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September 24, 2024

Hon. Ioana Petrou (Presiding Justice)
Hon. Carin T. Fujisaki (Associate Justice)
Hon. Alison M. Tucher (Associate Justice)
California Court of Appeal
First Appellate District, Third Division
350 McAllister Street
San Francisco, CA 94102-7421

Re*: Kramer v. Coinbase*, No. A167779 (filed Sept. 12, 2024)

Dear Justices Petrou, Tucher, and Fujisaki:

The Center for Consumer Law and Economic Justice at the UC Berkeley School of Law, California Association for Microenterprise Opportunity, Consumer Federation of California, Contra Costa Senior Legal Services, Elder Law & Advocacy, Katherine & George Alexander Community Law Center, Legal Aid of Marin, Legal Assistance for Seniors, National Consumer Law Center, and Public Counsel write to respectfully request that this Court order its thorough and careful opinion in *Kramer v. Coinbase, Inc.* certified for publication. (Cal. Rules of Court, rule 8.1120.)

The opinion in this case provides a thoughtful examination of the circumstances in which mandatory arbitration provisions must yield to claims for public injunctive relief. The opinion thus will, if published, help courts and litigants better understand the viability of claims not only against cryptocurrency companies but also involving other service providers whose terms of service contain binding arbitration clauses.

First, the opinion carefully analyzes a common type of legal claim—a motion to compel arbitration based on a mandatory arbitration clause in a consumer services contract—in a novel context where such claims are proliferating rapidly. (Cal. Rules of Court, rule 8.1105(c)(2).) The decision, if published, would be the first citable appellate opinion to apply the principles articulated by the

California Supreme Court in *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 955 to the cryptocurrency industry. Second, the opinion clarifies and expands the rule governing when contractual arbitration provisions are avoided by claims for public injunctive relief. (Cal. Rules of Court, rule 8.1105(c)(3).) Finally, the opinion addresses two domains of significant public interest: the cryptocurrency industry and the limits on binding arbitration clauses in consumer contracting. (Cal. Rules of Court, rule 8.1105(c)(6).)

Because the opinion, if published, would benefit California litigants and trial courts, and because it meets multiple standards for publication, we respectfully request that it be certified to appear in the Official Reports.

STATEMENT OF INTEREST

The undersigned organizations represent and advocate for low-income individuals across California. Mandatory arbitration clauses and class action waivers constrict our clients' ability to enforce vital statutory rights and consumer protections against fraud and deception in the marketplace. Many of our clients are seniors, a community that is acutely susceptible both to financial fraud and to contracts containing arbitration clauses. (See, e.g., *Harrod v. Country Oaks Partners, LLC* (2024) 15 Cal.5th 939 [interpreting arbitration provision in contract with skilled nursing facility].) Accordingly, the undersigned organizations have an interest in protecting the ability of consumers to vindicate public rights against unfair and deceptive business practices, and to ensure—as this Court did—that binding arbitration cannot be used to obstruct the pursuit of public injunctive relief. Individual statements of interest are available in the appendix.

GROUNDS FOR PUBLICATION

I. THE OPINION WOULD BE THE FIRST PUBLISHED APPELLATE DECISION TO APPLY *MCGILL* TO THE CRYPTOCURRENCY INDUSTRY—A RAPIDLY-GROWING FIELD OF IMMENSE PUBLIC INTEREST

Judicial input into the viability of claims against the burgeoning cryptocurrency industry provides urgently-needed guidance to both potential litigants and the public at large, and will help to improve the quality and focus of rapidly-proliferating claims relating to cryptocurrency products. Accordingly, the *Kramer* opinion both applies an existing rule of law to a set of facts significantly different from those stated in published opinions, and addresses a legal issue of

continuing public interest. (Cal. Rule of Court, rules 8.1105(c)(2) and (c)(6).)

