.*, arguing the Superior Court should dismiss the portions of Plaintiffs' claims regarding Washington Gas's Climate Business Plan. A34, Washington Gas Light Company's Opposed Special Partial Motion to Dismiss (Sept. 9, 2022). Washington Gas also

moved to dismiss Plaintiffs' claims in their entirety, arguing: (1) the CPPA exempts utilities like Washington Gas from its scope; (2) the Superior Court lacks jurisdiction to hear the case, as disputes involving ' statements about their products and service should be heard by the Commission; (3) most of the challenged statements fall outside the scope of the CPPA because they are not commercial speech; and (4) Plaintiffs' claims based on statements that were included in older billing statements—but are not included in any going forward—are moot. A831, Washington Gas Light Company's Opposed Motion to Dismiss (Nov. 8, 2022). After full briefing, the Superior Court held a hearing on the motions.

Disposition Below. On August 31, 2023, the Superior Court granted Washington Gas's motion to dismiss, holding that this Court's precedents have firmly established that the CPPA "exempts all individuals 'regulated by the Public Services Commission,' without regard to what that regulation might entail." A991, D.C. Sup. Ct. Order, 8. Because it disposed of the case on that basis, the Superior Court did not reach Washington Gas's other arguments for dismissal or its Anti-SLAPP motion.

STATEMENT OF THE FACTS

Washington Gas is a federally chartered public service utility that has provided gas service to the residential, federal, commercial, and industrial customers in the District of Columbia for over 175 years. *See* An Act to incorporate the

Washington Gas Light Company, 9 Stat. 722, 723 (1848); *see also* A14, Compl. ¶ 30. The utility has operated under the close supervision of the Commission since 1913. District of Columbia Public Utilities Act, ch. 150, 37 Stat. 938 (1913); *see generally* D.C. Code Title 34.

In June 2018, the Commission directed Washington Gas to submit and then hold regular public meetings to discuss "a long-term business plan on how it can evolve its business model to support and serve the District's 2050 climate goals (*e.g.*, providing innovative and new services and products instead of relying only on selling natural gas)." A389, Formal Case No. 1142, *In the Matter of the Merger of AltaGas, Ltd. And WGL Holdings, Inc.*, Order No. 19396, Appendix A, ¶ 79 (June 29, 2018). Washington Gas complied with the Commission's order by filing its Climate Business Plan on March 16, 2020. A60-A295, Washington Gas Climate Business Plan (Mar. 16, 2020).

This filing prompted additional Commission orders for climate change proposals by the District's electric and gas utilities regarding "the effects on global climate change and the District's climate commitments." A395, Formal Case No. 1167, *In the Matter of the Implementation of Electric and Natural Gas Climate Change Proposals* ("Formal Case No. 1167"), Order No. 20662, ¶ 11 (November 18, 2020); A398-A416, Formal Case No. 1167, Order No. 20754 (June 4, 2021). Notably, the Commission explicitly described its utility climate proceedings as "a

general inquiry into whether the Companies are meeting and advancing the District's climate goals" and as "entirely a matter of public interest." A436, Formal Case No. 1167, Order No. 21127, ¶ 56 (March 10, 2022). Public proceedings regarding the Climate Business Plan and Washington Gas's future climate goals remain ongoing in Formal Case No. 1167.

Plaintiffs are three nonprofit public interest organizations purportedly concerned with climate change, use of fossil fuels, and educating the public on these issues. A11-A14, Compl. ¶¶ 22-28. However, despite Plaintiffs' professed interests, they have chosen thus far not to participate in Formal Case No. 1167. A814, Plaintiffs' Anti-SLAPP Opp., 5 ("Plaintiffs here do not seek to participate in that political process."). Instead of voicing their policy disagreements or concerns about Washington Gas's statements at the Commission, Plaintiffs filed a CPPA suit against Washington Gas in Superior Court. Plaintiffs' complaint concerns various Washington Gas statements in and regarding its Climate Business Plan, Natural Gas 101 handbook, and outdated bills. A15-A18, Compl. ¶¶ 37-48.

STANDARD OF REVIEW

This Court reviews the grant of a motion to dismiss *de novo*. *Chamberlain v. Am. Honda Fin. Corp.*, 931 A.2d 1018, 1022-23 (D.C. 2007). "This court also reviews *de novo* questions of statutory construction." *Id.* at 1022. Finally, in conducting that review this Court must follow its own precedent because "[n]o

division of the D.C. Court of Appeals will overrule a prior decision of this court … .” *Fallen v. United States*, 290 A.3d 486, 493 (D.C. 2023) (citation and internal quotation marks omitted).

SUMMARY OF THE ARGUMENT

The dispositive issue in this case is not new for this Court. Fifteen years ago, the Court considered whether a CPPA amendment that expanded standing under the statute—*i.e.*, who can sue—also changed the substantive reach of the CPPA—*i.e.*, who can be sued. *See Gomez v. Indep. Mgmt. of Delaware, Inc.*, 967 A.2d 1276, 1284-88 (D.C. 2009). Specifically, the Court focused on whether the five categories of claims D.C. Code § 28-3903(c)(2) exempts from the CPPA’s reach survived that statutory amendment. There, the specific exemption concerned claims in the first of those categories—claims involving “landlord-tenant relations.” *Id.* The Court held that those express exemptions survived the standing amendment at issue there: “Nothing in the plain language of the statute or its legislative history indicates that the legislature intended such a dramatic expansion of the Act … .” *Id.* at 1288.

In the intervening years, various plaintiffs have challenged *Gomez*’s holding, and the Court has held firm to its binding precedent. In *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697 (D.C. 2013), the Court declined to limit *Gomez* to the “landlord-tenant relations” category in § 28-3903(c)(2)(A), holding that it necessarily also applied to the “professional services of … lawyers” category

in D.C. Code § 28-3903(c)(2)(C) as well: "[T]he CPPA specifically excludes the professional services of lawyers from its purview." *Id.* at 714-15. Then, in *Falconi-Sachs v. LPF Senate Square, LLC*, 142 A.3d 550 (D.C. 2016), the Court rejected the argument that *Gomez*'s holding was mere "dicta" and confirmed its nature as binding precedent. *Id.* at 554-55 & n.1. Most recently, in *Sizer v. Lopez Velasquez*, 270 A.3d 299 (D.C. 2022), the Court again made clear that *Gomez* constitutes "precedent" that the Court "ha[s] no authority to revisit." *Id.* at 305 n.6.

In the instant case, another group of plaintiffs challenges *Gomez*'s well-established holding. They argue, yet again, that an amendment to expand standing under the CPPA somehow repealed the CPPA's express exemption in § 28-3903(c)(2)(B) of claims against public utilities "subject to regulation by the Public Service Commission of the District of Columbia." As *Gomez* teaches, a statutory amendment on standing—*i.e.*, who can sue—has no impact on the substantive scope of the CPPA—*i.e.*, who can be sued. And it certainly does not *sub silentio* rescind or repeal exemptions expressly enumerated in the statute. 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.

If the Court disagrees and decides that *Gomez* and its progeny do not foreclose Plaintiffs' claims, it can still affirm based on two alternative grounds. First, even if

Plaintiffs could state a CPPA claim against a public utility, the Superior Court lacked jurisdiction to hear the claim, which must be brought—if at all—before the Commission. Second, many of the statements Plaintiffs challenge lack a commercial character and thus fall outside the reach of the CPPA, and the challenges to the few arguably commercial statements Plaintiffs challenge are moot.

ARGUMENT

I. *Gomez* and its progeny establish the CPPA excludes from its scope public utilities regulated by the Public Service Commission.

This Court has already decided the dispositive legal question at the heart of this case. Does the CPPA apply to "persons subject to regulation by the Public Service Commission of the District of Columbia"? D.C. Code § 28-3903(c)(2)(B). *Gomez* answered that question with a definitive "no": "Nothing in the plain language of the statute or its legislative history indicates that the legislature intended" for the CPPA to apply "to persons regulated by the Public Service Commission." 967 A.2d at 1287-88. As Washington Gas, a public utility, is indisputably "subject to regulation by the [Commission]," *Gomez* is controlling, and the Superior Court's dismissal for failure to state a claim should be affirmed.

In *Gomez*, the Court "consider[ed] whether th[e CPPA] applie[d]" to a landlord-tenant dispute. *Id.* at 1284-88. Central to that question was D.C. Code § 28-3903(c), which provides:

> The Department [of Consumer and Regulatory Affairs] may not … apply the provisions of section 28-3905 [*i.e.*, the CPPA] to:
>
> (A) landlord-tenant relations;
>
> (B) persons subject to regulation by the Public Service Commission of the District of Columbia;
>
> (C) professional services of clergymen, lawyers, and Christian Science practitioners engaging in their respective professional endeavors;
>
> (D) a television or radio broadcasting station or publisher or printer of a newspaper, magazine, or other form of printed advertising … ; or
>
> (E) an action of an agency of government.

D.C. Code § 28-3903(c).

While all agreed § 28-3903(c) prohibited the Department of Consumer and Regulatory Affairs ("DCRA")[1] from bringing a CPPA claim that fell into any of those categories (including, as most relevant in that case, the one for "landlord-tenant relations"), the *Gomez* plaintiffs argued that, unlike DCRA, they were free to bring a CPPA claim involving landlord-tenant relations. After a thorough analysis of the statutory text and legislative history, this Court disagreed.

