No. 22-CV-895

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

EARTH ISLAND INSTITUTE,
APPELLANT,

v.

COCA-COLA COMPANY,
APPELLEE.

ON APPEAL FROM THE SUPERIOR COURT OF THE DISTRICT OF COLUMBIA

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE CONSUMER BRANDS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE AND AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rules 29(a)(4)(A) and 26.1(a), *amici* state as follows:

The Chamber of Commerce of the United States of America states that it is a non-profit, tax-exempt organization incorporated in the District of Columbia. The Chamber has no parent corporation, and no publicly held company has 10% or greater ownership in the Chamber.

The Consumer Brands Association is not a publicly held corporation. It has no parent corporation, and there is no publicly held corporation that owns 10% or more of its stock.

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All parties have consented to the filing of this brief.

INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

The **Chamber of Commerce of the United States of America** is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every geographic region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the business community.

The **Consumer Brands Association** ("CBA") represents the world's leading consumer-packaged goods companies, as well as local and neighborhood businesses. The consumer-packaged goods industry is the largest U.S. manufacturing employment sector, delivering products vital to the wellbeing of people's lives every day. The industry contributes $2 trillion to U.S. gross domestic product and supports more than 20 million American jobs. CBA's industry members are committed to empowering consumers to make informed decisions about the products they use and

[1] No counsel for any party authored this brief in whole or in part and no entity or person, aside from *amici curiae*, their members, or their counsel, made any monetary contribution intended to fund the preparation or submission of this brief.

have long felt a unique responsibility to ensure their products align with the evolving expectations of consumers, including especially sustainability matters.

The Chamber, CBA, and their members have a strong interest in this case because an overly broad construction of the District of Columbia Consumer Protection Procedures Act ("CPPA") would chill protected expression guaranteed by the First Amendment and would impede constructive dialogue to pursue important sustainability goals. Just as appellee The Coca-Cola Company discussed how its corporate ethos and objectives support environmental sustainability and other responsible corporate practices, so too do other businesses frequently discuss their own commitments, interests, and values relating to environmental, social, and governance issues, as well as other topics of public concern. This expression is an essential part of the competition in the marketplace of ideas.

In this case, appellant Earth Island Institute seeks to leverage the power of the state to silence a message with which it disagrees. Specifically, Earth Island objects to Coca-Cola expressing its constitutionally protected opinions and views about its environmental sustainability practices, commitments, and objectives because, in Earth Island's opinion, Coca-Cola is not "a sustainable business." Compl. ¶ 57 (A26).[2] Earth Island's suit, the Superior Court correctly recognized, is therefore not

[2] Page numbers beginning with "A" refer to the Joint Appendix.

an attempt to protect consumers from any cognizable marketplace harm but an effort by Earth Island to force Coca-Cola (and others) to adopt the particular positions taken by Earth Island or otherwise remain silent on environmental issues. Slip Op. 6, 10 (A194, A198). Because the First Amendment prohibits governments from empowering private enforcers to suppress speech that expresses a company's opinions, values, and "brand," this Court should interpret the CPPA to prohibit Earth Island from censoring Coca-Cola from engaging in such speech, including speech that reflects and embodies the company's commitment to pursuing important environmental protection goals.

ARGUMENT

I. THE FIRST AMENDMENT PROTECTS BUSINESSES' RIGHT TO DISCUSS ISSUES OF PUBLIC CONCERN.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. "Above 'all else, the First Amendment means that government' generally 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2346 (2020) (plurality) (quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). That principle applies with full force to the statements by Coca-Cola at issue here because they express the company's goals, views, and values on topics of public concern. And contrary to

appellant's claim below, the First Amendment would still protect Coca-Cola's statements even if they are incorrectly deemed "commercial speech."

A. The First Amendment Protects Coca-Cola's Expression.

The First Amendment establishes what Justice Holmes famously described as a competitive marketplace of ideas. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). In a free society, "the general rule is that the speaker and the audience, not the government, assess the value of the information presented." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 579 (2011) (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). That way, "each person [can] decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

These fundamental First Amendment principles do not change based upon "the corporate identity of the speaker." *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 16–17 (1986) (plurality) (quoting *First Nat. Bank of Bos. v. Bellotti*, 435 U.S. 765, 777 (1978)). Unhindered speech on a wide array of topics "is 'indispensable to decisionmaking in a democracy, and this is no less true because the speech comes from a corporation rather than an individual.'" *Citizens United v. FEC*, 558 U.S. 310, 349 (2010) (citation omitted); *see also Pac. Gas & Elec. Co.*, 475 U.S. at 16 ("For corporations as for individuals, the choice to speak includes within it the choice of what not to say.").

