



LAWYERS

610 NEWPORT CENTER DRIVE, SUITE 700
NEWPORT BEACH, CALIFORNIA 92660

TELEPHONE 949.717.3000
FACSIMILE 949.717.3100

CALLJENSEN.COM

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OUR FILE NUMBER
RET01-02

Presiding Justice Therese M. Stewart
and Associate Justices
California Court of Appeal
First Appellate District, Division Two
350 McAllister Street
San Francisco, CA 94102-7421

Re: *Tucker v. Bath & Body Works et al.*,
Court of Appeal Case No. A170817
Amici Curiae Letter in Support of Petition for Writ of Mandate

Dear Honorable Justices:

We write on behalf of *amici curiae*, the Retail Litigation Center, Inc. (“RLC”) and California Retailers Association (“CRA”), urging this court to grant the Petition for Writ of Mandate filed by Petitioners Bath & Body Works, LLC; Bath & Body Works Direct, Inc.; and Bath & Body Works, Inc. (collectively, “Bath & Body Works”). We respectfully ask for permission to file this letter on behalf of amici.

The Superior Court’s failure to stay the litigation of Ms. Tucker’s representative PAGA claims while her individual claim is arbitrated represents a significant issue that is important to all retailers operating in California who enter into arbitration agreements with their employees. Courts are routinely faced with motions to compel arbitration of PAGA claims. Indeed, over 5,000 PAGA lawsuits were filed *in 2023 alone*. See Michael J. Nader et al., *The Data Is In—California Class Action and PAGA Filings to Hit New Highs* (Jan. 12, 2024), available at <https://ogletree.com/insights-resources/blog-posts/the-data-is-in-california-class-action-and-paga-filings-to-hit-new-highs/>.

Bath & Body Works’ Petition is an unfortunate example of denials of stays of representative PAGA claims pending arbitration in a few superior courts,

contrary to California authority under *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104 (2023), and the well-established mandate to stay under Cal. Civ. Proc. Code § 1281.4. Bath & Body Works' Petition is an opportunity for this Court to address inconsistent and invalid decisions in the trial courts that may result in forum shopping and pursuit of representative claims led by plaintiffs without standing.

Authority for Permitting this Amicus Letter

Petitions for Writ of Mandate, California Rules of Court, rule 8.487 expressly permits the filing of amicus briefs after an appellate court issues an alternative writ or order to show cause. (Cal. Rules of Court, rule 8.487(e)(1).) In addition, the Advisory Committee comment to the rule expressly permits courts to accept amicus letters *before* the court issues an alternative writ or order to show cause. The rule states:

Subdivisions (d) and (e). *These provisions do not alter the court's authority to request or permit the filing of amicus briefs or amicus letters in writ proceedings in circumstances not covered by these subdivisions, such as before the court has determined whether to issue an alternative writ or order to show cause or when it notifies the parties that it is considering issuing a peremptory writ in the first instance.*

(Emphasis added.) California judicial decisions have recognized the relevance of amicus letters in connection with writ petitions and acknowledged that they play a role in courts' consideration of whether to issue an order to show cause. (*Regents of University of California v. Superior Court* (2013) 220 Cal.App.4th 549, 557-558 [noting that amicus letters were filed in support of a writ petition and that, "based on the amici curiae submissions we have received," the matter "appears to be of widespread interest" such that writ review was appropriate]; see *Los Angeles County Bd. of Supervisors v. Superior Court of Los Angeles County* (2015) 235 Cal.App.4th 114 [185 Cal.Rptr.3d 842, 847] ["The Association of Southern California Defense Counsel, as amicus curiae, filed a[n] [amicus] letter in support of issuance of the writ"], revd. on another ground in (2016) 2 Cal.5th 282.) Therefore, *Amici* respectfully ask the court to consider this letter in deciding whether to grant Bath & Body Works' petition for writ of mandate.

Interest of Amici Curiae

The RLC is a 501(c)(6) nonprofit organization that represents national and regional retailers, including many of the country's largest and most innovative

retailers, across a breadth of retail verticals. Nearly all of the RLC’s retail members operate stores in California. The RLC is the only trade association solely dedicated to representing the retail industry in the courts. The RLC offers retail-industry perspectives to courts on important legal issues and highlights the industry-wide consequences of significant cases. Since its founding in 2010, the RLC has filed more than 200 amicus briefs on issues of importance to the retail industry. Its amicus briefs have been favorably cited by multiple courts, including the U.S. Supreme Court. *See, e.g., South Dakota v. Wayfair, Inc.*, 138 S. Ct. 2080, 2097 (2018); *Kirtsaeng v. John Wiley & Sons, Inc.*, 568 U.S. 519, 542 (2013); *State v. Welch*, 595 S.W.3d 615, 630 (Tenn. 2020).

