APPENDIX

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APPENDIX A

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION THREE

No. A167779

DARREN KRAMER ET AL.,

Plaintiffs and Respondents,

v.

COINBASE, INC., ET AL.,

Defendants and Appellants.

(San Francisco City & County
Super. Ct. No. CGC-23-604357)

Filed 9/12/24

Certified for Publication 10/4/24 (order attached)

Plaintiffs Darren Kramer, Manish Aggarwal, Mostafa El Bermawy, and Amish Shah filed a complaint against Defendant Coinbase, Inc. (Coinbase) for public injunctive relief under the Consumer Legal Remedies Act (Civ. Code, § 1750 et

seq.; CLRA), the California False Advertising Law (Bus. & Prof. Code, § 17500, et seq.; FAL), and the California Unfair Competition Law (Bus. & Prof. Code, § 17200, et seq.; UCL). The trial court denied Coinbase's motion to compel arbitration on the basis that plaintiffs sought public injunctive relief not subject to arbitration. We disagree with Coinbase's argument on appeal that plaintiffs' claims are subject to arbitration because they seek private injunctive relief, and we affirm the trial court order.[1]

FACTUAL AND PROCEDURAL BACKGROUND

Coinbase operates an online platform for buying, selling, and transferring cryptocurrencies. Prospective users create accounts to access Coinbase's services.

Plaintiffs are individuals who opened and utilized accounts on Coinbase's cryptocurrency platform. As part of creating their accounts, users are required to accept the terms of a user agreement. Plaintiffs accepted updated user agreement terms in 2022 as part of maintaining their Coinbase accounts. That user agreement contained an arbitration provision, which states in relevant part, "you and Coinbase agree that any dispute, claim, disagreements arising out of or relating in any way to your access to or use of the Services or of the Coinbase Site, any

[1] On September 9, 2024, Coinbase filed an unopposed request for judicial notice of two requests for dismissal without prejudice filed in the superior court by plaintiffs Kramer, El Bermawy, and Aggarwal. We grant the request. (Evid. Code, § 452, subd. (d)(1).) We do not opine on whether the superior court had jurisdiction to dismiss any plaintiffs while an appeal was pending, and note none of the plaintiffs requested dismissal of this appeal.

Communications you receive, any products sold or distributed through the Coinbase Site, the Services, or the User Agreement and prior versions of the User Agreement, including claims and disputes that arose between us before the effective date of these Terms . . . will be resolved by binding arbitration, rather than in court . . . ."

The Federal Action

Plaintiffs Aggarwal and El Bermawy filed a class action complaint in federal court (*Aggarwal I*) relating to various losses they sustained on Coinbase's platform. Aggarwal and El Bermawy alleged hackers gained access to their respective accounts and stole funds, and Coinbase failed to protect the accounts, mitigate their losses, or provide support following the thefts. The federal complaint alleged thirteen statutory and common law claims, including violations of the CLRA, FAL, and UCL. It sought various remedies, including "[i]njunctive relief, including public injunctive relief," declaratory relief, compensatory damages, statutory damages, treble damages, restitution, disgorgement, punitive damages, and attorneys' fees and costs.

Coinbase moved to compel *Aggarwal I* to arbitration pursuant to the terms of its user agreement. The court granted the motion. (*Aggarwal v. Coinbase, Inc.* (N.D. Cal. 2023) 685 F.Supp.3d 867, 882.) The court first concluded the unilateral contract modification provision did not render the arbitration provision illusory. (*Id.* at p. 877.) The court then concluded the parties delegated the question of arbitrability to the arbitrator, and that delegation clause was not unconscionable. (*Id.* at pp. 879, 881–882.) The court

did not address whether the complaint sought public injunctive relief and, if so, whether such a claim could be compelled to arbitration under existing California law.

The Current Action

While *Aggarwal I* was pending, plaintiffs filed a complaint in San Francisco Superior Court.[2] The complaint, which arises from the same facts set forth in *Aggarwal I*, asserts Coinbase misrepresented its security features, alleges claims under the CLRA, FAL, and UCL, and exclusively seeks "public injunctive relief."

Coinbase again moved to compel arbitration under the terms of its user agreement. Coinbase argued plaintiffs entered into valid and enforceable arbitration agreements, and, as relevant to this appeal, the complaint fell within the scope of the arbitration provision because plaintiffs sought private injunctive relief.

The trial court denied the motion to compel arbitration. In so holding, the court rejected Coinbase's argument that plaintiffs were seeking private injunctive relief. It explained, "Here, the complaint plainly shows that plaintiffs are only seeking public injunctive relief. . . . Plaintiffs do not request any sort of relief that would solely benefit them or existing Coinbase customers. In fact, . . . defendants' allegedly misleading scheme has already

[2] Coinbase removed the initial complaint to federal court based on diversity jurisdiction, and plaintiffs dismissed the action. They then refiled the current complaint, adding a California plaintiff.

harmed plaintiffs and plaintiffs are aware of defendants' practice. It is thus unclear how the requested injunction will benefit plaintiffs." The court further noted the "federal action buttresses plaintiffs' contention that they are merely seeking public injunctive relief in this case since plaintiffs are seeking individual relief in [*Aggarwal I*]."

Coinbase timely appealed.

DISCUSSION

On appeal, Coinbase argues plaintiffs' claims are subject to arbitration because they seek private injunctive relief. It further contends plaintiffs failed to prove otherwise.

An order denying a petition to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).) When, as here, a trial court's order denying a petition to compel arbitration is based on a question of law, we review the denial de novo. (*Clifford v. Quest Software Inc*. (2019) 38 Cal.App.5th 745, 749 (*Clifford*).)

I. Injunctive Relief

"In *McGill* [*v. Citibank, N.A.* (2017) 2 Cal.5th 945 (*McGill*)], the Supreme Court, relying on its earlier decisions in *Broughton v. Cigna Healthplans* (1999) 21 Cal.4th 1066 . . . (*Broughton*) and *Cruz v. PacifiCare Health Systems, Inc*. (2003) 30 Cal.4th 303 . . . (*Cruz*), distinguished between the two types of injunctive relief: Private injunctive relief is 'relief that primarily "resolve[s] a private dispute" between the parties . . . and "rectif[ies] individual wrongs" . . . and that benefits the public, if at all, only incidentally.' [Citation.] Public injunctive relief is 'relief that "by and large" benefits the general public . . . and that

benefits the plaintiff, "if at all," only "incidental[ly]" and/or as "a member of the general public." ' [Citation.] 'To summarize, public injunctive relief under the UCL, the CLRA, and the false advertising law is relief that has "the primary purpose and effect" of prohibiting unlawful acts that threaten future injury to the public. [Citation.] 'Relief that has the primary purpose or effect of redressing or preventing injury to an individual plaintiff—or to a group of individuals similarly situated to the plaintiff—does not constitute public injunctive relief.' " (*Ramsey v. Comcast Cable Commc'ns, LLC* (2023) 99 Cal.App.5th 197, 204–205 (*Ramsey*).) The court explained an arbitration provision that waives a plaintiff's right to seek public injunctive relief is invalid and unenforceable. (*McGill*, *supra*, 2 Cal.5th at pp. 951–952.)

The court then applied this framework to the case before it. The plaintiff, McGill, had filed a class action lawsuit against Citibank based on its marketing of a credit protection plan and its handling of a claim she filed pursuant to the plan after she lost her job. (*McGill*, *supra*, 2 Cal.5th at p. 953.) The complaint alleged various violations of California's consumer protection laws, including the CLRA, UCL, and the false advertising laws, and sought "an injunction prohibiting Citibank from continuing to engage in its illegal and deceptive practices," in addition to other relief. (*McGill*, at p. 953.)

The court identified two examples of what constituted public injunctive relief. "[A]n injunction under the CLRA against a defendant's deceptive methods, acts, and practices 'generally benefit[s]' the

public 'directly by the elimination of deceptive practices' and 'will . . . not benefit' the plaintiff 'directly,' because the plaintiff has 'already been injured, allegedly, by such practices and [is] aware of them.' " (*McGill*, at p. 955.) Likewise, "an injunction under the UCL or the false advertising law against deceptive advertising practices 'is clearly for the benefit of . . . the general public'; 'it is designed to prevent further harm to the public at large rather than to redress or prevent injury to a plaintiff.' " (*McGill*, at p. 955.)

The court thus noted (1) the complaint was brought under the consumer protection statutes, (2) it alleged " 'unfair, deceptive, untrue, and misleading' " advertising and marketing, and " 'false, deceptive, and/or misleading' " representations and omissions, and (3) it sought an injunction " 'to ensure compliance' " with these laws, and to enjoin Citibank from " 'continuing to falsely advertise or conceal material information and conduct business via the unlawful and unfair business acts and practice complained herein.' " (*McGill*, *supra*, 2 Cal.5th at pp. 956–957.) "In light of these allegations and requests for relief," the court concluded the complaint sought public injunctive relief and the plaintiff adequately explained " 'how the public at large would benefit from' that relief." (*Id.* at p. 957.)

A. Plaintiffs' Complaint Seeks Public Injunctive Relief

Several courts have analyzed whether a complaint asserts public or private injunctive relief under the framework set forth in *McGill*.

In *Mejia v. DACM Inc.* (2020) 54 Cal.App.5th 691 (*Mejia*), the plaintiff purchased a used motorcycle, with most of the purchase financed with a "WebBank-issued Yamaha credit card" he obtained through the dealership. (*Id.* at p. 694.) Mejia subsequently sued the defendant, alleging it violated various state laws, including the CLRA and UCL, by "failing to provide its customers with a *single document* setting forth all the financing terms for motor vehicle purchases made with a conditional sale contract." (*Id.* at p. 695.) The complaint requested an injunction requiring the defendant to provide consumers with a single document containing all required information. (*Id.* at p. 696.) On appeal, the defendant argued *McGill* was inapplicable. It asserted the complaint sought a private—not public— injunction because the injunction would "benefit only a 'narrow group of Del Amo customers'—the class of similarly situated individuals who, like Mejia, would buy a motorcycle from Del Amo with a conditional sale contract." (*Mejia*, at p. 702.) The Fourth District Court of Appeal rejected this argument, quoting the following analysis with approval from Mejia's brief: " '[T]he prayer is plainly one for a public injunction given that Mejia "seeks to enjoin future violations of California's consumer protection statutes, relief oriented to and for the benefit of the general public." [Citation] . . . Mejia's prayer does not limit itself to relief only for class members or some other small group of individuals; it encompasses "consumers" generally.' " (*Id.* at p. 703.)

