Supreme Court of California
Jorge E. Navarrete, Clerk and Executive Officer of the Court
Electronically RECEIVED on 11/23/2022 11:11:38 AM

Seyfarth Shaw LLP
2029 Century Park East
Suite 3500
Los Angeles, California 90067-3021
T (310) 277-7200
F (310) 201-5219

kseldon@seyfarth.com
T (310) 201-1581

www.seyfarth.com

November 23, 2022

VIA TRUEFILING

Honorable Tani Cantil-Sakauye, Chief Justice and Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco CA 94102-7303

Re: *Gavriiloglou v. Prime Healthcare Management, Inc.*, No. S277080: Amici Curiae Letter in Support of Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to California Rule of Court 8.500(g), amici curiae the California Hospital Association (CHA), Employers Group, the California Employment Law Council (CELC), and the California Chamber of Commerce (CalChamber) write in support of Prime Healthcare Management, Inc.'s petition for review.

Introduction

Amici agree with Prime that review is urgently needed because the Court of Appeal's published decision in *Gavriiloglou v. Prime Healthcare Management*, No. E076832 (Aug. 22, 2022) departs from established res judicata principles. Amici write separately to emphasize three points.

First, the Court of Appeal's decision gravely misconstrues *Viking River Cruises, Inc. v. Moriana*, 142 S.Ct. 1906 (2022), which recently authorized arbitration of "individual" PAGA claims. *Gavriiloglou* refuses to recognize that an "individual" PAGA claim even exists, making it irreconcilable with *Viking River* and with the recent decision in *Navas v. Fresh Venture Foods, LLC*, -- Cal.App.5th ---, 2022 WL 17087898 (Nov. 21, 2022). Review is necessary for this reason alone to eliminate the conflict. The Court of Appeal's failure to recognize individual PAGA claims also may lead lower courts to apply *Gavriiloglou*'s no-preclusion rule to those claims—meaning that even an adverse

judgment *on an individual PAGA claim* would not bar the PAGA plaintiff from bringing a representative PAGA action. Review is necessary to forestall this absurd result.[1]

Second, *Gavriiloglou*'s misapplication of issue preclusion in the PAGA context will create massive inefficiencies for litigants and for overburdened trial courts. The decision's no-preclusion rule gives the green light to wasteful re-litigation of a threshold standing question that arises in every PAGA case—namely, whether an employee is "aggrieved"—when trial courts already are overwhelmed with PAGA actions.

Third, and equally important, *Gavriiloglou* calls into question the finality and integrity of arbitration awards. By stripping arbitral awards of their preclusive force when—and only when—a PAGA action is involved, the Court of Appeal decision is irreconcilable with the Federal Arbitration Act. The ruling also deprives California employers and employees of what they contractually bargained for—that is, a final, binding arbitration award. The consequences of the decision will be felt broadly because *Viking River* has only increased the enforcement (and enforceability) of arbitration agreements in PAGA litigation.

Interest of Amici Curiae

California Hospital Association. CHA is a nonprofit membership corporation representing the interests of more than 400 hospital and health system members in California, including psychiatric hospitals. CHA's members furnish vital health care services, including behavioral health care services, to millions of our state's citizens. CHA provides its members with state and federal representation in the legislative, judicial, and regulatory arenas, in an effort to: support and assist California hospitals in meeting their legal and fiduciary responsibilities; improve health care quality, access, and coverage; promote health care reform and integration of services; achieve adequate health care funding; improve and update laws and regulations; and maintain the public trust in healthcare. CHA's efforts regularly include participating as amicus curiae in cases of importance to hospitals and other health care providers, including *Gerard v. Orange Coast Mem'l Med. Ctr.*, 6 Ca1.5th 443 (2018), *Rashidi v. Moser*, 60 Cal.4th 718 (2014), and *Fahlen v. Sutter Cent. Valley Hosps.*, 58 Ca1.4th 655 (2014).

