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

DISTRICT OF COLUMBIA
COURT OF APPEALS

ALAN GRAYSON,
Plaintiff-Appellant,

v.

AT&T CORPORATION, ET AL.,
Defendants-Appellees.

PAUL M. BREAKMAN,
Plaintiff-Appellant,

v.

AOL, LLC,
Defendant-Appellee.

On Rehearing En Banc of Appeals from the Superior Court of the District of Columbia

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BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLEES AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to D.C. Court of Appeals Rule 28(a)(2)(B), *Amicus Curiae* the Chamber of Commerce of the United States of America states as follows:

The Chamber of Commerce of the United States of America is a non-profit corporation organized under the laws of the District of Columbia; it has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses, representing 300,000 direct members and indirectly representing the interests of over 3,000,000 companies, as well as state and local chambers and industry organizations throughout the country. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. Ninety-six percent of the Chamber's members are businesses with fewer than 100 employees.

An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs involving issues of national concern to American business. The Chamber has filed *amicus* briefs in numerous cases in courts around the country involving issues pertaining to standing requirements and consumer-protection laws. *See*, *e.g.*, *Meyer v. Sprint Spectrum L.P.*, 200 P.3d 295 (Cal. 2009); *Snowney v. Harrah's Entm't, Inc.*, 112 P.3d 28 (Cal. 2005). The Chamber is especially interested in this case because altering or abolishing the traditional standing requirements for claims arising under the D.C. Consumer Protection Procedures Act (CPPA) would eliminate a vital safeguard against abusive and extortionate lawsuits. Indeed, as detailed below, the *Grayson* division's decision threatens to turn D.C. courts into a magnet for the same sorts of abusive faux-consumer-protection lawsuits that were routinely filed in California state courts until standing requirements were restored by a 2004 ballot initiative.

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[1] Counsel for all parties have consented to the filing of this brief. *See* D.C. App. R. 29(a).

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The standing doctrine—and in particular, the requirement that a plaintiff demonstrate that he or she has suffered an injury before bringing suit—is not a mere formalism that may lightly be cast aside. Rather, standing requirements serve a number of vital functions, such as protecting against abusive and meritless lawsuits; directing limited judicial resources toward cases involving real harms rather than squandering them on nuisance suits; and ensuring that cases are adjudicated within a concrete factual setting that allows for informed judicial decisions.

For these reasons, courts have long enforced the traditional standing requirements as a prudential matter, separate and apart from any constitutional commands. Thus, even if the *Grayson* division were correct that the federal case-or-controversy requirement is inapplicable to the D.C. courts, there remain powerful prudential reasons for construing the CPPA to incorporate traditional standing requirements, just as this Court has long required in a variety of other contexts. The Court therefore need not reach any of the difficult constitutional questions in this case.

That the Council omitted the phrase "suffers any damage" when it rewrote the CPPA in no way precludes this Court from construing the Act to incorporate a standing requirement. As the Supreme Court has long instructed, courts should not presume a legislative intent to alter or abolish prudential standing requirements unless the legislature does so "expressly or by clear implication." Neither the CPPA nor the 2000 amendments evince any such clear or affirmative statement; to the contrary, the *Grayson* division's holding was based on a mere omission—the very antithesis of a clear statement.

An additional reason against presuming that the Council intended to allow uninjured plaintiffs to sue is that such a fundamental change would convert the CPPA into a license to shake down any and all businesses that operate in the District. The dangers of this interpretation

are vividly illustrated by California's experience with eliminating standing requirements under its consumer-protection statute, which resulted in thousands of groundless and extortionate lawsuits before strict standing requirements were restored by a 2004 ballot initiative.

