Nos. 07-CV-1264 and 08-CV-1089

DISTRICT OF COLUMBIA COURT OF APPEALS

ALAN GRAYSON,
Appellant,

v.
AT&T CORPORATION, ET AL.,
Appellees.

PAUL M. BREAKMAN,
Appellant,
v.

AOL, LLC,
Appellee.

On Appeal from the Superior Court of the District of Columbia

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BRIEF OF THE LEGAL AID SOCIETY OF THE DISTRICT OF COLUMBIA, PUBLIC CITIZEN, INC., CENTER FOR SCIENCE IN THE PUBLIC INTEREST, NATIONAL ASSOCIATION OF CONSUMER ADVOCATES, AND NATIONAL CONSUMER LAW CENTER AS *AMICI CURIAE* SUPPORTING APPELLANTS

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May 5, 2010

RULE 28(a)(2)(B) DISCLOSURE STATEMENT

The Legal Aid Society of the District of Columbia is a District of Columbia nonprofit corporation. It has no parents, subsidiaries, or stockholders.

Public Citizen Inc. is a District of Columbia nonprofit corporation. It has no parents, subsidiaries, or stockholders.

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INTEREST OF *AMICI CURIAE*

The interest of *amici curiae* is described in the Appendix to this brief. The Court granted leave to file this brief on April 26, 2010.

INTRODUCTION AND SUMMARY OF ARGUMENT

The appellees contend that uninjured plaintiffs lack standing to sue in the District of Columbia courts and thus cannot bring representative actions under the D.C. Consumer Protection Procedures Act ("CPPA"). The appellees are wrong. Neither the Superior Court nor this Court is limited by Article III justiciability principles under either the Constitution or the statutes that govern the D.C. courts' jurisdiction.

In the forty years since Congress enacted the D.C. Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970) ("Court Reform Act"), this Court has articulated varying approaches to the question whether justiciability principles that constrain the jurisdiction of Article III courts—such as standing, mootness, and ripeness—similarly limit the judicial power of the D.C. courts. A close study of the statutes governing the courts' jurisdiction, however, reveals that both the Superior Court and this Court are courts of general jurisdiction and that neither is limited to deciding "cases" or "controversies" as those terms are understood by Article III courts. D.C. Code § 11-705(b), which appellees maintain limits the courts to deciding "cases and controversies," has nothing to do with Superior Court jurisdiction and does not purport to restrict this Court's judicial power in any respect. Instead, § 11-705(b)—which is not even situated in the subchapter governing this Court's "jurisdiction"—is an administrative provision specifying that this Court will hear cases in divisions.

That the D.C. courts are not bound by Article III-like justiciability principles does not mean, however, that this Court should abandon all *prudential* limits on standing. But in adopting such prudential rules, this Court—as is true of state courts throughout the nation—is not bound

by the standing limitations (such as the general prohibition on a plaintiff's litigating the rights of others) that apply in federal courts. In any event, whatever prudential limits this Court may choose to adopt for lawsuits asserting common-law or constitutional causes of action, a legislature may override such prudential limits by granting an express right of action to persons who otherwise would be barred by prudential standing rules. The D.C. Council did precisely that when it enacted the 2000 amendments to the CPPA: After the amendments, a person may bring a CPPA action on behalf of the general public, whether or not that person has suffered an injury. No limitation on judicial power prevents the D.C. courts from enforcing the Act as written.

ARGUMENT

I. COURTS OF GENERAL JURISDICTION ARE NOT CONSTRAINED BY THE SAME JUSTICIABILITY PRINCIPLES AS FEDERAL COURTS, WHICH ARE COURTS OF LIMITED JURISDICTION.

Our system of federalism, by design, envisions two very different kinds of court systems. Just as the federal government is one of limited powers, federal courts are courts of limited powers. "Federal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution." *Cary v. Curtis*, 44 U.S. 236, 245 (1845). Under Article III's case-or-controversy requirement, federal courts may not issue advisory opinions, address the grievances of uninjured parties, or decide moot disputes. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*, 528 U.S. 167, 180-86 (2000). Federal courts "may exercise power only 'in the last resort, and as a necessity.'" *Allen v. Wright*, 468 U.S. 737, 752 (1984) (citation omitted).

The doors of the state courts, by contrast, are open to a far broader range of disputes. "Most state courts are courts of general jurisdiction, and the presumption is that they have subject matter jurisdiction over any controversy unless a showing is made to the contrary." 13 Charles Alan Wright et al., *Federal Practice and Procedure* § 3522 (3d ed. 2008). The Supreme Court has made clear that "the special limitations that Article III of the Constitution imposes on

the jurisdiction of the federal courts are not binding on the state courts." *N.Y. State Club Ass'n v. City of New York*, 487 U.S. 1, 8 n.2 (1998); *see also ASARCO, Inc. v. Kadish*, 490 U.S. 605, 617 (1989) ("The constraints of Article III do not apply to state courts.").

Accordingly, states are free "to determine whether their courts may issue advisory opinions or to determine matters that would not satisfy the more stringent requirement in the federal courts that an actual 'case' or 'controversy' be presented for resolution." *N.Y. State Club Ass'n*, 487 U.S. at 8 n.2; *see generally* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 Harv. L. Rev. 1834, 1838 (2001); Richard H. Fallon, Jr. et al., *Hart and Wechsler's The Federal Courts and the Federal System* 138 (5th ed. 2003). In so doing, the state courts have demonstrated their institutional capacity to decide a variety of controversies, even those that are not brought by ideal plaintiffs or presented under optimal circumstances, when the public interest favors adjudication. Free from Article III's constraints, state courts of general jurisdiction can, and often do, issue advisory opinions, resolve moot disputes, and entertain the claims of uninjured parties—particularly where, as here, legislative bodies have expressly empowered them to do so.

1. "No rule of federal justiciability doctrine is more entrenched than the ban on advisory opinions." Hershkoff, 114 Harv. L. Rev. at 1844. The Supreme Court has nevertheless held that the question of whether a state court may issue an advisory opinion is determined entirely by state law. *N.Y. State Club Ass'n*, 487 U.S. at 8 n.2. Many state constitutions explicitly grant courts the authority to provide advisory opinions, and other states have assigned the judiciary that function through statutes. Hershkoff, 114 Harv. L. Rev. at 1845-46. Although they are not binding judgments, advisory opinions often provide helpful guidance to state legislatures before they enact a law that the courts would eventually strike down, thereby saving time, resources, and litigation costs. *See, e.g., Opinion of the Justices (Pub. Use of Coastal Beaches)*,