Maldonado v. Fast Auto Loans, Inc. (2021) 60 Cal.App.5th 710 (*Maldonado*) reached a similar

conclusion. In that case, the plaintiffs alleged violations of the CLRA, UCL, and FAL based on the defendant charging unconscionable interest rates on loans. (*Id.* at p. 713.) The plaintiffs requested injunctive relief ordering the defendant to "cease and desist its unlawful practices" and prohibiting future violations. (*Id.* at pp. 715–716.) On appeal, the defendant argued "the relief sought 'is private because it will, at best, benefit [the Customers] and a discrete, narrowly-defined group of other . . . customers.' " (*Id.* at p. 720.) The court rejected this argument, explaining the "operative allegations and specific requests for relief" alleged (1) the defendant's misconduct "was ongoing and 'injurious to the public and consumers,' " (2) the defendant "was continuing to provide high interest loans without proper licensing," and (3) the " 'unlawful conduct will continue' " injunctive relief prohibiting " 'future violations.' " (*Id.* at p. 721.) The court thus held the complaint sought public injunctive relief: "In short, the Customers' complaint and prayer does not limit the requested remedies for only some class members, but rather encompasses all consumers and members of the public. Moreover, an injunction under the CLRA against Lender's unlawful practices will not directly benefit the Customers because they have already been harmed and are already aware of the misconduct." (*Maldonado,* at p. 721.)

More recently, in *Ramsey*, *supra*, 99 Cal.App.5th 197, the plaintiff alleged Comcast misrepresented its pricing and discounts in violation of the CLRA and UCL. (*Id.* at pp. 201–202.) The complaint sought to: "(1) enjoin Comcast from engaging in 'unfair or

deceptive acts or practices and correcting all false and misleading statements and material omissions . . . to prevent future injury to the general public'; (2) require Comcast to 'halt their practice of issuing secret discounts'; (3) require Comcast to 'comply with their legal obligations and utilize only truthful and complete advertisements, statements, and representations'; and (4) enjoin Comcast from 'continuing their unlawful and unfair business practices.' " (*Id.* at p. 206.) The court concluded "[a]n injunction that seeks to prohibit a business from engaging in unfair or deceptive practices and marketing, requires it to provide enhanced pricing transparency, and requires it to comply with our consumer protection laws, does have the primary purpose and effect of protecting the public, and thus falls within *McGill*'s definition of public injunctive relief." (*Ramsey*, at p. 206.)

The court then addressed the question of "whether an injunction that benefits both existing and potential Comcast subscribers qualifies as a public injunction under *McGill*." [3] (*Ramsey*, at p. 207.) The court followed *Mejia*, *supra*, 54 Cal.App.5th 691, and *Maldonado*, *supra*, 60 Cal.App.5th 710, and concluded "[w]hile the requested injunction in those cases and here may not benefit the entire public as a 'diffuse

[3] The court rejected Comcast's argument that the injunctive relief would only benefit "a 'limited group of existing Comcast subscribers,' " noting the complaint asserted that consumers " 'rely on the representations made by service providers in determining whether to purchase their services' " and truthful advertisements would also benefit "any member of the public who considers signing up with Comcast." (*Ramsey*, at p. 207.)

whole,' we agree with the court in *Maldonado* that 'a requested injunction cannot be deemed private simply because [a business] could not possibly advertise to, or enter into agreements with, every person in California . . . .' . . . *McGill* did not require that public injunctive relief have such a universal reach." (*Ramsey*, *supra*, 99 Cal.App.5th at p. 211.)

We find the reasoning in *Mejia*, *Maldonado*, and *Ramsey* equally applicable here. Plaintiffs' complaint alleges violations of the CLRA, UCL, and FAL. The complaint asserts Coinbase is aware of the importance of security to consumers and thus advertises itself to the public as the " 'most trusted' and 'most secure' cryptocurrency platform." It does so via information on its website and in online, television, and newspaper advertisements. The complaint further alleges ongoing harm toward the public, including: (1) "Coinbase's misrepresentations about its security continue to deceive members of the general public;" (2) "These misrepresentations are targeted to entice consumers into creating accounts and depositing their hard-earned funds with Coinbase"; (3) "Coinbase knew that its various claims about being a 'secure' platform were false and misleading but made those statements to induce members of the general public (including Plaintiffs) to do business with Coinbase"; and (4) "If Coinbase is permitted to continue its deceptive and misleading practices, members of the public will suffer irreparable injuries beyond the harm of losing substantial sums of money." All three causes of action then state they exclusively seek public injunctive relief.

These allegations assert harm against the general public. While the complaint contains allegations specific to the individual harm suffered by each plaintiff, those allegations exemplify how Coinbase's actual conduct differs from its marketing statements to the public. And the complaint does not seek relief for those plaintiff-specific injuries. As explained in *Ramsey*, "[a]n injunction that seeks to prohibit a business from engaging in unfair or deceptive practices and marketing . . . does have the primary purpose and effect of protecting the public, and thus falls within *McGill*'s definition of public injunctive relief."[4] (*Ramsey*, *supra*, 99 Cal.App.5th at p. 206.)

In response, Coinbase asserts plaintiffs' complaint seeks relief for themselves and similarly situated individuals. It contends plaintiffs' allegations are more analogous to those in *Clifford*, *supra*, 38 Cal.App.5th 745, *Torrecillas v. Fitness International, LLC* (2020) 52 Cal.App.5th 485 (*Torrecillas*), *Cottrell v. AT&T Inc.* (9th Cir., Oct. 26, 2021, Case No. 20-16162) 2021 WL 4963246 (*Cottrell*), and *Croucier v. Credit One Bank, N.A.* (S.D. Cal., Jun. 11, 2018, Case No. 18CV20-MMA (JMA)) 2018 WL 2836889 (*Croucier*), all of which concluded the plaintiffs were seeking private injunctive relief.

We disagree. The cases cited by Coinbase involved complaints that focused on harm to the plaintiff and did not seek broader injunctive relief. For example, both *Clifford* and *Torrecillas* involved alleged wage

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[4] Coinbase asserts false advertising claims do not *per se* affect the public interest. We need not address this argument because we conclude the specific allegations here adequately demonstrate that the complaint asserts public injunctive relief.

and hour violations. In *Clifford*, the plaintiff alleged his employer misclassified him as an exempt employee. (*Clifford*, at p. 748.) The *Torrecillas* plaintiff challenged the employer's failure to pay him certain wages and business expense reimbursements. (*Torrecillas*, at pp. 499–500.) In both cases, the courts noted the alleged violations were directed at the plaintiff, the complaint did not allege similar conduct toward the general public, and the complaint only sought injunctive relief related to the plaintiff or similarly situated employees. (*Clifford*, at p. 753 [complaint alleged violations "directed at *Clifford only*," "does not allege Quest directed similar conduct at other employees, much less the public at large," and the "requests for injunctive relief under the UCL are similarly limited to [Clifford] as an individual."]; *Torrecillas*, at pp. 499–500 [complaint sought "an injunction prohibiting [the employer] from 'continuing to engage in the practices described above,' "—i.e., failing to pay Torrecillas certain wages and business expense reimbursements—and noting any injunctive relief would only benefit "Torrecillas and possibly [the employer's] current employees, not the public at large."].)

Similarly, the claims in *Cottrell* and *Croucier* addressed conduct directed solely at existing customers who were similarly situated to the plaintiffs, not conduct directed at potential customers or the general public. In *Cottrell*, the plaintiff alleged AT&T improperly charged customers for accounts without authorization and sought "an injunction requiring AT&T 'to provide an accounting of all monies obtained' through unauthorized accounts and

services; to give customers 'individualized notice' of the violations committed and of their legal rights; and to refrain from committing future violations of the California law by signing customers up for products or services without authorization." (*Cottrell*, *supra*, 2021 WL 4963246 at p. *1.) The court found this requested relief constituted private injunctive relief because it would only benefit "AT&T customers—'a "group of individuals similarly situated to" ' Cottrell." (*Id.* at p. *2.) Likewise, in *Croucier*, the plaintiff alleged Credit One Bank engaged in improper debt collection methods by utilizing an " 'automatic telephone dialing system' " after he revoked his consent to be contacted by such a system. (*Croucier*, *supra*, 2018 WL 2836889 at p. *1.) The court concluded the plaintiff's UCL claim sought private injunctive relief because the alleged violations focused on "unlawful conduct directed only at the Plaintiff, rather than the public at large." (*Id.* at p. *4.) In so holding, the court noted the complaint "does not specifically allege similar conduct directed at . . . the public at large." (*Id.* at p. *4.)

As noted above, and unlike the claims in *Clifford*, *Torrecillas*, *Cottrell*, and *Croucier*, plaintiffs' pending complaint alleges that Coinbase directed its conduct toward the public. The complaint asserts Coinbase is continuing to misrepresent its security measures precisely to deceive the general public into creating accounts, investing money, and utilizing its services.[5]

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[5] Coinbase asserts statements regarding its security are "primarily directed at existing Coinbase users," not the public. But the complaint alleges otherwise. It identifies numerous statements on Coinbase's public-facing website and asserts such advertising regarding its security is designed to encourage

The complaint seeks injunctive relief to bar Coinbase from continuing to make such statements to the public.

Coinbase also contends the requested relief primarily benefits users or, at most, potential users, of its platform and not the general public. Similar arguments have been considered and rejected. In *McGill*, for example, the California Supreme Court concluded that enjoining deceptive marketing constituted public relief, rather than benefitting only those individuals who use the bank's services. (*McGill*, *supra*, 2 Cal.5th at p. 957; see also *Mejia*, *supra*, 54 Cal.App.5th at pp. 702–703 [rejecting as "illogic[al]" the argument that requiring a defendant to give disclosure forms when selling vehicles would benefit only "the class of similarly situated individuals who . . . would buy a motorcycle from [the defendant]" under the same type of contract].) And as discussed in Part I.A., *ante*, the *Ramsey* court explained an injunction benefiting existing and potential customers was sufficient to constitute public relief; the requested injunction did not need to

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individuals to create accounts and deposit funds. Likewise, the complaint identifies marketing statements in Coinbase's "social media advertising" and "search engine marketing," X (formerly Twitter) statements by company executives, and online, television, and newspaper advertisements. While the complaint identifies some statements that are only accessible once an individual initiates the sign-up process, the majority of statements identified in the complaint are directed to the general public. At this stage, the question is *what relief is being sought by the complaint*, not whether plaintiffs can ultimately prove Coinbase engaged in such conduct or whether they are ultimately entitled to such relief.

"benefit the entire public as a 'diffuse whole.' " (*Ramsey*, *supra*, 99 Cal.App.5th at p. 211.)

Next, Coinbase contends plaintiffs' statements that they would like to continue utilizing Coinbase if the security lapses were remedied indicates the requested relief is private in nature. However, such statements are irrelevant because the complaint does not seek any relief that would require Coinbase to alter its security measures. Here, the causes of action focus on Coinbase's misrepresentation regarding the quality of its security: (1) "Defendants have violated the CLRA by, among other things, representing that its services have 'characteristics,' 'uses,' and 'benefits' 'that they do not have' "; (2) "Defendants violated the FAL by seeking to induce consumers, including Plaintiffs, to do business with Defendants by disseminating false and misleading statements regarding Defendants' products and services"; (3) "Defendants' conduct is fraudulent because it is likely to deceive reasonable consumers, whether because certain statements are literally false or because Defendants' conduct otherwise has a capacity, likelihood or tendency to deceive or confuse the public." The complaint asserts these misrepresentations are "likely to deceive reasonable consumers." The requested injunctive relief is thus focused on prohibiting Coinbase's misrepresentations regarding its security features—not altering those features. This is relief that primarily benefits the public. (See *McGill*, *supra*, 2 Cal.5th at pp. 951.) And it does not benefit plaintiffs because they are already aware of Coinbase's security features.