The *Gomez* Court began by observing that the CPPA provides "[t]he Department of Consumer and Regulatory Affairs ['DCRA'] shall be the principal

[1] The CPPA has since been amended to replace the DCRA with the Department of Licensing and Consumer Protection. D.C. Code. § 29-3901(a)(8). But for purposes of continuity, Washington Gas uses the term "DCRA" throughout this brief.

consumer protection agency of the District of Columbia government and shall carry out the purposes of this chapter." 967 A.2d at 1286 (quoting D.C. Code § 28-3902(a)). As the Court explained, it would defy the "language and legislative history of the CPPA" to "allow private parties to apply the CPPA to landlord-tenant relations" when "the Council has expressly forbidden the DCRA [from doing so]." *Id.*

Delving more deeply, the Court then explained that the plaintiffs' argument "rests not upon statutory language or legislative history, but rather upon an attenuated inference mistakenly drawn from an amendment to the statute which took effect in the year 2000." *Id.* Prior to the amendment, the statute had explicitly made the private right of action under the CPPA coextensive with the DCRA's:

> Any consumer who suffers any damage as a result of the use or employment by any person of a trade practice in violation of a law of the District of Columbia *within the jurisdiction of the Department* … may bring an action … [under the CPPA].

Id. (quoting former D.C. Code 28-3905(k)(1)). In other words, "where the Act limits the jurisdiction of the [DCRA], the scope of the cause of action created by § 28-3905(k)(1) is similarly limited." *Id.* (quoting *Childs v. Purll*, 882 A.2d 227, 238 (D.C. 2005)).

The 2000 amendment introduced some uncertainty, however, since it resulted in the subsection "no longer explicitly link[ing] the scope of private civil actions

[under the CPPA] to the jurisdiction of the [DCRA]." *Id.* (quoting *Childs*, 882 A.2d at 238). Specifically, the new provision read:

> A person, whether acting for the interests of itself, its members, or the general public, may bring an action under this chapter in the Superior Court of the District of Columbia seeking relief from the use by any person of a trade practice in violation of a law of the District of Columbia and may recover or obtain the following remedies.

Id. at 1286 n.11 (quoting D.C. Code § 3905(k)(1)). The removal of the link to the DCRA led to the question confronted in *Gomez* of whether § 28-3903(c)'s limitations applied to plaintiffs other than the DCRA.

In *Gomez*, this Court resolved any potential confusion and held "the Council did not intend by that amendment to extend the private right of action created by the CPPA into the realm of landlord-tenant relations" or into any of the other categories that lie beyond the scope of the DCRA's jurisdiction under D.C. Code § 28-3903(c). *Id.* at 1286. As the Court explained, "[t]here is a much more convincing explanation for the deletion of this language in October 2000." *Id.* at 1287. Namely, "[i]n 1995 the Council suspended DCRA enforcement of the CPPA for budgetary reasons," and the suspension was extended further in October 2000. *Id.* At the same time, the Council also authorized "the Office of the Corporation Counsel to pursue consumer protection claims more aggressively." *Id.* Given the context, "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" since "the DCRA was not enforcing the CPPA at that time." *Id.*

"More importantly, there is no indication whatsoever that the Council intended by deleting this language to expand the reach of the CPPA." *Id.* Indeed, it notably "did not repeal the express limitations on DCRA activities set forth in D.C. Code § 28-3903(c)." *Id.* In other words, the 2000 amendment changed only standing—expanding the list of those who could sue to include "[a] person, whether acting for the interests of itself, its members, or the general public"—not the substantive scope of the CPPA. And it certainly did not change who could be sued by somehow overriding the five express exemptions enshrined in § 28-3903(c)(2).

The Court concluded its analysis by emphasizing the absurdity of assuming "that the Council, although silent on the matter, intended to extend the reach of the CPPA not only to landlord-tenant relations but also to persons regulated by the Public Service Commission … and to the other entities listed in [§ 28-3903(c)]." *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." *Id.* at 1288.

Since *Gomez*, this Court has consistently rejected efforts to chip away at its core holding that the CPPA does not apply to § 28-3903(c)(2)'s list of exemptions. Just a few years after *Gomez*, the Court confronted the question of whether the CPPA

applies to "professional services of lawyers," another of the § 28-3903(c)(2) exempt categories. *Pietrangelo v. Wilmer Cutler Pickering Hale & Dorr, LLP*, 68 A.3d 697, 714-15 (D.C. 2013). Rather than limit *Gomez* to the landlord-tenant relations category, the Court instead made clear that its reasoning in *Gomez* necessarily extended to all of the § 28-3903(c)(2) categories and prevented the CPPA from applying to "professional services of … lawyers," D.C. Code § 28-3903(c)(2)(C), just as much as it did to "landlord-tenant relations," *id.* § 28-3903(c)(2)(A). *Pietrangelo*, 68 A.3d at 714-15. Accordingly, the Court held "the CPPA specifically excludes the professional services of lawyers from its purview" and affirmed the dismissal of the private party plaintiff's CPPA claim.

The Court then rejected a more frontal assault on *Gomez* in *Falconi-Sachs v. LPF Senate Square, LLC*, 142 A.3d 550 (D.C. 2016). There, the plaintiff argued that *Gomez*'s CPPA holding was dicta. *Id.* at 554 n.1. But the Court held "Appellant's argument that this holding was dicta is misplaced." *Id.* That is because *Gomez*'s CPPA holding was a necessary and indispensable part of its resolution of the case: "This court in *Gomez*, after deciding that the trial court had erred in granting summary judgment on appellants' Sales Act claim, *affirmed* the dismissal of the CPPA claim—even though the appellants had wholly premised that claim upon on the Sales Act claim—because it concluded that the CPPA does not apply to landlord-tenant relations." *Id.* As such, *Gomez*'s "holding that the CPPA does not apply to

landlord-tenant relations" is not dicta and instead constitutes binding precedent. *Id.* at 554-55.

The Court's most recent opportunity to reaffirm *Gomez* came in *Sizer v. Lopez Velasquez*, 270 A.3d 299 (D.C. 2022). There, the plaintiffs' "CPPA counterclaims were dismissed pretrial on the ground that the CPPA did not apply to landlord-tenant relations." *Id.* at 302. The Court recognized that *Gomez* had already settled the question: "To the extent Ms. Sizer and Mr. Michelman 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." *Id.* at 305 n.6.

Then the Court considered in *Sizer* whether two later legislative amendments altered that result and held they did not. *Id.* at 305-06. First, in December 2016, the Council of the District of Columbia amended the CPPA to "expressly authorize[] the Attorney General to apply to landlord-tenant relations 'the provisions and exercise the duties of this section.'" *Id.* at 305. Second, the Council "amended the CPPA in [2018][2] and added a private right of action to combat deceptive trade practices in landlord-tenant relations." *Id.* at 304. Notably, this amendment did not create a

[2] Plaintiffs refer to these amendments as the 2018 amendments even though they did not take effect until 2019. To avoid confusion, Washington Gas will adopt the same terminology.

private right of action for all of the categories listed in § 28-3903(c)(2), but instead did so only for the "landlord-tenant relations" category.

The Court concluded that neither amendment aided the plaintiffs. Only the 2018 amendments gave them a right to sue under the CPPA, but that amendment post-dated their claims and was not retroactive. *Id.* at 304-06. Accordingly, the Court rejected the argument that *Gomez* and *Falconi-Sachs* were "effectively overruled by the Council when it amended the CPPA in [2018] and added a private right of action to combat deceptive trade practices in landlord-tenant relations." *Id.* at 304.

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. Those binding precedents establish that § 28-3903(c)(2) exempts the five listed categories of cases and persons from the CPPA's reach. *Gomez* held "[n]othing in the plain language of the statute or its legislative history indicates that the legislature intended" for the CPPA to apply to any of the five categories under § 28-3903(c)(2), including "persons regulated by the Public Service Commission." 967 A.2d at 1287-88. *Pietrangelo* made clear that *Gomez* and its reasoning could not be confined to the "landlord-tenant relations" category alone, but must instead encompass all five of the categories under § 28-3903(c)(2),

including, as relevant there, "professional services of … lawyers." 68 A.3d at 714-15. *Falconi-Sachs* put to rest any notion that *Gomez*'s holding on these matters was dicta. 142 A.3d at 554-55 & n.1. And *Sizer* explained how later legislative amendments permitted CPPA suits regarding landlord-tenant relations going forward, but left intact the rest of *Gomez*'s holding regarding the other categories of § 28-3903(c)(2). *Sizer*, 270 A.3d at 304-06 & n.6.

In sum, this Court's task is a simple one. Are Washington Gas and other "persons subject to regulation by the Public Service Commission of the District of Columbia," D.C. Code § 28-3903(c)(2)(B), covered by the CPPA? This Court has already answered that question at least four times in the negative. The answer remains no here.

II. None of Plaintiffs' various efforts can circumvent *Gomez*'s binding and dispositive holding.

Plaintiffs strain against *Gomez* and its progeny in hopes of finding some way around that fatal line of precedent. None of their efforts succeed.

A. Plaintiffs cannot distinguish *Gomez* and its progeny.

Plaintiffs err when they claim *Gomez* does not apply here because "*Gomez* is not a consumer protection case," but rather "a "Sales Act case." Pls. Br. 13 (emphasis omitted). Plaintiffs insist "[t]he *Gomez* opinion is silent on whether its primary holding would apply to consumer deception actions generally, as opposed to an action arising from conduct regulated by another statue (in that case, the Sales Act)."

Id. at 13-14. But *Gomez* was anything but silent on that point. It rejected the "dramatic expansion of the Act" proposed in that case because "[t]he logic of appellant's position" would extend "not only to landlord-tenant relations but also to persons regulated by the Public Service Commission, to professional services of clergymen, lawyers, and Christian Science practitioners, to television or radio broadcasting stations, and to the other entities listed in [§ 28-3903(c)(2)]." 967 A.2d at 1287-88. Therefore, try as they might Plaintiffs cannot place such manufactured limits on *Gomez*.

Indeed, this Court has already established that thrice over—in *Pietrangelo*, *Falconi-Sachs*, and *Sizer*—when it held *Gomez* applies not just in those narrow confines, but to the CPPA generally. *See supra* at 13-16. This simply is not an open question. This Court has already established that *Gomez*'s exclusion of the § 28-3903(c)(2) categories applies to the CPPA writ large.