The statements to which Earth Island objects fall squarely within the First Amendment's guarantee of Coca-Cola's freedom of speech. According to the Complaint, Coca-Cola made general, aspirational statements and expressions of opinion in its corporate documents and through its social media accounts that reflect the company's values and positions on environmental matters. These are:

- "Our planet matters. We act in ways to create a more sustainable and better shared future. To make a difference in people's lives, communities and our planet by doing business the right way." Compl. ¶ 32 (A15).

- "Scaling sustainability solutions and partnering with others is a focus of ours." *Id.* ¶ 33 (A16).

- "Business and sustainability are not separate stories for The Coca-Cola Company – but different facets of the same story." *Id.* ¶ 34 (A17).

- "We're using our leadership to achieve positive change in the world and build a more sustainable future for our communities and our planet. . . . I'm reminded of the power of our people to make a difference, to serve our communities and to constantly work to shape a more sustainable business." *Id.* ¶¶ 35–36 (A17–18).

- "Because our company is in so many communities globally, we can share our best practices. We can collaborate with governments, communities, the private sector, and NGOs to help develop more effective recycling systems that meet each community's unique needs." *Id.* ¶ 41 (A19).

- "[C]omitted to creating a World Without Waste by taking responsibility for the packaging we introduce to markets and working to reduce ocean pollution." *Id.* ¶ 40 (A18).

As the Superior Court recognized, these statements express Coca Cola's "general, aspirational corporate ethos." Slip Op. 4 (A192). "[W]hile they point to a general theme of sustainability and corporate improvement, there is not a measurable

standard to apply as to whether or not [Coca-Cola] has met these general goals." Slip Op. 4–5 (A192–93).

In addition to these general, aspirational statements, Coca-Cola made two further statements reflecting the company's sustainability goals. These are:

- "Part of our sustainability plan is to help collect and recycle a bottle or can for every one we sell globally by 2030." Compl. ¶ 45 (A21).
- "Make 100% of our packaging recyclable globally by 2025. [And] [u]se at least 50% recycled material in our packaging by 2030." *Id.* ¶ 51 (bracket in original) (A24).

These statements, the Superior Court explained, set "future, aspirational goals." Slip Op. 6 (A194). Although the use of metrics makes them more specific than the other statements, they were not made in connection with any product or service, and neither statement "is provably false or plausibly misleading." *Ibid.*

In other words, the statements challenged by Earth Island are simply "expression[s]" of Coca-Cola's "ideas and beliefs" on matters of public concern and political debate—such as environmental issues—in the heartland of the First Amendment. *Turner*, 512 U.S. at 641; *see also, e.g., Nat'l Ass'n of Mfrs. v. SEC*, 800 F.3d 518, 530 (D.C. Cir. 2015) (holding First Amendment protected manufacturers' decisions whether to address "the atrocities of the Congo war"); *Hays Cnty. Guardian v. Supple*, 969 F.2d 111, 114–16 (5th Cir. 1992) (holding First Amendment protected "a small local newspaper" funded by "local businesses" and

"concentrating on 'environmental, peace, and social justice issues'"). Thus, Coca-Cola's expression is fully protected by the First Amendment.

B. Coca-Cola's Speech At Issue Here Is Not "Commercial Speech," And Even If It Were, The First Amendment Would Protect It.

In the court below, Earth Island claimed that Coca-Cola's expression is "commercial speech" and therefore "subject to ***no*** First Amendment protection whatsoever." Pl.'s Mem. Opp'n Def.'s Mot. Dismiss 14 (July 13, 2022) (emphasis in original) (A93). Earth Island is wrong on both counts.

To begin with, Coca-Cola's speech is not "commercial." "Commercial speech," the Supreme Court has explained, "propos[es] a commercial transaction." *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 562 (1980); *see IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1122 (9th Cir. 2020) (holding statements on website were "not . . . commercial speech" because they "d[id] not propose a commercial transaction" (quotation marks omitted)). Coca-Cola's challenged statements do not. Rather, the challenged statements merely express the company's "general, aspirational corporate ethos" and its "hopes[ ] and philosophies" in relation to environmental issues. Slip Op. 4, 8 (A192, A196). None of the statements discusses any particular product or service, let alone proposes a sale. Therefore, none are "commercial speech."

