No. 19-CV-0397

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

ANIMAL LEGAL DEFENSE FUND,

Appellant,

v.

HORMEL FOODS CORPORATION,

Appellee.

On appeal from the Superior Court of the District of Columbia,
Civil Division No. 2016 ca 004744 B (Hon. Anthony C. Epstein, Judge)

BRIEF OF AMICUS CURIAE NATIONAL CONSUMERS LEAGUE SUPPORTING APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule of Appellate Procedure 26.1, Amicus Curiae National Consumers League states that it has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

The National Consumers League (NCL), founded in 1899 by Jane Addams and Josephine Lowell and led by Florence Kelley, is the nation's oldest consumer rights organization. It is a non-profit advocacy group that provides government, industry, and other organizations with the consumer's perspective on a wide array of concerns including workplace fairness, privacy, and food and medication safety. NCL's mission is to protect and promote social and economic justice for consumers and workers in the United States and abroad. For 120 years, the NCL has stayed true to its core mission: consumers are entitled to safety, reliability and honesty in the goods and services they purchase for themselves and their families. NCL filed the first "Brandeis Brief" in *Muller v. Oregon,* 208 U.S. 412 (1908), setting a precedent for the Supreme Court's recognition of sociological evidence. The NCL educates the public on how to avoid fraud in the marketplace through its National Fraud Center. Promoting a fair marketplace for consumers was a foundational value of the NCL in 1899, and it guides the organization's work to this day.

NCL files this amicus brief due to a concern that the trial court's rejection of the Animal Legal Defense Fund ("ALDF") as a proper plaintiff will improperly

[1] All parties have consented to the filing of this brief. *See* D.C. Ct. App. R. 29(a)(2).

restrict the remedial power of the District of Columbia Consumer Protection Procedures Act ("CPPA"), after the D.C. Council unequivocally stated its intent to expand it. In 2012, the Council reaffirmed its intent to empower public interest organizations to act as private attorneys general, to prevent and remedy violations the CPPA. NCL has acted on that mandate in many suits that it has filed in this Court. Indeed, the Council expressly recognized NCL's litigation as emblematic of the kind of enforcement the 2012 amendments were intended to preserve and promote.[2] In *National Consumers League v. Gerber Prods. Co.,* Case No. 2014 CA 008202 B, 2015 D.C. Super. LEXIS 10 (Aug. 5, 2015), the court held that NCL had alleged organizational and representational standing under D.C. Code § 28-3905(k)(1)(C) & (D), and it denied a motion to dismiss NCL's claim that Gerber falsely represented its baby formula prevented or reduced risk of developing allergies. In *National Consumers League v. Bimbo Bakeries USA*, Case No. 2013 CA 006548 B, 2015 D.C. Super. LEXIS 5 (Apr. 2, 2015), the court held that NCL had standing under D.C. Code § 28-3905(k)(1)(A), (C) & (D) to claim that the

[2] *See* Yvette M. Alexander, Report on Bill 19-0581, the "Consumer Protection Amendment Act of 2012" ("Alexander Rpt."), at 2 n.1 ("For example, the National Consumers League, a consumer organization founded in 1899, brought suit on behalf of the general public against Kellogg Company for making false health claims on its cereal boxes. *See, e.g., Nat'l Consumers League v. Kellogg Co.,* No. 2009 CA005211 B (D.C. Superior Ct.). As a result of that litigation, Kellogg agreed to donate $200,000 to food-based charities and programs and 8,000 cases of cereal to local D.C. food banks and charities.").

manufacturer had made deceptive claims regarding the whole grain content of its products. In *National Consumers League v. Doctor's Assocs.*, Case No. 2013 CA 006549 B, 2014 D.C. Super. LEXIS 15 (D.C. Super. Sept. 12, 2014), the court sustained NCL's claims that Subway had misrepresented the healthful qualities of its sandwich breads. Courts have recognized that NCL has a "mission, goal, and work of protecting consumers through various efforts including promoting accurate labeling of consumer goods[.]" *NCL v. Gerber Prods. Co.,* 2015 D.C. Super. LEXIS 10, *18 (D.C. Super. Aug. 5, 2015). NCL has a well-documented interest in ensuring that District of Columbia courts remain open to organizations who seek to vindicate consumer rights.