Plaintiffs then pivot to claiming "[t]he Court has not yet had occasion to consider a CPPA consumer deception action against a defendant that otherwise engages in PSC-regulated conduct." Pls. Br. 24. That may be true in the most literal sense, but not in any sense that actually matters. Although the Court has not had a case that directly involves that particular category of § 28-3903(c)(2), it has definitively held time and again that the CPPA "specifically excludes the [§ 28-3903(c)(2) categories] from its purview." *Pietrangelo*, 68 A.3d at 714-15; *see also*

Gomez, 967 A.2d at 1287-88; *Falconi-Sachs*, 142 A.3d at 554-55 & n.1; *Sizer*, 270 A.3d at 304-05 & n.6; *cf. United States v. Johnson*, 457 U.S. 537, 549 (1982) ("[W]hen a decision of this Court merely has applied settled precedents to new and different factual situations, no real question has arisen as to whether the later decision should apply retrospectively. In such cases, it has been a foregone conclusion that the rule of the later case applies in earlier cases … ."), *abrogated on other grounds by Griffith v. Kentucky*, 479 U.S. 314 (1987).

There is no other way to read this Court's precedents, as their reasoning compels the conclusion that *all* of the § 28-3903(c)(2) categories fall outside the scope of the CPPA, at least until later amendments brought the landlord-tenant relations category back within its reach. *See Sizer*, 270 A.3d at 304-05 (discussing those amendments). *Gomez* itself recognized as much when it rejected the plaintiffs' attempt "to extend the reach of the CPPA not only to landlord-tenant relations but also to persons regulated by the Public Service Commission, to professional services of clergymen, lawyers, and Christian Science practitioners, to television or radio broadcasting stations, and to the other entities listed in [§ 28-3903(c)(2)]." 967 A.2d at 1287-88. And *Pietrangelo* removed any possible doubt when it applied the same reasoning outside of the landlord-tenant relations context of § 28-3903(c)(2)(A)—specifically to the "professional services of lawyers" context of § 28-3903(c)(2)(C). *Pietrangelo*, 68 A.3d at 715. That same logic holds for all five of § 28-3903(c)(2)'s

categories, including, most importantly here, § 28-3903(c)(2)(B)'s category of "persons subject to regulation by the Public Service Commission."

Plaintiffs next make a self-defeating comparison between § 28-3903(c)(2)(C)'s "professional services of lawyers" category at issue in *Pietrangelo* and § 28-3903(c)(2)(B)'s "persons subject to regulation by the Public Service Commission" category at issue here. Pls. Br. 26-30. Plaintiffs essentially argue that because § 28-3903(c)(2)(C)'s category is defined not as encompassing *all* claims against lawyers, but rather only those regarding the "professional services," that § 28-3903(c)(2)(B)'s category must be similarly "limited to the conduct actually regulated by the PSC." Pls. Br. 27. But that is not what the statute says.

The legislature purposefully drafted those two provisions differently. It limited § 28-3903(c)(2)(C) to cover only a specific type of claim (those relating to "professional services") against certain classes of defendants ("clergymen, lawyers, and Christian Science practitioners"). It chose not to include a similar subject-matter limitation in § 28-3903(c)(2)(B), defining that category instead purely by the class of defendant ("persons subject to regulation by the Public Service Commission of the District of Columbia"). As Plaintiffs themselves admit, "[w]hen the legislature uses different words, it must be assumed to have a different meaning in mind." Pls. Br. 35 (citing *Ruffin v. United States*, 76 A.3d 845, 854 (D.C. 2013)). Thus, § 28-3903(c)(2)(B)'s exemption means what it says and applies to all "persons subject to

regulation by the Public Service Commission of the District of Columbia," regardless of the subject matter of the CPPA claim at issue.

Plaintiffs also fail when they try the same approach using § 28-3903(c)(2)(A)'s "landlord-tenant relations" category. Pls. Br. 34-35. Because that category is similarly defined according to the subject matter of the claim, it only further highlights the defendant-specific focus of § 28-3903(c)(2)(B)'s exemption. Plaintiffs' supposedly helpful authority on this point, *Chaney v. Capitol Park Associates*, No. 2012 CA 005582 B, 2013 D.C. Super. LEXIS 2 (Mar. 11, 2013), falls flat. Pls. Br. 32. That case concerned whether certain claims relating to a parking garage fell within § 28-3903(c)(2)(A)'s category of "landlord-tenant relations." *Chaney*, 2013 D.C. Super. LEXIS 2, at *4. Reasoning "all customers of the Defendants' parking facility could bring a similar claim" whether or not they were residents, the court held that particular kind of claim did not fall within the scope of "landlord-tenant relations." *Id.* But since § 28-3903(c)(2)(B)'s exemption is unlimited as to the subject matter of the claim, *Chaney*'s analysis is entirely inapplicable here.

Digging their hole even deeper, Plaintiffs' invocation of *Scull v. Groover, Christie & Merritt, P.C.*, 76 A.3d 1186, 1193 (Md. 2013) serves only to further emphasize § 28-3903(c)(2)(B)'s lack of any subject-matter limitation. Pls. Br. 28-30. The question in that case was whether claims regarding "medical billing

practices [were] exempt from [Maryland's Consumer Protection] Act." *Scull*, 76 A.3d at 1187. Because the act excluded the "professional services" of medical practitioners from its purview, the court's analysis focused on whether medical billing constituted a "professional service" of a medical practitioner. *Id.* at 1193-98. The court held it did not. *Id.* But none of that has any applicability here since § 28-3903(c)(2)(B) deliberately is not limited to "professional services" or anything else in terms of subject matter. Instead, the legislature defined the exemption in terms of the class of persons protected alone and provided them a full exemption from all types of CPPA claims. *Scull* therefore does not aid Plaintiffs.

Plaintiffs' attempted analogy to the far-afield area of federal preemption law on food labeling fails for the same reason. Pls. Br. 29 n.8. As Plaintiffs explain, that analysis depends on the subject matter of the text appearing on the label. *Id.* But the § 28-3903(c)(2)(B) exemption at issue here is not limited by subject matter and instead applies to *all* claims against "persons subject to regulation by the Public Service Commission of the District of Columbia."[3]

[3] Moreover, even if there were some sort of subject-matter limitation in § 28-3903(c)(2)(B), at least the Climate Business Plan and the Natural Gas 101 handbook still would plainly fall within its scope because those statements were made pursuant to Commission orders and District law. *See infra* at 39-42.

B. The 2012 and 2018 amendments to the CPPA do not undercut *Gomez*'s application to this case.

Plaintiffs also claim that amendments in 2012 and 2018 effectively overruled *Gomez*. Pls. Br. 14-23. But that view cannot be squared with either the amendments themselves or the binding precedent that controls their application.

The 2012 amendments to the CPPA conferred standing on public interest organizations to pursue CPPA claims:

> (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 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). As Plaintiffs explain, the impetus for that legislative change was a decision that had interpreted the CPPA to narrowly limit who had standing to sue under it. Pls. Br. 18-20. The Council sought to combat the resulting "chilling effect" on CPPA litigation by "provid[ing] 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, at 1-2 (Nov. 18, 2012).

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. The amendments' explicit and undeniable focus was on expanding standing to sue, not on effectuating any substantive changes to the CPPA. Indeed, 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)." D.C. Code § 28-3905(k)(1)(D)(i); *see also Animal Legal Def. Fund v. Hormel Foods Corp.*, 258 A.3d 174, 183 (D.C. 2021) (explaining that "the consumer or class of consumers must be capable of bringing suit in their own right" in order for § 28-3905(k)(1)(D)(i) to confer standing). In other words, the substantive reach of the CPPA stayed the same—regardless of whether the plaintiff is a consumer or a public interest organization—following this change in the 2012 amendments.

That renders them useless for Plaintiffs' purposes, as Washington Gas is not making a *standing* challenge against Plaintiffs and arguing they do not have a sufficient injury-in-fact to bring suit. Washington Gas is instead making a *merits* argument that the CPPA simply does not apply to it—or, as *Gomez* put it, that "[n]othing in the plain language of the statute or its legislative history indicates that the legislature intended" for the CPPA to apply "to persons regulated by the Public Service Commission." 967 A.2d at 1287-88.

Those are separate and distinct issues, as this Court has explained. "[T]he basic function of the standing inquiry is to serve as a threshold a plaintiff must surmount *before* a court will decide the merits question about the existence of a claimed legal right." *Grayson v. AT&T Corp.*, 15 A.3d 219, 229 (D.C. 2011). "[T]he correctness of the plaintiff's legal theory—his understanding of the statute on which he relies—is a question that goes to the merits of the plaintiff's claim, not the plaintiff's standing to present it." *Id.* Although the 2012 amendments provide Plaintiffs safe harbor on the former, they offer no aid on the latter.

Plaintiffs' principal response borders on the nonsensical. Unable to dispute that "the CPPA specifically excludes [the § 28-3903(c)(2) categories] from its purview," *Pietrangelo*, 68 A.3d at 714-15, they instead claim the exclusion somehow does not apply if a public interest organization brings the CPPA claim under the 2012 standing amendments. Plaintiffs are not entirely clear on why this is the case. At one point they assert it is because "[s]ubsection 28-3905(k)(1)(D), which governs this type of collective action, is not bound by what can be brought to the [DCRA]." Pls. Br. 15. But that is the exact reasoning this Court considered and rejected in *Gomez* and its progeny. If those cases established anything, it is that § 28-3903(c)(2) "excludes … [those categories] from [the CPPA's] purview," regardless of whether the DCRA or someone else is bringing the claim. *Pietrangelo*, 68 A.3d 714-15.

Plaintiffs also insist that their claim is different because it "rests upon a statutorily created form of standing[] … [and] must be brought in Superior Court." Pls. Br. 15. That misses the point because it assumes their CPPA claim exists in the first place. It does not matter how standing is conferred or where a claim must be brought if the statute "specifically excludes [the claim] from its purview." *Pietrangelo*, 68 A.3d 714-15.

