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October 12, 2021

U.S. Chamber of Commerce

The Honorable Tani Cantil-Sakauye
and Honorable Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, California 94102

Re: *Qaadir v. Figueroa*, No. S270948

Dear Chief Justice Cantil-Sakauye and Associate Justices:

In accordance with California Rule of Court 8.500(g), I file this letter-brief on behalf of *amici* the Chamber of Commerce of the United States of America and the American Tort Reform Association (ATRA). Amici support Mr. Figueroa's and Pacific Trucks' petition for review.

AMICI'S STATEMENT OF INTEREST[1]

The Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end,

[1] In accordance with California Rule of Court 8.520(f), the Chamber and ATRA certify that no party or party's counsel authored this letter-brief in whole or in part and that no person except the Chamber, ATRA, their respective members, or their counsel funded the letter-brief.

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the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than two decades, ATRA has filed *amicus curiae* briefs in cases addressing important liability issues.

Amici's members often face lawsuits in which medical expenses represent a portion of claimed damages. They have an interest in ensuring that damages awarded for medical expenses reflect market realities, not made-up numbers. Those interests led Amici to submit an *amicus* letter three years ago in *Pebley v. Santa Clara Organics*, *LLC*, 22 Cal. App. 5th 1266 (2018).

Now here we are again. The *Qaadir* decision below—and the earlier *Pebley* decision that it treated as controlling—are part of a continuing split in authority that this Court should correct. Both decisions break from the Court's decision in *Howell v. Hamilton Meats & Provisions, Inc.*, 52 Cal. 4th 541 (2011), and other decisions from the Court of Appeal recognizing that a medical provider's billed charges often present an inaccurate measure of medical services' value. The Court of Appeal below expanded upon the special rule conjured in *Pebley* that allows an insured plaintiff to recover medical damages based on billed charges when the plaintiff chooses (in this case, at counsel's direction) to receive treatment from a provider that takes a lien on tort recovery instead of seeking reimbursement from the plaintiff's insurer. The Court of Appeal followed the *Pebley* rule that, in those circumstances, a plaintiff must "be considered uninsured, as opposed to insured, for the purpose of determining economic damages," which justifies using billed charges to calculate medical damages. (Typed Op. 14 (quoting *Pebley*, 22 Cal. App. 5th at 1269)). The Court of Appeal expanded on *Pebley* by allowing those billed charges to be introduced as amounts that the plaintiff incurred, regardless of whether the plaintiff would in fact pay the charges in the ordinary course. *Id.*

That legal rule, which suspends reality by treating an insured plaintiff as uninsured and the full amount of medical bills as evidence of damages, is producing confusion and mischief in California. In their petition, Mr. Figueroa and Pacific Trucks chronicle both the post-*Howell* chaos in the lower courts and the bad public policy of encouraging a symbiotic medical-lien industry to flourish in the ecosystem of personal-injury cases. Petitioners argue that the decision below will only add to the mess, and Amici agree. In ruling as it did below, the Court of Appeal continues to ignore not only this Court's settled teaching that billed charges are irrelevant to calculating medical damages but

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also numerous industry and government reports supporting that conclusion. The goal in awarding medical damages is to compensate for harm suffered. Awarding damages based on inflated billed charges created in the medical-lien mill does not compensate; it provides the plaintiff a windfall recovery—in some cases, many multiples of the damages that would make the plaintiff whole.

ARGUMENT

Petitioners have explained that the Court of Appeal's decision below makes mincemeat of *Howell* and entrenches a split about the propriety of using billed charges to calculate medical damages. *See* Pet. 19-33; *compare Corenbaum v. Lampkin*, 215 Cal. App. 4th 1308, 1326 (2013) (following *Howell* and holding that "the full amount billed by medical providers is not an accurate measure of the value of medical services"), and *Ochoa v. Dorado*, 228 Cal. App. 4th 120, 130, 136 (2014) (in lien case, following *Howell* and *Corenbaum* to hold that "medical bills were not evidence of the reasonableness of the amounts charged"), *with Bermudez v. Ciolek*, 237 Cal. App. 4th 1311, 1333 n.5 (2015) (in case involving uninsured plaintiff, concluding that *Howell* "did not actually hold that medical charges are inadmissible"); *Pebley*, 22 Cal. App. 5th at 1269 (classifying insured plaintiff in lien case as "uninsured" and following *Bermudez* to permit "an uninsured plaintiff [to] introduce evidence of the amounts billed for medical services"); Typed Op. 18 (in lien case, holding that "the billed amount is generally relevant"). The post-*Howell* case law continues to be all over the map and will continue to produce conflicting lower court decisions. Having passed on *Pebley*, this Court should weigh in to confirm that billed charges are neither an accurate measure of the value of medical services nor evidence of the amounts that an injured individual actually incurs.

That is what *Howell* teaches. After analyzing the issue at some length, this Court concluded in *Howell* that billed medical charges don't reflect fair-market values or practices. "Because so many patients, insured, uninsured, and recipients under government health care programs, pay discounted rates," the Court explained, "hospital bills have been called 'insincere, in the sense that they would yield truly enormous profits if those prices were actually paid.'" *Howell*, 52 Cal. 4th at 561 (citing Uwe Reinhardt, *The Pricing of U.S. Hospital Services: Chaos Behind a Veil of Secrecy*, 25 HEALTH AFFAIRS 57, 62 (2006). The Court concluded that "the relationship between the value or cost of medical services and the amounts providers bill for them . . . is not always a close one" and that "it is not possible to say generally that providers' full bills represent the real value of their service[]." *Id.* at 562. Because the "pricing of medical services is highly complex," the Court went on, it makes more sense to look to negotiated rates—not full billed amounts—to assess the value of medical services actually incurred. *Howell*'s reasoning didn't turn on whether the plaintiff is insured or uninsured; in either case, billed charges don't represent

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a reasonable measure of medical services' value. *See Ochoa*, 228 Cal. App. 4th at 138-39.