Even with traditional standing requirements firmly in place, the District of Columbia has experienced its own share of abusive faux-consumer-protection lawsuits, with recent high-profile abuses like the infamous "Great American Pants Suit" attracting international media attention. If the CPPA were construed to allow claims by uninjured plaintiffs, this sort of abuse would expand exponentially. Unlike agency enforcement actions, which can be initiated only by government officials who are accountable to the public and who must exercise prosecutorial discretion, private enforcement actions are almost entirely lawyer-driven and seek to maximize personal payouts rather than serve the public interest. By requiring private plaintiffs to establish a concrete basis for suing, the standing doctrine diminishes the risk that CPPA claims will be used as a tool for extortion when they should instead be reserved for combating real harms through cases that promote—rather than undermine—the public welfare.

ARGUMENT

I. WHETHER OR NOT ARTICLE III IS DIRECTLY APPLICABLE, PRUDENTIAL CONSIDERATIONS DICTATE ADHERING TO TRADITIONAL LIMITS ON STANDING.

Although aspects of the standing doctrine are often ascribed to the Article III case-or-controversy requirement, courts have enforced elementary limits on standing since long before the Supreme Court tied them to any constitutional mandate. "[I]n earlier [American] cases, the doctrine of standing is seen, not as a constitutional command, but as a prudential limitation." Heather Elliot, *The Functions of Standing*, 61 STAN. L. REV. 459, 471 (2008). Even today, many of the standing requirements enforced by the Supreme Court can be attributed to prudential

concerns rather than—or in addition to—any constitutional requirement. *See*, *e.g.*, *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 471 (1982) ("The term 'standing' subsumes a blend of constitutional requirements and prudential considerations, and it has not always been clear in the opinions of this Court whether particular features of the 'standing' requirement have been required by [Article III], or whether they are requirements that the Court itself has erected and which were not compelled by the language of the Constitution.") (internal citation omitted).

Thus, as the *Grayson* division recognized, this Court "ha[s] generally adhered to [the case-or-controversy] requirement in determining whether a party has standing," without regard to whether Article III literally applies. *Grayson v. AT&T Corp.*, 980 A.2d 1137, 1155 n.78 (D.C. 2009). That requirement is motivated by concerns that are just as compelling whether standing is given a constitutional label or instead applies simply as a prudential matter. Absent a clear and express legislative statement specifically abolishing this longstanding requirement—a statement that is nowhere to be found in the CPPA or the 2000 amendments—the Court should continue to require that a plaintiff demonstrate standing in order to bring a CPPA claim.

A. The Standing Doctrine Serves Many Important Functions And Should Not Lightly Be Cast Aside.

The traditional elements of the standing doctrine—injury, causation, and redressability—are required not merely to comply with Article III, but to serve the larger need to "limit the business of * * * courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 95 (1968); *see also Massachusetts v. EPA*, 549 U.S. 497, 516 (2007) (same). The doctrine is critical to ensuring the just, accurate, and fair judicial resolution of disputes.

First, the standing doctrine serves to "assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Valley Forge*, 454 U.S. at 472. As the Supreme Court has explained, "[o]nly concrete injury presents the factual context within which a court * * * is capable of making decisions." *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 221 (1974). Without this "essential dimension of specificity," the court is deprived of "a complete perspective on the adverse consequences flowing from the specific set of facts undergirding [the plaintiff's] grievance." *Id.* When courts unnecessarily reach out and decide issues without the benefit of concrete facts, there is a substantial danger that their decisions will give rise to significant problems that the courts failed to anticipate. *See* 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3531.3 (3d ed. 1998).

Second, standing requirements are necessary to ensure that a plaintiff has "such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Requiring parties to have a personal stake in the litigation provides "the proper adversarial presentation" (*Massachusetts v. EPA*, 549 U.S. at 517) because "[i]mmediate tangible benefit is thought to be a surer incentive to effective presentation than the hope of vindicating abstract values" (WRIGHT ET AL., *supra*, § 3531.3).