Plaintiffs then latch onto the 2018 amendments that specifically created an exception to § 28-3903(c)(2)'s exclusion of suits regarding "landlord-tenant relations" from the CPPA's purview. Pls. Br. 21-23. But those undercut, rather than support, Plaintiffs' position. Those amendments provide "[t]he right of action established by this subsection [*i.e.*, for "consumer[s]"] shall apply to trade practices arising from landlord-tenant relations" and "[t]he 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 §§ 28-3905(k)(6), 28-3909(d).

These amendments offer two important insights. First, the Council was well aware of § 3903(c)(2)'s exclusion of certain categories of claims from the reach of the CPPA. That had been made abundantly clear by that point by *Gomez* (2009), *Pietrangelo* (2013), and *Falconi-Sachs* (2016). The Council's action to reverse part of that prohibition demonstrates its awareness and acknowledgment of the legal state of affairs.

Second, the Council demonstrated it knows how to alter § 28-3903(c)(2)'s exclusion of certain categories of claims from the CPPA's scope, as the 2018 amendments did just that for the "landlord-tenant relations" category in § 28-3903(c)(2)(A). Notably absent from those amendments, however, is any similar provision for lifting the prohibition on claims covered by the other four categories listed in §§ 28-3903(c)(2)(B)-(E)—including, most importantly here, the one for "persons subject to regulation by the Public Service Commission of the District of Columbia" in § 28-3903(c)(2)(B). The purposeful choice to alter only the "landlord-tenant relations" category in § 28-3903(c)(2)(A) further confirms that the prohibition remained in place for the other categories not covered by the amendments. After all, where two provisions differ, it "must be assumed to be deliberate." *Doe v. Burke*, 133 A.3d 569, 574 (D.C. 2016).

To paraphrase *Gomez,* "there is no indication whatsoever that the Council intended by [adding the 2012 amendments] to expand the reach of the CPPA." 967 A.2d at 1287. Much like the 2000 amendments at issue in *Gomez*, neither the 2012 amendments nor the 2018 amendments "repeal[ed] the express limitations … set forth in D.C. Code § 28-3903(c)" for anything other than the "landlord-tenant relations" category. *Id.* Rather, the 2012 amendments merely addressed who could sue—adding public interest organizations—and the 2018 amendments enacted a targeted expansion of the CPPA only to the "landlord-tenant relations" category.

Nothing in those amendments can be read to change the law—mandated by precedent from both before and after these amendments—that "the CPPA specifically excludes [the § 28-3903(c)(2) categories] from its purview." *Pietrangelo*, 68 A.3d at 714-15.

C. Plaintiffs' alternative view would lead to absurd results.

Plaintiffs acknowledge "[s]tatutes must be interpreted 'to avoid absurd results.'" Pls. Br. 7 (quoting *In re Bright Ideas Co.*, 284 A.3d 1037, 1050 (D.C. 2022)). But their own preferred reading of the CPPA—in addition to being at odds with this Court's binding precedent and the statute's text—would produce truly absurd results the Council could not have intended. That is yet another reason why Plaintiffs' efforts to shoehorn Washington Gas within the CPPA's scope cannot succeed.

In the Plaintiffs' view, the 2012 amendments that created standing for public interest organizations also expanded the substantive scope of the CPPA—but only for them. Thus, the CPPA's exclusions in § 28-3903(c)(2) would still apply for consumers, the DCRA, and even the D.C. Attorney General, but ***not*** for public interest organizations. Why would the Council choose to deny it citizens and their own government that tremendous power to override the CPPA's exclusions and yet grant it to public interest organizations? Plaintiffs cannot answer that question because no legislative body would intend such a nonsensical result—and certainly

nothing in the 2012 amendments indicates that the Council had such irrational intentions.[4]

Followed to its logical conclusion, Plaintiffs' position would mean the Council elected to expose its own D.C. government agencies to civil suit under the CPPA—because § 28-3903(c)(2)(E)'s exemption for "an agency of government" would not apply—but only if a public interest organization brings the claim. In that event, the Department of Energy & Environment's claim that "[t]he Sustainable DC 2.0 Plan is the city's plan to make DC the healthiest, greenest, most livable city for all residents"[5]—which is strikingly similar to Washington Gas's challenged statements in this case—may soon be the subject of a CPPA suit, and that is just one example of the deluge of CPPA claims against all manner of D.C. government statements that could follow if Plaintiffs prevail. But, of course, those claims could only be pursued by public interest organizations—not by consumers, not by the DCRA, and not even by the D.C. Attorney General. "Absurd" hardly begins to describe the result of Plaintiffs' illogical reading of the CPPA and *Gomez*.

[4] Notably, Plaintiffs' theory would also run counter to how environmental statutory liability functions at the federal level, where Congress provides private parties with a right of action only in cases where a government could also bring suit. *See, e.g.*, 33 U.S.C. § 1365(a), § 1319(a) (providing for both citizen suit and state enforcement under the Clean Water Act).

[5] *Sustainable DC 2.0 Plan*, https://sustainable.dc.gov/node/1447351.

D. Plaintiffs have a path to relief because they are able to challenge the statements at issue before the Commission.

Plaintiffs also argue they would be left without a forum for their complaints if the CPPA exempts Washington Gas from its reach. Not so, as Plaintiffs are free to raise these same kinds of issues before the Commission. To be clear, the Court need not weigh in on this point because the exemption of public utilities from the CPPA applies whether or not Plaintiffs have a forum at the Commission. Indeed, despite Plaintiffs' claims to the contrary, Pls. Br. 38, the Superior Court declined to opine on the topic of the Commission's jurisdiction and held only "the CPPA explicitly exempts such entities [*i.e.*, 'gas compan[ies] regulated by the PSC'] from its subject matter jurisdiction," A995, D.C. Sup. Ct. Order, 12. But if the Court does delve into this issue, it will find that the Council set up an eminently reasonable structure that funnels CPPA-type complaints against regulated public utilities like Washington Gas to the Commission rather than to the Superior Court. That is entirely in keeping with the Commission's role as the "general supervis[or]" of such entities. D.C. Code § 34-301(1).[6]

[6] Notably, the Commission's jurisdiction over the kinds of complaints Plaintiffs seek to raise avoids their concern that "[o]riginal judicial jurisdiction for a challenge cannot simultaneously lie with two courts." Pls. Br. 42. Since no CPPA claim exists against utilities like Washington Gas, the Superior Court is not part of the jurisdictional equation for those types of complaints. Jurisdiction instead lies solely with the Commission in the first instance and this Court on review.

Plaintiffs proceed by constructing various fanciful scenarios regarding hypothetical CPPA claims against Washington Gas. Pls. Br. 31. Then they express outrage that they could not bring those CPPA claims if—as is plain under this Court's precedents—§ 28-3903(c)(2)(B) exempts Washington Gas from its scope. *Id.* at 31-32. But that is not an absurd result; it is simply how statutory exemptions operate. Plaintiffs may disagree with the legislature's explicit decision to exempt entities like Washington Gas from the CPPA's reach, but that does not give them license to judicially override the legislature's expressed will.

That is not to say Plaintiffs would be left without a forum for such complaints, only that they could not raise them as CPPA claims in Superior Court. Plaintiffs would be free to complain about the challenged statements at the Commission. Broadly speaking, Plaintiffs' claims allege false advertising of public utility services to consumers. *See, e.g.*, Pls. Br. 1 (describing the core of Plaintiffs' complaints as the claim that Washington Gas "has increased sales and profits by misrepresenting the properties of its natural gas products … to consumers"). The Commission has broad authority to adjudicate such matters.

The Commission has expansive supervisory authority over public utilities like Washington Gas. By statute, it is vested with "general supervision of all gas companies." D.C. Code § 34-301(1). That includes a duty to ensure that gas companies abide by all applicable statutes and regulations: The Commission "shall

inquire into any neglect or violation of the laws or regulations in force in the District of Columbia by any public utility doing business therein … and shall have the power, and it shall be its duty, to enforce the provisions of this subtitle as well as all other laws relating to public utilities." D.C. Code § 34-402. Pair that with the statutory command that gas "[c]ustomers are protected from unfair, deceptive, fraudulent, and anticompetitive practices," D.C. Code § 34-1671.01(3), and it becomes clear that Plaintiffs' complaints regarding Washington Gas's allegedly "false and deceptive marketing of [its] natural gas products and services" fit squarely within the types of matters the Commission is statutorily charged with overseeing.

If there were doubt as to that conclusion, myriad other statutory provisions provide further confirmation that the Commission is fully authorized—and indeed duty-bound—to hear the kinds of complaints Plaintiffs are lodging here. Those range from narrow provisions targeted at consumer protection matters:

- 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."
- D.C. Code § 34-1671.03(a): "The Commission shall adopt regulations or issue orders to … [i]mplement consumer protections" and "[e]stablish reasonable requirements for solicitation of residential customers."

And they extend to more general provisions that expound on the Commission's power to regulate utilities like Washington Gas:

- D.C. Code § 34-1103: "The Commission shall have power, after hearing and notice by order in writing, to require and compel every public utility to comply with the provisions of this subtitle, and with other laws of the United States applicable, and any municipal ordinance or regulation relating to said public utility … ."
- D.C. Code § 34-706: "If any public utility shall violate any provision of this subtitle … the Commission may adjudicate the occurrence of a violation under this section and impose sanctions in accordance with its regulations."

These "[v]arious provisions of [Title 34] grant the Commission authority to regulate all aspects of public utility rates and services." *Wash. Gas Light Co. v. D.C. Pub. Serv. Comm'n*, 856 A.2d 1098, 1105 (D.C. 2004).