649 A.2d 604 (N.H. 1994); *Opinion of the Justices to the House of Representatives*, 236 N.E.2d 926 (Mass. 1968).

The Supreme Court has also acknowledged that state courts are free to address moot disputes that would not be justiciable in a federal court. *See, e.g.*, *Goldwater v. Carter*, 444 U.S. 996, 1005 n.2 (1979); *Doremus v. Bd. of Ed. of Borough of Hawthorne*, 342 U.S. 429, 434 (1952). Although some state courts have adopted mootness doctrines similar to those applied in federal courts, these limitations are not rooted in Article III. *See* Don B. Kates, Jr. & William T. Barker, *Mootness in Judicial Proceedings: Toward a Coherent Theory*, 62 Cal. L. Rev. 1385, 1412 n.154 (1974). State courts that resolve moot disputes often do so when resolution of a case will provide clarity on an issue affecting "the rights or interests of the public at large." *See, e.g.*, *Leak v. High Point City Council*, 213 S.E.2d 386, 388 (N.C. Ct. App. 1975). Some state courts have explicitly acknowledged that Article III would prohibit resolution of a given controversy if in federal court but have resolved the controversy in light of the public interest in doing so. *See, e.g.*, *In re Lawrance*, 579 N.E.2d 32, 37 (Ind. 1991) (invoking "an exception to the general rule [against deciding moot cases] when the case involves questions of 'great public interest'" to decide whether parents could authorize withdrawal of artificial nutrition from their adult daughter who was in a persistent vegetative state, even though she died during the litigation). The rationale for this approach is similar to the justification for issuing advisory opinions. In cases of significant public interest, local concerns may best be served by authoritative adjudication. *See State ex rel. Shepherd v. Nebraska Equal Opportunity Comm'n*, 557 N.W.2d 684, 689 (Neb. 1997).

Finally, and most relevant here, the Supreme Court has acknowledged that state courts are free to adjudicate cases to which the doors of the federal courthouse would be closed because a party has not suffered the requisite injury or imminent threat of injury. As a consequence, state

courts are often the only fora for cases seeking to hold governments or corporations accountable for patterns of illegal conduct. For example, in the leading case of *City of Los Angeles v. Lyons*, 461 U.S. 95 (1983), the Supreme Court held that a man who sought to prohibit the use of "choke holds" by the Los Angeles Police Department lacked standing to seek injunctive relief. Although Lyons alleged that he personally had been subjected to a choke hold and that police regularly made excessive use of this dangerous maneuver on non-threatening citizens, the Court held that he lacked standing because Article III requires that a plaintiff be "immediately in danger of sustaining some direct injury" to obtain relief. *Id.* at 103. In spite of the previous incident, Lyons could not show "a sufficient likelihood that he will again be wronged in a similar way" and was therefore "no more entitled to an injunction than any other citizen of Los Angeles." *Id.* at 111.

At the same time, the Court emphasized that the state courts might remain open to people in Lyons's shoes. "[T]he state courts," *Lyons* explained, "need not impose the same standing or remedial requirements that govern federal court proceedings. The individual states may permit their courts to use injunctions to oversee the conduct of law enforcement authorities on a continuing basis." *Id.* at 113. Such oversight, however, simply was not "the role of the federal courts." *Id. Lyons* thus underscores the propriety of a broader role for courts of general jurisdiction. Whether in Los Angeles or the District of Columbia, people subject to police abuses may obtain damages for the harms they suffer or injunctions to stop future abuses. It is well within the power of a legislature to employ broader notions of standing in authorizing courts to stop such harms before they occur.

State courts frequently acknowledge that they "are not subject to a 'cases or controversies' limitation like that imposed upon the federal judiciary by Article III," and, accordingly, that the only applicable standing limitations are prudential. *Life of the Land v. Land Use Comm'n of State of Hawaii*, 623 P.2d 431, 438 (Haw. 1981). The Hawaii Supreme Court,

for example, has explained that, although "standing requisites ordinarily comprise one of the 'prudential rules'" adopted by the Hawaiian courts, those rules can nevertheless "be tempered, or even prescribed, by legislative and constitutional declarations of policy." *Id.* Similarly, the California courts have held that there is no universally applicable state analogue to Article III's case-or-controversy requirement. *See, e.g.*, *Nat'l Paint & Coatings Ass'n v. State*, 58 Cal. App. 4th 753, 761 (Cal. Ct. App. 1997). These courts instead evaluate the justiciability of each claim by the contours of the statute under which the claim is brought. *See Midpeninsula Citizens for Fair Hous. v. Westwood Investors*, 271 Cal. Rptr. 99, 104 (Cal. Ct. App. 1990) ("Standing requirements will vary from statute to statute based upon the intent of the Legislature and the purpose for which the particular statute was enacted."); *see also In re Sullivan*, 157 S.W.3d 911, 915 (Tex. App. 2005) ("[J]udge-made criteria regarding standing do not apply when the Texas Legislature has conferred standing through a statute.").

Indeed, in stark contrast to *Lyons*, the California Supreme Court in *White v. Davis*, 533 P.2d 222 (Cal. 1975), applied its own justiciability doctrines to permit a taxpayer challenge seeking injunctive relief brought by an uninjured plaintiff against the Los Angeles Police Department. The court unanimously found that the plaintiff had standing to challenge the allegedly unconstitutional expenditure of funds on a covert surveillance program in which police officers posed as university students to gather information. Observing that "[i]t is elementary that public officials must themselves obey the law," *White* held that a state statute granting taxpayer standing provided a "general citizen remedy for controlling illegal governmental activity." *Id.* at 226. Because such suits could not be brought in federal court, the absence of a state remedy would entail the absence of *any* remedy for what was in effect an unconstitutional municipal spying program. *See also Saratoga County Chamber of Commerce, Inc. v. Pataki*, 798 N.E.2d 1047, 1053 (N.Y. 2003) (recognizing that citizen-taxpayers "need not demonstrate an injury-in-

fact to acquire standing" and that otherwise "an important constitutional issue would be effectively insulated from judicial review").

2. The statute at issue here is not an aberration. Consistent with the more expansive judicial powers of their courts, state legislatures have created causes of action allowing consumers to bring suit as private attorneys general in state courts to redress unlawful trade practices on behalf of the general public. California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17000 *et seq.* ("UCL"), before its amendment in 2004 by ballot initiative, was similar to the CPPA, permitting uninjured parties to file suit on behalf of the general public. In addressing claims brought under the UCL, California courts honored the clear intent of the state legislature by entertaining cases initiated by uninjured plaintiffs. *See Stop Youth Addiction, Inc. v. Lucky Stores*, 950 P.2d 1086, 1091 (Cal. 1998) ("Pursuant to section 17200 as construed by this court and the Courts of Appeal, 'a private plaintiff who has himself suffered no injury at all may sue to obtain relief for others.'"); *Comm. on Children's Television, Inc., v. Gen. Foods Corp.*, 673 P.2d 660, 668 (Cal. 1983) ("To state a cause of action under these statutes for injunctive relief, it is necessary only to show that 'members of the public are likely to be deceived.'").