The Council believes that NCL should have standing to act as a private attorney general based on its status as a consumer rights organization. Indeed, the amended CPPA only requires that the plaintiff be a "nonprofit organization" to be a proper plaintiff for such a suit. The CPPA also authorizes nonprofit and public interest organizations to bring suit based on injury to themselves or their members, forms of standing that Article III courts have long recognized, and which standing ALDF has demonstrated in this case. The statute further authorizes a "public interest organization" to step in to the shoes of consumers and obtain the full array of remedies that consumers could obtain in a class action or other forms of

representative actions, if it has a "substantial nexus" to the interests of consumers so that it may adequately represent those interests.

The court erred both in construing the standing requirements of the CPPA and the legal standard to apply on a motion for summary judgment. The trial court improperly weighed and illogically discounted evidence supporting the allegations that Judge Kravitz had already credited in his order denying Hormel's motion to dismiss.

In this brief, NCL wants to make one point very clear: extensive discovery or scrutiny of the kind that occurred in this case is neither necessary nor appropriate where a nonprofit organization seeks to bring suit on behalf of the "general public." NCL urges this Court to issue a ruling that respects the clear intent of the D.C. Council. This Court should affirm the explicit text of Section 28-3905 (k), reverse the trial court's judgment that ALDF does not have standing under the CPPA, and remand this case for further proceedings.

SUMMARY OF THE ARGUMENT

NCL makes three arguments below. First, the Consumer Protection Procedures Act expressly empowers public interest organizations to act as private attorneys general, without an injury-in-fact requirement. Second, the legislative history confirms the D.C. Council's express intent to expand CPPA standing for nonprofit and public interest organizations. Third, the Superior Court's improperly

restrictive application of CPPA standing law in its opinion granting summary judgment to defendant Hormel is reversible error.

ARGUMENT

NCL urges reversal of the judgment below. Affirmance will impede the ability of non-profit advocacy organizations, including NCL, to act as private attorneys general to promote a free and fair marketplace, as the D.C. Council intended. The trial court based its standing analysis on rationales that have no basis in the explicit text of the CPPA, as recently amended.

I. The Consumer Protection Procedures Act Expressly Empowers Public Interest Organizations to Act as Private Attorneys General.

The CPPA expressly empowers non-profit and public interest organizations to bring actions on their own behalf, on behalf of their members, on behalf of consumers, and on behalf of the general public. The D.C. Council enacted the Consumer Protection Act of 2000 to allow public interest organizations and the private bar to bring suit for injunctive relief and disgorgement of illegal proceeds in the public interest. The Council suspended the Department of Consumer and Regulatory Affairs' budget as a result of severe fiscal problems, and it saw public interest organizations as an alternative source of consumer protection enforcement. With the 2000 amendments, these plaintiffs could enjoin illegal trade practices *before* they harmed consumers. However, in *Grayson v. AT&T,* 15 A.3d 219 (D.C. 2011), this Court concluded that because it could not discern a clear intent to

abrogate Article III standing, an individual plaintiff bringing a claim under the CPPA needed to plead injury-in-fact. This case represents the Court's first look at the 2012 Amendments, which the D.C. Council enacted in response to *Grayson.*

NCL has seen firsthand the impact of *Grayson* in cases it brought to enforce the CPPA. In *The National Consumers League v. Kellogg Company*, No. 2009 CA 005211 B (D.C. Super. Ct.), NCL brought suit on behalf of the general public against Kellogg Company for falsely claiming that its cereal made children more attentive. The case settled before *Grayson* was published, resulting in substantial benefits to the public: $200,000 to local food-based charities and programs, around 100,000 boxes of cereal to local banks and charities.

Contrast this result with *The National Consumers League v. General Mills, Inc.*, 680 F. Supp. 2d 132 (D.D.C. 2010). NCL brought suit on behalf of the general public (before the 2012 Amendments), alleging that General Mills violated the CPPA by falsely claiming that Cheerios would lower cholesterol. General Mills removed the case to federal court, arguing that NCL *did* have Article III standing. NCL contended it *did not* have Article III standing, and it should properly be litigating its claim in D.C. Superior Court. The federal court agreed with NCL: "NCL's claim rests on alleged harm to the general public, not to itself. NCL does not allege that General Mills' conduct has had any impact -- much less a direct, adverse impact -- on its activities as an organization." *Id.* at 136. It added,

"Challenging conduct like General Mills' alleged mislabeling is the very purpose of consumer advocacy organizations." Yet after the case returned to Superior Court, this Court issued *Grayson*, and the case was then dismissed because NCL did not claim Article III injury-in-fact. *See Alexander Rpt*. at 45 (testimony of NCL).