Stout v. Grubhub Inc. (N.D. Cal. Dec. 3, 2021, Case No. 21-cv-04745-EMC) 2021 WL 5758889 (*Stout*) provides a useful discussion of how to classify different types of injunctions. In that case, the plaintiff alleged Grubhub induced individuals to sign up for a Grubhub+ subscription based on the promise of " 'Unlimited Free Delivery,' " which Grubhub then breached by adding a " 'CA Driver Benefits Fee' " to every Grubhub delivery order. (*Id.* at p. *1.) The complaint then sought two different injunctions: (1) "an order enjoining Grubhub from charging the CA Driver Benefits Fee on Grubhub+ subscribers"; and (2) "an order enjoining Grubhub 'from continuing to engage, use, or employ [its] practice of misrepresenting [its] delivery fees.' " (*Id.* at pp. *1–2.)

In assessing whether the complaint sought public injunctive relief, the court found that an injunction prohibiting Grubhub from continuing to charge Grubhub+ subscribers would constitute private injunctive relief. The court explained this requested relief "is not public injunctive relief because it is primarily designed to benefit Grubhub+ subscribers only, even if the public may incidentally benefit." (*Stout*, *supra*, 2021 WL 5758889 at p. *7.) Conversely, the court found the second requested injunction—an order enjoining Grubhub from its misrepresentation of delivery fees—constituted "public injunctive relief; the relief sought is a prohibition of false advertising which affects not just existing Grubhub customers but the broader public." (*Ibid.*)

Here, Coinbase appears to confuse an injunction requiring it to modify its security features—which has not been requested—with an injunction requiring it to

cease misrepresentations regarding its security features. And such an injunction, like the second injunction requested in *Stout*, constitutes public injunctive relief because it would affect the broader public.[6]

B. Plaintiffs Did Not Fail to Meet Their Burden of Proof

Coinbase asserts plaintiffs failed to carry their burden of proof by failing to offer any evidence regarding how the public would benefit from the injunctive relief.

This argument has been rejected by the California Supreme Court in *McGill*. In *McGill*, the defendant, Citibank, argued "that ' "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." ' " (*McGill*, *supra*, 2 Cal.5th at p. 958.) The Supreme Court first noted "Citibank cites no authority—and we are aware of none—applying this principle, which governs an effort to resist arbitration of a claim the

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[6] Coinbase asserts a different conclusion was reached in *Woody v. Coinbase Global, Inc*. (N.D. Cal., Oct. 17, 2023, Case No. 23-CV-00190-JD) 2023 WL 6882750 (*Woody*). While that court concluded the plaintiff sought private injunctive relief, it did so based on its finding that the damages and equitable relief sought "would . . . affect only Coinbase customers." (*Id.* at p. *4.) The court presumably reached this conclusion because the complaint involved misrepresentations regarding an "airdrop" of new digital assets to Coinbase customers holding a specific digital currency unit, XRP, in their accounts. (*Woody v. Coinbase Global, Inc*. (Case No. 23-CV-00190-JD) 2023 WL 6476303 [First Amended Complaint].) As such, the misrepresentations only related to existing customers holding XRP in their accounts—i.e., plaintiffs and similarly situated individuals.

parties *agreed* to arbitrate, to an effort to pursue a claim the parties *excluded* from arbitration." (*Ibid.*) The court then rejected Citibank's argument, explaining, "[a]t this stage of the proceeding—a motion to compel arbitration—it is premature to consider whether [the plaintiff] 'has . . . established' these allegations with proof or how her failure to do so would ultimately affect her request for injunctive relief." (*Ibid*.) The California Supreme Court resolved the question of whether the plaintiff sought public injunctive relief based solely on the complaint's "allegations and requests for relief." (*Id.* at p. 957.)

Multiple courts of appeal have followed this approach. (See, e.g., *Maldonado*, *supra*, 60 Cal.App.5th at p. 721 ["Customers' complaint and prayer does not limit the requested remedies for only some class members, but rather encompasses all consumers and members of the public."]; *Ramsey*, *supra*, 99 Cal.App.5th at p. 212 ["Because the relief Ramsey requests both 'seeks to enjoin future violations of California's consumer protection statutes,' and is 'oriented to and for the benefit of the general public,' it falls within *McGill*'s definition of public injunctive relief."].) Even those courts that concluded plaintiffs were seeking private injunctive relief have likewise relied on complaint allegations. (See, e.g., *Clifford*, *supra*, 38 Cal.App.5th at p. 754 ["Our review of Clifford's complaint discloses no request for injunctive relief that would impact the public"]; *Hodges v. Comcast Cable Commc'ns, LLC* (9th Cir. 2021) 21 F.4th 535, 549 [evaluating complaint allegations and concluding "these requests [for injunctive relief] on their face stand to benefit only

Comcast 'cable subscribers.' "]; *California Crane Sch., Inc. v. Google LLC* (N.D. Cal. 2022) 621 F.Supp.3d 1024, 1032 [addressing specific claims and relief as alleged in the complaint].)

To the extent cases have required additional evidence, those cases involve plaintiffs who seek to avoid enforcement of an arbitration provision by alleging fraud (see *Strauch v. Eyring* (1994) 30 Cal.App.4th 181, 187; *Rosenthal v. Great W. Fin. Sec. Corp*. (1996) 14 Cal.4th 394, 413), or other challenges to the circumstances under which the arbitration agreement was executed (see *Owens v. Intertec Design, Inc*. (1995) 38 Cal.App.4th 72, 74 [challenging validity of arbitration provision based on numerous grounds, including his location, location of witnesses, location where contract was executed, and assertion of economic coercion]).

While we agree with Coinbase that courts should not blindly rely on a complaint's prayer for public injunctive relief, such is not the case here. Plaintiffs' complaint does not superficially request such relief but contains supporting allegations and facts. The complaint identifies specific statements at issue, how those statements were conveyed by Coinbase, and why those statements would allegedly mislead the public. These statements, if ultimately proven at trial, would support a claim for public injunctive relief. *McGill* indicates such statements are sufficient at this stage to oppose arbitration. (See *McGill*, *supra*, 2 Cal.5th at p. 958.)

In sum, the trial court did not err in concluding the complaint seeks public injunctive relief and may not be compelled to arbitration.[7]

II. *Aggarwal I* Does Not Compel a Different Conclusion

Finally, Coinbase appears to suggest that the order compelling arbitration in *Aggarwal I* should impact this court's analysis. Coinbase asserts the existence of *Aggarwal I* indicates this action was filed for " gamesmanship." It contends plaintiffs' delay in filing this complaint, along with the similar factual allegations, indicates the complaint is for the purpose of obtaining financial compensation and leverage in the federal action.

While both actions may involve substantially the same plaintiffs and arise from the same set of facts, *Aggarwal I* alleges various causes of action and seeks relief not sought in this matter. For example, *Aggarwal I* alleges violations of the Electronic Funds Transfer Act, related Regulation E, and the California Uniform Commercial Code. It also alleges causes of action for bailment, conversion, breach of contract, breach of the implied covenant of good faith and fair dealing, negligence, and unjust enrichment. The complaint, apart from seeking injunctive relief, also seeks declaratory relief, compensatory damages, statutory damages, restitution, disgorgement, and punitive damages.

The fact that *Aggarwal I* also asserts CLRA, FAL, and UCL claims does not alter our analysis. In

[7] We thus do not reach Coinbase's arguments regarding prejudice or whether it is appropriate to affirm on other grounds.

Croucier, *supra*, 2018 WL 2836889, the original complaint focused on conduct against the plaintiff and sought compensatory and statutory damages. (*Id.* at p. *5.) When the plaintiff amended the complaint to add a claim under the UCL, the court declined to find that the requested injunction sought public relief. The court explained, "Plaintiff did not cite new facts or reasoning supporting the additional claim. . . . The addition of the public relief claim in the absence of new factual information, and its use as a means to avoid arbitration, further indicates that the purpose of the relief sought is unique to Plaintiff." (*Ibid.*) Here, as explained above, the causes of action and requested relief in the pending complaint are focused solely at Coinbase's misrepresentations directed to the public. Accordingly, the current complaint contains allegations supporting its public relief claim.[8]

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[8] While not specifically argued by Coinbase, we note the California Supreme Court held in *McGill* that there is no FAA preemption. (*McGill*, *supra*, 2 Cal.5th at p. 963.) We, like various other appellate courts to consider the issue, are bound to follow Supreme Court precedent. (See, e.g., *Ramsey*, *supra*, 99 Cal.App.5th at p. 213 [concluding FAA does not preempt *McGill*]; *Maldonado*, *supra*, 60 Cal.App.5th at p. 724 [same]; *Jack v. Ring LLC* (2023) 91 Cal.App.5th 1186, 1208 [same].) We do so here, concluding that the FAA does not preempt *McGill*. Moreover, the "procedural complexity" concerns raised in *Hodges* that the Ninth Circuit claimed could still be preempted by the FAA, such as "requir[ing] evaluation of . . . individual claims," are not present here. (*Hodges*, *supra*, 21 F.4th at p. 547.) This case involves alleged misrepresentations regarding the security of its platform as generally asserted by Coinbase to the public, as compared to Coinbase's actual security features.

DISPOSITION

The order is affirmed. Plaintiffs may recover their costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

APPENDIX B

CERTIFIED FOR PUBLICATION

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COINBASE, INC., ET AL.,

Defendants and Appellants.

(San Francisco City & County
Super. Ct. No. CGC-23-604357)

Filed: 10/4/24

THE COURT:

The opinion in the above-entitled matter filed on September 12, 2024, was not certified for publication in the Official Reports. For good cause it now appears that the opinion should be published in the Official Reports and it is so ordered.

There is no change in judgment.

Date October 4, 2024 TUCHER, PJ P. J.

APPENDIX C

SUPERIOR COURT OF CALIFORNIA
SAN FRANCISCO COUNTY

No. CGC-23-604357

DARREN KRAMER, a California resident, MANISH AGGARWAL, a Connecticut resident, MOSTAFA EL BERMAWY, a New York resident, and AMISH SHAH, an Illinois resident, on behalf of the California public,

Plaintiffs,

v.

COINBASE, INC., and COINBASE GLOBAL INC.,

Defendants.