Similarly, Ohio's Consumer Sales Practices Act authorizes a claim by a consumer seeking damages as well as injunctive relief—without requiring that the consumer show an injury. *See* Ohio Rev. Code Ann. § 1345.09(B) (allowing recovery of "three times the amount of the consumer's actual economic damages or two hundred dollars, whichever is greater"); *id.* § 1345.09(D) ("Any consumer may seek a declaratory judgment, an injunction, or other appropriate relief against an act or practice that violates this chapter."). "Generally, the CSPA gives consumers standing to enforce its provisions even when they have not suffered actual injury from a violation." *Shumaker v. Hamilton Chevrolet, Inc*., 920 N.E.2d 1023, 1030 (Ohio Ct. App. 2009); *see also* Carolyn Carter, et al., *Unfair and Deceptive Acts and Practices* 732 (7th

ed. 2008) ("Ohio's UDAP statute does not have a damage precondition and allows statutory damages even in the absence of actual injury.").

Other state courts have acknowledged the legislature's authority to confer standing on uninjured plaintiffs by statute, and have enforced such rights accordingly. *See, e.g.*, *Animal Legal Def. Fund v. Woodley*, 640 S.E.2d 777, 778 (N.C. Ct. App. 2007) (rejecting defendant's contention that the state could not "grant standing to persons who have suffered no injury . . . [because] North Carolina courts are not constrained by the 'case or controversy' requirement of Article 3"). Even in states that retain some form of injury requirement, many provide for taxpayer standing in cases that would not be justiciable in an Article III court. *See, e.g.*, *Chiles v. Children A, B, C, D, E & F*, 589 So.2d 260, 263 n.5 (Fla. 1991) (permitting a "citizen taxpayer" to challenge an exercise of legislative authority "without having to demonstrate a special injury"); *Saratoga County*, 798 N.E.2d at 1053. Finally, other states minimize or entirely discard any requirement of injury in cases of "great public importance." *See, e.g.*, *State v. Johnson*, 990 P.2d 1277, 1284 (N.M. 1999); *Salorio v. Glaser*, 414 A.2d 943, 947 (N.J. 1971).[1]

The flexible doctrines adopted by courts of general jurisdiction have allowed cases to proceed that have vindicated the interests of the public—cases that could not have proceeded under the justiciability requirements of Article III courts. This dichotomy is appropriate, because the federalism rationales for sharply limiting the jurisdiction of Article III courts do not apply to courts of general jurisdiction. *See* Hershkoff, 114 Harv. L. Rev. at 1885-97. Most importantly, these doctrines give state and local governments the freedom to empower courts to address real,

[1] For additional discussion of private-attorney-general and public-interest standing doctrines, *see generally* John DiManno, *Beyond Taxpayers' Suits: Public Interest Standing in the States*, 41 Conn. L. Rev. 639 (2008); *see also* Robert A. Anthony, *Zone-Free Standing for Private Attorneys General*, 7 Geo. Mason L. Rev. 237, 237 & n.3 (1999) (listing and discussing statutes that contain private-attorney-general provisions).

concrete problems that could not be resolved in federal courts, given the limited nature of Article III judicial review. The D.C. Council took advantage of that freedom when it enacted the CPPA.

II. DISTRICT OF COLUMBIA COURTS ARE COURTS OF GENERAL JURISDICTION AND ARE NOT BOUND BY "CASE" OR "CONTROVERSY" JUSTICIABILITY PRINCIPLES THAT CONSTRAIN ARTICLE III COURTS.

The appellees contend that the appellants cannot bring claims under the CPPA because the appellants personally have suffered no injury and accordingly lack standing to sue. The division in *Grayson* was correct to reject that argument. *See* Slip op. at 39 n.78. This Court is not required to follow Article III justiciability principles under either the Constitution or the statutes governing the jurisdiction of the District of Columbia courts.

A. The Court Should Reexamine the Applicability of Justiciability Principles to the D.C. Courts.

This *en banc* proceeding is an opportunity for the Court broadly to reexamine justiciability principles (such as standing, mootness, and ripeness) that govern the D.C. courts and to resolve any inconsistencies in the Court's prior decisions that have addressed these issues in particular contexts. For example, in numerous cases, this Court has announced that, although the Court was established by Congress pursuant to Article I of the Constitution rather than Article III, the Court's "jurisdiction is limited by the same 'case or controversy' requirement, *see* D.C. Code 1973, § 11-705(b), as that imposed on the Article III courts . . . ." *Kopff v. D.C. Alcoholic Beverage Control Bd.*, 381 A.2d 1372, 1378 n.11 (D.C. 1977).[2] Accordingly, the Court

[2] *See also, e.g.*, *Lee v. D.C. Bd. of Appeals & Review*, 423 A.2d 210, 216 n.13 (D.C. 1980) ("This court, of course, is not bound by the mandates of Article III, since it was created by Congress as an Article I court. In creating this court, however, Congress provided that we, like the federal courts, should hear only '[cases] and controversies.'") (citing D.C. Code § 11-705(b)) (other citations omitted); *Consumer Fed'n of Am. v. Upjohn Co.*, 346 A.2d 725, 727 n.6 (D.C. 1975) ("Appellants assumed and we agree that the rules of standing as applied in the federal courts are substantially the same as those which govern the instant case in Superior Court."); *United States v. Cummings*, 301 A.2d 229, 231 (D.C. 1973) (D.C. Code § 11-705 "provides for the hearing of '[cases] and controversies' by this court.").

has often said that it "look[s] to federal jurisprudence to define the limits of 'cases and controversies' that [its] enabling statute empowers [the Court] to hear." *Community Credit Union Servs., Inc. v. Fed. Express Servs. Corp.*, 534 A.2d 331, 333 (D.C. 1987); *accord Fisher v. Gov't Employees Ins. Co.*, 762 A.2d 35, 38 n.7 (D.C. 2000).

In some decisions, the Court has declared in absolute terms that it "appl[ies] *in every case* 'the "constitutional" requirement of a "case or controversy" and the "prudential" prerequisites of standing,'" and that, accordingly, the Court "'look[s] to' federal standing jurisprudence, [both] constitutional and prudential." *See, e.g., Friends of Tilden Park, Inc. v. District of Columbia*, 806 A.2d 1201, 1206 (D.C. 2002) (emphasis added) (quoting *Speyer v. Barry*, 588 A.2d 1147, 1160 (D.C. 1991)); *see also Riverside Hosp. v. D.C. Dep't of Health*, 944 A.2d 1098, 1103-04 (D.C. 2008). In other decisions, however, the Court has acknowledged that its jurisdiction may extend beyond the "case or controversy" restriction, but that it has chosen to follow federal justiciability principles for prudential reasons. *See, e.g., Banks v. Ferrell*, 411 A.2d 54, 56 n.7 (D.C. 1979) ("Although it is . . . true that the judicial power of the local D.C. courts may extend beyond the case or controversy requirement," this Court "has followed the principles of standing, justiciability and mootness to promote sound judicial economy and has recognized that an adversary system can best adjudicate real, not abstract, conflicts.") (citations omitted); *accord Hessey v. Burden*, 615 A.2d 562, 572 n.17 (D.C. 1992).[3]