The Council clearly has the power to expand or eliminate standing requirements by statute, because D.C. courts are Article I courts of general jurisdiction, not Article III courts of limited jurisdiction. *See Palmore v. United States,* 411 U.S. 389, 397 (1973); *Pernell v. Southall Realty,* 416 U.S. 363, 367 (1974) (recognizing express Congressional intent that the District of Columbia court system is "comparable to those of the states and other large municipalities"); *District of Columbia v. Group Ins. Administrator,* 633 A.2d 2, 12 (D.C. 1993); *see also City of Los Angeles v. Lyons,* 461 U.S. 95, 113 (1983) (stating that state courts "need not impose the same standing or remedial requirements that govern federal court proceedings."). However, the *Grayson* court observed that it had consistently followed the constitutional minimum of standing as articulated in *Warth v. Seldin,* 422 U.S. 490 (1975) and *Lujan v. Defenders of Wildlife,* 504 U.S. 555 (1992), and although the Council had eliminated a requirement that the plaintiff show damages, "which at first blush may appear to be crystal clear" in eliminating an injury in fact requirement, this "would produce the unintended result of overturning our long-

enduring legal principles governing constitutional standing[.]" 15 A.3d at 243. The Court concluded that there was nothing explicit in the 2000 amendments or the legislative history indicating that the Council intended to eliminate a requirement of injury or imminent injury. *Id.* at 238.

In the amended D.C. Code § 28-3905(k), the D.C. Council unequivocally stated its intent to confer broad standing on nonprofit and public interest organizations:

> **(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.

These new additions to Subsection (k) provide several forms of standing to nonprofit and public interest organizations. First, an organization can sue on its own

behalf, as ALDF has here, claiming injury to itself as an organization. Second, an organization can sue on behalf of its members, as occurred in *Hunt v. Washington State Apple Adver. Comm'n,* 432 U.S. 333 (1977).[3] Third, an organization can sue on behalf of the general public, as NCL often has, including the cases summarized above. Fourth, an organization can step into the shoes of consumers who *would* have standing if they brought the action themselves, and obtain the remedies that consumers could obtain, including damages.

The only fair reading of Subsection (k) is that it confers standing on organizations without requiring a showing of direct injury to themselves or their members.[4] First, there is no reason to permit actions on behalf of the "general public" in Subsection (k)(1)(C) if the organization could also bring the action on behalf of itself or its members. The mention of "general public," which has a specific history all its own, would be mere surplusage. Second, Subsection (D) creates a new vehicle for a CPPA claim that a "public interest organization" can

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[3] *See also Warth*, 422 U.S. at 511 ("Even in the absence of injury to itself, an association may have standing solely as the representative of its members."); *Kingman Park Civic Ass'n v. Bowser*, 815 F.3d 36 (D.C. Cir. 2016) (holding that a neighborhood group had associational standing to challenge a District law authorizing construction of overhead wires for streetcars).

[4] That is exactly what NCL stated in its October 11, 2012 testimony to the Committee on Public Services & Consumer Affairs, as it considered the 2012 Amendments: "the amendment to section 3905(k)(1)(B) and (C) here expresses the clear intent of the Council to grant nonprofit organizations standing under the CPPA without the need to suffer an injury-in-fact to itself or its members and to legislatively and partially overrule *Grayson."*

bring on behalf of consumers "if the consumer or class could bring" the action. Again, this entire provision would be no more than surplusage if it required the organization to have standing in its own right to bring such an action. The organization need only show that it "operat[es], in whole or in part, for the purpose of promoting interests or rights of consumers, and that it has a "sufficient nexus" to consumers' interests to adequately represent those interests. D.C. Code §§ 28-3901 (a)(15), 28-3905(k)(1)(D).