Filed: March 28, 2023

Order Denying Defendants' Petition to Compel Arbitration and Stay Proceedings

Defendants COINBASE, INC. and COINBASE GLOBAL, INC.'s motion to compel arbitration and stay is denied.

In *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 962, the court held that any contract that seeks to waive "the statutory right to seek public injunctive relief under the UCL, the CLRA, or the false advertising law is invalid and unenforceable under California law." The *McGill* court explained that the plaintiff's public injunctive relief claim, which alleged that a bank's "advertising and marketing" was "misleading," was not subject to arbitration. (*Id.* at 956.) Numerous other cases have similarly found that claims of false advertising implicate public injunctive relief and are not arbitrable. (See *Broughton v Cigna Healthplans of Cal.* (1999) 21 Cal.4th 1066, 1072 [public injunction claim not arbitrable where plaintiffs alleged that "Cigna deceptively and misleadingly advertised the quality of medical services which would be provided under its health care plan"]; *Cruz v. PacifiCare Health Sys., Inc.* (2003) 30 Cal.4th 303, 308 [public injunction claim not arbitrable where plaintiffs alleged that "PacifiCare has employed a 'fraudulent, unlawful, and/or unfair scheme designed to induce' persons to enroll in its health plans by 'misrepresenting … that its primary commitment… is to maintain and improve the quality of healthcare provided'"]; *Maldonado v. Fast Auto Loans, Inc.* (2021) 60 Cal.App.5th 710, 721 [finding public injunction claim where the plaintiff alleged that the CLRA required the defendant "[l]ender to stop charging unlawful interest rates and adopt 'corrective advertising'" and explaining that the sought relief was public since it benefited "all consumers and members of the public" and did not "directly benefit the Customers because they have already been harmed and are aware of the

misconduct."]; *Meija v. DACM Inc.* (2020) 54 Cal.App.5th 691, 703 [CLRA and UCL claims sought public injunctive relief where the complaint "[did] not limit itself to relief only for class members or some other small group of individuals; it encompasse[d] 'consumers' generally."].)

The "determinative issue" in examining whether a plaintiff seeks public injunctive relief is "whether the injunctive relief sought has the primary purpose and effect of prohibiting unlawful acts that threaten future injury to the general public." (*Vaughn v. Tesla, Inc.* (2023) 87 Cal.App.5th 208, 229 (internal quotations omitted).) And that "not all members of the public will become customers of the defendant … does not negate the fact that public injunctive relief will nevertheless offer benefits to the general public." (*Vaughn,* 87 Cal.App.5th at 231; see also *Clifford v. Quest Software Inc.* (2019) 38 Cal.App.5th 745, 753 [plaintiff that sought to recover for himself did not seek public injunctive relief].)

Here, the complaint plainly shows that plaintiffs are only seeking public injunctive relief. The charging allegations and prayer only seek "public injunctive relief." (Complaint, pars. 164, 171, 176; Prayer, par. A.) Defendants contend that plaintiffs are really seeking private relief and note that the complaint includes numerous allegations regarding how plaintiffs were directly harmed. But those allegations merely provide background and/or establish standing. Plaintiffs do not request any sort of relief that would solely benefit them or existing Coinbase customers. In fact, like the plaintiff in *Maldonado,* defendants' allegedly misleading scheme has already harmed

plaintiffs and plaintiffs are aware of defendants' practice. It is thus unclear how the requested injunction will benefit plaintiffs.

Defendants argue that plaintiffs (or at least two of them) are engaging in gamesmanship as evidenced by their federal action, which also pleads false advertising claims against defendants. That federal action buttresses plaintiffs' contention that they are merely seeking public injunctive relief in this case since plaintiffs are seeking individual relief in the federal action. Lastly, the injunctive relief that plaintiffs' notice of motion for its motion for preliminary injunction is prospective and benefits consumers generally.

IT IS SO ORDERED.

Dated: 3/28/23

By: /s/
Superior Court Judge
Richard B. Ulmer

APPENDIX D

IN THE SUPREME COURT OF CALIFORNIA

En Banc

No. S287507

DARREN KRAMER ET AL.,

Plaintiffs and Respondents,

v.

COINBASE, INC., ET AL.,

Defendants and Appellants.

Court of Appeal, First Appellate District, Division Three – No. A167779

Filed: 12/31/2024

The applications to appear as counsel pro hac vice are granted. (Cal. Rules of Court, rule 9.40(a).)

The petition for review is denied.

GUERRERO
Chief Justice

APPENDIX E

IN THE SUPREME COURT OF CALIFORNIA

No. S287507

DARREN KRAMER, MANISH AGGARWAL, ET AL.,

Plaintiffs and Respondents,

v.

COINBASE, INC., ET AL.,

Defendants and Appellants.

After a Decision of the Court of Appeal, First Appellate District, Division Three, No. A167779

After an Appeal from the Superior Court for the State of California, County of San Francisco, Case No. CGC-23-604357, Hon. Richard B. Ulmer

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PETITION FOR REVIEW

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* * *

ISSUES PRESENTED

1. A party who opposes arbitration bears the burden to produce evidence of any fact necessary to, and prove the applicability of, any defense to the arbitration agreement. (*Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 413; *Engalla v. Permanente Group* (1997) 15 Cal.4th 951, 973; *Pinnacle Museum Tower Assn. v. Pinnacle Mkt. Dev. (US), LLC* (2012) 55 Cal.4th 223, 236; *Green Tree Financial Corp.-Ala. v. Randolph* (2000) 531 U.S. 79, 91.) Did the Opinion Below conflict with this principle when it held that litigants may defeat a petition to compel arbitration by simply ***pleading*** that they are seeking public injunctive relief under *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, without offering any evidence to establish, as factual matter, that enjoining the conduct they challenge would in fact confer a benefit on the public at large, rather than a discrete class of persons similarly situated to the plaintiffs?

2. In *McGill, supra,* 2 Cal.5th 945, this Court held that the right to seek "public injunctive relief" cannot be waived, including in an arbitration agreement. Assuming Plaintiff carried his burden to establish his *McGill* defense to arbitration, was *McGill* wrongly decided, and does the Federal Arbitration Act (FAA) (9 U.S.C., §§ 1–16) preempt *McGill,* because (a) the *McGill* rule is not a generally applicable contract defense, (b) *McGill* insists that contracting parties may not waive a form of relief—a statewide injunction allegedly benefiting the entire California public—that is incompatible with the FAA's streamlined

procedures, and (c) in practice, *McGill* has been used to avoid arbitration hundreds of times, but since *McGill* was decided, courts have ordered an injunction for the benefit of the public at large ***only once,*** exposing the rule as impermissibly anti-arbitration in its real-world effects, whatever the rule's original intent?

INTRODUCTION—WHY REVIEW SHOULD BE GRANTED

The published Opinion Below presents two issues that warrant this Court's review.

First, the Opinion Below created a novel and unjustified exception to the rule that this Court established in *Rosenthal, Engalla,* and *Pinnacle,* and that the United States Supreme Court applied under the FAA in *Green Tree.*[1] Those decisions recognize that a party may resist an agreement to arbitrate by asserting a generally applicable contract defense; they further hold that to prevail on that defense, the party must produce evidence of, and prove, every fact necessary to that defense and must do so at the time the motion or petition for arbitration is heard.

But according to the Opinion Below, a party resisting arbitration by invoking *McGill* has ***no burden of production or proof at all.*** Instead, if that party requests an injunction that it alleges would

[1] *Rosenthal, supra,* 14 Cal.4th at p. 413; *Engalla, supra,* 15 Cal.4th at p. 973; *Pinnacle, supra,* 55 Cal.4th at p. 236; *Green Tree, supra,* 531 U.S. at p. 91.

confer a benefit primarily on the public at large,[2] that allegation alone is sufficient to resist arbitration, even if that allegation is disputed, and even if that allegation is false.

As *McGill* itself demonstrates, whether a particular action truly seeks "public injunctive relief" is quintessentially a question of fact that turns on the nature and the scope of the defendant's challenged conduct. A plaintiff who challenges, and seeks to enjoin, acts that are unlawful and "threaten future injury to the general public" seeks public injunctive relief, whereas a plaintiff who challenges and seeks to enjoin unlawful acts that threaten injury "to an individual plaintiff—or to a group of individuals similarly situated to the plaintiff—does not." (*McGill, supra,* 2 Cal.5th at p. 955.) That is an issue of fact that the party resisting arbitration must prove, no different from a defense of fraud or unconscionability or any other contract defense.

The Opinion Below acknowledged that the parties disputed whether the conduct described in the complaint actually was directed at the public at large, and acknowledged that plaintiffs offered no evidence of any kind on that issue. Nonetheless, it held that the plaintiffs' unsworn and disputed ***allegations*** were sufficiently detailed to overcome the agreement to arbitrate.

The Opinion Below conflicts with binding precedent of this Court and the U.S. Supreme Court, as well as the FAA itself. When a litigant opposes arbitration based on a generally applicable contract defense, such

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[2] *McGill, supra,* 2 Cal.5th 945.

as unconscionability or fraud, the court must decide whether the litigant has proven that the arbitration agreement is void. If not, the agreement must be enforced. (*Rosenthal, supra,* 14 Cal.4th at pp. 413, 423–431; *Engalla, supra,* 15 Cal.4th at pp. 972–973; see 9 U.S.C. §§ 2 & 4.) The Opinion Below conflicts with the FAA by allowing courts to deny arbitration based on the mere possibility that the plaintiff might prove a defense to arbitration at trial. Nowhere else in law may a party avoid an arbitration agreement or other contract by merely pleading that a defense applies.

If allowed to stand, the Opinion Below would allow any plaintiff to avoid their agreement to arbitrate merely by alleging the defendant has directed its conduct at the public at large and asking to enjoin that conduct. Even if those allegations about the public nature of the defendant's conduct are inaccurate or outright false, the defendant's sole recourse would be to proceed to judgment on the merits, in court, losing the benefits of the arbitration agreement.

This Court should grant review to secure uniformity of decision—and to avoid conflicting with the FAA—on this important issue. The Court should clarify that a *McGill* defense is not entitled to preferential treatment compared to other contract defenses. As with any other such defense, the party invoking *McGill* must produce evidence to support any fact necessary to establish that the relief sought, if granted, would be ***public*** injunctive relief. (*Rosenthal, supra,* 14 Cal.4th at p. 413; *Engalla, supra,* 15 Cal.4th at p. 973; *Pinnacle, supra,* 55 Cal.4th

at p. 236; *Green Tree, supra,* 531 U.S. at p. 91; see Evid. Code, § 500.)

Second, assuming Plaintiff carried his burden to establish his *McGill* defense to arbitration, this Court should grant review to resolve whether *McGill* was wrongly decided and is preempted by the FAA.