Employers Group. Employers Group is one of the nation's largest and oldest human resources management organizations for employers. It represents nearly 3,000 California employers of all sizes in a wide range of industries, which collectively employ nearly

---

[1] In *Adolph v. Uber Technologies, Inc.*, No. S274671, this Court will address an antecedent question: whether a PAGA plaintiff retains standing to pursue a representative PAGA action when their individual PAGA claim has been compelled to arbitration. This case would allow the Court to address what preclusive effect an individual arbitration award would have on subsequent PAGA litigation.

three million employees. As part of its mission, Employers Group maintains an advocacy group designed to represent the interests of employers in government and agency policy decisions and in the courts. As part of that effort, Employers Group seeks to enhance the predictability and fairness of the laws and decisions governing employment relationships. Employers Group has appeared for decades before this Court as amicus curiae, including in *Ferra v. Loews Hollywood Hotel, LLC*, 11 Cal.5th 858 (2021), *Oman v. Delta Air Lines, Inc.*, 9 Cal.5th 762 (2020), and *Kim v. Reins Int'l Cal., Inc.*, 9 Cal.5th 73 (2020).

California Employment Law Council. CELC is a voluntary, nonprofit organization that promotes the common interests of employers and the general public in fostering the development in California of reasonable, equitable, and progressive rules of employment law. CELC's membership includes approximately 70 private-sector employers in the State of California, who collectively employ hundreds of thousands of Californians. CELC has been granted leave as amicus curiae to orally argue and/or file briefs in many of California's leading employment cases, including in *Ferra*, 11 Cal.5th 858, *Augustus v. ABM Sec. Servs., Inc.*, 2 Cal.5th 257(2016), and *Iskanian v. CLS Transp., L.A., LLC*, 59 Cal.4th 348 (2014).

California Chamber of Commerce. CalChamber is a non-profit business association with over 14,000 members, both individual and corporate, representing virtually every economic interest in the State of California. While CalChamber represents several of the largest corporations in California, 75 percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the State's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues.

Reasons for Granting Review

Gavriiloglou holds that an employee who has definitively and finally been found *not* to be "aggrieved" can still pursue a representative PAGA action. As Prime correctly explains, the Court of Appeal's decision is manifestly incorrect and warrants immediate review for multiple reasons. For one, the decision flies in the face of PAGA's statutory text, which authorizes *only* an "aggrieved employee" to sue "on behalf of himself or herself" and other aggrieved employees, Lab. Code §2699(a). *See* Pet. at 22-23.

Gavriiloglou also undermines the entire purpose of PAGA's standing requirement: to avoid the spectacle of uninjured individuals pursuing costly collective actions, just as they had done under a previous version of California's Unfair Competition Law. *See* Pet. at 33, n. 6. Further, the ruling runs roughshod over settled issue preclusion principles, rendering meaningless a *final* decision (by either an arbitrator or trial court judge) adjudicating an *identical* issue (whether the plaintiff suffered a Labor Code violation)

between the *same* parties. Pet. at 18-30. Amici joins with Prime in urging review in order restore certainty and consistency to this area of the law.

Amici—a coalition of organizations representing California employers across a broad range of sectors with millions of California employees—write separately to emphasize that this case does not present merely an abstract dispute about res judicata doctrine. The consequences of the Court of Appeal's decision will reverberate broadly—and immediately—given the prevalence of PAGA litigation, particularly in the wake of *Viking River.*

1. Review should be granted to eliminate confusion and answer important questions in the wake of *Viking River.*

By conflating an individual PAGA claim with an individual Labor Code claim, *Gavriiloglou* sows confusion regarding the meaning and effect of *Viking River*. The Court of Appeal dismissed *Viking River*'s recognition of an "individual PAGA claim" as "mere wordplay," holding that "[w]hat the Supreme Court called … an 'individual PAGA claim,'" was "not actually a PAGA claim at all" but, rather, "an individual Labor Code claim." Order Modifying Opinion, p. 2. This is manifestly incorrect.

Viking River's central holding was that "the FAA preempts the rule of *Iskanian* insofar as it precludes *division of PAGA actions* into *individual* and non-individual claims through an agreement to arbitrate." 142 S.Ct. at 1924 (emphasis added). The Supreme Court "mandated arbitration of [the plaintiff's] individual PAGA claim," *id.* at 1925, which it defined as the portion of the PAGA claim that was "premised on Labor Code violations actually sustained by the plaintiff." *Id.* at 1916.