The Council modeled the CPPA's private attorney general provisions on California's Unfair Competition Law, which for years until its 2004 amendment gave individuals and organizations standing to bring actions on behalf of the "general public," with *no* constitutional standing or injury in fact requirement. The CPPA – "on behalf of itself or any of its members, or on any such behalf and on behalf of the general public" – is almost identical to the pre-2004 UCL – "any person acting for the interests of itself, its members or the general public." *See Stop Youth Addiction, Inc. v. Lucky Stores, Inc.,* 17 Cal. 4th 553, 567 (1998) (holding private, for-profit corporation had standing to bring action on behalf of general public to prevent retailer from selling cigarettes to minors: "a private plaintiff who has himself suffered no injury at all may sue to obtain relief for others."). Rejecting a challenge to the provision, the California Supreme Court rightly recognized that "it is not for the courts . . . to determine whether or not the policy of a statute is

economically sound or beneficial. That is a matter solely for the legislature." *Id.* at 1102.

In addition, the CPPA does not require that an organization be deceived or suffer any damages. Alan Grayson alleged that defendants had injured him by violating his right to truthful information regarding prepaid calling cards, despite the fact that he himself was not deceived and had not suffered any economic injury, and he did not allege that any other individual consumer was injured. *See Grayson*, 15 A.3d at 227-28. Moreover, had defendants done what Grayson asked, he and other consumers would not be compensated, because Grayson demanded that any damages be turned over the mayor, not to him or anyone else. On these facts, the Court held that Grayson had standing. It recognized "[t]he deprivation of . . . a statutory right [to be 'free from improper trade practices'] may constitute an injury-in-fact sufficient to establish standing, even though the plaintiff would have suffered no judicially cognizable injury in the absence of [the] statute.'" *Id.* (quoting *Shaw v. Marriott Int'l Inc.,* 605 F.3d 1039, 1042 (D.C. Cir. 2010)).

The D.C. Council amended the CPPA to reflect the Court's holding: "This chapter establishes an enforceable right to truthful information from merchants about consumer goods and services that are or would be purchased, leased, or

received in the District of Columbia."[5] The Council explained that this amendment "is intended to more explicitly illuminate that the kinds of harm actionable under the CPPA include the provision of untruthful or misleading information, whether or not measurable economic damages demonstrably result to any particular consumer," and it cited federal cases holding that the plaintiff organization did *not* have Article III standing despite having tester standing. *See* Alexander Rpt. at 3. The Council clearly intends that organizations may bring actions as testers, but it does not in fact require a purchase to confer private attorney general standing.[6]

[5] D.C. Code § 28-3901(c) (emphasis added); *see Zuckman v. Monster Beverage Corp*., Case No. 2012 CA 008653 B, 2016 WL 4272477, at *1 & n.1 (D.C. Super. Aug. 12, 2016) ("the CPPA provided [plaintiff] a statutory right to truthful information concerning Monster Energy drinks," and violation of this right was "sufficiently concrete to satisfy the injury-in-fact requirement of Article III.").

[6] *See* § 28-3905(k)(1)(C) (using word "including" to indicate that tester standing was not the exclusive means of bringing an action under this subsection). A similar provision exists in the Fair Housing Act that the Supreme Court examined in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982). "Congress intended standing under § 812 to extend to the full limits of Art. III, and that the courts accordingly lack the authority to create prudential barriers to standing in suits brought under that section." *Id.* at 372. Individuals and organizations, even those who have no intention of renting a property and know they are being lied to about the availability of housing, have a right to truthful information; they sustain cognizable Article III injury and have Article III standing when they are subject to unlawful misrepresentations.

It is important to note that although the amended § 28-3905(k) confers standing on organizations without requiring a showing of injury in fact, the CPPA respects the principle underlying Article III, which is that the organization has a particularized stake in the controversy that will ensure it prosecutes the matter with sufficient zeal. An organization can still allege injury to itself or its members, or it can proceed pursuant to Subpart (D), which requires a showing that the organization has a "sufficient nexus to the interests involved of the consumer or class to adequately represent those interests." Moreover, it is not the case that these new forms of standing create some kind of windfall for opportunistic plaintiffs. First, standing under these provisions is only available to "nonprofit organizations" and "public interest organizations," which are specifically defined in Section 28-3901; a for-profit entity could not avail itself of this remedy. Second, any damages go to the "consumer," not the organization itself. D.C. Code § 28-3905(k)(2).