The FAA "protect[s] pretty absolutely" parties' ability to agree to "individualized" arbitration and preempts "new devices and formulas" that disfavor arbitration. (*Epic Systems Corp. v. Lewis* (2018) 584 U.S. 497, 506, 509.) Whether the FAA preempts *McGill* is of exceptional importance. Virtually every UCL, FAL, and CLRA plaintiff can tack on a boilerplate request for an injunction seeking broad, "public" relief. *McGill* thus creates a significant loophole in the FAA's enforcement mandate, and does so in at least three impermissible ways.

(A) The *McGill* rule is not a generally applicable contract defense. Civil Code, § 3513, on which *McGill* relied, is an interpretive canon, not a contract defense. Interpretive canons do not abridge or confer substantive rights. Because section 3513 is not a generally applicable contract defense, it cannot, consistent with the FAA, be used to avoid arbitration.

(B) The "individualized" nature of arbitration is one of its "fundamental attributes" and "Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." (*Epic Sys., supra,* 584 U.S. at pp. 502, 508.) Consequently, an "argument that a contract is unenforceable *just because it requires bilateral arbitration"* "is one that impermissibly disfavors arbitration." (*Id.* at pp. 509–

510.) The *McGill* rule is precisely such an "argument"—it holds that contracts that require bilateral arbitration, and thus waive the right to seek relief for the public, are unenforceable. *McGill* forces parties to an arbitration agreement to forgo the benefits of the private, streamlined, and bilateral procedures the FAA protects any time a plaintiff prays for injunctive relief on behalf of the California public. That rule is preempted by the FAA.

(C) In practice, *McGill* routinely allows plaintiffs to avoid their agreements to arbitrate, yet almost never results in a public injunction. Indeed, the rule can be invoked without any meaningful limiting principle. It renders standard arbitration agreements unenforceable when a plaintiff seeks to enjoin virtually any allegedly unlawful business practice and contends that the relief (if granted) would primarily benefit the public at large. *McGill* thus obstructs the FAA's objectives of enforcing arbitration agreements as written.

The Opinion Below adopted an expansive view of *McGill,* deepening the split of authority between the California Courts of Appeal and the Ninth Circuit. (Compare Op. at p. 19, fn. 8, and, e.g., *Ramsey v. Comcast Cable Commc'ns, LLC* (2023) 99 Cal.App.5th 197, review den. May 1, 2024, No. H049949, cert. pending, Sept. 27, 2024, No. 24-365, with, e.g., *Hodges v. Comcast Cable Commc'ns, LLC* (9th Cir. 2021) 21 F.4th 535, 548.) By expanding *McGill's* reach even further, and simultaneously allowing the defense to be established by ***mere pleading,*** the Opinion Below magnifies *McGill's* conflict with the FAA's policy favoring arbitration.

The *McGill* rule creates a significant exception to the enforceability of arbitration agreements and limits the ability of consumers and businesses to rely on arbitration as a streamlined and predictable form of dispute resolution. The Opinion Below exacerbates this effect by allowing litigants to defeat arbitration merely by pleading their entitlement to the *McGill* defense, dispensing entirely with the usual rules governing burden and proof.

These are recurring issues that merit this Court's review. *McGill* has been cited in hundreds of cases by litigants seeking to avoid arbitration, while there is only a single example where a private litigant has obtained a "public injunction." And in the past few years alone, there have been nearly a dozen cases seeking to challenge *McGill* in this Court and the U.S. Supreme Court, not to mention in the lower courts.

It is time to revisit *McGill*. This is the right case for it. This Court should grant review to ensure uniformity of decision and to resolve these important questions of state and federal law.

STATEMENT OF THE CASE

Coinbase, Inc. (a wholly owned subsidiary of Coinbase Global, Inc.) operates an online platform for buying, selling, and transferring cryptocurrencies like Bitcoin and Ether. (Op. at p. 2.) Plaintiff Amish Shah is a Coinbase user who alleges his cryptocurrency was stolen by third-party thieves, and that Coinbase misleadingly marketed its platform as secure.[3] (1-CT-

[3] The action initially involved three co-plaintiffs who voluntarily dismissed their claims. (See Op. at pp. 1–2, fn. 1.) Their claims and allegations do not materially differ from Shah's.

20–54; 5-CT-1255–1256.) Shah failed to keep his own account credentials secure from third-party thieves. Although unfortunate, that fact does not support Shah's allegations that Coinbase's marketing was inaccurate or that its platform was not secure. Coinbase employs extensive security measures and its marketing is truthful and accurate.

Shah sued in San Francisco Superior Court, seeking solely injunctive relief for alleged violations of California's consumer statutes. [4] (Op. at p. 3.) Coinbase petitioned to compel arbitration. (*Ibid.;* see Corrected CT-2778–2779.)

Before this case began, two of the originally named plaintiffs to this action had filed a nearly identical putative class action in federal court, seeking substantial damages and injunctive relief to remedy the exact same alleged conduct at issue in this case, including public injunctive relief. (Op. at pp. 2–3.) After Coinbase moved to compel arbitration in that federal case, Plaintiffs filed this suit in state court. (*Ibid.)* Coinbase contended that Plaintiffs' state court complaint seeking "public injunctive relief" was a tactic to gain leverage in the class action and avoid the likely federal arbitration order. (See *ibid.)* And in fact, the federal court compelled those plaintiffs to arbitration. (*Id.* at p. 3.)

In the San Francisco Superior Court action, Shah sought to avoid arbitration by arguing that his claims involve "public injunctive relief," an injunction to

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[4] Unfair Competition Law (UCL), Bus. & Prof. Code, §§ 17200 *et seq.;* False Advertising Law (FAL); Bus. & Prof. Code, §§ 17500 *et seq.;* Consumer Legal Remedies Act (CLRA), Civ. Code, § 1750.

benefit the public at large, which California law treats as unwaivable and practically nonarbitrable. (*Ibid.;* see *McGill, supra,* 2 Cal.5th at p. 961.) But Shah did not offer any evidence in support of his allegations that the injunctive relief he sought would primarily benefit the general public—he merely alleged as much. (See Op. at p. 15.) Despite Coinbase disputing those factual allegations, the trial court denied the petition to compel arbitration, agreeing with Shah, and Coinbase appealed. (Op. at p. 4; see 8-CT-2348–2350.)

In a published opinion, the Court of Appeal affirmed. (*Kramer v. Coinbase, Inc.* Cal. Ct. App. 1st Dist., Div. 3, Sept. 21, 2024) No. A167779, - Cal. Rptr. 3d -, 2024 WL 4403544.) No petition for rehearing was filed.

STANDARD OF REVIEW

De novo review applies when this Court interprets decisional law (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 860, as modified (July 11, 2001)) and reviews questions of federal preemption (*Quishenberry v. UnitedHealthcare, Inc.* (2023) 14 Cal.5th 1057, 1064).[5]

REASONS FOR GRANTING REVIEW

I. Review Is Necessary To Clarify Whether A Plaintiff Must Prove A *McGill* Defense With Evidence Or If Merely Pleading It Is Enough To Defeat Arbitration

[5] It is undisputed that this action involves interstate commerce and is therefore covered by the FAA. (See 7-CT-2098–2100; 8-CT-2245:2.)

A. The Opinion Below Conflicts with this Court's Precedents and the Evidence Code, which Require the Party Invoking a Defense to Prove Any Fact Necessary to that Defense

Plaintiffs in this State may oppose arbitration if the arbitration agreement waives the right to seek "public injunctive relief" in any forum. (*McGill, supra,* 2 Cal.5th at p. 961–962.) This Court has described the *McGill* rule as a generally applicable contract defense. (*Id.* at p. 962.)

Once Coinbase established the existence of an agreement to arbitrate, Shah had the "burden of producing evidence of, and proving by a preponderance of the evidence, ***any fact*** necessary to the defense." (*Rosenthal, supra,* 14 Cal.4th at p. 413, emphasis added; accord *Engalla, supra,* 15 Cal.4th at p. 972; *Pinnacle, supra,* 55 Cal.4th at p. 236; *Green Tree, supra,* 531 U.S. at p. 91 ["the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration"]; accord Evid. Code, § 500 ["[A] party has the burden of proof as to each fact … essential to the … defense that he is asserting."].)

The facts of this case illustrate why this evidentiary burden matters. Shah seeks to avoid arbitration by claiming that he seeks public injunctive relief under *McGill*. He alleges that Coinbase engaged in conduct that harmed him and that is directed at the public at large, such that enjoining that conduct would primarily benefit the public at large. To make that argument, Mr. Shah asserts ***facts*** about the public reach of the conduct that caused his claimed injury,

which the Opinion Below credited over Coinbase's objections (see Op. at pp. 9–12, & fn. 5):

• Coinbase allegedly "engaged in a false advertising campaign to induce members of the public to sign up for Coinbase accounts by falsely 'represent[ing] that its platform is secure, when in fact, it is not.'" (RB at p. 29, citing 1-CT-21 ¶ 1.)

• Coinbase allegedly "does an even worse job of working to mitigate those thefts after they occur. Instead of providing '24/7 live support,' as it promises, it forces fraud victims to navigate an impenetrable automated 'customer service' process that leads nowhere." (*Ibid.,* citing 1-CT-21 ¶ 2.)

• There are allegedly "numerous false advertisements by Coinbase to the general public regarding the security of its platform and the account protections and customer service that it offers." (*Ibid.,* citing 1-CT-26–35 ¶¶ 31–48.)

But Shah freely admits he offered no evidence at all to support his assertions that Coinbase actually directed the challenged statements about platform security to the public. Instead, Shah contended the Court should accept the allegations as true—and on that basis, hold he met his burden under *McGill* to invalidate the arbitration agreement. The Opinion Below agreed with Shah, accepting those facts as alleged, even while acknowledging those contentions are disputed. (See Op. at 9–12 & fn. 5.)

And Coinbase emphatically disputes these allegations. For starters, the complaint does not paint a coherent picture of Coinbase's statements about its security. The complaint reads as if the drafters

trawled through every statement they could find when Coinbase used terms like "security" or "trust"—even when the statements were not made to the public at large, were made only to individuals who had already signed up for a Coinbase account, or related solely to "trust" in some other sense, unrelated to the risks to account security from third-party scammers. (See 1-CT-20–57.)

For example, many allegations on their face are not statements about the security of the service Shah used, are not advertisements, or are not directed to the public. (Compare 1-CT-20–57, with 5-CT-1255–1273.) Other challenged statements were made to Coinbase's investors, not consumers. (1-CT-33 ¶ 41.) Others are presented only after users create an account. (E.g., 1-CT-30 ¶¶ 33–34, 34.)

And some statements are not about "security" of the platform at all. Some have to do with the fact that crypto assets in customer accounts are kept separately from corporate assets. (See 1-CT-33–34 ¶¶ 40, 42.) Others had to do with the fact that Coinbase was not swept up in scandals that have affected other cryptocurrency companies. (See 1-CT-37 ¶ 58.) Further, the know-your-consumer ("KYC") and anti-money laundering ("AML") regulations Plaintiffs cite (1-CT-40–41 ¶¶ 69–79) are used to assess whether *customers themselves* have engaged in unlawful activity (see 4-CT-1098–1126)—these issues, too, bear no relation to Shah's claims, which concern Coinbase's security procedures to prevent unauthorized access by third parties.