In still other cases, the Court has set aside Article III justiciability principles entirely. For example, athough the refusal to review moot or unripe cases, like the standing doctrine, derives

[3] *See also Riverside*, 944 A.2d at 1104-05 (this Court "generally" adheres to "the case and controversy requirement of Article III as well as prudential principles of standing"); *District of Columbia v. Group Ins. Admin.*, 633 A.2d 2, 12 (D.C. 1993) (although this Court is not bound by the "case or controversy" requirement of Article III, it has "adopted this requirement for prudential reasons"); *Francis v. Recycling Solutions, Inc.*, 695 A.2d 63, 68 (D.C. 1997) (same).

from the "case" or "controversy" limitations of Article III, *see DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006), this Court has emphasized that it "enjoys flexibility in regard to mootness not possessed by the federal courts," *Atchison v. District of Columbia*, 585 A.2d 150, 153 (D.C. 1991), and will exercise discretion to decide whether to address moot controversies. *Id.*; *see also Lynch v. United States*, 557 A.2d 580, 582 (D.C. 1989) (en banc) (Supreme Court decisions on mootness not binding on this Court). The Court likewise has reserved the discretion to address unripe cases, such as constitutional objections to proposed ballot initiatives. *See Hessey*, 615 A.2d at 572-75 & n.17.

The cases now before the Court sitting *en banc* provide an important opportunity for the Court to recognize explicitly that the D.C. courts are not subject to the same justiciability principles that constrain the judicial power of Article III courts and that the Council has broad authority to override any prudential standing limitations adopted by the Court.

B. Under the Statutes Governing Their Jurisdiction, D.C. Courts Are Not Limited to Deciding "Cases and Controversies" Within the Meaning of Article III.

Whether the D.C. courts are limited to hearing "cases" and "controversies" is a question of statutory construction and not one of constitutional dimension. The D.C. Court of Appeals and the D.C. Superior Court were established pursuant to Article I, not Article III, of the Constitution. *See* Pub. L. No. 91-358, § 111, 84 Stat. 473, 475 (codified at D.C. Code § 11-101(2)); *see also Palmore v. United States*, 411 U.S. 389, 390, 397-410 (1973). Whereas Article III specifies that "the judicial power" of federal courts "shall extend" to "cases" and "controversies," no such limitation appears in Article I. Indeed, Congress's power "to exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia is "plenary." *Palmore*, 411 U.S. at 397.

The D.C. courts' "jurisdiction thus extends as far as Congress has granted it." *District of*

Columbia v. Walters, 319 A.2d 332, 338 n.13 (D.C. 1974); *accord Lee*, 423 A.2d at 215. As explained below, the Court Reform Act makes clear that both the Superior Court and this Court are courts of general jurisdiction and that the reference in D.C. Code § 11-705 to divisions of this Court hearing "cases and controversies" is not a restriction on this Court's jurisdiction.

1. The Purposes of the Court Reform Act. "One of the primary purposes of the Court Reform Act was to restructure the District's court system so that 'the District will have a court system comparable to those of the states and other large municipalities.'" *Pernell v. Southall Realty*, 416 U.S. 363, 367 (1974) (quoting H.R. Rep. No. 91-907, at 23 (1970)). To that end, the Act "invested the local courts with jurisdiction equivalent to that exercised by state courts." *Palmore*, 411 U.S. at 392 n.2. The three former trial courts were combined into the new Superior Court of the District of Columbia. *Id.*; *see* D.C. Code § 11-901. With the exception of matters entrusted to exclusive federal-court jurisdiction, "the Superior Court has jurisdiction of any civil action or other matter (at law or in equity) brought in the District of Columbia." D.C. Code § 11-921(a). No other limitation on the Superior Court's civil jurisdiction is imposed.

Congress established the D.C. Court of Appeals as "[t]he highest court of the District of Columbia." *Id.* § 11-102. Its jurisdiction, with respect to appeals from the Superior Court, is set out in § 11-721, in Subchapter II on "Jurisdiction." That section provides in pertinent part that "(a) The District of Columbia Court of Appeals has jurisdiction of appeals from—(1) all final orders and judgments of the Superior Court of the District of Columbia . . . ." *Id.* § 11-721(a)(1). Nowhere is the jurisdiction of this Court limited to deciding "cases" or "controversies."[4] The

[4] The Home Rule Act is equally expansive regarding the scope of D.C.-court jurisdiction. *See* D.C. Code § 1-204.31 ("The Superior Court has jurisdiction of any civil action or other matter (at law or in equity) brought in the District . . . . The Court of Appeals has jurisdiction of appeals from the Superior Court . . . . The District of Columbia courts shall also have jurisdiction over any other matters granted to the District of Columbia courts by other provisions of law."); Bruce Comly French, *Broadened Concepts of Standing in the Local District of Columbia Courts*,

Court's jurisdiction also includes review of decisions by D.C. government agencies, *id.* § 11-722, which this Court has recognized are not subject to judicial standing requirements. *See Goto v. D.C. Bd. of Zoning Adjustment*, 423 A.2d 917, 921 n.8 (D.C. 1980).

As both the Supreme Court and this Court have recognized, "[t]he aim of the Act was to establish 'a Federal-State court system in the District of Columbia analogous to court systems in the several States.'" *Key v. Doyle*, 434 U.S. 59, 64 (1977) (quoting H.R. Rep. No. 91-907, at 35); *accord Pernell*, 416 U.S. at 367-68; *Reichman v. Franklin Simon Corp.*, 392 A.2d 9, 12 n.5 (D.C. 1978). As this Court has correctly recognized on numerous occasions, "the Superior Court is no longer a court of *limited* jurisdiction, but a court of general jurisdiction with the power to adjudicate any civil action at law or in equity involving local law." *Andrade v. Jackson*, 401 A.2d 990, 992 (D.C. 1979).[5] This understanding—that the D.C. courts, as established in 1970, are courts of general jurisdiction analogous to state courts and not bound by Article III limits—is amply borne out by the legislative history of the Court Reform Act. The Senate Committee Report, for example, states explicitly that "[b]y creating the local courts under authority granted by article I of the Constitution, the local District of Columbia court structure is not bound by the provisions found in article III of the Constitution." S. Rep. No. 91-405, at 18 (1969). The committee reports and testimony at congressional hearings emphasize repeatedly that Congress intended to create a "trial court of general local jurisdiction" and a Court of Appeals that "will be the highest court in the jurisdiction, similar to a state Supreme Court." H.R. Rep. No. 91-907, at

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23 How. L.J. 255, 267 (1980) (discussing Council's broad power under Home Rule Act to "act in Congress' stead with respect to broadening the definition of party standing for the local courts").