In all events, "commercial speech receives First Amendment protection," *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366 (2002) (citing *Va. Bd. of*

Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976)), so Earth Island is simply wrong to contend otherwise. Constitutional protection for commercial expression recognizes that a "consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue." *Sorrell*, 564 U.S. at 566 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)). Therefore, contrary to Earth Island's assertions below, Coca-Cola's statements would receive First Amendment protection even if they were properly labeled "commercial."

II. THE FIRST AMENDMENT PROHIBITS THE DISTRICT FROM CENSORING BUSINESSES' SPEECH ABOUT ISSUES OF PUBLIC CONCERN.

Because Earth Island's invocation of the CPPA touches upon businesses' expressive activities, "free speech principles inform [judicial] interpretation of the Act." *ONY, Inc. v. Cornerstone Therapeutics, Inc.*, 720 F.3d 490, 496 (2d Cir. 2013). Under those settled principles, this Court must construe the CPPA to avoid censoring statements like Coca-Cola's, "lest the statute be rendered unconstitutional." *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016), *as amended* (Dec. 13, 2018).

A. The District Cannot Escape The First Amendment By Authorizing Private Enforcers To Chill Speech.

If the CPPA were interpreted to authorize a District enforcement action penalizing companies for—or preventing companies from—expressing their view

on issues of public concern, the statute would obviously burden First Amendment rights by chilling public debate and the free flow of useful information. *See, e.g.*, *Citizens United*, 558 U.S. at 335 (identifying "chilling effect" where FEC regulation caused some parties to self-censor to avoid "defending against FEC enforcement"); *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc.*, 487 U.S. 781, 794 (1988) (explaining "the costs of litigation and the risk of a mistaken adverse finding by the factfinder" in state enforcement actions "necessarily chill speech").

The burden on First Amendment rights is not mitigated by deputizing private attorneys general to enforce the CPPA. The Supreme Court has long held that the First Amendment protects speech from lawsuits by private parties invoking the power of the court to enforce state law. *See, e.g.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) ("Although this is a civil lawsuit between private parties, the Alabama courts have applied a state rule of law which petitioners claim to impose invalid restrictions on their constitutional freedoms of speech and press."). For private suits "on matters of public concern," the Constitution requires "that the plaintiff bear the burden of showing falsity, as well as fault." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 776 (1986) (defamation claim); *Unelko Corp. v. Rooney*, 912 F.2d 1049, 1058 (9th Cir. 1990) (noting that "the same first amendment requirements that govern actions for defamation" apply to other claims implicating speech on matters of public concern).

In addition, as the District's *amicus* brief explains, the CPPA "is the cornerstone of the District's consumer protection efforts" and, as such, is "routinely" enforced by "the Attorney General" against businesses "that conceal corporate environmental harms." D.C. Br. 1–2; *see also* D.C. Code § 28-3909(a), (b). Therefore, when private enforcers step into the shoes of the Attorney General to enforce the CPPA on behalf of "the general public" as Earth Island did here, *see* D.C. Code § 28-3905(k)(1); Compl. ¶ 154 (A41), they are necessarily subject to the same First Amendment limitations as the Attorney General himself. *See, e.g.*, *Cal. Chamber of Com. v. Council for Educ. & Rsch. on Toxics*, 29 F.4th 468, 480, 483 (9th Cir. 2022) (preliminarily enjoining "private enforcers" from suing where putative defendant was "likely to succeed on the merits of its First Amendment claim"), *cert. denied sub nom. CERT v. Cal. Chamber of Com.*, No. 22-699, 2023 WL 2959385 (U.S. Apr. 17, 2023).

B. No State Interest Supports Construing The CPPA To Reach A Company's Efforts To Portray Itself As Environmentally Conscious.

Because Earth Island's unnecessarily broad construction of the CPPA would chill speech and otherwise burden First Amendment rights, that construction cannot stand unless it is justified by a compelling state interest. *See Sorrell*, 564 U.S. at 572; *Pac. Gas & Elec. Co.*, 475 U.S. at 19. There is none here.

In its Complaint, Earth Island alleges Coca-Cola's expression is "false and misleading." Compl. ¶ 18 (A12). Even if that were true,[3] the First Amendment teaches that governments may not "compile a list of subjects about which false statements are punishable" merely because they are false. *United States v. Alvarez*, 567 U.S. 709, 723 (2012) (plurality); *see id.* at 730 (Breyer and Kagan, JJ., concurring); *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 504 (1984) ("Under our Constitution 'there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.'"). Because Earth Island's suit is, at bottom, an effort to leverage the power of the state to suppress speech with which it disagrees (by labeling it as "false"), the suit is unsupported by any legitimate governmental interest and therefore cannot proceed consistent with the First Amendment.