Third, the "[s]tanding doctrine functions to ensure * * * that the scarce resources of * * * courts are devoted to those disputes in which the parties have a concrete stake." *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 191 (2000). It is "desirab[le] [to] confin[e] the right to sue to the person who has the greatest interest in the outcome of the suit,

rather than allowing someone with a tenuous interest to gum up the works by suing also or instead." *Frierdich v. United States*, 985 F.2d 379, 382 (7th Cir. 1993). Permitting a plaintiff to sue without injury encourages nuisance suits that put a tremendous strain on the legal system. Because the only thing that uninjured plaintiffs stand to gain from these lawsuits is money damages—not redress of any actual violation of their legal rights—these plaintiffs are prone to sue over trifles rather than true harms and to demand payment of greenmail rather than redress of actual grievances.

B. This Court Should Require A Clear Statement Before Presuming Legislative Intent To Abolish Deep-Seated Principles Of Standing.

Given the important role played by the standing doctrine, this Court should require a clear and express legislative statement before concluding that the D.C. Council intended to eliminate this longstanding and salutary doctrine. The Supreme Court has expressly adopted a clear-statement rule in the very context of standing requirements, explaining that even though prudential standing requirements can be overcome by statute, the courts should not presume a legislative intent to abolish traditional standing requirements unless the statute does so "expressly or by clear implication." *Warth v. Seldin*, 422 U.S. 490, 509-10 (1975).

The clear-statement rule is a corollary of the broader principle of construction that, "when there are two reasonable constructions for a statute, yet one raises a constitutional question, the Court should prefer the interpretation which avoids the constitutional issue." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 545 (2001); *see also Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) (because the retroactive application of a statute providing for punitive damages would implicate serious constitutional concerns, the statute should be construed to be prospective only, absent an "unambiguous directive" that Congress intended retroactivity); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991) (applying "plain statement rule" to avoid broad construction of statute

that would raise difficult federalism concerns, without addressing whether the broader interpretation could withstand constitutional scrutiny).

In keeping with these core principles, courts in other states have applied a clear-statement rule when determining whether to construe a consumer-protection statute to eliminate standing requirements. For example, Colorado's consumer-protection statute specifies that the remedies set forth in the statute "shall be available to any person in a civil action * * * against any person who has engaged in * * * any deceptive trade practice." COLO. REV. STAT. § 6-1-113(1). The Colorado Supreme Court recognized that "[a] literal reading of the phrase 'any person' would permit a private cause of action regardless of whether the plaintiff had suffered injury in fact," but declined to give the statute that literal reading because doing so "would violate our fundamental standing requirements." *Hall v. Walter*, 969 P.2d 224, 230-31 (Colo. 1998) (en banc). Accordingly, to avoid "constitutional infirmities," it held that individuals must allege that they suffered injury as a result of the deceptive practice in order to sue under the statute. *Id.* at 231.

There is no question that, like the Colorado statute, the CPPA is subject to two possible interpretations. The revised CPPA provides that "[a] person, whether acting for the interests of itself, its member, or the general public, may bring an action * * *." D.C. CODE § 28-3905(k)(10). It does not say one way or the other whether the person must allege an injury to himself or herself. Moreover, construing the CPPA's silence to eliminate standing requirements would raise serious constitutional questions. *See* Appellees' Br. 18-33. Accordingly, because neither the statute itself nor its legislative history contains a clear expression of the Council's intent to abandon traditional standing requirements, the CPPA should be construed to retain them.

The Court should therefore hold that plaintiffs who desire to bring CPPA claims must continue to demonstrate that they have been injured by the challenged practice and have standing to bring suit. If the Council wishes to extend the CPPA beyond these traditional and longstanding limits, it should say so expressly, at which point the question whether the change is constitutional would be ripe for consideration by the courts.