[5] *Accord Cormier v. D.C. Water & Sewer Auth.*, 959 A.2d 658, 664 n.3 (D.C. 2008); *DeGroot v. DeGroot*, 939 A.2d 664, 668 (D.C. 2008); *Feaster v. Vance*, 832 A.2d 1277, 1283 (D.C. 2003); *see also Reichman*, 392 A.2d at 12 ("The local courts were to be given powers analogous to those of state courts, with the District of Columbia Court of Appeals constituted as the final judicial authority in the jurisdiction on matters of local law.").

23; *see also id.* at 5 (purpose of legislation was "to give Washington both a trial and an appellate court comparable to those in the States").[6]

2. D.C. Code § 11-705(b). The appellees maintain that D.C. Code § 11-705(b), like Article III, limits this Court's judicial power to deciding "cases and controversies" and that, accordingly, a plaintiff bringing a CPPA claim must satisfy Article III standing principles. Appellees are wrong. Although, as noted above, this Court has often cited § 11-705(b) in passing for this proposition, in no decision of which we are aware has the Court analyzed whether § 11-705(b) actually restricts this Court to deciding cases and controversies. Moreover, this Court's willingness to overlook Article III constraints in the mootness context and its frequent recognition that the Court follows justiciability principles for *prudential* reasons—rather than because it is required to do so—suggest that the Court implicitly recognizes that it is not limited to deciding "cases and controversies" within the meaning of Article III. The Court should recognize definitively that its judicial power is not so circumscribed.

"Statutory construction is a holistic endeavor, and, at a minimum, must account for a statute's full text, language . . . , structure, and subject matter." *District of Columbia v. Beretta, U.S.A., Corp.*, 872 A.2d 633, 652 (D.C. 2005) (en banc) (quoting *United States Nat'l Bank of Oregon v. Indep. Ins. Agents of Am.*, 508 U.S. 439, 455 (1993)). Section 11-705(b) provides in relevant part: "Cases and controversies shall be heard and determined by divisions of the court unless a hearing or a rehearing before the court in banc is ordered. Each division of the court

[6] *See also, e.g., Court Reorganization, Criminal Law Procedures, Bail, and Public Defender Service: Hearings Before the H. Subcomm. No. 1 of the H. Comm. on the District of Columbia, Part I*, 91st Cong. 12 (1969) (statement of Donald E. Santarelli, Associate Deputy Attorney General) ("[T]he District will have a court system comparable to those of the states and other large municipalities."); *Crime in the National Capital: Hearings Before the Comm. on the District of Columbia*, 91st Cong. 1149 (1969) (statement of Richard J. Kleindienst, Deputy Attorney General) (same).

shall consist of three judges." It is plain from both the text and structure of the Court Reform Act, and reinforced by the provision's history, that § 11-705(b) does not limit this Court's jurisdiction to hearing "cases and controversies" as understood under Article III.

For starters, § 11-705(b)—the provision on which appellees have seized as importing Article III standing principles—affects only this Court, not the Superior Court. At best, then, we are arguing only about whether *this Court's* appellate jurisdiction, and not the Superior Court's jurisdiction in the first instance, is limited to "cases and controversies." AOL tries to bootstrap its way into arguing that, because this Court (supposedly) can hear only "cases or controversies" but has jurisdiction to hear "all final orders and judgments of the Superior Court," D.C. Code § 11-721(a)(1), then the *Superior Court* must also be limited to hearing "cases and controversies." AOL's Petition for Rehearing En Banc at 4. AOL offers no reason, however, to read a limitation into the Superior Court's jurisdiction that simply is not there. This Court's authority to hear "all final orders and judgments of the Superior Court" is not, perversely, a limit on *Superior Court* jurisdiction, but instead, is a broad grant of jurisdiction *to this Court* to hear all final orders and judgments of the Superior Court. Nor would imposing a "case" or "controversy" requirement on an appellate court be a sensible way of limiting a *trial* court's jurisdiction because a party may have Article III standing on appeal even if there was no such standing at the case's inception. *See, e.g.*, *ASARCO*, 490 U.S. at 617-18.

It would be equally anomalous and contrary to the plain language of the statute to read it to confer jurisdiction on the Superior Court to hear a case, such as the CPPA lawsuits at issue here, while denying this Court the power to review the Superior Court's final judgments on appeal. Nothing in the Court Reform Act or its legislative history indicates any congressional intent to confer lopsided jurisdiction on the D.C. Courts such that the Superior Court can render unreviewable judgments in a class of cases.

In any event, the reference to "[c]ases and controversies" in § 11-705(b) does not purport to restrict this Court's judicial power in any way. The contrast between the use of "cases and controversies" language in § 11-705(b) and in Article III of the Constitution is telling. Article III directly limits federal judicial power to deciding "cases" and "controversies": "The judicial power shall extend to all Cases . . . to Controversies . . . ." U.S. Const. art. III, § 2; *see Muskrat v. United States*, 219 U.S. 346, 356 (1911) ("[T]he exercise of the judicial power is limited to 'cases' and 'controversies.'"); William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 Cal. L. Rev. 263, 267 (1990) ("[T]he language in article III that most directly imposed on the federal courts what we now call the 'case or controversy' requirement was the phrase 'judicial power.'"). No similar constraint appears in D.C. Code § 11-705(b), which refers to "cases and controversies" in a purely descriptive way: "Cases and controversies shall be heard and determined by divisions of the court . . ." The section does not speak in terms of judicial power being limited to "cases" and "controversies." Instead, the thrust of the provision is to require that this Court hear and decide cases in divisions, comprised of three judges, unless a hearing or rehearing en banc is ordered. *See id.*; *see also id.* § 11-705(d). Indeed, § 11-705 appears under the heading "Assignment of judges; divisions; hearings"—providing no inkling that a restriction of the Court's jurisdiction follows. Furthermore, § 11-705 does not even appear in "Subchapter II.—Jurisdiction," where the provisions governing this Court's jurisdiction, *e.g.*, D.C. Code § 11-721, are set forth. Instead, § 11-705 appears in "Subchapter I.—Continuation and Organization," a compilation of administrative provisions that govern this Court's operations. *See Reed Elsevier, Inc. v. Muchnick*, 130 S. Ct. 1237, 1245-46 (2010) (copyright registration requirement not "jurisdictional" in part because it is "located in a provision 'separate' from those granting federal courts subject-matter jurisdiction over those respective claims").

As one commentator, writing exhaustively about the Court Reform Act shortly after its enactment, put it:

> This ["cases and controversies"] expression follows precisely the pattern of the federal judicial code. In the context of the local District of Columbia court system, however, this language should not be construed to denote the limited category of legal business which article III of the Constitution describes as being appropriate for cognizance by federal, constitutional courts. The Court Reorganization Act grants the local court of appeals jurisdiction over much that falls clearly outside of the specific constitutional concept of "cases and controversies," and there is no indication, in general policy or express purpose, of a congressional intent to have "cases and controversies" heard by three-judge divisions, with other court business to be heard otherwise.