To be sure, in the context of commercial transactions, the U.S. Supreme Court has recognized that governments have a legitimate interest in restricting "false claims [that] are made to effect a fraud or secure moneys or other valuable considerations." *Alvarez*, 567 U.S. at 723. But even under the most expansive

[3] As the Superior Court correctly concluded, Coca-Cola's statements are aspirational and thus are not "provably false or plausibly misleading." Slip Op. 6 (A194).

interpretations of that state interest, the speech in question must involve specific "representations about a product[,]" *POM Wonderful, LLC v. FTC*, 777 F.3d 478, 500 (D.C. Cir. 2015); *cf. Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2377 (2018) ("Our precedents require disclosures to remedy a harm that is 'potentially real not purely hypothetical'")—not a generalized expression of a business's values, aspirations, or "brand." No authority holds that a government's interest in preventing fraudulent transactions justifies regulation of the way a company speaks about matters of opinion or issues of public concern. In short, there is no state interest that would support construing the CPPA to reach the kind of statements Earth Island targets here.

C. Traditional Protections For "Puffery" And Opinion Are Necessary To Accommodate First Amendment Values.

Even if there were a permissible state interest at work, the construction of the CPPA advanced by Earth Island is not carefully "drawn to achieve that interest" because that construction would sweep away long-standing constitutional protections for puffery and for statements of opinion. *Sorrell*, 564 U.S. at 572; *see Pac. Gas & Elec. Co.*, 475 U.S. at 19 ("[T]he Commission's order could be valid if it were a narrowly tailored means of serving a compelling state interest.").

To begin with, Earth Island's overbroad construction would eliminate traditional protections for "puffery"—that is, "generalized statements of optimism that are not capable of objective verification." *In re Harman Int'l Indus., Inc. Sec.*

Litig., 791 F.3d 90, 109 (D.C. Cir. 2015); *see In re Ford Motor Co. Sec. Litig.*, 381 F.3d 563, 570 (6th Cir. 2004) ("Statements that are 'mere puffing' or 'corporate optimism' may be forward-looking or 'generalized statements of optimism that are not capable of objective verification.'"). This Court has held that such statements are "reasonably to be expected of a seller," *Pearson v. Chung*, 961 A.2d 1067, 1076 (D.C. 2008), and, therefore, "are not actionable," *Ludwig & Robinson, PLLC v. BiotechPharma, LLC*, 186 A.3d 105, 113 n.6 (D.C. 2018) (citation omitted)).

"Defining puffery broadly" accommodates First Amendment values by "protecting legitimate commercial speech." *Am. Italian Pasta Co. v. New World Pasta Co.*, 371 F.3d 387, 391 (8th Cir. 2004); *cf. Golan v. Holder*, 565 U.S. 302, 328 (2012) ("the 'traditional contours' of copyright protection" are "built-in First Amendment accommodations"). Indeed, that is why "[c]ourts everywhere 'have demonstrated a willingness to find immaterial as a matter of law a certain kind of rosy affirmation commonly heard from corporate managers and numbingly familiar to the marketplace.'" *In re Ford Motor Co. Sec. Litig.*, 381 F.3d at 570–71 (collecting cases).

The Tenth Circuit provides a good example. In *Bimbo Bakeries USA, Inc. v. Sycamore*, 29 F.4th 630 (10th Cir. 2022), that court held that a bakery's "use of the word 'local' in its tagline [was] not actionable" with respect to goods baked in other States because "local" was "not a factual claim that may be deemed false or

misleading." *Id.* at 643. It was, rather, "a puffing statement," protection of which was necessary so that "unpredictability could [not] chill commercial speech." *Id.* at 646 (citation omitted); *see also Am. Italian Pasta*, 371 F.3d at 389 (holding "America's Favorite Pasta" non-actionable); *In re Ford Motor Co. Sec. Litig.*, 381 F.3d at 570 (holding thirteen statements, including "[a]t Ford quality comes first"; "Ford is a worldwide leader in automotive safety"; and "Ford 'is going to lead in corporate social responsibility'" were non-actionable as "either mere corporate puffery or hyperbole" and as "not material, even if they were misleading"; "*[a]ll* public companies praise their products and their objectives" (emphasis added)).