Pricing and economic data support that conclusion. *Howell* recognized that billed medical charges outstrip paid amounts (whether Medicaid or private insurance). *See* 52 Cal. 4th at 561. Studies since have confirmed those remarkable differences, often in orders of magnitude. *See, e.g.*, America's Health Insurance Plans (AHIP), *Charges Billed by Out-of-Network Providers: Implications for Affordability* at 5 (Sept. 2015), https://www.ahip.org/wp-content/uploads/2015/09/OON_Report_11.3.16.pdf (using the Fair Health database, among other resources, to identify "a pattern of average billed charges submitted by out-of-network providers that far exceeded Medicare reimbursement for the same service performed in the same geographic area"); AHIP, *Survey of Charges Billed by Out-of-Network Providers: A Hidden Threat to Affordability* (Jan. 2013), http://blog.riskmanagers.us/wp-content/uploads/2013/02/SurveyofBilledChargesOONProviders1.pdf (similar findings).

In many cases, the numbers are shocking. The 2013 AHIP study revealed huge disparities between provider charges and Medicare reimbursement rates. One provider, for instance, charged $34,366 for arthroscopic knee surgery; Medicare reimburses $718 for the same procedure. AHIP, *Survey of Charges Billed by Out-of-Network Providers: A Hidden Threat to Affordability* at 2. The 2015 AHIP study found that, on average, providers billed an "electrocardiogram (ECG)/monitoring and analysis" at $2,407—1,382% of the average amount ($174) that Medicare reimburses for the same procedure. AHIP, *Charges Billed by Out-of-Network Providers: Implications for Affordability* at 5, 8. The 2015 study also revealed "wide variation in [the] out-of-network charges from different providers for the same procedure": "[B]illed charges for 'muscle-skin graft trunk' differed from $3,565 for the 25th percentile to $14,998 for the 75th percentile." *Id.* Similar statistics have featured in press coverage about medical billing. *See, e.g.*, Jenny Gold & Sarah Kliff, *A Baby Was Treated With a Nap and a Bottle of Formula. The Bill was $18,000*, CALIFORNIAHEALTHLINE (July 9, 2018), https://californiahealthline.org/news/a-baby-was-treated-with-a-nap-and-a-bottle-of-formula-the-bill-was-18000/; Chad Terhune & Sandra Poindexter, *Price of a Common Surgery Varies from $39,000 to $237,000 in L.A.*, L.A. TIMES (June 2, 2015), https://www.latimes.com/business/la-fi-medicare-payment-hospitals-20150602-story.html

Despite recognizing the disconnect between the value of medical services, the amounts paid for those services, and the amounts that providers bill for them, *Howell* declined to hold that unpaid medical bills were always inadmissible. 52 Cal. 4th at 562. But this Court could not have foreseen the "uninsured" insured

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rule that *Pebley* would invent and that would further encourage the medical-lien litigation strategies outlined in the petition (36-39). In this case, the insured plaintiff initially received treatment under his insurance plan, but then his personal injury attorney referred him to an out-of-network pain management provider, who in turn referred him to an out-of-network surgery center for spinal-fusion surgery and other procedures. (Typed Op. 3-4). At trial, the plaintiff called a billing expert who had both an ownership interest in the surgery center and a business relationship with the pain management provider. *Id.* at 5. Something is not right with that picture.

Just ask the Department of Industrial Relations. It has identified problems in the medical-lien practice in California. A 2018 Progress Report discussed the Department's efforts to reduce medical provider fraud and illegitimate liens in the workers' compensation system and highlighted the problem's huge scope with hundreds of suspended providers and billions of dollars in dismissed liens. Cal. Dept. of Industrial Relations, *Progress Report on Anti-Fraud Efforts in the California Workers' Compensation System* (Mar. 2018), www.dir.ca.gov/Fraud_Prevention/Reports/Anti-Fraud-Report2018.pdf).

Ten years after *Howell*, the time has come for this Court to declare unpaid medical bills irrelevant and inadmissible to calculate medical damages. The judicial use of unreliable medical figures should not depend on a litigant's insurance status or on which prong of an evidentiary test they are trying to prove. Granting the petition and reversing the judgment below is not just a matter of resolving a lower court split. It is also a matter of discouraging harmful litigation practices and aligning the law with economic reality.

CONCLUSION

This Court should grant Mr. Figueroa's and Pacific Trucks' petition and, having done that, should reverse the decision below.

Respectfully,

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PROOF OF SERVICE

STATE OF NEW YORK, COUNTY OF NEW YORK

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of New York, State of New York. My business address is Alston & Bird LLP, 90 Park Ave. New York, NY 10016.

On October 12, 2021, I served true copies of the document described as **AMICUS LETTER** on the interested parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY MAIL: (TRIAL JUDGE ONLY) I enclosed the document(s) in a sealed envelope or package addressed to the persons at the addresses listed in the Service List and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with Horvitz & Levy LLP's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

BY E-MAIL OR ELECTRONIC TRANSMISSION: Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission via Court's Electronic Filing System (EFS) operated by ImageSoft TrueFiling (TrueFiling) as indicated on the attached service list:

I declare under penalty of perjury under the laws of the State of New York that the foregoing is true and correct.

Executed on October 12, 2021, at New York, New York.

/S/
David Venderbush

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