Plaintiffs futilely try to chip away at that uniform wall of authority. They claim the Commission's broad supervisory authority over public utilities does not encompass the types of consumer complaints raised here. Pls. Br. 32-34. But they do so only by artificially reading that restriction into the statutes. For example, Plaintiffs assert—without any support whatsoever—that § 34-1671.01(3)'s command that "[c]ustomers are protected from unfair, deceptive, fraudulent, and anticompetitive practices" "is directed at the provision of energy and water, not at marketing or salesmanship." Pls. Br. 34. Yet one searches in vain for the statutory language that supposedly limits that provision.

Plaintiffs next try to argue "Title 34 … does not accord any standing for a public interest organization to act on behalf of customers." Pls.' Br. 39. But the governing regulations are clear that "[a] formal or informal complaint, petition or

application [before the Commission], may be filed by *any person*." D.C. Mun. Regs. tit. 15, § 101.1 (emphasis added). And "person" is broadly defined to include "any … organization or institution"—which necessarily includes public interest organizations like Plaintiffs. *Id.* § 199. Therefore, Plaintiffs—like any other "person"—can raise these same kinds of complaints before the Commission.

Plaintiffs then point to statements Washington Gas made in a different case and incorrectly describe them here as addressing Title 34 when they plainly do not. Plaintiffs claim "WGL argued that Title 34 grants a very limited jurisdictional scope for the Commission." Pls. Br. 43. What actually happened in that case is Washington Gas explained that *the District Charter*—not Title 34—"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." A938, Brief of Washington Gas in Formal Case No. 1167, 6 (citing D.C. Code § 1-204.93). Then, on the very next page, Washington Gas reviewed the relevant provisions of "Title 34 of the D.C. Code" that demonstrated "the Commission's authority to regulate, not ban, ongoing natural gas manufacturing, distribution, and supply." A939, Brief of Washington Gas in Formal Case No. 1167, 7 (citing D.C. Code §§ 34-301(1)-(3)). This mattered because the whole dispute revolved around whether the Commission possessed "the power to compel electrification or prohibit gas utilities from operating to achieve

certain climate goals." A938, Brief of Washington Gas in Formal Case No. 1167, 6. But that entire discussion is inapposite here, as it sheds no light on the Commission's power to regulate Washington Gas's statements regarding its products and operations. This erroneous attempt at embarrassing Washington Gas is nothing but a wasteful digression.

Moreover, even if Plaintiffs could not pursue their complaints at the Commission, the Office of People's Counsel ("OPC") provides an ultimate backstop that ensures these types of consumer complaints may be brought before the Commission. The OPC was established the year before the Council enacted the CPPA,[7] and its duties shed light on the overarching statutory context for the public utilities exemption. The OPC is statutorily charged with independently advocating for the people of the District before the Commission. It "[s]hall represent and appeal for the people of the District of Columbia at hearings of the Commission and in judicial proceedings in the District of Columbia courts when these proceedings and hearings involve the interests of users of the products of or services furnished by public utilities under the jurisdiction of the Commission." D.C. Code § 34-804(d)(1). It may also "investigate independently, or within the context of formal proceedings before the Commission, the services given by, the rates charged by, and the valuation

[7] The OPC was established in 1975. Pub. L. 93-614, 88 Stat. 1975 (Jan. 2, 1975). The CPPA was enacted in 1976. Act of July 22, 1976, D.C. Law 1-76.

of the properties of the public utilities under the jurisdiction of the Commission," *id.* § 34-804(d)(4), and "develop means to otherwise assure that the interests of the users of the products of or services furnished by public utilities under the jurisdiction of the Commission are adequately represented in the course of proceedings before the Commission," *id.* § 34-804(d)(5). And, importantly, "[i]n defining its positions while advocating on matters pertaining to the operation of public utility or energy companies, the Office shall consider the public safety, the economy of the District of Columbia, the conservation of natural resources, and the preservation of environmental quality, including effects on global climate change and the District's public climate commitments." *Id.* § 34-804(e). Accordingly, the OPC acts as a final safeguard to ensure the kinds of complaints Plaintiffs wish to lodge are adequately aired at the Commission.[8]

III. In any event, there are multiple alternative grounds for affirming the Superior Court's dismissal.

The Court need proceed no further since the above-discussed points are more than sufficient for an affirmance. But in the event the Court were to disagree with the Superior Court's conclusion that § 28-3903(c)(2)(B) exempts Washington Gas

[8] Indeed, the Maryland Office of People's Counsel has raised similar complaints against Washington Gas before the Maryland Public Service Commission under Maryland's similar regulatory regime, thereby demonstrating the viability of that route to relief. *See In re Maryland Office of People's Counsel*, 306 A.3d 712, 735-39 (Md. App. 2023).

from the CPPA's scope, there are two alternative bases for affirming that dismissal nonetheless. *See Exec. Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 735 n.14 (D.C. 2000) ("[I]t is well settled that an appellate court may affirm a decision for reasons other than those given by the trial court.").

A. Even if CPPA claims were available against Washington Gas, the Commission would be the exclusive forum for such claims.

The first alternative basis for affirmance is that even if Plaintiffs were entitled to bring CPPA claims against Washington Gas, D.C. law makes the Commission—not the Superior Court—the exclusive forum for Plaintiffs' claims, with judicial review to follow in this Court. It is true that § 28-3905(k)(2) directs that CPPA claims "shall be brought in the Superior Court of the District of Columbia." But that must be harmonized with § 34-402, which states that the Commission "shall inquire into any neglect or violation *of the laws or regulations in force in the District of Columbia* by any public utility doing business therein, or by the officers, agents, or employees thereof, … and shall have the power, and it shall be its duty, to enforce the provisions of this subtitle as well *as all other laws relating to public utilities*." (emphases added). Even if the CPPA applies to Washington Gas, then it would fall within the scope of that provision since it would be a "law[] relating to public utilities" and an applicable "law[] … in force in the District of Columbia." *Id.*

It makes sense that § 34-402 is an implicit exception to § 28-3905(k)(2)'s vesting of jurisdiction in the Superior Court given the Commission's capacious

control over utilities and the Council's deliberate efforts to ensure the Commission's unitary legal supervision of them. Surely the Council could have not meant to set up that integrated system of supervision and review, only to break it for CPPA claims. The more reasonable reading would be that the Council intended for CPPA claims to be channeled to the Commission in keeping with its role of providing unitary oversight of the public utilities.

Further confirming that conclusion is that the alternative reading—under which the CPPA claims against utilities (again, assuming *arguendo* that they exist) must proceed in Superior Court—would result in an absurd system in which plaintiffs could pursue two parallel tracks to challenge the same statements—one in the Superior Court with a CPPA claim and another in the Commission with a similar complaint. The Council could not have intended to set up such an irrational and inefficient method for resolving these kinds of disputes. *See Ne. Neighbors for Responsible Growth, Inc. v. Appletree Inst. for Educ. Innovation, Inc.*, 92 A.3d 1114, 1121 (D.C. 2014) (rejecting appellants' statutory interpretation that would have "permitted two parallel and independent tracks of review," because "its inherent inefficiency and the potential for inconsistent decisions[]").

B. All of Plaintiffs' challenges either concern noncommercial speech that is not covered by the CPPA or are moot.

The second alternative basis for affirmance consists of a combination of two defects with Plaintiffs' claims. Most of the statements Plaintiffs challenge are

noncommercial speech that necessarily falls outside the scope of the CPPA. And the challenges to the remaining statements are moot. That one-two punch is yet another way to affirm the Superior Court's dismissal.

1. Most of the statements at issue are noncommercial speech that cannot be challenged under the CPPA.

Most of the statements Plaintiffs challenge are noncommercial speech that is not actionable under the CPPA. As Plaintiffs conceded below, the CPPA "appl[ies] exclusively to commercial speech." A820, Plaintiffs' Anti-SLAPP Opp. 11 n.20; *see also Ford v. Chartone, Inc.*, 908 A.2d 72, 81 (D.C. 2006) ("A valid claim for relief under the CPPA must originate out of a consumer transaction."). Yet the majority of the challenged statements here—those Washington Gas made in or about the Climate Business Plan and the Natural Gas 101 handbook and aligned safety and educational information—are not commercial speech. Rather, those statements are constitutionally protected noncommercial speech that falls outside the scope of the CPPA.

Commercial speech is speech that is "related *solely* to the economic interests of the speaker and its audience" or "speech proposing a commercial transaction." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-62 (1980) (emphasis added). Political advocacy or scientific debate is not commercial speech, but rather noncommercial speech protected under the First Amendment. *See, e.g., Bd. of Trs. of Leland Stanford Jr. Univ. v. Sullivan*, 773 F.

Supp. 472, 474 (D.D.C. 1991) ("[T]he First Amendment protects scientific expression and debate just as it protects political and artistic expression.") (collecting cases).

The Climate Business Plan is not commercial speech. It originated from 2018 proceedings in Formal Case No. 1142, wherein the Commission ordered Washington Gas (and its parent) to address various District of Columbia government climate policies regarding achieving carbon neutrality by 2050. The Commission's order contemplated that Washington Gas's filing would show how Washington Gas could "support and serve" these policy goals—including, but not limited to providing new services and products other than natural gas—and that Washington Gas would conduct public outreach on the Climate Business Plan and its progress. A359, Formal Case No. 1142, *In the Matter of the Merger of AltaGas, Ltd. And WGL Holdings, Inc.*, Order No. 19396, 28 (June 29, 2018).