Aspirational statements and other corporate-image and brand-related statements, such as those made by Coca-Cola, are just such puffery. After all, every reasonable consumer would understand that Coca-Cola's statements about a "World Without Waste" and its commitment to a "better shared future" and "doing business the right way" are aspirational goals, not measurable statements of fact. *See Pearson*, 961 A.2d at 1075–76 (relying on "reasonableness" and "basic common sense" to conclude that "'Satisfaction Guaranteed' sign" was mere puffery).

In addition to displacing protection for puffery, Earth Island's construction would eliminate First Amendment protection for opinion. "Assertions of opinion on a matter of public concern," this Court has explained, "receive full constitutional protection if they do not contain a provably false factual connotation." *Guilford*

Transp. Indus., Inc. v. Wilner, 760 A.2d 580, 597 (D.C. 2000) (citation omitted); *accord Milkovich v. Lorain J. Co.*, 497 U.S. 1, 19 (1990) ("a statement on matters of public concern must be provable as false before there can be liability under state defamation law"); *White v. Fraternal Ord. of Police*, 909 F.2d 512, 522 (D.C. Cir. 1990) ("[A] statement of opinion having no provably false factual connotation is entitled to full constitutional protection."). That is true of businesses' speech and economically motivated speech no less than other kinds of speech. *See Bimbo Bakeries*, 29 F.4th at 645 (finding claim non-actionable when it turned on "opinion about when something qualifies as 'local'"). Characterizations like "sustainable," "climate friendly," and "doing business the right way" are not statements of fact capable of being proven "false," but rather pure statements of opinion that are "constitutionally protected" and not actionable. *Myers v. Plan Takoma, Inc.*, 472 A.2d 44, 47 (D.C. 1983).

Because the construction of the CPPA advanced by Earth Island would eliminate traditional First Amendment protections for puffery and opinion, it plainly is not tailored to advance any permissible state interest in preventing consumer deception. Therefore, the Court should reject that construction.

III. ELIMINATING FIRST AMENDMENT PROTECTIONS FOR BUSINESSES' SPEECH ABOUT ISSUES OF PUBLIC CONCERN WOULD HAVE UNTOWARD CONSEQUENCES.

If this Court were to embrace Earth Island's erroneous construction of the CPPA in violation of the First Amendment, the decision would have deleterious consequences, including consequences for the environmental values that Earth Island claims to be advancing. Foremost, the free marketplace of ideas would suffer because the resulting uncertainty would necessarily chill protected speech. *Riley*, 487 U.S. at 794; *Bimbo Bakeries*, 29 F.4th at 646.

For one thing, there would be fewer companies willing to promote sustainability initiatives or to talk about other issues of public concern. If a business's claims about its desire for a cleaner planet, for example, could lead to CPPA liability, then many businesses will undoubtedly conclude that the safer course is to say nothing at all. In this way, the CPPA would put businesses at a disadvantage in communicating their points of view by potentially subjecting them to liability that other types of speakers do not face. *Cf. R.A.V. v. City of St. Paul*, 505 U.S. 377, 392 (1992) (holding government may not "license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules."). And, perversely, by dissuading businesses from publicly declaring their goals and values on important environmental, social, and governance issues, the CPPA could stymie progress on these very issues.

The District's courts would also suffer if Earth Island's construction were adopted. "The delegation of state authority to private individuals" to punish speech they do not like would "authorize[ ] a purely ideological plaintiff, convinced that his opponent is not telling the truth, to bring into the courtroom the kind of political battle better waged in other forums." *Nike, Inc. v. Kasky*, 539 U.S. 654, 679 (2003) (Breyer and O'Connor, JJ., dissenting from dismissal of writ of certiorari as improvidently granted). The District's courts would become a forum for plaintiffs to "vindicate their beliefs" rather than correct legal wrongs, "and to do so unencumbered by the legal and practical checks that tend to keep the energies of public enforcement agencies focused upon more purely economic harm." *Id.* at 680. Neither the District's courts nor any other courts, federal or state, are the appropriate fora for determining the truth or falsity of competing beliefs in our nation's free marketplace of ideas.