The rapid proliferation of cryptocurrency-based products has fascinated and polarized broad swathes of the public.[1] These products have also generated a flurry of litigation—some of it involving attempts to apply old laws to new and ill-fitting facts.[2] The public has a strong interest in understanding whether and how existing laws apply to novel financial products so as better to gauge the potential risks of these products. Courts also have a strong interest in publicizing cryptocurrency-related legal developments, both to prevent the filing of specious claims and to help legitimate plaintiffs seek redress for wrongs as efficiently as possible.

Despite the enormous public attention that cryptocurrency companies have generated over the past decade, the California Courts of Appeal have certified only five cryptocurrency-related opinions for publication. Of these, only two directly concern the cryptocurrency industry itself.[3] The most extensive of these, *Pillar Project AG v. Payward Ventures, Inc.* (2021) 64 Cal.App.5th. 671, declined to enforce a binding arbitration clause against a third-party beneficiary of the defendant's crypto investment. The present opinion, if published, will offer a natural and important complement to *Pillar*, shedding light on a different kind of limitation on the scope of binding arbitration clauses. Certifying the opinion for publication will give consumers a more complete picture of how long-standing legal principles protect public rights in the cryptocurrency market.

[1] See BitIRA, *Crypto's Having a Resurgence of Public Interest* (Jan 18, 2024) (reporting that the number of Google search queries about Bitcoin is "the highest it's been since June 2022 and halfway on the way to reaching the highest level of interest… set in May 2021," and that "[c]ryptocurrency ... is on a rising tide"), https://www.bitira.com/public-interest-resurgence/; see also Faverio & Sidoti, Pew Research, *Majority of Americans aren't confident in the safety and reliability of cryptocurrency* (Apr. 10, 2023) (finding that "the vast majority of Americans … say they have heard at least a little about cryptocurrency," even as "three-quarters say they are not confident that current ways to invest in, trade or use cryptocurrencies are reliable and safe").

[2] See, e.g., *Archer v. Coinbase, Inc.* (2020) 53 Cal.App.5th 266 (granting summary judgment to defendant Coinbase in a conversion action).

[3] Compare *ibid*. with *People v. Ung* (2023) 88 Cal.App.5th 997 (requiring defendant to make in-kind restitution for theft of cryptocurrency); *In re Marriage of DeSouza* (2020) 54 Cal.App.5th 25 (holding that spouse's failure to disclose cryptocurrency holdings during divorce proceedings was breach of fiduciary duty), and *Wozniak v. YouTube, LLC* (2024) 100 Cal.App.5th 893 (considering claims against interactive computer service providers for hosting fraudulent cryptocurrency-related solicitations).

II. THE OPINION REFINES THE RULES DETERMINING WHEN BINDING ARBITRATION CLAUSES APPLY TO CLAIMS FOR PUBLIC INJUNCTIVE RELIEF.

Even as the opinion faithfully follows *McGill* and its progeny, it adds two important refinements to existing case law. (See Cal. Rule of Court, rule 8.1105(c)(3).)

First, the opinion announces a clear way to satisfy the *McGill* test for public relief, holding that while seeking to change company policies and procedures might sometimes fall into the category of private relief, seeking changes to public *statements* about those policies is unequivocally a claim for public relief. This Court aptly observed that, "Coinbase appears to confuse an injunction requiring it to modify its security features . . . with an injunction requiring it to cease misrepresentations regarding its security features. And such an injunction . . . constitutes public injunctive relief because it would affect the broader public." (Slip op. at p. 15.) *McGill* and its other progeny—*Mejia*, *Maldonado*, and *Ramsey*—have all concerned blends of claims concerning both company procedures and public-facing statements about those procedures, and those courts have therefore had no reason to reach the question whether there is an intrinsic difference between corporate procedures and marketing materials. A clear rule that injunctive claims targeting public-facing statements about products fall outside the scope of mandatory arbitration clauses is significant, both for delineating how consumer rights may be vindicated and for enhancing judicial efficiency.