The result was a 236-page filing consisting of technical analysis and forward-looking policy proposals for how Washington Gas can collaborate with the District on policy and regulatory initiatives to address the District's climate goals over the next thirty years. A60-A295, Washington Gas Climate Business Plan (Mar. 16, 2020). The Climate Business Plan is a "blueprint to achieve carbon neutrality in support of the District of Columbia's long-term climate goals," advocates for "[i]mplementing a regulatory framework and policy that facilitates and incents

emission reduction measures," and concludes that "collaborative and good faith dialogue among Washington Gas, the DC PSC, policymakers and various other stakeholders," "supportive policy," and "regulatory certainty" would be required to implement the Climate Business Plan. A65, A84, A90, Washington Gas Climate Business Plan, 1, 21, 27 (Mar. 16, 2020). These statements detail Washington Gas's aspirations; they do not propose a commercial transaction. *See Nat'l Consumers League v. Wal-Mart Stores, Inc.*, No. 2015 CA 007731 B, 2016 WL 4080541, at *6-8 (D.C. Super. Ct. July 22, 2016) (dismissing claims because the use of qualifying terms demonstrates statements are "aspirational in nature" and "are not promises to consumers").[9]

Likewise, the targeted statements about the Climate Business Plan in internet publications that educate the residents of the District of Columbia on the soundness and progress of its proposals—such as a link to the "science-based" Climate Business Plan (A17, Compl. ¶¶ 42-43) or a 10-minute YouTube video summarizing the Climate Business Plan (A18, Compl. ¶ 47)—do not propose a commercial transaction. For instance, the video, titled "Learn about the WGL Climate Business

[9] Washington Gas's statements regarding sustainability, *see* A18, Compl. ¶ 45 ("At WGL, we strive to be responsible stewards of the environment … ."), are similarly aspirational in nature and do not propose a commercial transaction. *See Nat'l Consumers League v. Wal-Mart Stores, Inc.*, No. 2015 CA 007731 B, 2016 WL 4080541, at *6–8 (D.C. Super. Ct. July 22, 2016) (citing to terms like "expect," "goal," and "ask" in dismissing claims).

Plan – July 2020," opens with a description and summary of the Climate Business Plan's "three main action areas." The video closes by explaining that there will be biannual community meetings and additional public outreach about the Climate Business Plan in meetings with "ANC's [Advisory Neighborhood Committees]," "legislators," "communities of faith," "business leaders," "developers," "education systems," and a "whole host and robust list of stakeholders that we value" to discuss "the solutions when it comes to climate change." WGL, *Learn about the WGL Climate Business Plan – July 2020*, https://www.youtube.com/watch?v=uLxXLTD2WaY&t=5s. The statements in this video—*e.g.*, that Washington Gas "can help the District reach its carbon neutral status, spending $2.7 billion less than relying solely on electrification to get there"—and similar public outreach efforts do not advertise consumer sales. *Id.* Rather, they are essential to Washington Gas's efforts to develop, propose, and discuss viewpoints on these policy proposals.

The Natural Gas 101 handbook is not commercial speech either. Informational pamphlets like the handbook can be considered commercial only if they: (1) are "conceded to be advertisements," (2) "refer[] to a specific product," and (3) are "economic[ally] motivat[ed]." *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 66–67 (1983). The handbook is not a sales ad. The 12-page document outlines safety tips and emergency information on how to detect, respond to, and report suspected

gas leaks, how and when gas leaks are assessed, common causes for damage to gas infrastructure, and information about important safety programs (*e.g.*, "Call Before You Dig"). Washington Gas, *Natural Gas 101 – Resources, Safety Tips and Emergency Information*, https://www.washingtongas.com/-/media/89777d1992864298ab23868eadda44ec.pdf.[10] Moreover, the handbook was not published for economic reasons; like the Climate Business Plan, it is mandated by the Commission. *See* D.C. Mun. Regs. tit. 15 § 2304.2 (requiring "mass communication … of the hazards of leaking gas and … procedures … in reporting gas leaks").

Thus, the challenged statements neither "relate[] *solely* to the economic interests of the speaker and its audience" nor are "speech proposing a commercial transaction." *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 561-62 (emphasis added). Indeed, no case supports holding that such regulatory filings or safety and educational materials mandated by an agency constitute commercial speech. A contrary rule would virtually eliminate the distinction between commercial and noncommercial speech by deeming essentially every public company statement commercial speech. That would have especially absurd and deleterious consequences here, as any injunction would effectively bar Washington Gas from

[10] Likewise, Washington Gas's statements on its safety and educational webpages, *see* A16-A17, Compl. ¶¶ 40-43, are not advertisements; their primary purpose is to provide general information about the use of natural gas.

advocating its views on public issues being considered by the Commission—even when the Commission orders it to do so.

2. Plaintiffs' remaining claims—those based on older billing statements—are moot.

That leaves only the statements on some of Washington Gas's older billing statements as the lone remaining instance of arguably commercial speech. A15, Compl. ¶ 39. But the challenges to those are moot and should be dismissed on that basis. *Grant v. Dist. of Columbia*, 908 A.2d 1173, 1177 n.9 (D.C. 2006) (mootness is a "jurisdictional defect").[11]

A case is moot where parties lack a "legally cognizable interest in the outcome" or the issues are no longer "live." *Fraternal Ord. of Police, Metro. Lab. Comm. v. Dist. of Columbia*, 113 A.3d 195, 198 (D.C. 2015). Critically, to avoid a finding of mootness, "a plaintiff seeking forward-looking relief, such as an injunction, must allege facts showing that the injunction is necessary to prevent injury otherwise likely to happen in the future." *Equal Rights Ctr. v. Props. Int'l*, 110 A.3d 599, 603 (D.C. 2015); *see also Mbakpuo v. Ekeanyanwu*, 738 A.2d 776,

[11] Because the challenges to these statements are moot, the Court need not decide whether the statements themselves constitute commercial speech. *Cf. Consol. Edison Co. of New York, Inc. v. Pub. Serv. Comm'n of New York*, 447 U.S. 530, 544 (1980) ("The Commission's suppression of bill inserts that discuss controversial issues of public policy directly infringes the freedom of speech protected by the First and Fourteenth Amendments."). Washington Gas reserves the right to raise those arguments on any remand.

782 (D.C. 1999) (an injunction must be "needed" to avoid "some cognizable danger of a recurrent violation, something more than mere possibility which serves to keep the case alive") (citation omitted).

Plaintiffs fail that basic requirement here. They conceded below that they do not seek damages for past conduct and instead request only prospective declaratory and injunctive relief "to stop the representations from being made to D.C. consumers." A817, Plaintiff's Anti-SLAPP Opp., 8. But the challenged statements no longer appear on any Washington Gas bills. A882-A884, Decl. of Andrea Mills, 1-4 ("No Washington Gas bills generated after May 23, 2022, contain the cited statements … . Unless otherwise required by law, Washington Gas unconditionally and irrevocably represents that Washington Gas has no intention to, and will not, take any action to include the cited statements on any future bills or invoices to Washington Gas customers."). Nor is there any reasonable basis to expect them to reappear in the future. *Id.* Plaintiffs are therefore left with nothing to enjoin.

Where, as here, "a party merely seeks a declaratory judgment, or simply has a desire for vindication," the case is moot and should be dismissed. *Bruce v. Potomac Elec. Power Co.*, 162 A.3d 177, 183 (D.C. 2017) (citation omitted). No live dispute exists over the billing statements, and aside from a purely advisory opinion, it is impossible for a declaratory judgment to provide any meaningful relief.

CONCLUSION

For these reasons, the Court should affirm the judgment of the Superior Court.

Respectfully,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was filed electronically on May 23, 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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Statutory Addendum

Attachment A	D.C. Code § 28-3903. Powers of the consumer protection agency.
Attachment B	D.C. Code § 28-3905. Complaint procedures.

ATTACHMENT A

West's District of Columbia Code Annotated 2001 Edition
Division V. Local Business Affairs.
Title 28. Commercial Instruments and Transactions. [Enacted Title] (Refs & Annos)
Subtitle II. Other Commercial Transactions.
Chapter 39. Consumer Protection Procedures. (Refs & Annos)

DC ST § 28-3903
Formerly cited as DC ST 1981 § 28-3903

§ 28-3903. Powers of the consumer protection agency.

Effective: February 4, 2022
Currentness

(a) The Department, in its discretion, may:

(1) receive and investigate any consumer complaint and initiate its own investigation of deceptive, unfair, or unlawful trade practices against consumers where the:

(i) amount in controversy totals $250 or more; or

(ii) case, or cases, indicates a pattern or practice of abuse on the part of a business or industry;

(2) issue summonses and subpoenas to compel the production of documents, papers, books, records, and other evidence, hold hearings, compel the attendance of witnesses, administer oaths, and take the testimony of any person under oath, concerning any trade practice;

(3) issue cease and desist orders with respect to trade practices determined to be in violation of District law by the Department;

(4) report to appropriate governmental agencies any information concerning violation of any law;

(5) present the interest of consumers before administrative and regulatory agencies and legislative bodies;

(6) assist, advise, and cooperate with private, local and federal agencies and officials to protect and promote the interest of the District of Columbia consumer public;

(7) assist, develop, and conduct programs of consumer education and information through public hearings, meetings, publications, or other materials prepared for distribution to the consumer public of the District of Columbia;

(8) undertake activities to encourage local business and industry to maintain high standards of honesty, fair business practices, and public responsibility in the production, promotion, and sale of consumer goods and services and in the extension of credit;

(9) exercise and perform such other functions and duties consistent with the purposes or provisions of this chapter which may be deemed necessary or appropriate to protect and promote the welfare of District of Columbia consumers;

(10) Repealed.

(11) implead and interplead persons who are properly parties to a case before the Department under section 28-3905;

(12) negotiate, agree to, and sign consent decrees;

(13) determine whether a person has executed a trade practice in violation of any law of the District of Columbia, and provide full remedy for such violation by:

(A) damages in contract, and orders for restitution, rescission, reformation, repair, and replacement,

(B) stipulations, conditions, and directives, both temporary and permanent, of all kinds,

(C) enforcement of orders and decrees, collection of civil penalties, and other activities, in the courts,

(D) and other lawful methods;

(14) maintain both confidential and public records, and publicize its own actions, in accordance with section 28-3905;

(15) Repealed.