II. ABOLISHING ALL STANDING REQUIREMENTS IN CPPA CASES WOULD HAVE WIDESPREAD PERNICIOUS EFFECTS.

An additional reason for not inferring that, in omitting the words "suffers any damages," the Council meant to allow uninjured plaintiffs to sue is that such a fundamental change would convert the CPPA into a license to shake down any and all businesses that operate in the District. Indeed, the profound dangers of allowing uninjured plaintiffs to bring purported consumer-protection actions absent any semblance of personal injury are more than merely speculative. California's recent experience with abandoning standing requirements for consumer-protection plaintiffs was an unmitigated disaster, resulting in thousands of groundless and extortionate shakedown lawsuits before the public voted overwhelmingly to restore full standing requirements in consumer-protection cases. This change would surely be just as disastrous here in the District. The CPPA already has proven to be exceptionally prone to abuse in high-profile lawsuits that have brought unflattering international media attention, even without abandoning the injury-in-fact requirement.

A. The California Saga Starkly Illustrates The Perils Of Abolishing Standing Requirements In Consumer-Protection Cases.

To see just how calamitous the *Grayson* division's interpretation of the CPPA would be, the Court need look no further than California's disastrous experience with eliminating standing requirements under its parallel consumer-protection statute. Although California has provided a

private right of action under its state consumer-protection law since 1933, few private plaintiffs brought claims under the law until many decades later, when the California Supreme Court began to give it an expansive judicial gloss. *See Kraus v. Trinity Mgmt. Servs., Inc.*, 999 P.2d 718, 727 (Cal. 2000) (discussing history of California's Unfair Competition Law, CAL. BUS. & PROF. CODE §§ 17200 *et seq.*). Under these broad decisions, "an actual injury to the consuming public or competitors was not required" to bring a consumer-protection claim. *People v. Cappuccio, Inc.*, 251 Cal. Rptr. 657, 663 (Ct. App. 1988) (discussing *People v. E.W.A.P, Inc.*, 165 Cal. Rptr. 73 (Ct. App. 1980); *Barquis v. Merchants Collection Ass'n*, 496 P.2d 817 (Cal. 1972) (en banc)). The result of this expansion was a private cause of action that was "unique in the nation * * * allow[ing] any Californian to sue a business for wrongdoing on behalf of the general public even if no one, including the plaintiff, ha[d] been personally injured." Michael Hiltzik, *Consumer-Protection Law Abused in Legal Shakedown*, L.A. TIMES, July 21, 2003, at B1.

However well-intended it might have been, elimination of the injury requirement for consumer-protection claims produced a system "riddled with loopholes that unprincipled lawyers use[d] to shake down small businesses." Editorial, *A Remedy for Shakedowns*, L.A. TIMES, Feb. 27, 2004, at B14. This "legal shakedown scheme" was most famously illustrated by "the sort of abuse of California's unfair competition law which made the Trevor Law Group a household name in California in 2002 and 2003." *People ex rel. Lockyer v. Brar*, 9 Cal. Rptr. 3d 844, 845 (Ct. App. 2004). Unscrupulous attorneys would "scour public records on the Internet for what [were] often ridiculously minor violations of some regulation or law by a small business, and sue that business in the name of [a] front organization" which had no meaningful relationship with the business and which had never been injured by the alleged violation. *Id.* at 1316.

Because "even frivolous lawsuits can have economic nuisance value" (*id.*), California's unrestricted and then-unprecedented consumer-protection statute became a pernicious tool for legal extortion. The attorneys behind these claims would "contact the business (often owned by immigrants for whom English is a second language) and point out that a quick settlement * * * would be in the business's long-term interest." *Id.* "Since most of their victims didn't have the wherewithal to hire their own lawyers, and had little experience responding to formal legal complaints, this scam began to look like a new frontier in legal extortion." Hiltzik, *supra*, at B1. And even when one business refused to settle and successfully defended itself in court, the legal fees alone "cost the auto body shop $10,000—roughly $8,000 more than the law firm had wanted for a settlement." David Reyes, *Business Owners Rally Around Initiative to Limit Lawsuits*, L.A. TIMES, Sept. 16, 2004, at B3.