In sum, the complaint fails to identify—let alone prove—statements that Coinbase made about

security to the public at large and that relate to the injury Shah alleges he suffered, a loss of his cryptocurrency after scammers were able to get access to his account credentials. Rather, the complaint lists public statements that are irrelevant to Shah's claims, and additional statements about platform security to existing customers like Shah that would at most support a claim for narrow ***private*** injunctive relief (if proven false).

Given the disconnect between the complaint's allegations and the purported harm to the public, Shah's failure of proof is significant. Shah falls well short of his obligation to prove, by a preponderance of the evidence, (1) that Coinbase's alleged statements actually relate to the injuries Shah alleges that he experienced and that other members of the public may experience; (2) that the statements were directed to the public; and (3) if enjoined, would primarily benefit the public at large, not just plaintiffs and those similarly situated to them.[6] (See *McGill, supra,* 2 Cal.5th at p. 955; see also, e.g., *Rosenthal, supra,* 14 Cal.4th at p. 413.)

Nevertheless, the Opinion Below ruled that the *McGill* defense—unlike any other defense to arbitrability—may be established with allegations, with no need for supporting evidence. (Op. at pp. 15–17.) The Court reasoned that the allegations, "if

[6] Coinbase does not contend plaintiffs would be required to prove any more than these facts; i.e., to establish a *McGill* defense it would be unnecessary to prove that the statements actually were false, that a plaintiff relied on them, or that they caused injury.

ultimately proven at trial, would support a claim for public injunctive relief." (Op. at p. 17.)

This ruling contravenes this Court's longstanding precedents holding that, once Coinbase established the existence of an agreement to arbitrate, Shah had the "burden of producing evidence of, and proving by a preponderance of the evidence, ***any fact*** necessary to the defense." (*Rosenthal, supra,* 14 Cal.4th at p. 413, emphasis added.)

Likewise, the Opinion Below runs directly contrary to the holdings of *Rosenthal* and *Engalla* that the superior court must decide any factual dispute as part of a summary proceeding at the time the petition or motion to compel arbitration is heard—not "ultimately … at trial." (Op. at p. 17.) For example, in *Rosenthal,* the plaintiffs raised fraud as a defense to an agreement to arbitrate and even submitted declarations in support of that argument, which the defendants contested. (14 Cal.4th at p. 404.) Rather than decide who was right, the superior court denied the petition on the ground that plaintiffs had presented "substantial" evidence of fraud. (*Ibid.)* This Court held the deferred ruling was improper; instead, courts must "resolve" the disputed factual issues on the motion. (*Id.* at p. 414; see also *Engalla, supra,* 15 Cal.4th at p. 973 ["Because the trial court … apparently abdicated its role as trier of fact in deciding the petition to compel arbitration, the case must be remanded to that court to resolve any factually disputed issues, unless there is no evidentiary support for the Engallas' claims" of fraud].)

This Court should grant review to secure uniformity of decision on this important question of law.

B. The Opinion Below's Burden Ruling Also Conflicts with the FAA

The requirement for parties to present competent evidence of their contract defenses when opposing arbitration is no mere formality under federal law, just as it is not a formality under this State's law. When a litigant opposes arbitration on the ground of a generally applicable contract defense, like fraud, the court must determine whether the litigant "did produce legally sufficient evidence" of the defense, thereby "voiding the arbitration agreement." (*Rosenthal, supra,* 14 Cal.4th at p. 414.) If the arbitration agreement is not "void," the arbitration agreement is still effective—and must be enforced (9 U.S.C. § 2).

The Opinion Below's contrary rule makes an end-run around the FAA, allowing courts to deny arbitration if there is a mere possibility that plaintiffs will "ultimately prove[ ] at trial" that they are entitled to the *McGill* defense. (Op. at p. 17.) Not only is the Opinion Below's ruling inconsistent with *Green Tree, Rosenthal, Engalla, Pinnacle,* and Evidence Code, § 500 (*supra,* § I.A), but it also conflicts with FAA § 2, which makes arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the ***revocation of any contract."*** (Emphasis added.)

The Opinion Below similarly conflicts with FAA § 4, which requires a court to "hear the parties" regarding the enforceability of arbitration agreements at the

time a petition to compel arbitration is filed. The Opinion Below creates a "state procedure[ ]" that "defeat[s] the rights granted by Congress" under that section, and is thus inconsistent with the FAA for that separate and independent reason. (See *Rosenthal, supra,* 14 Cal.4th at p. 409.)

Further, the FAA and California law presume the enforceability of an agreement to arbitrate; doubts about the scope of arbitrable issues must be resolved in favor of arbitrability. (See, e.g., *Moses H. Cone Memorial Hospital v. Mercury Constr. Corp.* (1983) 460 U.S. 1; *Madden v. Kaiser Foundation Hospitals* (1976) 17 Cal.3d 699.) In *Green Tree,* the U.S. Supreme Court rejected a challenge to an arbitration clause where the plaintiff asserted that arbitration costs were so high as to prevent her from vindicating her rights. (531 U.S. at p. 90.) While such an argument might have been sufficient in theory, *Green Tree* rejected it because "the record does not show that [plaintiff] will bear such costs if she goes to arbitration. Indeed, it contains hardly any information on the matter." (*Id.* at p. 91.)

Allowing a party to avoid an agreement to arbitrate by simply crediting unsubstantiated allegations in a complaint—as the Opinion Below does—is directly contrary to the mandatory presumption in favor of arbitrability imposed by the FAA §§ 2 and 4. This Court should grant review not only to ensure uniformity of decision with its own decisions, but also with the FAA—and to avoid FAA preemption. (See *Kleffman v. Vonage Holdings Corp.* (2010) 49 Cal.4th 334, 346 [construing law to avoid federal preemption].)

C. The Opinion Below Misreads *McGill* and Is Unsupported by Precedent

In holding that litigants like Shah may defeat a petition to compel arbitration by simply ***pleading*** they are seeking public injunctive relief, the Opinion Below relied on three mistaken premises.

First, the Opinion Below asserted that *McGill* itself rejected Coinbase's burden argument. (Op. at p. 16.) This is mistaken. The argument was not presented in *McGill* and was not decided in *McGill.* Citibank never argued that McGill failed to establish, with proof, that the relief sought was ***private*** as opposed to ***public.***[7] On this private versus public issue, Citibank confined itself to arguing about the scope of the complaint, and the Court decided the question on that basis. No one—no party, no amici—cited *Rosenthal* anywhere because that evidentiary standard was never the issue.

Instead, the passage on which the Opinion Below relied concerned Citibank's argument, in supplemental briefing, that plaintiff had to prove Citibank's conduct was "ongoing." (*McGill, supra,* 2 Cal.5th at p. 958.) The Court quoted and rejected Citibank's argument: "We also disagree with Citibank that, ***because*** 'McGill has not established that any of the alleged conduct she challenges is ongoing or likely to recur,' she 'has failed to establish that the relief she

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[7] See Answer Brief on the Merits, *McGill, supra,* 2 Cal.5th 945 (No. S224086), 2015 WL 6776573, at pp. *1, *13–14; Response of Citibank, N.A. to Respondent's Supplemental Brief, *McGill, supra,* 2 Cal.5th 945 (No. S224086), 2017 WL 628893, at pp. *7–8.)

seeks is, in fact, public injunctive relief.'" (*Ibid.,* emphasis added.) The Court noted that voluntary cessation is not dispositive of the right to an injunction. (*Ibid.)*

Further, the *McGill* Court relied on Citibank's concession that its arbitration clause prevented public injunctive relief from being litigated in any forum. (See *id.* at p. 956.) Thus, in that particular circumstance, there was no agreement to arbitrate that claim and the normal burden rule did not apply. (See *ibid.)* By contrast, Coinbase's User Agreement provides that, if a court holds the arbitration agreement unenforceable as to a particular claim for relief, "such as a request for public injunctive relief," that claim will be severed from the arbitration and may be tried in court. (Corrected-CT-2778 § 1.3.) So here, unlike in *McGill,* the dispute is whether Shah's claim is one subject to the agreement to arbitrate, or one that must be litigated in court. That is a challenge to arbitrability on which Shah had the burden of proof under *Green Tree* and *Rosenthal.*

McGill cannot be read to cast aside the rule of *Rosenthal* and *Engalla*—that the party resisting arbitration must prove the facts on which it relies—when the disputed facts concern public versus private injunctive relief. Certainly, *McGill* did not overrule *Rosenthal, Engalla,* and *Pinnacle* sub silentio. (See *Trope v. Katz* (1995) 11 Cal.4th 274, 287 [this Court does not overrule its precedents in dicta].)

Second, the Opinion Below observed that other courts addressing *McGill* have relied on allegations of fact to analyze whether the defense applied. (Op. at pp. 16–17.) However, no defendant in those cases

made the argument, as Coinbase does here, that *Rosenthal* required the plaintiffs to substantiate their allegations with evidence to successfully overcome an arbitration agreement based on *McGill*. Cases are not precedent for propositions not therein considered. (*B.B. v. County of Los Angeles* (2020) 10 Cal.5th 1, 11; *Ginns v. Savage* (1964) 61 Cal.2d 520, 524, fn. 2.)

Third, the Opinion Below reasoned that the *Rosenthal* rule applies only when a party resists arbitration on other grounds, like fraud or unconscionability. (Op. at p. 17.) But nothing in *Rosenthal* or its progeny says this rule is so limited. The Opinion Below offers no reasoned basis for dispensing with the burden of proof for a plaintiff who asserts public injunctive relief, but not for one who asserts any other defense to arbitration.

The Opinion Below's procedure is also at odds with the structure of both the FAA and the California Arbitration Act, which have formal procedures to ensure that all disputes about arbitrability—including factual disputes—are decided at the outset of the case. (See 9 U.S.C. §§ 2, 4; Code Civ. Proc., § 1281.2; *Rosenthal, supra,* 14 Cal.4th at pp. 405–406.)

Consider the following scenario. The court determines the complaint is sufficient to state the *McGill* defense and denies the petition to compel arbitration. Months later, the evidence reveals that the statements were only made to a discrete set of customers, like Shah, and not in advertisements to the public. An injunction against such statements would have no appreciable effect on the public and so should have been subject to arbitration. Similarly,

consider what would happen if the evidence shows, months down the line, that the alleged statements in fact had nothing to do with the security features of Coinbase's platform that Shah blames for his loss of cryptocurrency. Coinbase will have been deprived of its right to arbitrate in the interim and will have no real recourse by this time. That is why defenses to arbitration agreements must be adjudicated—looking to the evidence—at the time a petition to compel arbitration is filed.