The California Retailers Association (CRA) promotes, preserves and enhances the retail industry in California. The CRA is the only statewide trade association in California representing all segments of the retail industry including general merchandise, department stores, mass merchandisers, online markets, restaurants, convenience stores, supermarkets and grocery stores, chain drug and specialty retail such as auto, vision, jewelry, hardware and home stores. The CRA provides the voice to retail, which is vital to California’s economy and diverse workforce.

The RLC and CRA have a particular interest in this case because many of their retail members employ hourly, non-exempt employees in California and, in accordance with both state and federal authority, have entered and enforced arbitration agreements in PAGA matters necessitating stays of any associated non-individual PAGA claims. Thus, the issue of whether a court mandates a stay of non-individual PAGA claims pending individual arbitration is an important question of law impacting California-based retailers and their employees.

Argument

The Court of Appeal Should Grant Bath & Body Works’ Writ Because the Impact of the Superior Court’s Decision Extends Beyond This Case.

The Superior Court’s refusal to issue a mandatory stay is an example of what appears to be an emerging pattern in a few courts to deny stays of representative PAGA claims pending arbitration of individual/non-representative claims, contrary Cal. Civ. Proc. Code § 1281.4 and *Adolph v. Uber Techs., Inc.*, 14 Cal. 5th 1104.¹ The potential for PAGA plaintiffs to continue litigating representative claims while individual claims are arbitrated presents the significant risk that plaintiffs will

¹ See e.g., *Lara v. Dreyer’s Grand Ice Cream, Inc.*, Case No. 22-cv-024868, 2023 WL8691717 (Ca. Superior Ct., Alameda Cty.); *Rodriguez v. Best Buy Stores, L.P.*, Case No. 23-cv-028792, (Ca. Superior Ct., Alameda Cty.).

gravitate toward the few outlier courts that allow it and then prematurely expend substantial judicial resources and defense costs before the critical threshold standing question is answered. Neither law nor policy dictates putting this cart before the horse.

Both before and after *Adolph*, courts have stayed non-individual PAGA claims until the relevant individual claims have been arbitrated.² The decision to deny a stay in this case is wrong but, unfortunately, not isolated in recent months. As a result, a clear ruling in a published opinion from this Court is needed to ensure that PAGA plaintiffs cannot selectively choose a venue to attempt to prematurely utilize judicial resources and impose significant costs on defendants. Moreover, as pointed out in Bath & Body Works' Petition, this question may evade review if this Court does not accept a writ. This issue is of widespread interest and this case is a useful opportunity to reiterate the longstanding requirement that a stay of non-individual PAGA claims is required upon request when the individual claim is compelled to arbitration.

The Court of Appeal Should Grant Bath & Body Works' Writ Because the Superior Court's Decision Is Contrary to *Adolph v. Uber Technologies, Inc.*

The Superior Court entirely disregarded *Adolph's* framework that makes clear (1) section 1281.4 governs stays of representative PAGA actions pending arbitration and (2) Ms. Tucker must have her own standing by statute.

The Plain Language of CCP § 1281.4 Mandates a Stay.

First, staying Ms. Tucker's representative PAGA claims pending in the Superior Court is mandatory as a matter of law. *See* CCP § 1281.4³ ("If a court of competent jurisdiction...has ordered arbitration of a controversy which is an issue involved in an action or proceeding pending before a court of this State, the court in which such action or proceeding is pending **shall**, upon motion of a party to such action or proceeding, stay the action or proceeding until an arbitration is had.")

² See e.g., *Jenkins v. Sterling Jewelers, Inc.*, 2018 WL 922386 (S.D. Cal. Feb. 16, 2018); *Galarsa v. Dolgen California, LLC*, 88 Cal.App.5th 639 (2023); *Seifu v. Lyft, Inc.*, Case No. B3011774, 2023 WL 2705285 (Cal. Ct. App. March 30, 2023); *Piplack v. In-in-Out Burgers*, 88 Cal.App.5th 1281 (2023); *Gregg v. Uber Techs., Inc.* 89 Cal. App. 5th 786, 806 (2023); *Merhi v. Lowe's Home Ctr., LLC*, 2023 WL 6498500, at *8 (S.D. Cal. Oct. 13, 2023).

³ While not addressed extensively in this letter brief, it is important to note the Federal Arbitration Act likewise requires the imposition of a stay of non-individual PAGA claims while the individual PAGA claim is arbitrated. *See* Bath & Body Works' Petition, 12 ¶ 7; 9 U.S.C. § 3.

(emphasis added)); *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 Franco’s individual claims, the trial court must order an appropriate stay of trial court proceedings.” (emphasis added) (citing CCP § 1281.4)).