The D.C. Council's act of deputizing public interest organizations to act as private attorneys general is analogous to the False Claims Act, 31 U.S.C. §§ 3729-3733, which grants individuals the power to bring "qui tam" fraud actions on behalf of the government, in the absence of any injury to themselves.[7] In *Vermont Agency of Nat. Resources v. United States ex rel. Stevens,* 529 U.S. 765 (2000), the

[7] "Qui tam" means "who as well," and derives from the Latin phrase "qui tam pro domino rege quam pro se ipso in hac parte sequitur," meaning "who sues in this matter for the king as well as for himself."

Supreme Court held that "[t]he FCA can reasonably be regarded as effecting a ***partial assignment*** of the Government's damages claim," and thus, a relator has standing based on "the United States' injury in fact." *Id.* at 773-74 (emphasis added). The Court observed that the qui tam relator's interest in the portion of the recovery was no better than someone who placed a wager on the outcome and as such, this interest was an unrelated "byproduct" of the injury in fact that would be insufficient to give a plaintiff standing. But the Court reasoned that it had long entertained actions by assignees and subrogees and that qui tam actions had a long tradition in English courts going back to the 13th century, as well as appearing in courts in the American colonies.

> We think this history well nigh conclusive with respect to the question before us here: whether *qui tam* actions were "cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process." *Steel Co.*, 523 U.S. at 102. When combined with the theoretical justification for relator standing discussed earlier, it leaves no room for doubt that a *qui tam* relator under the FCA has Article III standing.

Id. at 777-78; *see also District of Columbia v. ExxonMobil Oil Corp.*, 172 A.3d 412, 424 (citing *United States ex rel. Stevens*) ("Case law establishes that a government is injured when its laws are violated.").

The D.C. Council has effectuated a similar assignment of rights in the 2012 Amendments. If Article III courts can observe an assignment of standing to plaintiffs who do not plead injury, surely a non-Article III court can as well. *See*

Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 12 (2004) (explaining that the general prohibition on a litigant's raising another person's legal rights is a *prudential* rule of standing adopted by the Supreme Court). This Court has observed that it has adopted Article III standing requirements "for prudential reasons," and as such, they are subject to change by the legislature. *Group Ins. Admin.*, 633 A.2d at 12. Imposing Article III requirements on a non-Article III court, contrary to the express intent of the D.C. Council, would not reflect judicial restraint, but judicial overreach. A court should not substitute its policy views, however well-intended, for those of the legislature.

States may assign their rights to sue to individuals and organizations as well, and that assignment of rights is cognizable in federal courts. California has done just that in the Private Attorneys General Act of 2004, Cal. Labor Code § 2698 *et seq.* ("PAGA"), which assigns "aggrieved employees" standing to seek civil penalties on behalf of the State of California and other aggrieved employees for violations of the California Labor Code. A federal court recently held that a PAGA plaintiff had Article III standing to represent other employees, even though she was not injured by Costco's alleged violation towards others. *Canela v. Costco Wholesale Corp.*, Case No. 13-cv-3598, 2018 U.S. Dist. LEXIS 88037 (N.D. Cal. May 28, 2018). Recognizing that courts were divided on the issue, the court stated, "Contrary to Costco's contention, the court concludes that PAGA actions are

appropriately considered to be like qui tam actions when determining the plaintiff's standing. The California Supreme Court has clearly recognized a PAGA suit as 'a type of qui tam action' brought by 'private attorneys general.'" *Id.* at *13-14 (quoting *Iskanian v. CLS Transp. Los Angeles, LLC,* 59 Cal. 4th 348, 363 (2014)). The court also dismissed Costco's argument that the plaintiff could not represent other employees without certification under Rule 23, reasoning that the California statute was not procedural. *Canela* recognized that both state and federal governments can assign their standing to others who will satisfy Article III.