A recent decision from another appellate district confirms the distinction *Viking River* drew: "PAGA lawsuits include: 1) *individual PAGA actions* where the employee seeks damages for violations committed against the individual employee, and 2) 'representative' actions where an employee seeks damages because of the employer's PAGA violations committed against a group of employees." *Navas v. Fresh Venture Foods, LLC*, -- Cal.App.5th ---, 2022 WL 17087898, at *3 (Nov. 21, 2022) (emphasis added). *Gavriiloglou*'s refusal to recognize an individual PAGA claim cannot be reconciled with either *Viking River* or *Navas.* For this reason alone, review (or at least depublication) is necessary.

Gavriiloglou's failure to distinguish between "individual" PAGA claims and non-PAGA Labor Code claims also will cause confusion. It may lead lower courts to apply *Gavriiloglou*'s no-preclusion rule to both types of claims—meaning that even an arbitral (or trial court) finding that the plaintiff failed to establish *an individual PAGA claim* would have no preclusive effect in later PAGA litigation. That cannot be the law.

Granting review would allow this Court to clarify what preclusive effect an arbitration award in an individual PAGA case would have on any subsequent PAGA litigation.

2. *Gavriiloglou* will cause massive inefficiency.

PAGA actions have proliferated since the statute's enactment in 2004. According to its filing data, the Labor Workforce Development Agency (LWDA) annually receives roughly 5,000 or more PAGA notices (which are a prerequisite to suit), with a 25% increase in LWDA notices between 2017 and 2021: from 4,984 in 2017, to 6,502 in 2021.[2] And by one estimate, PAGA plaintiffs filed around 27,100 PAGA lawsuits from fiscal year 2013/2014 through the first 3 months of fiscal year 2020/2021.[3] Because they often generate extensive discovery (*Williams v. Superior Court*, 3 Cal.5th 531 (2017)) and are not bound by class certification requirements (*Arias v. Superior Court*, 46 Cal.4th 969 (2009)), PAGA suits already consume extensive party and trial court resources.

Further increasing the litigation burden, PAGA actions often follow overlapping litigation. Some PAGA suits, for example, follow class actions alleging the same or similar violations. *See e.g. Villacres v. ABM Industries Inc.*, 189 Cal.App.4th 562 (2010); *Howitson v. Evans Hotel, LLC*, 81 Cal.App.5th 475 (2022). Other PAGA suits follow arbitrations. Specifically, trial courts often will stay PAGA actions pending arbitration of the named plaintiff's individual Labor Code claims against the employer. *See e.g.* 9 U.S.C. §3 (under the FAA, trial courts "*shall* … stay the trial of the action until … arbitration has been had …") (emphasis added); Code Civ. Proc. §1281.4; *Franco v. Arakelian Enterprises, Inc.*, 234 Cal.App.4th 947, 966 (2015) ("Because the issues subject to litigation under the PAGA might overlap those that are subject to arbitration of [plaintiff's] individual claims, the trial court must order an appropriate stay of trial court proceedings").

Now, if the *Gavriiloglou* opinion is correct, a finding that the plaintiff did not suffer a Labor Code violation (whether in a prior trial court action or prior arbitration proceeding) will have no preclusive effect in the representative PAGA action. The trial court presiding over the PAGA suit necessarily will have to relitigate the "aggrieved

---

[2] *See* Nader and Zagger, *No COVID-19 Slowdown for California PAGA Filings: The Data Is In*, The National Law Review (July 17, 2022), available at [No COVID-19 Slowdown for California PAGA Filings: The Data Is In](). The data on LWDA PAGA notice filings were compiled from the LWDA's records at https://cadir.secure.force.com/PagaSearch/PAGASearch (last accessed November 21, 2022).

[3] *See* Baker and Welsh, *California Private Attorneys General Act of 2004, Outcomes and Recommendations* (October 2021), available at https://cabiafoundation.org/app/uploads/2021/11/CABIA_PAGA-Report-2021.pdf (last accessed November 21, 2022).

employee" issue, thereby doubling the work of the parties and the courts. That increased litigation burden would be unavoidable—after all, whether a PAGA plaintiff is "aggrieved" is a threshold question in every PAGA action. Thus, if left unreviewed, *Gavriiloglou* will only exacerbate the litigation burdens PAGA actions already impose.