Nor was this widespread scam limited to the Trevor Law Group. Even as the Trevor attorneys were forced to surrender their law licenses, the state bar revealed that it was investigating several other law firms for similar extortion schemes. Hiltzik, *supra*, at B1. Another lawyer was sued by the state attorney general's office for engaging in an identical scheme against several Vietnamese nail salons, real-estate brokers, and liquor stores. *See Brar*, 9 Cal. Rptr. 3d 844; Sara Lin, *O.C. Judge Jails Brea Lawyer for Filing Frivolous Suits*, L.A. TIMES, Feb. 11, 2006, at B1.

And there are numerous California cases demonstrating the frequency with which other lawyers filed questionable complaints against businesses that never had any meaningful relationship with the plaintiffs, much less caused them concrete injury. *See*, *e.g.*, *Am. Prods. Co. v. Law Offices of Geller, Stewart & Foley, LLP*, 37 Cal. Rptr. 3d 93, 102 (Ct. App. 2005) (overturning summary judgment for law firm alleged to have engaged in "a pattern or practice of

filing complaints for settlement purposes" against at least 24 local businesses); *Ball v. Blue Cross of Cal.*, No. G033976, 2005 WL 1101675, at *1 (Cal. Ct. App. May 10, 2005) ("Suzanne Ball likes to sue businesses with whom she has no dealings, asserting liability under California's Unfair Competition Law * * *.").

The disastrous consequences of unrestricted consumer-protection lawsuits eventually grew so great that consumers themselves felt obliged to put an end to it by voting overwhelmingly to pass a ballot measure known as Proposition 64, which expressly prohibits consumer-protection lawsuits by individuals who have not suffered a personal injury. *See* CALIFORNIA SECRETARY OF STATE, STATEMENT OF VOTE AND SUPPLEMENT TO THE STATEMENT OF VOTE, 2004 PRESIDENTIAL GENERAL ELECTION, NOV. 2, 2004, at 45 (2005), *available at* http://www.sos.ca.gov/elections/sov/2004_general/ssov/formatted_ballot_measures_detail.pdf; *see also Californians for Disability Rights v. Mervyn's, LLC*, 138 P.3d 207 (Cal. 2006). Following the passage of Proposition 64, "[no] other state jurisdiction[] * * * gives private attorney general status to any person without qualification," instead demanding that "persons must be injured to obtain redress for themselves." Robert C. Fellmeth, *California's Unfair Competition Act: Conundrums and Confusions*, *in* 26 CAL. L. REVISION COMM'N REPS. 227, 248 (1995). And given California's disastrous experience, the District should be loath to follow in its footsteps and impose similar burdens upon its own small businesses.

B. Private Enforcement Actions Under The CPPA Are Prone Enough To Abuse As It Is.

1. The District of Columbia already is no stranger to abusive and extortionate "consumer-protection" lawsuits. In June 2005, Roy L. Pearson—then an administrative law judge for the District—filed a now-infamous CPPA claim against a neighborhood dry cleaner owned by the Chungs, a family of South Korean immigrants. Marc Fisher, *Lawyer's Price for*

Missing Pants: $65 Million, WASH. POST, Apr. 26, 2007, at B1. Pearson had dropped off a pair of suit pants to be altered, but when he returned to pick up the pants, he was told that they had been misplaced and might take several days to locate. *Pearson v. Chung*, 961 A.2d 1067, 1071-72 (D.C. 2008). When the pants were located and presented to Pearson a week later, he insisted that they were not the correct pants—a claim he was later unable to prove at trial (*id.* at 1076 & n.10, 1079)—and demanded that the Chungs pay to replace the suit. *See* Fisher, *supra*, at B1.