Article III courts also have long recognized "derivative" standing in a variety of contexts. Shareholders may file derivative actions in Article III courts on behalf of the corporation for injury to the corporation, standing which derives from equity. *See United Copper Sec. Co. v. Amalgamated Copper Co.,* 244 U.S. 261 (1917); *Hawes v. Oakland,* 104 U.S. 450 (1882). ERISA also confers derivative standing based on an assignment of rights. *See, e.g., Physicians Multispecialty Grp. v. Health Care Plan of Horton Homes, Inc*., 371 F.3d 1291, 1294 (11th Cir. 2004). In addition, federal bankruptcy courts, which are non-Article III, statutory courts, recognize the standing of creditors to sue derivatively to recover property for the benefit of the estate. *See, e.g., Official Committee of Unsecured Creditors of Cybergenics v. Chinery,* 330 F.3d 548 (3d Cir. 2003). Given that D.C. courts are

Article I courts, the ability of the D.C. Council to expand or modify an injury in fact requirement is not only not in doubt; it is also not unusual.

II. The Legislative History of the 2012 Amendments Confirms the D.C. Council's Express Intent to Expand CPPA Standing.

Even if there were any doubt that the 2012 Amendments eliminated a requirement that an organization seeking private attorney general status must demonstrate Article III injury, the legislative history would settle it. The very first paragraph of the Alexander Report states that one purpose of the statute is "to provide explicit ***new*** authorization for non-profit organizations and public interest organizations to bring suit under the District's consumer protection statute[.]". Alexander Rpt. at 1 (emphasis added). It notes that the 2000 amendments to the CPPA permitted persons and entities to sue "on behalf of themselves or the general public," and subsequently, "both public interest organizations and the private bar have acted as 'private attorneys general' in the District of Columbia by suing on behalf of members of the general public that would have been injured by a given unlawful trade practice, and have obtained great relief for District of Columbia citizens." *Id.* at 2. The Report singles out NCL's Kellogg suit as an example of a private attorney general suit that obtained excellent relief for the general public. *Id*.

The Report observed that *Grayson,* while it only addressed individuals' standing, "had a chilling effect on non-profit public interest organizations litigating cases in the public interest." *Id.* The Council intended the 2012 Amendments to

ensure that public interest and nonprofit organizations would have standing to bring such actions. "The bill revises section 28-3905(k)(1) . . . to provide further clarity in the wake of the D.C. Court of Appeals' decision in *Grayson*." *Id*. at 4. "The bill responds to *Grayson* by being more explicit about what kinds of suits the Council intends to authorize." *Id.* at 4.

One remarkable aspect of Subsection (k)(1)(C) is its explicit authorization of tester standing for organizations: "a tester organization that has not actually been misled may nevertheless have standing based on a violation of its right to truthful information about the goods or services it tests." *Id.* at 5. Thus, an organization has standing under this subsection by purchasing the subject product, just as the individual plaintiffs in *Havens* had standing by being lied to about the availability of rental housing for people of color, "without respect to the testers' intentions in initiating the encounters." *Molovinsky v. Fair Employment Council of Greater Washington, Inc.*, 683 A.2d 142, 146 (D.C. 1996).

It is in the Report's remarks on subsection (k)(1)(D), conferring "maximum standing" on public interest organizations, that it makes most clear that the expansive wording of the statute is no accident: the Council fully intended to confer a broad statutory mandate on organizations including ALDF and NCL.

> New subsection (k)(1)(D) responds most directly to *Grayson* and the Committee's desire to explicitly state the maximum of the Council's intentions for maximum standing in enacting the 2000 amendments to the CPPA.

> Subparagraph (D) is intended to explicitly and unequivocally authorize the court to find that a public interest organization has standing beyond what would be afforded under subparagraphs (A)-(C), beyond what would be afforded under a narrow reading of prior DC court decisions, and beyond what would be afforded in a federal case under a narrow reading of prior federal court decisions on federal standing.

Id. at 6. It would be a usurpation of the legislature's role, and it would undermine its intent, to construe Subsection (k) narrowly. "This chapter shall be construed and applied liberally to promote its purpose." D.C. Code. § 28-3901(c).

III. The Superior Court's Improperly Restrictive Application of CPPA Standing is Reversible Error.

The trial court erred in its evaluation of both the quantity and quality of evidence necessary to establish standing. Nothing in the evidentiary record contradicted the well-pled allegations on which Judge Kravitz denied Hormel's motion to dismiss; he set out a roadmap that the parties followed through discovery yet the subsequent court failed to follow at the summary judgment. Instead of reviewing the record to determine if there was *sufficient evidence* from which the finder of fact could conclude that ALDF had standing under D.C. Code § 28-3905(k), the court weighed, resolved, credited and rejected evidence in the record, and even let its view of the merits of ALDF's underlying consumer fraud claim inform its ruling. This is reversible error.