Gavriiloglou also may encourage plaintiffs to file even *more* PAGA actions as a backstop. If, for example, an arbitrator finds that Employee X's wage statement complies with Labor Code section 226, Employee X has every incentive to file a PAGA action asserting an identical wage statement claim in order to get a second bite at the apple. So rather than serving as an efficient way to weed out non-aggrieved employees and meritless PAGA litigation, the arbitration proceeding would have been meaningless.[4] To make matters worse, in the absence of any res judicata effect, trial courts would have little incentive to stay PAGA actions pending parallel litigation, thereby forcing employers to defend on two fronts at once (which, as addressed below, conflicts with *Viking River* and impermissibly frustrates the FAA).

Because, under *Gavriiloglou*, PAGA litigation could never be terminated by a favorable judgment in an individual Labor Code action, employers will be pressured to settle even meritless PAGA actions to avoid costly, duplicative litigation—an unfair result for California employers.[5]

Finally, as Prime correctly points out (Pet. at 12, 31-34), *Gavriiloglou* undermines public policies favoring conservation of judicial resources, finality, and consistency of results. *Castillo v. City of Los Angeles*, 92 Cal.App.4th 477, 481 (2001) (policies behind issue preclusion include "preservation of the integrity of the judicial system, promotion of judicial economy, and protection of litigants from harassment by vexatious litigation"). Subjecting employers and trial courts to repetitious litigation by a PAGA plaintiff whose

---

[4] A similar scenario would unfold if a trial court adjudicated Employee X's Labor Code wage statement claim, and then the employee filed an identical PAGA action in another trial court.

[5] Using the earlier example, Employee X could ignore the arbitrator's adverse finding on her wage statement claim, then file a broad PAGA action asserting not only the identical wage statement violation, but other Labor Code violations not personally suffered by her. *Huff v Securitas Sec. Servs. USA, Inc.*, 23 Cal.App.5th 745, 751 (2018). The PAGA "do over" would allow Employee X and her attorneys to exert settlement pressure on the employer, despite the fact that an arbitrator has already determined that Employee X was not injured. As it stands, according to data received from the LWDA, employers have paid out over $8 billion in PAGA settlements since 2016. While the plaintiffs' bar may argue that filling the LWDA's coffers in this way benefits the public, these settlements should not come at the expense of fair and efficient litigation.

claim already has been determined to be without merit is wasteful and unfair, and undermines the integrity of the judicial system.

3. *Gavriiloglou* undermines arbitral awards in violation of the FAA.

The FAA "protects a right to enforce arbitration agreements." *Viking River*, 142 S.Ct. at 1918. Rules "'aimed at destroying arbitration' or 'demanding procedures incompatible with arbitration,' … contravene the FAA's 'overarching purpose' of 'ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings.'" *Sonic-Calabasas A, Inc. v. Moreno*, 57 Cal.4th 1109, 1138 (2013) (quoting *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 343 (2011)).

By rendering an arbitrator's findings non-binding in subsequent PAGA litigation, *Gavriiloglou* nullifies arbitration awards—and the agreements those awards are based on. *Gavriiloglou* effectively creates a special state law rule whereby PAGA can negate arbitration awards, putting the decision on a collision course with the FAA. 9 U.S.C. §9; *cf. Marmet Health Care Ctr., Inc. v. Brown*, 565 U.S. 530, 533 (2012) (state law rule exempting certain claims from arbitration preempted).

If not reviewed, the Court of Appeal's decision will mean that arbitration contracts (and resulting arbitration awards) will not be worth the paper they are written on. A dissatisfied plaintiff could simply ignore a confirmed arbitration award and sue in court, seeking PAGA penalties for Labor Code violations the arbitrator determined were never committed against her. That is the very opposite of the respect to be accorded to arbitration awards under established law. *Moncharsh v. Heily & Blase*, 3 Cal.4th 1, 10 (1992) ("expectation of finality strongly informs the parties' choice of an arbitral forum over a judicial one," and "[t]he arbitrator's decision should be the end, not the beginning, of the dispute").