Second, *Kramer* would be the first published appellate case to apply *McGill* to an action brought in state court after a parallel motion to compel arbitration had been granted by a federal court. Though estoppel is not a novel legal principle, this opinion clarifies its application, articulating a clear rule that will be helpful in subsequent cases involving parallel state and federal actions: even if "both actions . . . involve substantially the same plaintiffs and arise from the same set of facts," the state action is unconstrained by its federal predecessor and can avoid arbitration as long as "the causes of action and requested relief in the pending complaint are focused solely at . . . misrepresentations directed to the public." (Slip Op. at pp. 18-19.)

Courts and litigants alike will derive significant benefit from being able to cite *Kramer* for the propositions (a) that requesting "injunctive relief . . . focused on prohibiting misrepresentations regarding [product] features—not altering those features . . . —primarily benefits the public," (slip op. at p. 14), and (b) that the

grant of a motion to compel arbitration in federal court has no preclusive effect on a subsequent state-court action involving the same parties and facts, as long as the state action exclusively seeks separate public relief.

III. THE OPINION SERVES THE PUBLIC INTEREST BY HIGHLIGHTING THAT CLAIMS FOR PUBLIC INJUNCTIVE RELIEF CANNOT BE DEFEATED BY CONTRACT.

Finally, highlighting coercive contracting practices that attempt to deny consumers access to the courts even for public injunctive claims squarely advances the public interest. This opinion therefore meets the standard that recommends publication of opinions that examine a legal issue of continuing public interest. (Cal. Rule of Court, rule 8.1105(c)(6).)

Given the increasing prevalence of mandatory arbitration provisions in consumer services contracts,[4] it is vital to ensure that these provisions are not used to prevent consumers from vindicating critical public rights. Tens of millions of Californians are bound by mandatory arbitration clauses in consumer contracts.[5] Moreover, almost none of those consumers realize that the contracts they sign contain mandatory arbitration provisions.[6] The demand for clear and enforceable standards for arbitration agreements and public interest actions is acute.

In the absence of clear standards, businesses that unilaterally set the terms of the arbitral process may be tempted to try to prevent recourse to consumer protection laws in precisely the manner that characterized the claim at issue here.[7] Additionally, arbitration often places severe limits on discovery, such that "wrongdoing that is revealed through the discovery process is often sealed and kept secret from the public."[8] Both of these dynamics pose significant due process concerns in the context of actions seeking public injunctions. Accordingly, all

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[4] McNichols & Shierholz, Economic Policy Inst., *The Supreme Court is Poised to Make Forced Arbitration Nearly Inescapable* (2018) https://perma.cc/56WGN28R.

[5] CFPB, *Arbitration Study* (2015) p. 9, https://perma.cc/K62Y-VDXF.

[6] Sommers, *What Do Consumers Understand About Predispute Arbitration Agreements? An Empirical Investigation* (2024) p. 1, https://perma.cc/EL3C-FG42

[7] Colvin & Stone, Economic Policy Inst., *The Arbitration Epidemic: Mandatory Arbitration Deprives Workers And Consumers Of Their Rights* (2015) p. 3, https://perma.cc/9N72-A29N.

[8] Hines, *Fine Print Traps: Terms in Corporate Form Contracts That Cause the Most Harm to Consumer Rights and Protections* (2024) pp. 3-4, https://perma.cc/7TVA-XBGW.

Californians will benefit from the publication of an opinion that lucidly articulates which claims may—and may not—be compelled into arbitration.

If published, *Kramer* will help to protect consumers from being deceived into agreeing to arbitrate their claims for public relief. It will also provide businesses that seek to maintain or implement an arbitration program guidance on how to implement that process properly.

CONCLUSION

This Court's opinion in *Kramer v. Coinbase, Inc.* serves at least three of the purposes outlined in California Rule of Court, rule 8.1105(c). The opinion applies an existing rule of law limiting the enforcement of binding arbitration clauses to new facts (rule 8.1105(c)(2)), clarifies and expands the *McGill* rule that claims for public injunctive relief override binding arbitration clauses (rule 8.1105(c)(3)), and addresses a new type of business that is of immense public interest (rule 8.1105(c)(6)).

The opinion, therefore, "should be certified for publication." (Rule 8.1105(c)).

Respectfully submitted,

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Public Counsel