Although Pearson could have replaced his suit for $1,150, he filed a lawsuit against the Chungs seeking damages of more than $67 million. *Id.* Pearson refused the Chungs' repeated offers to settle the case for amounts several times greater than the purported value of the suit: first $3,000, then $4,600, and eventually $12,000. *Id.* Shortly before trial, Pearson adjusted his final demand to $54 million—an amount that was justified, he claimed, "because he is a 'private attorney general' standing up for every person in Washington." Marc Fisher, *Wearing Down the Judicial System With a Pair of Pants*, WASH. POST, June 14, 2007, at B1.

Pearson's $54 million CPPA claim alleged that the cleaners engaged in an unfair trade practice by displaying a "Satisfaction Guaranteed" sign in the store but failing to satisfy him. *Pearson*, 961 A.2d at 1070-71, 1075. In essence, Pearson contended that if a customer "claims that the item is not his * * * the dry cleaner must pay the customer whatever the customer claims the item is worth if there is a 'Satisfaction Guaranteed' sign in the store, even if the dry cleaner knows the customer is mistaken or lying." *Id.* at 1079; *see also* Robin Givhan, *Even Pants Worth $54 Million Won't Make the Man*, WASH. POST, June 15, 2007, at C1 ("Pearson argued that the lawsuit was not about the pants per se, but rather about the sign in the dry cleaners that promised 'satisfaction guaranteed.' He was not satisfied."). Both the trial court and this Court eventually rejected Pearson's claims in their entirety. *Pearson*, 961 A.2d at 1079.

Preposterous as Pearson's lawsuit was, the owners of the dry cleaning shop incurred untold misery and more than $100,000 in legal fees over two years of litigation, which ultimately drove the shop out of business. *See* Marc Fisher, *Dry Cleaners' Victory in Pants Lawsuit Still Comes With a Loss*, WASH. POST, Sept. 20, 2007, at B1. Even for such frivolous claims, the vague language of the CPPA meant that "the judge found he could not simply dismiss all of the claims * * * [without] going to trial"—an exceptionally costly, tedious, and time-consuming endeavor. Henri E. Cauvin, *Court Rules for Cleaners in $54 Million Pants Suit*, WASH. POST, June 26, 2007, at A1. And "even if [the judge] orders Pearson to pay the Chungs' legal bills, there's hardly a chance the family will see any money because Pearson has few, if any, assets." *See* Marc Fisher, *A Scary View of U.S. Legal System*, WASH. POST, June 26, 2007, at B1.

Now known notoriously as "The Great American Pants Suit," Pearson's lawsuit has made the District's legal system the subject of widespread criticism in the local, national, and even international media. *See*, *e.g.*, Marc Fisher, *Judge Who Seeks Millions for Lost Pants Has His (Emotional) Day in Court*, WASH. POST, June 13, 2007, at B1 ("The courtroom was packed with * * * reporters from print and broadcast outlets in at least five countries."); Lubna Takruri, *Judge Rules in Favor of Dry Cleaner in $54M Suit Over Missing Pants*, ASSOC. PRESS, June 26, 2007 ("Pearson became a worldwide symbol of legal abuse by seeking jackpot justice * * *"); *U.S. Man Loses $54m Trousers Claim*, BBC NEWS, http://news.bbc.co.uk/2/hi/americas/6238364.stm (reporting that the case "has damaged the image of the U.S. judicial system"). Pearson's lawsuit has inspired many imitators seeking to use the threat of tremendous legal fees to pressure businesses into an unwarranted settlement, such as another recent lawsuit here in the District which—in an intentional gesture to Pearson's suit—also demanded $54 million in damages, this time against Best Buy for allegedly losing a single laptop computer that had been brought in for

repair. *Another Outrageous Lawsuit: Here's Your Publicity, But Never Again (Well, Unless...)*, WASH. POST, Feb. 19, 2008, at B3.