Wesley S. Williams, Jr., *An Introduction to the District of Columbia Court Reform and Criminal Procedure Act of 1970, With a Survey of the Provisions on Court Reorganization*, 50 Geo. L.J. 477, 501 (1971) (footnotes omitted).

Finally, legislative history reinforces the fact that § 11-705 was adopted for housekeeping purposes, not to restrict this Court's jurisdiction to hearing "cases and controversies." The provision was not new to the Court Reform Act, but was a recodification of § 11-705 as adopted in a 1967 statute that increased the number of associate judges on the D.C. Court of Appeals from two to five and provided for the judges to hear cases in divisions. *See* Pub. L. No. 90-178, § 1, 81 Stat. 544, 544-45 (1967); H.R. Rep. No. 91-907, at 134 (1970) ("Section 11-705 is a recodification of the present law providing for assignment of judges, divisions, and hearings."); S. Rep. No. 91-405, at 20 (1969). Nothing in the committee reports suggests that the recodification of § 11-705 signaled a retention of a previously codified jurisdictional limit.

At the time the 1967 statute was enacted, the D.C. Court of Appeals' jurisdiction over the orders and judgments of the Superior Court's predecessor courts was set out in § 11-741, in Subchapter III on "Jurisdiction." *See* Pub. L. No. 88-241, 77 Stat. 478, 485 (1963). Analogous to the present-day D.C. Code § 11-721(a)(1), the statute then granted the D.C. Court of Appeals

jurisdiction to review "final orders and judgments of the District of Columbia Court of General Sessions" as well as "final orders and judgments of the Juvenile Court of the District of Columbia." *Id.* (codified at D.C. Code § 11-741(a)(1) & (3)). No provision limited the Court of Appeals to hearing cases and controversies. In 1967, Congress increased the number of judges on the Court of Appeals and added a new § 11-705 to Subchapter I on "Continuation and Organization" to require that the now-expanded court hear "[c]ases and controversies" in divisions. Pub. L. No. 90-178, § 1, 81 Stat. 544, 545 (1967) (enacting D.C. Code § 11-705). Nothing in the 1967 Act or its legislative history gives any indication that in doing so, Congress intended to diminish the Court of Appeals' jurisdiction. The absence of any such indication is reason enough for this Court to reject that interpretation.[7]

C. This Court Has the Discretion to Adopt Prudential Limits on Standing, But the Council Has the Power To Grant a Right of Action to a Person Who Would Otherwise Lack Standing Under Such Prudential Limits.

That the D.C. courts are not bound by Article III-like justiciability principles does not mean, of course, that the Court should jettison all *prudential* limits on standing. Prudential principles function as "self-imposed restrictions on jurisdiction." *See Riverside*, 944 A.2d at 1104; *see also Allen*, 468 U.S. at 751. But the D.C. courts should be governed only by such prudential principles of justiciability as this Court may adopt "to promote sound judicial economy" and in recognition of the fact "that an adversary system can best adjudicate real, not abstract, conflicts." *Walters*, 319 A.2d at 338 n.13. In adopting such prudential rules, this Court,

[7] *See INS v. St. Cyr*, 533 U.S. 289, 320 n.44 (2001) ("In a case where the construction of legislative language such as this makes so sweeping and so relatively unorthodox a change as that made here, I think judges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.") (quotation and citation omitted); *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001) (a legislature "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions—it does not, one might say, hide elephants in mouseholes"); *Covington v. United States*, 698 A.2d 1033, 1036 n.6 (D.C. 1997).

as is true of state courts, is not bound by the prudential standing limitations—such as the general prohibition on a plaintiff litigating the rights of others, or *jus tertii*—that apply to federal courts. *See City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999); *City of Revere v. Mass. Gen. Hosp.*, 463 U.S. 239, 243 (1983).[8]

Whatever prudential limits the Court may choose to adopt for a lawsuit asserting common-law or constitutional causes of action, it is well established that Congress—and, by analogy, the Council—"may grant an express right of action to persons who otherwise would be barred by prudential standing rules." *Warth v. Seldin*, 422 U.S. 490, 501 (1975); *see also Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997) ("Congress' decision to grant a particular plaintiff the right to challenge an act's constitutionality . . . eliminates any prudential standing limitations . . . ."); *Bennett v. Spear*, 520 U.S. 154, 162 (1997) (prudential standing principles "can be modified or abrogated by Congress"); *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 558 (1996) ("[P]rudential limitations are rules of 'judicial self-governance' that 'Congress may remove . . . by statute.'") (internal citation omitted).

For example, in *United Food*, the Supreme Court held that Congress, through the WARN Act, could authorize a union to sue for damages on behalf of its employee-members, notwithstanding the general prudential prohibition on an association bringing an action on behalf of its members where participation of individual members in the case, such as when damages are sought, ordinarily would be necessary. *See* 517 U.S. at 551-58; *cf. Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 733 (D.C. 2000) (because standing under the D.C. Human Rights Act is co-extensive with standing under Article III, this Court "lacks the authority

[8] The general prohibition on a litigant's raising another person's legal rights is a prudential rule of standing adopted by the Supreme Court. *See Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004); *Allen*, 468 U.S. at 751; *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 955-56 (1984); *Riverside*, 944 A.2d at 1104.

to create prudential barriers to standing" under the statute").

As discussed in Part III, *infra*, the Council amended the CPPA in 2000 to create a right of action for a person, whether that person has suffered injury or not, to bring a representative action under the statute on behalf of the general public. In doing so, the Council abrogated any judicially created prudential barrier to such a lawsuit, and this Court has no authority to refuse to enforce the statute as written. Nor does the Home Rule Act, which provides that the Council has no authority to "Enact any act, resolution, or rule with respect to any provision of Title 11," D.C. Code § 1-206.02(a)(4), present an obstacle to the Council's exercise of power here. As discussed above, Title 11 does not subject the D.C. courts to Article III-like standing limitations; thus, no requirement of Title 11 is offended or altered by the CPPA's grant of a right of action to uninjured persons to serve as private attorneys general in enforcing the statute.

Finally, the Council's decision to allow representative actions by uninjured plaintiffs does not impair the courts' ability to adjudicate the rights of the parties, any more than when the Attorney General sues to enforce the rights of consumers. In both situations, a concrete dispute about challenged trade practices has been brought to the court by a party with a real interest in its resolution. *Cf. Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 772 (2000) (False Claims Act gives qui tam relator a "concrete private interest in the outcome of [the] suit") (citation and internal quotation marks omitted). Although, as discussed *infra* pp. 24-25, representative actions raise some distinct implementation issues, these issues do not stem from defects in justiciability and can be effectively managed by the courts.

III. THE CPPA, AS AMENDED IN 2000, CONFERS ON PRIVATE ATTORNEYS GENERAL THE RIGHT TO BRING AN ACTION ON BEHALF OF THE GENERAL PUBLIC TO CHALLENGE UNLAWFUL TRADE PRACTICES.