The resulting trials would be unmanageable, as this case illustrates. Earth Island's chief complaint is that Coca-Cola represented "itself as a sustainable and environmentally friendly company," Compl. at 1 (A9), when, in Earth Island's opinion, Coca-Cola is not "a sustainable business," *id.* ¶ 57 (A26). This type of claim, the Superior Court explained, is not susceptible to judicial resolution. "Courts cannot be expected to determine whether a company is actually committed to creating a 'world without waste' or 'to doing business the right way.'" Slip Op. 10

(A198). There is simply "no precedent for such questions" and no way for "a reasonable juror [to] decide that Coca-Cola's future goals cannot be met." *Ibid.*; *accord Bimbo Bakeries*, 29 F.4th at 645 ("It is true that 'local' evokes meaning, but so do nearly all words."); *Am. Italian Pasta*, 371 F.3d at 393 ("the phrases 'Made from 100% Semolina' and 'Made with Semolina' do not define a methodology by which to ascertain the veracity of American's claim that Mueller's is 'America's Favorite Pasta'").

That is especially true with respect to Earth Island's "mosaic" theory of liability. There is no coherent way to assess whether a "mosaic" of protected speech gives a misleading "general impression" that may be regulated consistent with the First Amendment. As the Superior Court observed, any trial on such a claim would be unlikely to determine the truth as it would necessarily involve "each side cherry-pick[ing] events, documents, and actions all over the world over several decades to state or negate how the defendant entity 'represented' itself." Slip Op. 9 (A197). The very vagueness of the standard and its practical operation demonstrates that it cannot be enforced consistent with the First Amendment, in no small part because allowing such a claim under the CPPA would broadly chill protected speech. Companies would be forced to refrain from engaging in speech about both their corporate images and matters of public concern for fear that such speech could give

rise to liability whenever plaintiffs have a different overall impression of the corporation or the correctness of its views.

Nor, once Pandora's box is opened, can it be easily shut. There are, after all, many speakers making aspirational claims. For example, the District says that it is "building great momentum on sustainability" and that "[b]y 2032" it hopes to "achieve 80% waste diversion citywide without the use of landfills, waste-to-energy or incineration." Sustainable DC 2.0, Progress Report 2, 17 (2022), https://sustainable.dc.gov/sites/default/files/dc/sites/sustainable/page_content/attachments/SDC_ProgressReport2022_FINAL-1r.pdf. Earth Island claims it is "protect[ing] the planet and all species that live on it." *What We Do*, Earth Island, https://www.earthisland.org/index.php/aboutUs/what-we-do (last visited May 22, 2023). If Coca-Cola's aspirational statements are potentially misleading, then these are too. But the District's courts should not be called upon to determine whether, for example, Earth Island is protecting "all" species or only some, or whether D.C.'s momentum on sustainability is "great" or unremarkable.

The bottom line is simple. The "CPPA protects consumers" from specific, "enumerated" "unlawful trade practices." *Osbourne v. Cap. City Mortg. Corp.*, 727 A.2d 322, 325 (D.C. 1999) (citation omitted). It does not authorize private plaintiffs to leverage the power of the state to silence any message or speaker with which they happen to disagree. Because that is exactly what Earth Island is doing here, the First

Amendment requires this Court to give the CPPA a saving construction and affirm the Superior Court.

CONCLUSION

The Court should affirm.

Respectfully submitted,

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May 22, 2023

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 2023, I electronically filed the foregoing brief with the Court's electronic filing system. I further certify that all participants in this case are registered, and that service will be accomplished via the Court's electronic filing system.

May 22, 2023 /s/ Jeremy J. Broggi

District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (filed June 17, 2021), this certificate must be filed in conjunction with all briefs submitted in all cases designated with a "CV" docketing number to include Civil I, Collections, Contracts, General Civil, Landlord and Tenant, Liens, Malpractice, Merit Personnel, Other Civil, Property, Real Property, Torts and Vehicle Cases.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21 and Super. Ct. Civ. R. 5.2, and removed the following information from my brief:

1. All information listed in Super. Ct. Civ. R. 5.2(a); including:

   - An individual's social-security number
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   - Birth date
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   - Financial account numbers, except that a party or nonparty making the filing may include the following:

     (1) the acronym "SS#" where the individual's social-security number would have been included;
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     (4) the year of the individual's birth;
     (5) the minor's initials; and
     (6) the last four digits of the financial-account number.

2. Any information revealing the identity of an individual receiving mental-health services.

3. Any information revealing the identity of an individual receiving or under evaluation for substance-use-disorder services.

4. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

5. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

6. Any other information required by law to be kept confidential or protected from public disclosure.

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22-CV-895
Case Number(s)

May 22, 2023
Date