This Court's timely attention to the issue is critical, given that *Viking River* just recently emphasized that PAGA cannot interfere with enforcement of individual arbitration contracts. 142 S.Ct. at 1925 ("Viking was entitled to enforce the agreement insofar as it mandated arbitration of [plaintiff's] individual PAGA claim"). A greater encroachment on arbitration is hard to imagine than a California law stating that an arbitration award loses all preemptive force whenever a PAGA claim is involved.

The consequences of the Court of Appeal's decision will be felt widely. A 2018 Economic Policy Institute study estimated that 53.9% of nonunion private-sector employers have mandatory arbitration agreements, with the share rising to 65.1% among

companies with 1,000 or more employees.[6] The study notes that "mandatory arbitration is especially widespread in California." *Id.* Another source notes that "the number of employment disputes resolved in arbitration climbed by roughly 66% between 2018 and 2020," with companies "clos[ing] just over 5,000 workplace arbitration cases in 2020, up from more than 3,000 cases in 2018."[7] *Viking River* is likely to accelerate the trend, now that it is clear that agreements to arbitrate individual PAGA claims must be enforced.

Given *Gavriiloglou*'s potential widespread impact on the integrity and enforceability of arbitration awards, amici join with Prime in urging review.

For the reasons set forth above and in Prime's petition, amici urge this Court to grant review in this case.

Very truly yours,

SEYFARTH SHAW LLP

/s/ Kiran A. Seldon

Kiran Aftab Seldon

cc: *Counsel for plaintiff Eleni Gavriiloglou*:
Gavril Theodoros Gabriel
Counsel for defendant Prime Healthcare Management, Inc.:
Thomas M. Peterson
Clifford Douglas Sethness
Samson Charles Huang
Amicus Counsel:
Jeffrey A. Berman
Geoffrey Westbrook

---

[6] Colvin, *The growing use of mandatory arbitration*, Economic Policy Institute (Apr. 16, 2018), www.epi.org/publication/the-growing-use-of-mandatory-arbitration-access-to-the-courts-is-now-barred-for-more-than-60-million-american-workers/ (last accessed November 21, 2022).
[7] Mulvaney, *Mandatory Arbitration at Work Surges Despite Efforts to Curb It*, Bloomberg Law (Oct. 28, 2021), available at https://news.bloomberglaw.com/daily-labor-report/mandatory-arbitration-at-work-surges-despite-efforts-to-curb-it (last accessed November 21, 2022).

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF LOS ANGELES)

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 2029 Century Park East, Suite 3500, Los Angeles, California 90067-3021. On November 23, 2022, I served the within document(s):

☒ by transmitting the document(s) listed above, electronically, via TrueFiling electronic service

Gavril Theodoros Gabriel Law Offices of Gavril T. Gabriel 8255 Firestone Boulevard, Suite 209 Downey, CA 902141 Email: ggabriel@gtglaw.org	*Attorney for Plaintiff and Appellant Eleni Gavriiloglou*
Thomas M. Peterson Morgan, Lewis & Bockius LLP One Market Street, Spear Tower San Francisco, CA 94105 Email: Thomas.peterson@morganlewis.com	*Attorneys for Defendants, Respondents and Petitioners Prime Healthcare Management, Inc., Prime Healthcare Management II, Inc., Hospital Business Services, Inc., and Prem Reddy*
Clifford Douglas Sethness Samson Charles Huang Morgan, Lewis & Bockius LLP 300 S. Grand Avenue, 22nd Floor Los Angeles, CVA 90071 Email: Clifford.sethness@morganlewis.com Samson.huang@morganlewis.com	*Attorneys for Defendants Respondents and Petitioners Prime Healthcare Management, Inc., Prime Healthcare Management II, Inc., Hospital Business Services, Inc., and Prem Reddy*

VIA U.S. POSTAL SERVICE ONLY

The Hon. Donald R. Alvarez
San Bernardino County Superior Court
8303 North Haven Avenue
Rancho Cucamonga, CA 91730

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 23, 2022, at Los Angeles, California.

Rachel D. Victor