(16) appoint private attorneys from the District of Columbia bar, who shall take action in the name of the Department, and shall promulgate regulations implementing this provision, in order to assist in the enforcement of any consumer complaint; and

(17) impose civil fines, pursuant to Chapter 18 of Title 2, as alternative sanctions for any violation of the provisions of this chapter or of any rules issued under the authority of this chapter. Any violation of this chapter, or of any rule issued under the authority of this chapter, shall be a Class 2 infraction pursuant to 16 DCMR § 3200.1(b), unless the violation is classified otherwise pursuant to rules issued by the Department.

(b) The Department shall:

(1) perform the functions of the Mayor, Department of Consumer Affairs, Board of Consumer Goods Repairs Services or Department of Economic Development in:

(A) the District of Columbia Consumer Credit Protection Act of 1971 (Title 28, Chapters 36, 37, 38, et al.),

(B) the District of Columbia Consumer Retail Credit Regulation (16 DCMR Ch. 1),

(C) the District of Columbia Consumer Goods Repair Regulation (16 DCMR Ch. 6); and

(D) the District of Columbia Consumer LayAway Plan Act (section 28-3818);

(2) render annual reports to the Council and the Mayor as to the number of complaints filed and the nature, status, and disposition thereof, and about the other activities of the Department undertaken during the previous year.

(c) The Department may not:

(1) order damages for personal injury of a tortious nature;

(2) apply the provisions of section 28-3905 to:

(A) landlord-tenant relations;

(B) persons subject to regulation by the Public Service Commission of the District of Columbia;

(C) professional services of clergymen, lawyers, and Christian Science practitioners engaging in their respective professional endeavors;

(D) a television or radio broadcasting station or publisher or printer of a newspaper, magazine, or other form of printed advertising, which broadcasts, publishes, or prints an advertisement which violates District law, except insofar as such station, publisher or printer engages in a trade practice which violates District law in selling or offering for sale its own goods or services, or has knowledge of the advertising being in violation of District law; or

(E) an action of an agency of government.

Credits

(July 22, 1976, D.C. Law 1-76, § 4, 23 DCR 1185; June 11, 1977, D.C. Law 2-8, § 4(a), 24 DCR 726; Oct. 4, 1978, D.C. Law 2-115, § 3, 25 DCR 1997; enacted, Sept. 6, 1980, D.C. Law 3-85,

§ 3(a), (d), 27 DCR 2900; Mar. 8, 1991, D.C. Law 8-234, § 2(d), 38 DCR 296; Feb. 5, 1994, D.C. Law 10-68, § 27(a), (d), 40 DCR 6311; Apr. 9, 1997, D.C. Law 11-255, § 27(w), 44 DCR 1271; Apr. 29, 1998, D.C. Law 12-86, § 1301(b), 45 DCR 1172; Oct. 20, 2005, D.C. Law 16-33, § 2032(c), 52 DCR 7503; Mar. 2, 2007, D.C. Law 16-191, § 100, 53 DCR 6794; Aug. 16, 2008, D.C. Law 17-219, § 2024, 55 DCR 7598; Feb. 26, 2015, D.C. Law 20-155, § 2012(a), 61 DCR 9990; Oct. 22, 2015, D.C. Law 21-36, § 7029, 62 DCR 10905.)

Notes of Decisions (14)

DC CODE § 28-3903
Current through April 25, 2024. Some sections may be more current, see credits for details.

End of Document

ATTACHMENT B

DC ST § 28-3905
Formerly cited as DC ST 1981 § 28-3905

§ 28-3905. Complaint procedures.

Effective: November 13, 2021
Currentness

(a) 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. The complaint must be in or reduced by the Director to writing. The filing of a complaint with the Department shall toll the periods for limitation of time for bringing an action as set out in section 12-301 until the complaint has been resolved through an administrative order, consent decree, or dismissal in accordance with this section or until an opportunity to arbitrate has been provided in Chapter 5 of Title 50.

(b)(1) Except as provided in paragraph (2) of this subsection, the Director shall investigate each such complaint and determine:

(A) What trade practice actually occurred; and

(B) Whether the trade practice which occurred violates any statute, regulation, rule of common law, or other law of the District of Columbia.

(2) The Director may, in his or her discretion, decline to prosecute certain cases as necessary to manage the Department's caseload and control program costs.

(b-1) In carrying out an investigation and determination pursuant to subsection (b) of this section, the Director shall consult the respondent and such other available sources of information, and make such other efforts, as are appropriate and necessary to carry out such duties.

(c) If at any time the Director finds that the trade practice complained of may, in whole or in part, be a violation of law other than a law of the District of Columbia or a law within the jurisdiction of the Department, the Director may in writing so inform the complainant, respondent and officials of the District, the United States, or other jurisdiction, who would properly enforce such law.

(d) The director shall determine that there are, or are not, reasonable grounds to believe that a trade practice, in violation of a law of the District of Columbia within the jurisdiction of the Department, has occurred in any part or all of the case. The Director may find that there are not such reasonable grounds for any of the following reasons:

(1) any violation of law which may have occurred is of a law not of the District of Columbia or not within the jurisdiction of the Department, or occurred more than three years prior to the filing of the complaint;

(2) in case paragraph (1) of this subsection does not apply, no trade practice occurred in violation of any law of the District;

(3) the respondent cannot be identified or located, or would not be subject to the personal jurisdiction of a District of Columbia court;

(4) the complainant, to the Director's knowledge, no longer seeks redress in the case;

(5) the complainant and respondent, to the Director's knowledge, have themselves reached an agreement which settles the case; or

(6) the complainant can no longer be located.

(d-1) The Director may dismiss any part or all of a case to which one or more of the reasons stated in subsection (d) of this section apply. The Director shall inform all parties in writing of the determination, and, if any part or all of the case is dismissed, shall specify which of the reasons in this subsection applies to which part of the case, and such other detail as is necessary to explain the dismissal.

(e) The Director may attempt to settle, in accordance with subsection (h) of this section, each case for which reasonable grounds are found in accordance with subsection (d-1) of this section. After the Director's determination as to whether the complaint is within the Department's jurisdiction, in accordance with subsection (d-1) of this section, the Director shall:

(1) effect a consent decree;

(2) dismiss the case in accordance with subsection (h)(2) of this section;

(3) through the Chief of the Office of Compliance present to the Office of Adjudication, with copies to all parties, a brief and plain statement of each trade practice that occurred in violation of District law, the law the trade practice violates, and the relief sought from the Office of Adjudication for violation; or

(4) notify all parties of another action taken, with the reasons therefor stated in detail and supported by fact. Reasons may include:

(A) any reason listed in subsections (d)(1) through (d)(6) of this section; and

(B) that the presentation of a charge to the Office of Adjudication would not serve the purposes of this chapter.

(5) Repealed.

(f) When the case is transmitted to the Office of Adjudication, the Chief of the Office of Compliance shall sign, and serve the respondent, the Department's summons to answer or appear before the Office of Adjudication. Not less than 15 nor more than 90 days after such transmittal,

the case shall be heard. The case shall proceed under section 10 of the District of Columbia Administrative Procedure Act (section 2-509). The Office of Adjudication may, without delaying its hearing or decision, attempt to settle the case pursuant to subsection (h) of this section, and has discretion to permit any stipulation or consent decree the parties agree to. The Director shall be a party on behalf of the complainant. Applications to intervene shall be decided as may be proper or required by law or rule. Reasonable discovery shall be freely allowed. Any finding or decision may be modified or set aside, in whole or part, before a notice of appeal is filed in the case, or the time to so file has run out.

(g) If, after hearing the evidence, the Office of Adjudication decides a trade practice occurred in which the respondent violated a law of the District of Columbia within the jurisdiction of the Department, such Office of Adjudication shall issue an order which:

(1) shall require the respondent to cease and desist from such conduct;

(2) shall, if such Office of Adjudication also decides that the consumer has been injured by the trade practice, order redress through contract damages, restitution for money, time, property or other value received from the consumer by the respondent, or through rescission, reformation, repair, replacement, or other just method;

(3) shall state the number of trade practices the respondent performed in violation of law;

(4) shall, absent good cause found by the Office of Adjudication, require the respondent to pay the Department its costs for investigation, negotiation, and hearing;

(5) may include such other findings, stipulations, conditions, directives, and remedies including punitive damages, treble damages, or reasonable attorney's fees, as are reasonable and necessary to identify, correct, or prevent the conduct which violated District law; and

(6) may be based, in whole or part, upon a violation of a law establishing or regulating a type of business, occupational or professional license or permit, and may refer the case for further proceedings to an appropriate board or commission, but may not suspend or revoke a license or permit if there is a board or commission which oversees the specific type of license or permit.

(h)(1) At any time after reasonable grounds are found in accordance with subsection (d) of this section, the respondent, the Department (represented by (i) the Director prior to transmittal to the Office of Adjudication and after an order issued pursuant to subsection (f) of this section has been appealed, and (ii) the Office of Adjudication after transmittal to the Office of Adjudication and prior to such appeal), and the complainant, may agree to settle all or part of the case by a written consent decree which may:

(A) include any provision described in subsection (g)(2) through (6) of this section;

(B) not contain an assertion that the respondent has violated a law;

(C) contain an assurance that the respondent will refrain from a trade practice;

(D) bar the Department from further action in the case, or a part thereof; or

(E) contain such other provisions or considerations as the parties agree to.

(2) The representative of the Department shall administer the settlement proceedings, and may utilize the good offices of the Advisory Committee on Consumer Protection. All settlement proceedings shall be informal and include all interested parties and such representatives as the parties may choose to represent them. Such proceedings shall be private, and nothing said or done, except a consent decree, shall be made public by the Department, any party, or the Advisory Committee, unless the parties agree thereto in writing. The representative of the Department may call settlement conferences. For persistent and unreasonable failure by the complainant to attend such conferences or to take part in other settlement proceedings, the Director, prior to transmittal to the Office of Adjudication, may dismiss the case.