Any other rule is not workable. The Opinion Below does recognize that "courts should not blindly rely on a complaint's prayer for public injunctive relief" (Op. at p. 17) and notes that the complaint here alleges specific facts. But that is essentially a judicially created heightened pleading standard for public injunctive relief arguments. It has no basis in the FAA nor the California Arbitration Act and it has no discernible standards. (Cf. *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 347 ("*Concepcion")* [while the erstwhile *Discover Bank* rule "require[d] that the consumer allege a scheme to cheat consumers[,]" this requirement "ha[d] no limiting effect, as all that [was] required is an allegation"].) There is already a rule in place: the statute-based rule of *Rosenthal* and *Green Tree,* which requires the party resisting arbitration to offer evidence.

Rosenthal does not impose a heavy burden—litigants can and do routinely meet it. And they should have to do so when asserting a *McGill* defense, just like every other defense this Court characterizes as "generally applicable."

D. The Opinion Below Expands the *McGill* Defense in a Manner that Can Be Easily Exploited to Frustrate the Right to Arbitrate

While litigants have invoked *McGill* in hundreds of cases to avoid otherwise enforceable arbitration agreements,[8] research reveals only a single instance in which a private litigant has actually sought and obtained a "public injunction" under *McGill*.[9] In reality, *McGill* is a tool to defeat arbitration, not to protect the public.

The Opinion Below exacerbates this problem by allowing plaintiffs to defeat arbitration by merely pleading their entitlement to the *McGill* defense, dispensing entirely with the usual rules governing burden and proof. The Opinion Below will make it easier than ever to defeat arbitration by tacking on a prayer for public injunctive relief in any complaint asserting claims under the UCL, FAL, CLRA, or any other statute that could support a broad injunctive remedy. All a plaintiff wishing to defeat arbitration has to do is to plead that the conduct it challenges

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[8] In approximately 77% of *McGill* cases, litigants invoke *McGill* to oppose arbitration, according to Westlaw headnote data. Nearly all the remaining cases cite *McGill* for general propositions of law.

[9] Of the 336 cases in Westlaw's database citing *McGill,* research did not reveal ***any*** ordering a public injunction. Research revealed a single post-*McGill* case where a court ordered a public injunction to a private plaintiff under the UCL, FAL, or CLRA. (See *Loy v. Kenney* (2022) 85 Cal.App.5th 403, 413, reh'g denied (Dec. 2, 2022) [injunction against "puppy mill"].)

affects the public and must be enjoined. This cannot and should not be the law. (Cf. *Concepcion, supra,* 563 U.S. at p. 347.)

The multiple requests for publication demonstrate that the Opinion Below goes well beyond any prior decision and will be interpreted expansively. The Opinion Below is based on a misreading of *McGill* that must be corrected, lest it create a statewide wave of decisions denying arbitration based on allegations of public injunctive relief alone.

This case is a good vehicle to resolve this question of statewide importance because it is squarely presented and preserved, and determinative to the outcome reached by the Opinion Below. This Court should grant review.

II. This Court Should Also Grant Review To Resolve Whether The FAA Preempts *McGill*

A court may invalidate an arbitration agreement subject to the FAA based on "generally applicable contract defenses" but not on legal rules that "apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue." [Citation.] (*Viking River Cruises, Inc. v. Moriana* (2022) 596 U.S. 639, 649–650, citing *Concepcion, supra,* 563 U.S. at p. 339; see 9 U.S.C. § 2.) This "saving clause" "allows courts to refuse to enforce arbitration agreements 'upon such grounds as exist at law or in equity for the revocation of any contract.'" (*Ibid.,* quoting 9 U.S.C. § 2.)

However, "nothing in [the saving clause] suggests an intent to preserve state-law rules that stand as an obstacle to the accomplishment of the FAA's

objectives." (*Concepcion, supra,* 563 U.S. at p. 343; see *Lamps Plus, Inc. v. Varela* (2019) 587 U.S. 176, 183 ["[S]tate law is preempted to the extent it 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives' of the FAA[.] [Citation.]"].) Thus, for the saving clause to apply and invalidate an agreement to arbitrate, the contract defense must: (1) be a "generally applicable" ground for revoking any contract; and (2) not obstruct the FAA's objectives. (See *Concepcion, supra,* at p. 343; *Lamps Plus, supra,* at p. 187.)

McGill satisfies neither requirement.

A. The *McGill* Rule, Based on Civil Code § 3513, Is Not a Generally Applicable Contract Defense

Merely labeling a contract defense "generally applicable" is not determinative. (See, e.g., *Concepcion, supra,* 563 U.S. at p. 341.) Some doctrines that are "normally thought to be generally applicable, such as duress or ... unconscionability" may be "applied in a fashion that disfavors arbitration." (*Ibid.)* For example, state law holding contracts unconscionable if they waive judicially monitored discovery procedures or strict adherence to the rules of evidence would be preempted. (*Id.* at pp. 341–344; see also, e.g., *Kindred Nursing Centers Ltd. P'ship v. Clark* (2017) 581 U.S. 246, 253 [state rule requiring powers of attorney to include express statements of authority to enter into arbitration agreements not a generally applicable contract defense].)

McGill cited Civil Code Section 3513 as a generally applicable contract defense that applies to waivers of the right to seek public injunctive relief. (2 Cal.5th at

p. 962.) But Section 3513 is an interpretive canon for statutes, not a contract defense. (See Civ. Code, § 3509 ["The maxims of jurisprudence hereinafter set forth are intended not to qualify any of the foregoing provisions of this code, but to aid in their just application."].) Thus, Section 3513 is not a ground for invalidating contracts. (See *ibid.; Nat'l Shooting Sports Found., Inc. v. State* (2018) 5 Cal.5th 428, 433 ["We understand Civil Code section 3531 just as Civil Code section 3509 provides: It is an interpretative canon for construing statutes, not a means for invalidating them."]; *McGovern v. U.S. Bank N.A.* (S.D. Cal. 2019) 362 F.Supp.3d 850, 860 ["[S]ection 3513 is meant to aid in the construction of statutes; it is not a contract defense at all."], reconsideration granted (S.D. Cal., Aug. 10, 2020, No. 18-CV-1794-CAB-LL) 2020 WL 4582687, in light of *Blair v. Rent-A-Center, Inc.* (9th Cir. 2019) 928 F.3d 819 [holding *McGill* not preempted].)

Though the Ninth Circuit in *Blair* listed several cases invoking Section 3513 to invalidate "waivers" outside the context of arbitration (928 F.3d at pp. 827–828), none of those cases employed Section 3513 as a generally applicable contract defense. Rather, each held certain ***statutory labor rights*** could not be waived because the statutes in question included express prohibitions on waiver. (*County of Riverside v. Superior Court* (2002) 27 Cal.4th 793, 805–806 [holding law enforcement agencies could not routinely require applicants to waive their rights under the Public Safety Officers Procedural Bill of Rights Act, though police officers could waive that right]; *Covino v. Governing Board* (1977) 76 Cal.App.3d 314, 322

[public teachers' tenure rights]; *Benane v. International Harvester Co.* (1956) 142 Cal.App.2d Supp. 874, 878 [terms of collective bargaining agreement could not waive the right to compensation while taking time off to vote]; *De Haviland v. Warner Bros. Pictures* (1944) 67 Cal.App.2d 225 [actor's contractual waiver of the Labor Code's seven-year limit on personal service contracts]; cf. *California Powder Works v. Atlantic & P.R. Co.* (1896) 113 Cal. 329, 335–336 [*approving* common carrier's release of liability for dangerous cargo notwithstanding Section 3513].)

The pattern that emerges from cases applying Section 3513 is a context-dependent approach to analyzing whether a particular statutory right may be waived under the circumstances—the opposite of a generally applicable contract defense. And unlike generally applicable contract defenses, a Section 3513 "defense" has no limiting principle. Although individuals may realize private benefits from a law, every law is established for some public reason. (*McGovern, supra,* 362 F.Supp.3d at p. 861.)

Conversely, if Section 3513 were truly a generally applicable contract defense, it would be overinclusive. It would prevent an individual plaintiff from settling a case under the UCL, FAL, or CLRA, because any settlement would almost certainly include a release of all rights to relief under those statutes, including the right to seek public injunctive relief. (See *McGovern, supra,* F.Supp.3d at p. 861.) But that is not how courts treat agreements to settle unlawful business practices cases. Yet under *McGill,* they do employ Section 3513

to single out arbitration agreements that contain such waivers.

Perhaps the most telling reason why *McGill* is not a generally applicable contract defense is the *McGill* Court's own explanation of its holding: as protecting certain public interests ***from being waived in predispute arbitration agreements:***

> ***[T]he waiver in a predispute arbitration agreement of the right to seek public injunctive relief under these statutes*** would seriously compromise the public purposes the statutes were intended to serve. Thus, insofar as ***the arbitration provision*** here purports to waive McGill's right to request in any forum such public injunctive relief, it is invalid and unenforceable under California law.

(*McGill, supra,* 2 Cal.5th at p. 961, emphases added.)

McGill erroneously transformed Section 3513's interpretive canon into an open-ended arbitration defense for any claim arising from a statute that serves, in any sense, to protect members of the public from alleged harm. Because section 3513 is not a generally applicable contract defense, it cannot, consistent with the FAA, be employed to avoid arbitration.

B. *McGill,* Like *Discover Bank,* Insists that Litigants May Not Waive a Form of Relief that, If Sought in Arbitration, Would Complicate and Protract the Proceedings, Obstructing the FAA's Objectives

Even state procedural rules that appear on their face not to discriminate against arbitration may be

preempted if, when applied, they would transform "'traditiona[l] individualized … arbitration' into the 'litigation it was meant to displace' through the imposition of procedures at odds with arbitration's informal nature. [Citations.]" (*Viking River, supra,* 596 U.S. at p. 651; see *Concepcion, supra,* 563 U.S. at p. at 343–344 ["the FAA's objectives" include "facilitat[ing] streamlined proceedings"].) The "individualized" nature of arbitration is one of its "fundamental attributes" and "Congress has instructed federal courts to enforce arbitration agreements according to their terms—including terms providing for individualized proceedings." (*Epic Sys., supra,* 584 U.S. at pp. 502, 508.)

McGill obstructs the FAA's objectives because it forces parties to an arbitration agreement to forgo the benefits of the private, streamlined, and bilateral procedures the FAA protects any time a plaintiff prays for injunctive relief on behalf of the California public at large. (See, e.g., *ibid.; Concepcion, supra,* 563 U.S. at pp. 343–344, 352.)