1. The CPPA is "a comprehensive statute designed to provide procedures and remedies for a broad spectrum of practices which injure consumers." *Dist. Cablevision Ltd.*

P'Ship v. Bassin, 828 A.2d 714, 722-23 (D.C. 2003) (citation omitted). "A main purpose of the CPPA is to 'assure that a just mechanism exists to remedy *all* improper trade practices.'" *Id.* at 723 (quoting D.C. Code § 28-3901(b)(1)) (emphasis added by Court). As the Court has often observed, "the CPPA is, 'to say the least, an ambitious piece of legislation,' with broad remedial purposes." *DeBerry v. First Gov't Mortgage & Investors Corp.*, 743 A.2d 699, 700 (D.C. 1999) (quoting *Howard v. Riggs Nat'l Bank*, 432 A.2d 701, 708 (D.C. 1981)).

Before the CPPA's amendment in 2000, D.C. Code § 28-3905(k)(1), which specifies who may bring a private action in court, provided:

> *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 [of Consumer and Regulatory Affairs] may bring an action in the Superior Court of the District of Columbia to recover or obtain any of the following . . . .

(emphasis added). Effective October 19, 2000, the Council enacted D.C. Law 13-172, which significantly expanded the CPPA's private right of action:

> *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 . . . .

D.C. Law 13-172, § 1402(d) (2000) (emphasis added) (codified at D.C. Code § 28-3905(k)(1)). As is evident from its plain language, the amended section eliminates the former requirement that a CPPA action be brought only by a "consumer" who has suffered "damage" from the use of an unlawful trade practice, and instead authorizes "a person" to bring an action in court "whether acting for the interests of itself, its members, or the general public." D.C. Code § 28-3905(k)(1); *see United States v. Brown*, 422 A.2d 1281, 1284 (D.C. 1980) ("[A] change in legislative language gives rise to the presumption that a change was intended in legislative result.").

In addition, the CPPA now specifically refers to "representative actions" and adds new

remedies, such as injunctive relief and restitution. D.C. Code § 28-3905(k)(1)(D) & (E). In keeping with the statutory purpose of "assur[ing] that a just mechanism exists to remedy all improper trade practices and deter the continuing use of such practices," *id.* § 28-3901(b)(1), and the new directive that "[t]his chapter . . . be construed and applied liberally to promote its purpose," D.C. Law 13-172, § 1402(b)(2) (codified at D.C. Code § 28-3901(c)), the 2000 amendments authorize a person—whether or not that person has been injured—to bring an action challenging unlawful trade practices on behalf of the general public. *See Snowder v. District of Columbia*, 949 A.2d 590, 603 & n.10 (D.C. 2008) (allowing plaintiff who did not own involved vehicle at time of alleged injury and who did not have standing to bring common-law claims, to bring CPPA claim against towing companies "on behalf of the general public").

Although the language of the statute is not ambiguous, it is useful to place this important expansion of the CPPA's private right of action in context. In 1995, the Council suspended enforcement of the CPPA by the Department of Consumer and Regulatory Affairs ("DCRA") for budgetary reasons. *See Gomez v. Indep. Mgmt. of Delaware, Inc.*, 967 A.2d 1276, 1287 & n.13 (D.C. 2009) (citing history of suspensions of DCRA enforcement authority). In the 2000 amendments, the Council extended that suspension until October 1, 2002, again for budgetary reasons. *See* D.C. Law 13-172, § 1402(c) (amending D.C. Code § 28-3902(i)); *see also* D.C. Council, Comm. of the Whole, Report on Bill 13-679, Fiscal Year 2001 Budget Support Act of 2000, at 9, 26 (May 19, 2000) ("Comm. of the Whole Report").

The D.C. Bar and other interested parties reacted to the suspension of DCRA's enforcement authority by recommending significant changes to the pre-2000 version of the CPPA to enable public interest organizations and individuals to halt and seek remedies for illegal trade practices. *See* D.C. Bar, Section on Antitrust, Trade Regulation & Consumer Affairs, *Consumer Protection in the District of Columbia Following the Suspension of DCRA*

Enforcement of the Consumer Protection Procedures Act (Apr. 1999), appended to Letter from Mara Verheyden-Hilliard, Section Co-Chair, to the Council (Mar. 29, 2000). To compensate for the absence of DCRA enforcement, the Council authorized the Office of the Corporation Counsel (now the Office of the Attorney General) "to pursue consumer protection claims more aggressively" and "provide[d] additional remedies and potential recovery on behalf of citizens and the District government, and establishe[d] a District of Columbia Consumer Protection Fund into which increased fines and other monetary remedies would be deposited and dedicated for the purposes of consumer protection." Comm. of the Whole Report at 26. Among the new means of enforcement afforded consumers, the 2000 amendments "allow representative organizations as well as individuals to maintain actions to redress unfair trade practices." *Id.* at 10.

The rationale for the expansion of the private right of action was to "provide public interest organizations and individuals additional abilities to take consumer protection actions in the public interest to stop fraudulent conduct when an unlawful trade practice comes to their attention" because, prior to the amendment, it was "not possible to bring a consumer action to stop illegal conduct until *after* a victim suffers injury." D.C. Council, Comm. on Consumer & Regulatory Affairs, Report on Bill 13-679, Fiscal Year 2001 Budget Support Act of 2000 (Apr. 26, 2000) (Section 3: Consumer Protection, Rationale). Emphasizing that one of the amendment's purposes was to eliminate the preexisting restriction that only *injured* consumers could bring a CPPA action, the committee report specifically states that the amendment "would allow, for example, an organization that monitors fraud against the elderly to petition the court to stop a misleading and fraudulent mailing in the public interest without waiting for a senior citizen to lose his or her life savings." *Id.* The committee recognized that expansion of the private right of action will "also allow the government to coordinate with the non-profit and private sectors more efficiently, allowing the government to leverage the impact of existing public

resources and target its activities in areas where enforcement by private parties will not be sufficient. As a consequence, consumer protection can be increased without any additional, or substantial, cost to the government." *Id.*; *see also* 1 The District of Columbia Practice Manual, at 8-1 to 8-2 (18th ed. 2009) (summarizing the legislative history of the 2000 CPPA amendments).

2. The D.C. courts not only have been charged by the D.C. Council with hearing private-attorney-general actions but are fully capable of discharging that duty. Because these cases are at the pleadings stage, they do not present this Court with practical case-management issues that may arise at the remedy phase of a successful private-attorney-general action. These issues may include whether and how to provide notice and opportunity to participate to members of the public, whether such actions are limited to injunctive relief, whether and how to distribute a monetary recovery to affected consumers, whether and how to employ a *cy pres* distribution, and whether and under what circumstances a judgment would bind members of the public.