The Supreme Court addressed the evidentiary burden necessary to establish the elements of standing at the summary judgment phase in *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992): "the plaintiff can no longer rest on such "mere allegations," but must "set forth" by affidavit or other evidence 'specific facts,' Fed. Rule Civ. Proc. 56(e), which for purposes of the summary judgment motion *will be taken to be true*." *Id*. at 561 (emphasis added) (quoting *Lujan v. National Wildlife Fed'n,* 497 U.S. 871, 889 (1990). Sworn statements setting forth specific facts can serve to satisfy the non-movant's evidentiary burden. *See Veitch v. England*, 471 F.3d 124, 134 (D.C. Cir. 2006) (Rogers, J., concurring). Only if the plaintiff fails to put forward sufficient evidence on which the factfinder could conclude satisfied the minimum requirements of Article III standing is dismissal the proper result. *See Grayson*, 15 A.3d at 232 (citing *Warth v. Seldin*, 422 U.S. 490, 501-02 (1975). If there is a material fact dispute as to standing – e.g., conflicting evidence as to whether an organization actually engages in particular activities – summary judgment must be denied. A "genuine issue" exists so long as "the evidence is such that a reasonable jury could return a verdict for the nonmoving party [respondents]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). This court has likened the non-movant's evidentiary showing to a prima facie case. *Nader v. de Toledano*, 408 A.2d 31 (D.C. 1979), *cert. denied*, 444

U.S. 1078 (1980). If the plaintiff proffers a sufficient quantum of evidence in response to a motion for summary judgment, the motion must be denied.

The amended CPPA greatly streamlines the standing inquiry for non-profit organizations. A plaintiff need not be subject to a full company audit to determine its standing under Subsection (k). All it must establish to sue on behalf of the general public under Subsection (k)(1)(C) is that it is a "public interest organization" as defined in § 28-3901(a)(15). Or it can show that it is a "public interest organization" with a "sufficient nexus to the interests involved of the consumer or class to adequately represent those interests" to proceed under Subsection 28-3905(k)(1)(D). The sworn declarations of ALDF employees fully satisfied these requirements.

The trial court erred in concluding that Subsection (k)(1)(D) did not apply because ALDF did not qualify as a "public interest organization," defined in § 28-3901(a)(15) as "a nonprofit organization that is organized and operating, in whole ***or in part***, for the purpose of promoting interests or rights of consumers." (emphasis added). The court stated that ALDF "is organized and operating to promote not the interests and rights of the consumers of Hormel meat products, but rather those of the consumed." Order at 13. This conclusion was reversible error. The CPPA does not require that consumer rights be the only or even the primary purpose of the organization. It only requires that ALDF be organized and operating

"in part" for promoting the interests or rights of consumers. Oddly, the court found exactly that: it acknowledged as an *undisputed fact* that ALDF "believes that providing consumers with accurate information about factoring farming conditions and practices will reduce consumer demand for factory-farmed products." Order at 8 (citing ALDF SOMF ¶ 12). The court on page 13 appeared unaware of what it had written on page 8. This is plain error.

The trial court appeared to find it inappropriate that an animal rights organization would seek to enforce consumer rights. But there is nothing unusual or improper about a non-profit organization that has particularized concerns about commercial practices bringing suit as ALDF did here. For example, organizations such as NCL who are concerned with exploitative labor practices may sue to bring those practices to the attention of consumers, when a merchant misleads consumers about those practices.[8] Courts also have recognized the standing of animal rights

[8] *See, e.g., Kasky v. Nike, Inc.,* 27 Cal.4th 939, 969 (2002) (holding that false or misleading messages about the working conditions in a company's factories were actionable under the UCL; "for a significant segment of the buying public, labor practices do matter in making consumer choices."); Douglas A. Kysar, *Preferences for Processes: The Process/Product Distinction and the Regulation of Consumer Choice,* 118 Harv. L. Rev. 525, 529 (2004) ("[C]onsumer preferences may be heavily influenced by information regarding the manner in which goods are produced."); Deirdre S. Shaw & Ian Clarke, Culture, Consumption and Choice: Towards a Conceptual Relationship, 22 J. Consumer Stud. & Home Econ. 163, 166 (1998) (arguing that "for many consumers ethical attributes are one among a 'bundle' of other product attributes that must be evaluated when making purchase decisions"); Robin L. West, Liberalism Rediscovered: A Pragmatic Definition of