(3) A consent decree described in paragraph (1) of this subsection may be modified by agreement of the Department, complainant and respondent.

(i)(1) An aggrieved party may appeal to the District of Columbia Court of Appeals after:

(A) the Office of Adjudication decides a case pursuant to subsection (f) of this section;

(B) all parts of a case have been dismissed by operation of subsection (d) or (e) of this section; or

(C) the Director dismisses an entire case in accordance with subsection (h)(2) of this section.

(1A) Such appeals shall be conducted in accordance with the procedures and standards of section 11 of the District of Columbia Administrative Procedure Act (section 2-510), and take into account the procedural duties placed upon the Department in this section and all actions taken by the Department in the case.

(2) An aggrieved party may appeal any ruling of the Office of Adjudication under subsection (j) of this section to the Superior Court of the District of Columbia.

(3)(A) Any person found to have executed a trade practice in violation of a law of the District within the jurisdiction of the Department may be liable for a civil penalty not exceeding $1,000 for each failure to adhere to a provision of an order described in subsection (f), (g), or (j) of this section, or a consent decree described in subsection (h) of this section.

(B) The Department, the complainant, or the respondent may sue in the Superior Court of the District of Columbia for a remedy, enforcement, or assessment or collection of a civil penalty, when any violation, or failure to adhere to a provision of a consent decree described in subsection (h) of this section, or an order described in subsection (f), (g), or (j) of this section, has occurred. The Department shall sue in that Court for assessment of a civil penalty when an order described in subsection (g) of this section has been issued and become final. A failure by the Department or any person to file suit or prosecute under this subparagraph in regard to any provision or violation of a provision of any consent decree or order, shall not constitute a waiver of such provision or any right under such provision. The Court shall levy the appropriate civil penalties, and may order, if supported by evidence, temporary, preliminary, or permanent injunctions, damages, treble damages, reasonable attorney's fees, consumer redress, or other remedy. The Court may set aside the final order if the Court determines that the Department of Licensing and Consumer Protection lacked jurisdiction over the respondent or that the complaint was frivolous. If, after considering an application to set aside an order of the Department of Licensing and Consumer Protection, the Court determines that the application was frivolous or that the Department of Consumer and Regulatory Affairs lacked jurisdiction, the Court shall award reasonable attorney's fees.

(C) Application to the Court to enforce an order shall be made at no cost to the District of Columbia or the complainant.

(4) The Attorney General for the District of Columbia shall represent the Department in all proceedings described in this subsection.

(j) If, at any time before notice of appeal from a decision made according to subsection (f) of this section is filed or the time to so file has run out, the Director believes that legal action is necessary to preserve the subject matter of the case, to prevent further injury to any party, or to enable the Department ultimately to order a full and fair remedy in the case, the Chief of the Office of Compliance shall present the matter to the Office of Adjudication, which may issue a cease and desist order to take effect immediately, or grant such other relief as will assure a just adjudication of the case, in accordance with such beliefs of the Director which are substantiated by evidence. The Office of Adjudication's ruling may be appealed to court within 7 days of notice thereof on the Director, respondent, and complainant.

(k)(1)(A) A consumer may bring an action seeking relief from the use of a trade practice in violation of a law of the District.

(B) An individual may, on behalf of that individual, or on behalf of both the individual and the general public, bring an action seeking relief from the use of a trade practice in violation of a law of the District when that trade practice involves consumer goods or services that the individual purchased or received in order to test or evaluate qualities pertaining to use for personal, household, or family purposes.

(C) 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)(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 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.

(2) Any claim under this chapter shall be brought in the Superior Court of the District of Columbia and may recover or obtain the following remedies:

(A)(i) Treble damages, or $1,500 per violation, whichever is greater, payable to the consumer;

(ii) Notwithstanding sub-subparagraph (i) of this subparagraph, for a violation of § 28-3904(kk) a consumer may recover or obtain actual damages. Actual damages shall not include dignitary damages, including pain and suffering.

(B) Reasonable attorney's fees;

(C) Punitive damages;

(D) An injunction against the use of the unlawful trade practice;

(E) In representative actions, additional relief as may be necessary to restore to the consumer money or property, real or personal, which may have been acquired by means of the unlawful trade practice; or

(F) Any other relief which the court determines proper.

(3) Any written decision made pursuant to subsection (f) of this section is admissible as prima facie evidence of the facts stated therein.

(4) If a merchant files in any court a suit seeking to collect a debt arising out of a trade practice from which has also arisen a complaint filed with the Department by the defendant in the suit either before or after the suit was filed, the court shall dismiss the suit without prejudice, or remand it to the Department.

(5) An action brought by a person under this subsection against a nonprofit organization shall not be based on membership in such organization, membership services, training or credentialing activities, sale of publications of the nonprofit organization, medical or legal malpractice, or any other transaction, interaction, or dispute not arising from the purchase or sale of consumer goods or services in the ordinary course of business.

(6) The right of action established by this subsection shall apply to trade practices arising from landlord-tenant relations.

(7)(A) Commencement of an action by the Attorney General under § 28-3909, including the maintenance of an action previously commenced and pending as of November 13, 2021, shall serve to stay until the resolution of the Attorney General's action any civil action that includes any claim that is:

(i) Made pursuant to this subsection by a public interest organization or on behalf of the general public; and

(ii) Based in whole or in part on any matter complained of in the action commenced by the Attorney General.

(B) A plaintiff that is a public interest organization or is acting on behalf of the general public shall provide notice to the Office of the Attorney General within 10 days of the filing of an action that includes a claim made under this subsection.

(l) The Director and Office of Adjudication may use any power granted to the Department in section 28-3903, as each reasonably deems will aid in carrying out the functions assigned to each in this section. Each, while holding the primary responsibility of the Department for decision in a certain case, may join such case with others then before the Department. No case may be disposed of in a manner not expressly authorized in this section. Every complaint case filed with

the Department and within its jurisdiction shall be decided in accordance with the procedures and sanctions of this section, notwithstanding that a given trade practice, at issue in the case, may be governed in whole or in part by another law which has different enforcement procedures and sanctions.

(m)(1) Whenever requested, the Department will make available to the complainant and respondent an explanation, and any other information helpful in understanding, the provisions of any consent decree to which the Department agrees, and any order or decision which the Department makes.

(2) The Director shall maintain a public index for all the cases on which the Department has made a final action or a consent decree, organized by:

(A) name of complainant;

(B) name of respondent;

(C) industry of the merchant involved;

(D) nature of the violation of District law alleged or found to exist (for example, subsection of section 28-3904 involved, or section of a licensing law involved);

(E) final disposition.

(n) There shall be established a Consumer Protection Education Fund (“Fund”). All monies awarded to or paid to the Department by operation of this section, including final judgements, consent decrees, or settlements reduced to final judgements, shall be paid into the Fund in order to further the purpose of this chapter as enumerated in § 28-3901.

(o) Every complaint case that is before the Department in accordance with this section shall proceed in confidence, except for hearings and meetings before the Office of Adjudication, until the Department makes a final action or a consent decree.

(p) The Director may file a complaint in accordance with subsection (a) of this section, on behalf of one or more consumers or as complainant, based on evidence and information gathered by the Department in carrying out this chapter. Persons not parties to but directly or indirectly intended as beneficiaries of an order described in subsection (f), (g), or (j) of this section, or a consent decree described in subsection (h) of this section, arising out of a complaint filed by the Director, may enforce such order or decree in the manner provided in subsection (i)(3)(B) of this section.

(q) At any hearing pursuant to subsection (f) or (j) of this section, a witness has the right to be advised by counsel present at such hearing. In any process under this section, the complainant and respondent may have legal or other counsel for representation and advice.

(r) All cases for which complaints were filed before March 5, 1981, may be presented to and heard by the Office of Adjudication notwithstanding the time limits previously provided in section 28-3905(d), 28-3905(e), and 28-3905(f) for the investigation and transmittal of cases to the Office of Adjudication, and for the hearing of cases by the Office of Adjudication.

Credits

(July 22, 1976, D.C. Law 1-76, § 6, 23 DCR 1185; June 11, 1977, D.C. Law 2-8, § 4(b), 24 DCR 726; enacted, Sept. 6, 1980, D.C. Law 3-85, § 3(a), (d), 27 DCR 2900; Mar. 5, 1981, D.C. Law 3-159, §§ 2(b), (c), 3, 27 DCR 5147; Mar. 8, 1991, D.C. Law 8-234, § 2(f), 38 DCR 296; Feb. 5, 1994, D.C. Law 10-68, § 27(f), 40 DCR 6311; Apr. 9, 1997, D.C. Law 11-255, § 27(y), 44 DCR 1271; Apr. 29, 1998, D.C. Law 12-86, § 1301(c), 45 DCR 1172; Oct. 19, 2000, D.C. Law 13-172, § 1402(d), 47 DCR 6308; Oct. 20, 2005, D.C. Law 16-33, § 2032(d), 52 DCR 7503; June 12, 2007, D.C. Law 17-4, § 2(b), 54 DCR 4085; Apr. 23, 2013, D.C. Law 19-282, § 2(b)(3), 60 DCR 2132; Feb. 26, 2015, D.C. Law 20-155, § 2012(c), 61 DCR 9990; Feb. 22, 2019, D.C. Law 22-206, § 2(a), 65 DCR 12363; June 17, 2020, D.C. Law 23-98, § 2(b)(2), 67 DCR 3923; Apr. 5, 2021, D.C. Law 23-269, § 501(n)(4), 68 DCR 1490; Nov. 13, 2021, D.C. Law 24-45, § 1042, 68 DCR 10163.)

Notes of Decisions (168)

DC CODE § 28-3905
Current through April 25, 2024. Some sections may be more current, see credits for details.