Although the Court need not, and should not, touch on these questions now, there is no reason to believe that the D.C courts are incapable of crafting appropriate practical solutions that are consistent with due process. Indeed, D.C. courts have already devised ways of dispersing damages awards in representative actions without running afoul of due process. *See, e.g.*, *Boyle v. Giral*, 820 A.2d 561, 570 n.11 (D.C. 2003) (concluding that § 28-3911(a) of the CPPA permits *cy pres* distributions into the Consumer Protection Fund). The D.C. Courts may use their equitable discretion to draw upon the wealth of judicial experience in administering class actions—to assess the adequacy of a representative plaintiff, afford adequate notice to affected consumers, and ensure that the due process rights of absent consumers and defendants alike are adequately protected. In *Kraus v. Trinity Manamgent Services, Inc*., 999 P.2d 718, 733 (Cal. 2000), for example, in a case brought under the pre-2004 version of California's UCL, the California Supreme Court found it unnecessary to accept "defendants' due process-based

argument that UCL defendants must be accorded the protections against multiple suits and duplicative liability" that are "available only in a class action." To the contrary, the court explained that "[i]f defendants have already made restitution to any claimant, defendants may introduce evidence of prior payment and need not pay any tenant twice, thus alleviating the due process concerns." *Id*. at 732-33. The court also noted that in cases that present the possibility of future suits, "it may be appropriate for the court to condition payment of restitution to beneficiaries of a representative UCL action on execution of acknowledgment that the payment is in full settlement of claims against the defendant, thereby avoiding any potential for repetitive suits on behalf of the same persons or dual liability to them." *Id.* at 733. Furthermore, *Kraus* recognized that the trial court may order the defendant "to notify absent persons on whose behalf the action is prosecuted of their right to make a claim for restitution," as well as "establish a reasonable time within which such claims must be made to the defendant." *Id.* at 732 n.18.[9]

The availability of these and other case-management solutions demonstrates that the D.C. courts are not only empowered to entertain private-attorney-general actions as the Council intended, but that they are fully capable of doing so.

CONCLUSION

This Court should hold that the District of Columbia courts are not bound by the case-and-controversy requirements that apply to Article III courts and that an uninjured person may bring a representative action under the CPPA.

[9] In implementing the CPPA's private-attorney-general provision, however, courts need not, and should not, adopt class-action requirements wholesale. The D.C. courts lack the authority to simply engraft onto the Act the requirements of Fed. R. Civ. P. 23, particularly where doing so would interfere with full enforcement of the statute as the Council intended. *Cf. Gen. Tel. Co. v. EEOC*, 446 U.S. 318, 329-30 (1980) (holding that "forcing EEOC civil actions [under Title VII] into the Rule 23 model would in many cases distort the Rule as it is commonly interpreted and in others foreclose enforcement actions not satisfying prevailing Rule 23 standards but seemingly authorized by [the statute]").

Respectfully submitted,

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APPENDIX

DESCRIPTIONS OF *AMICI CURIAE*

The Legal Aid Society of the District of Columbia, a District of Columbia nonprofit organization, was founded in 1932 to "provide aid and counsel to indigent persons in civil law matters and to encourage measures by which the law may better serve their needs." Legal Aid By-Laws, Art. II. Legal Aid is the oldest general civil legal service program in the District of Columbia and represents hundreds of litigants each year before the District's courts and administrative agencies. Legal Aid's staff members work on a range of legal issues affecting persons living in poverty in the District. The program's principal practice areas are housing, family, public benefits, and consumer law. Its consumer practice, founded in 2008, seeks to protect low-income residents of the District of Columbia from unfair, deceptive, exploitative, or otherwise unlawful consumer practices and transactions. These may include the failure of businesses to adhere to consumer protection requirements of the D.C. Municipal Regulations and the CPPA.

Public Citizen, Inc. is a national, non-profit consumer advocacy organization that was founded in 1971 and is based in the District of Columbia. On behalf of its more than 250,000 members and subscribers, Public Citizen appears before legislatures, administrative agencies, and the courts on a wide range of issues, and works toward the enactment and effective enforcement of laws protecting consumers. In particular, Public Citizen is concerned about protecting consumers from abuses in the marketplace and ensuring that consumers have access to courts of general jurisdiction where the legislature so intends. To that end, Public Citizen launched a Consumer Justice Project in 2005 to handle appeals, collaborate on class-action litigation, and file amicus briefs in important consumer-law cases such as this one.

The Center for Science in the Public Interest (CSPI) is an independent non-profit organization supported by more than 750,000 individual members as well as charitable donations and foundation grants. CSPI accepts no funding from industry or government agencies. As part of its advocacy efforts, CSPI publishes an award-winning *Nutrition Action Healthletter* to inform its members about health topics of interest. As one form of advocacy, CSPI created a Litigation Project in 2004, to bring cases in state and federal courts to help correct corporate misbehavior. CSPI's legal filings have produced binding settlements resulting in more honest labeling of artificial ingredients and halting deceptive marketing. Litigation, or the threat of litigation, has spurred several companies to remove artificial trans fats from their foods and is reducing the marketing of junk foods to kids. CSPI currently has two cases pending in District of Columbia courts where the issue of standing under the CPPA is present. One is an appeal to this Court, which has been briefed and argued. *Center for Science in the Public Interest v. Burger King Corp*., No. 08-CV-001616. The other case is pending in Superior Court and has been held in abeyance pending decision on the Burger King appeal. *Center for Science in the Public Interest v. MillerCoors LLC*, No. 2008-CA-006605-B.

The National Association of Consumer Advocates (NACA) is an association of over 1,500 consumer advocates organized to help create and strengthen state and federal laws designed to protect purchasers from unscrupulous business practices in connection with consumer transactions. NACA has established itself as one of the most effective advocates for the interests of consumers in this country.

The National Consumer Law Center (NCLC) is a non-profit research and advocacy organization focusing on the legal needs of consumers, especially low-income and elderly consumers. For over forty years, NCLC has been the consumer law resource center to which legal services and private lawyers, state and federal consumer protection officials, public policy

makers, consumer and business reporters, and consumer and low-income community organizations across the nation have turned to NCLC for legal answers, policy analysis, and technical and legal support. One of the treatises in NCLC's eighteen-volume Consumer Credit and Sales Legal Practice Series is *Unfair and Deceptive Acts and Practices* (7th ed. 2008 and Supp.). NCLC recently published a comparative study of the UDAP statutes in the fifty states and the District of Columbia, *Consumer Protection in the States: A 50-State Report on Unfair and Deceptive Acts and Practices Statutes* (Feb. 2009), *available at* http://www.nclc.org/issues/udap/index.shtml.

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing Brief of the Legal Aid Society of the District Of Columbia, Public Citizen, Inc., Center for Science in the Public Interest, National Association of Consumer Advocates, and National Consumer Law Center as Amici Curiae Supporting Appellants to be delivered by first-class mail, postage prepaid, this 5th day of May, 2010, to each of the following:

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