organizations, including ALDF, in consumer protection cases.[9] In *Organic Consumers Ass'n v. Sanderson Farms, Inc*., 284 F. Supp. 3(d) 1005, 1012 (N.D. Cal. 2018), the court held that three public interest organizations – a food safety organization, an organic food organization, and an environmental group – had standing to challenge a factory farm's misrepresentations of its meat as "natural." Each organization had a specific policy goal that motivated its participation in the suit, but what they had in common was a pro-consumer goal: informing consumers about misleading sales practices so that they would make more informed purchasing decisions. Such suits serve the truth-promoting purpose of consumer protection law. The CPPA does not ask the court to interpose its own view about whether an organization's agenda is worthwhile. ALDF has established that it wants consumers to know that Hormel's meat products are the result of factory

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the Liberal Vision, 46 U. Pitt. L. Rev. 673, 702 (1985) (describing traditional liberal theory's embrace of the principle of "equal respect for the differing preferences and visions of the good life with which individual consumers and producers approach the market").

[9] *See People for the Ethical Treatment of Animals v. Whole Foods,* Case. No. 15-cv-4301, 2016 U.S. Dist. LEXIS 11006, *8 (N.D. Cal. Jan. 29, 2016) (holding that PETA had standing to bring claims that Whole Foods misled consumers that its meat was humanely raised, where it alleged that its mission "focuses on improving and educating the public about animal use in four main areas, including animals raised for food."); *Animal Legal Def. Fund v. Great Bull Run, LLC*, Case No. 14-cv-1171, 2014 U.S. Dist. LEXIS 78367, *13-14 (N.D. Cal. June 6, 2014) (holding that ALDF had standing under California's UCL because it sufficiently alleged a diversion of resources from its mission of educating the public about animal cruelty).

farming, so they will buy less of them, resulting in diminished animal suffering. By bringing this suit, ALDF is holding a merchant accountable for deceptive marketing, just as the framers of the CPPA intended.

The trial court also erred in doubting ALDF's commitment to this suit by questioning whether consumers were actually misled. See Slip Op. at 16 (doubting "that ALDF would invest substantial resources to counteract Hormel's advertising program when it had only very limited, anecdotal evidence that a significant number of consumers were actually misled"). In evaluating ALDF's standing, the court was obligated to credit ALDF's expert testimony that Hormel's marketing *was* deceptive and would mislead a reasonable consumer. This Court did not dismiss Mr. Grayson's complaint on standing grounds even though he failed to state a claim. *See* 15 A.3d at 251. To the contrary, the Court stated, "the 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." *Id.* at 229. In this case, the trial court put the cart before the horse.

Last, the superior court improperly considered "fairness" to the defendant as part of its standing inquiry. Addressing what it erroneously construed as conflicting evidence in the record about ALDF's mission, the trial court stated, "It would be unfair in these circumstances to Hormel to allow ALDF to change its position at this stage of the case." The standing inquiry is "the determination of

whether a specific person is the proper party to bring a matter to the Court for adjudication." Erwin Chemerinsky, *Federal Jurisdiction* § 2.3, at 56 (3d ed. 1999), *quoted in Executive Sandwich Shoppe, Inc. v. Carr Realty Corp.*, 749 A.2d 724, 731 (2000). A plaintiff may have a slam-dunk case on the merits but not make it past the pleadings stage if it is not the proper party to bring the suit. Conversely, as was the case in *Grayson,* a court may dismiss a claim on a motion to dismiss, but also find the plaintiff has demonstrated injury and is entitled to litigate the claim. Most important here, a CPPA case that may not be proper for adjudication in an Article III court may be perfectly suitable for hearing in this Court. This appears to be an instance where the court let its unfavorable view of the merits of ALDF's claim improperly affect its application of the law to the facts.

CONCLUSION

Amicus the National Consumers League urges this Court to reverse the judgment of the trial court and remand the case for further proceedings.

Dated: August 6, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 6, 2019, I caused a copy of the foregoing document to be sent by first class mail and filed via the Court's electronic filing system, which will send a notice of filing to any of the following registered users:

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