Like the *Discover Bank* rule, the *McGill* rule makes public injunctive relief waivers unenforceable although public injunctive relief is, by definition, unnecessary to make a plaintiff whole in an individual arbitration. (See *Concepcion, supra,* 563 U.S. at p. 352 [holding the FAA preempted California's former *Discover Bank* rule, which barred most class action waivers in arbitration agreements].) In effect, *McGill* prohibits a streamlined, bilateral arbitration of customer claims limited to their individual alleged injuries. (See *ibid.; McGovern, supra,* 362 F.Supp.3d at p. 863.) The *McGill* rule interferes with the

traditionally individualized and informal nature of arbitration, and unfairly targets bilateral arbitration by restructuring relief and proceedings from centering on one claimant to the entire California public at large—analogous to a putative class—which the FAA prohibits. (See *Concepcion, supra,* at pp. 346–352; *Swanson v. H&R Block, Inc.* (W.D. Mo. 2020) 475 F.Supp.3d 967, 977–978.)

As the Ninth Circuit has observed, the expansion of the *McGill* rule in the California Courts of Appeal is preempted because it "insist[s] that contracting parties may not waive a form of relief that is fundamentally incompatible with the sort of simplified procedures the FAA protects." (*Hodges, supra,* 21 F.4th at p. 548.) While the Ninth Circuit in *Hodges* leveled this criticism at the California Courts of Appeal that have expanded *McGill,* it is equally true of *McGill* itself. (See *Epic Sys.,* 584 U.S. at pp. 502, 508–510; *Concepcion, supra,* 563 U.S. at pp. 346–352.)

In concluding that the FAA does not preempt *McGill,* lower courts have erroneously downplayed the analogy between class actions and public injunctive relief, while overemphasizing superficial similarities between public injunctive relief and relief available in representative PAGA actions. (See *McBurnie v. RAC Acceptance E., LLC* (9th Cir. 2024) 95 F.4th 1188, 1193 [relying on its assumption, contrary to *McGill* itself, that public injunctive relief is equivalent to "representative" PAGA actions that may be exempted from arbitration]; *Blair, supra,* 928 F.3d at p. 829 [concluding public injunctive relief does not entail the burdensome procedures of class actions,

even though it may be substantively complex to adjudicate].)

McGill itself clarified that a request for public injunctive relief "does not constitute the 'pursu[it]' of 'representative claims or relief on behalf of others.'" (2 Cal.5th at p. 958.) Accordingly, *McGill*-derived claims for public injunctive relief are not the type of "representative claims" that survived FAA preemption in *Viking River*. (596 U.S. at pp. 659–662 [holding individual PAGA claims could be compelled to arbitration, but State could prohibit waiver of employee's right to pursue "representative" PAGA claims].)

Further, the proposed distinction between ***procedural*** complexity (which leads to preemption, per *Concepcion)* and ***substantive*** complexity (see *Blair, supra,* 928 F.3d at p. 829) is not grounded in the FAA and is contrary to *Concepcion* itself. That class arbitration would require excessively formal procedures was just one of several grounds the U.S. Supreme Court articulated for holding the *Discover Bank* rule preempted. (*Concepcion, supra,* 563 U.S. at pp. 348–351.) The *Discover Bank* rule also "sacrific[ed] the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment." (*Ibid.)* And class arbitration "greatly increases risks to defendants," who otherwise are willing to forgo appellate review of arbitration decisions because their impact is limited to relief awarded to an individual claimant. (*Id.* at pp. 350–351.)

Here, as with class arbitration, having a private arbitrator consider and potentially order a statewide injunction affecting the interests of potentially millions of Californians would be costly, inefficient, slow, and the very picture of a procedural morass at odds with arbitration's informal, bilateral nature. (See *ibid.; Epic Sys., supra,* 584 U.S. at pp. 502, 508–510.) And like class arbitration, public injunctive relief intolerably increases risks to defendants, who would otherwise have the right to appeal an injunction. (Code Civ. Proc., § 904.1, subd. (a)(6).) States cannot force defendants to choose between their contractual arbitration rights and "bet[ting] the company with no effective means of review[.]" (*Concepcion, supra,* 563 U.S. at p. 351.)

Further, absent members of the public would likely have no way of participating in a private arbitration, though they may be affected by the injunction. (See *Cruz v. PacifiCare Health Systems, Inc.* (2003) 30 Cal.4th 303, 312 [entrusting public injunctive relief to arbitrators would result in "'diminution or frustration of the public benefit'"], quoting *Broughton v. Cigna Healthplans of California* (1999) 21 Cal.4th 1066, 1082.) And arbitrators lack "the institutional continuity and the appropriate jurisdiction to sufficiently enforce and, if needed, modify a public injunction." (*Ibid.)* As this Court has recognized, these are "'inherent conflict[s]'" with arbitrating public injunctive relief. (*Ibid.)* Coinbase agrees.

Like class actions, actions for "public" injunctions have no place in ***private*** arbitration. The *McGill* rule conflicts with the FAA and is preempted.

C. In Practice, *McGill* Is Almost Exclusively Used as a Tool to Avoid Arbitration

McGill further obstructs the FAA because litigants routinely use it to avoid arbitration, yet it almost never results in a public injunction. And *McGill's* reach has no meaningful limit. It renders standard arbitration agreements unenforceable when a plaintiff seeks to enjoin virtually any allegedly unlawful business practice and pleads that the relief would primarily benefit the public.

As the Ninth Circuit has observed, the California Courts of Appeal have expanded the scope of what is "public" injunctive relief without any principled limitation. (See *Hodges, supra,* 21 F.4th at p. 544; cf., e.g., *Ramsey, supra,* 99 Cal.App.5th 197; *Maldonado v. Fast Auto Loans, Inc.* (2021) 60 Cal.App.5th 710, 724; *Jack v. Ring LLC* (2023) 91 Cal.App.5th 1186, 1208; *Mejia v. DACM Inc.* (2020) 54 Cal.App.5th 691; *Vaughn v. Tesla, Inc.* (2023) 87 Cal.App.5th 208.) For example, people purchasing used motorcycles (*Mejia)* and people entering into allegedly unconscionable loan agreements (*Maldonado)* are not representative of "the general public as a whole." (*Hodges, supra,* at p. 545.) Likewise, current consumers of specific Coinbase products and potential customers choosing among cryptocurrency exchanges do not constitute the general public. They are current and potential customers of a business, a discrete class.

Yet the Opinion Below adopted this expansive view of *McGill,* deepening the split of authority between the California Courts of Appeal and the Ninth Circuit. (Op. at p. 19, fn. 8; see Massie Payne Cooper et al., *Can You Spot a "Public" Injunction in California?,*

American Bar Association, Feb. 15, 2024 <https://bit.ly/CA-public-injunctions> [detailing split of authority and urging this Court's review].) Further, the Opinion Below's expansion of *McGill's* reach to defeat arbitration agreements ***merely by pleading*** its applicability (*supra,* § I), exacerbates the problem with *McGill*—it is confined by neither a coherent limiting principle nor any evidentiary standard of proof. These attributes underscore *McGill's* conflict with the FAA's policy favoring arbitration. (See *Epic Systems, supra,* 584 U.S. at pp. 506, 509; *Lamps Plus, supra,* 587 U.S. at p. 183.)

And *McGill* is an arbitration-avoidance tool. Research reveals ***only a single instance*** in which a private plaintiff obtained public injunctive relief after *McGill.*[10] By contrast, litigants have invoked *McGill* in ***hundreds*** of cases to avoid otherwise enforceable arbitration agreements.[11] These statistics confirm that *McGill* is an arbitration-specific rule that obstructs the FAA's objectives. (See *Concepcion, supra,* 563 U.S. at pp. 342–343 [that "California's courts have been more likely to hold contracts to arbitrate unconscionable than other contracts" weighed in favor of holding rule preempted]; accord, e.g., *Taylor v. Extendicare Health Facilities, Inc.* (Pa. 2016) 147 A.3d 490, 509–510 [holding state procedural rule requiring consolidation of wrongful death and survival claims was not "generally applicable contract

[10] See *supra,* fn. 9, citing *Loy, supra,* 85 Cal.App.5th at p. 413 (injunction against "puppy mill").

[11] *Supra,* fns. 8–9.

defense," observing it was generally used as a tool to avoid arbitration].)

Lawyers on all sides agree that *Blair* and *McGill* "give[ ] plaintiffs' lawyers in California the green light to continue trying to side-step arbitration provisions with class action waivers by asserting claims for public injunctive relief." (Alan S. Kaplinsky et al., *Ninth Circuit Holds FAA Does Not Preempt California's* McGill *Rule, The National Law Review* (July 2, 2019) <https://bit.ly/kaplinsky-green-light>.)

McGill is preempted.

D. *McGill's* Conflict with the FAA Is a Recurring Issue that Merits this Court's Review

McGill has spawned hundreds of nominal public injunctive relief claims, virtually all aimed at avoiding arbitration.[12] In the last few years alone, *McGill's* implications and conflict with the FAA have been raised in nearly a dozen cases and petitions in this Court and the U.S. Supreme Court—not to mention the lower courts.[13]

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[12] *Supra,* fns. 8–9; see, Alan S. Kaplinsky, Mark J. Levin, Martin C. Bryce, Jr., *Arbitration Year in Review: Back to Basics (but with Some New Twists)* (2021) 76 Bus. Law. 675, 678, & fn. 30; Petition for Writ of Certiorari app. g, at 60a, *AT&T Mobility LLC v. McArdle,* No. 19-1078 (Feb. 27, 2020).

[13] See, e.g., *Ramsey, supra,* 99 Cal.App.5th 197 (No. S283742) review den. (May 1, 2024), cert. petition filed, Sept. 27, 2024; *Dixon v. Fast Auto Loans, Inc.* (Cal. Ct. App., Jan. 14, 2022, No. B307730) 2022 WL 130874, review den. (Mar. 23, 2022); *Jack, supra,* 91 Cal.App.5th 1186, review den. (Sept. 13, 2023); *Rogers v. Lyft, Inc.* (Cal. Ct. App., July 21, 2022, No. A160182) 2022 WL 2866364, review den. (Nov. 9, 2022); *Maldonado, supra,* 60

The Opinion Below is the tipping point. Not only is there a compelling case that *McGill* was wrongly decided and its rule preempted, but courts' refusal to apply *Rosenthal's* burden of proof to *McGill* defenses lays bare that *McGill* is untenable.

CONCLUSION

This Court should grant review.

Dated: October 22, 2024 Respectfully submitted,

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Cal.App.5th 710, cert. den., 142 S.Ct. 7088; *Tillage v. Comcast Corp.* (2020) 140 S.Ct. 2827; *AT&T Mobility LLC v. McArdle* (2020) 140 S.Ct. 2827; *RAC Acceptance East, LLC v. MCBurnie* (U.S., Oct. 7, 2024, No. 23-1307) 2024 WL 4426660; *HRB Tax Grp., Inc. v. Snarr* (2021) 142 S. Ct. 577; *Clifford v. Quest Software Inc.* (2019) 38 Cal.App.5th 745, review den. (Nov. 13, 2019); see also *Gostev v. Skillz Platform, Inc.* (2023) 88 Cal.App.5th 1035, review den. (June 14, 2023); *California Medical Assn. v. Aetna Health of California Inc.* (2023) 14 Cal.5th 1075, 1092, fn. 6.)