What is most amazing about Pearson's lawsuit is that he was a plaintiff who actually ***did*** have standing. If an unethical and litigious lawyer like Pearson could threaten a CPPA lawsuit against any local business for any imagined unfairness in its practices, the law would transform the District into a magnet for extortion and clog the District's courts with abusive litigation. Imagine Pearson bringing cookie-cutter actions against every dry cleaning business in the city, making the same basic allegation that their "Satisfaction Guaranteed" promises are misleading. It simply is not plausible that the D.C. Council intended to impose these burdens and force District residents to bear the cost of letting uninjured plaintiffs use our courts, much less that the Council would have silently enacted such a drastic change in the law through a subtle and unnoticed omission.

2. The problem of abusive and extortionate "consumer-protection" lawsuits is magnified by the CPPA's provision allowing plaintiffs to bring purported "representative actions" without having to meet any of the traditional class requirements—*i.e.*, that the named plaintiff be an adequate class representative and have claims typical of those of the putative class. *See* D.C. R. Civ. P. 23(b)(2); *see also* Fellmeth, *supra*, at 229-30, 247-48. Indeed, a plaintiff who has not been injured and has not relied on the business's actions in any way surely would ***not*** be an adequate representative for a class of the business's customers. When class requirements do not apply, "standing in many ways has become more central" to ensuring that courts avoid deciding issues without a sufficient record, since "[a]n improvident decision may harm more or less narrow classes of individuals who are not before the court, or may botch up matters better left to the more political organs of society." WRIGHT ET AL., *supra*, § 3531.

Because of the CPPA's representative action provision, ***every*** dispute with a customer effectively becomes a bet-the-company affair. Pearson's $54 million demand, for instance, was based on his case being a representative action. *See* Marc Fisher, *Wearing Down the Judicial System With a Pair of Pants*, Wash. Post, June 14, 2007, at B1. Further, the CPPA provides for statutory damages of $1,500 per customer, treble and punitive damages, restitution, attorneys' fees, and costs. D.C. CODE § 28-3905(k). In this respect, the CPPA is even more susceptible to abuse than California law ever was, because California allowed private plaintiffs to receive only restitution and other equitable relief, not monetary or statutory damages. *See Bank of the W. v. Super. Ct.*, 833 P.2d 545 (1992) (en banc). Given the sheer enormity of these remedies, it is vital that the right to bring suit under the CPPA be limited to individuals who have really been injured.

3. Absent meaningful standing limits on CPPA claims by private plaintiffs, this sort of abuse would become rampant. Significantly, the law's broad provisions for agency enforcement can be invoked only by government officials who are accountable to the public and must exercise prosecutorial discretion. By contrast, there are no such constraints on lawsuits brought by private plaintiffs and their attorneys. These self-anointed "private attorneys general" work not to promote the public interest, but instead to maximize their own personal payouts.

The standing requirements are thus vital for ensuring that D.C.'s consumer-protection laws operate to protect injured consumers, rather than becoming a vehicle for extortionate lawsuits against businesses operating here. Questionable "consumer-protection" lawsuits often do more to harm consumers than to protect them, as the risk of expensive lawsuits adds to the cost of goods and may drive many products out of the market altogether—or cause businesses to

flee to the more hospitable climes of Virginia or Maryland. Excessive numbers of private enforcement actions thus threaten to undermine, rather than promote, the public welfare.

By requiring private plaintiffs to establish a concrete basis for suing, the standing doctrine can ensure that CPPA claims will be less of a lawyer-driven tool for extortion and instead focus on conduct causing actual harm. Although the CPPA may serve an important purpose, its exceptional powers must be reserved for true harms. Otherwise, it will be abused by unprincipled and profit-driven plaintiffs' lawyers, imposing overwhelming burdens on local businesses, their customers, and the courts.

CONCLUSION

The Court should dismiss these cases for lack of standing.

Dated: May 12, 2010

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I hereby certify that, on the 12th day of May, 2010, a true and accurate copy of the foregoing *Amicus* Brief in Support of Appellees and Affirmance was filed with the Clerk of the Court and was served by overnight delivery on:

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