The section’s use of the word “shall” “**require[s] imposition of a stay.**” *Heritage Provider Network, Inc. v. Superior Ct.*, 158 Cal. App. 4th 1146, 1152 (2008). Such stays are important to prevent inconsistent judgments that undermine the ability of arbitration to serve “as a speedy and relatively inexpensive method of resolving disputes.” *Id.* The California Supreme Court in *Adolph v. Uber Technologies, Inc.* further underscored the importance of a stay to avoid duplicative litigation and the potential for conflicting judgments, which could severely undermine the judicial process. The *Adolph* Court stated:

When a case includes arbitrable and nonarbitrable issues, the issues may be adjudicated in different forums while remaining part of the same action. Code of Civil Procedure section 1281.4 states that upon ‘order[ing] arbitration of a controversy which is an issue involved in an action,’ the court should ‘stay the action.’

Adolph, 14 Cal.5th at 1123-24. (emphasis added) Following the plain text of § 1281.4, as supported by *Adolph* and *Franco*’s acknowledgment of the statute in the PAGA context, the Superior Court must stay Ms. Tucker’s representative PAGA claims upon ordering her individual claims to arbitration.

The Superior Court’s Decision Risks Inconsistent Results Because Standing Is Necessary for a Non-Individual/Representative PAGA Claim.

Second, allowing representative PAGA claims to proceed in court before the individual’s claim is arbitrated presents the unescapable risk that the ongoing representative PAGA action is being led by a plaintiff without standing. For the PAGA plaintiff to have standing to bring a PAGA action, she must have an individual claim that one of her Labor Code rights have been violated. If a PAGA plaintiff was never aggrieved during her employment, she has no standing to bring her PAGA action in place of the Labor Commissioner.

Ms. Tucker is required to prove she suffered a violation of one of the Labor Code rights to have standing to be a PAGA plaintiff. *Rocha v. U-Haul Co. of*

California, 88 Cal. App. 5th 65, 77-78 (2023); *Adolph*, 14 Cal. 5th 1104, 1127. The Superior Court disregarded this critical requirement entirely. In support of its decision to deny the mandatory stay, the Superior Court quoted *Jarboe v. Hanlees Auto Group*, 53 Cal. App. 5th 539, 557 (2020) for the notion that, “[b]ecause a PAGA claim is representative and does not belong to an employee individually, an employer should not be able to dictate how and where the representative action proceeds.” However, the *Jarboe* decision was issued prior to *Viking River Cruises, Inc. v. Moriana*, 596 U.S. 639 (2022), and therefore pre-*Adolph*, and was not intended to address arbitration in the post-*Viking River*/post-*Adolph* framework of “individual” and “non-individual” PAGA claims.

The California Supreme Court, on the other hand, wrestled with this framework in *Adolph* and made clear that the individual and non-individual claims are inseparable for purposes of establishing standing. The *Adolph* Court said:

“General public” standing once existed under the UCL and allowed individuals with no ties to the unlawful conduct to bring suit. (*Kim*, supra, 9 Cal.5th at p. 90, 259 Cal.Rptr.3d 769, 459 P.3d 1123.) In order to curb abusive litigation, the Legislature designed PAGA standing to be narrower than general public standing. (*Kim*, at p. 90, 259 Cal.Rptr.3d 769, 459 P.3d 1123.) An “aggrieved employee” under PAGA is not merely a member of the general public; an “aggrieved employee” is an individual who worked for the alleged violator and **personally sustained at least one Labor Code violation.** (§ 2699, subd. (c); see *Kim*, at p. 90, 259 Cal.Rptr.3d 769, 459 P.3d 1123, quoting Sen. Com. on Judiciary, Analysis of Sen. Bill No. 796 (2003–2004 Reg. Sess.) as amended Apr. 22, 2003, p. 7.)”

Adolph, 14 Cal. 5th 1104, 1127 (emphasis added).

Thus, standing – the determination of whether a plaintiff *personally sustained at least one Labor Code violation* – must be decided by the arbitrator before the non-individual action proceeds on a different timeline. *Adolph* again acknowledged how critical this timing is when noting that if “the arbitrator determines that *Adolph* is not an aggrieved employee and the court confirms that determination [by following the typical process of confirming the arbitral award] and reduces it to a final judgment, the court would give effect to that finding, **and *Adolph* could no longer prosecute his non-individual claims due to lack of standing.**” *Id.* at 1124 (emphasis added). This principle is supported by the *Franco* court, which emphasized that issues subject to arbitration that also overlap with litigation should


be stayed to avoid duplicative efforts and inconsistent outcomes. 234 Cal. App. 4th 947 (2015).

As set forth in the relevant statute, rule and case law, the condition precedent for Ms. Tucker to maintain a PAGA action on behalf of other allegedly aggrieved employees is that she herself must be an “aggrieved employee.” That determination must be made by the arbitrator, as the Superior Court itself recognized when it compelled Ms. Tucker’s claims to arbitration. The Superior Court’s refusal to stay the litigation until this overlapping issue is decided by the arbitrator compromises the integrity of both the arbitration and litigation processes, could create inconsistent findings, and will fuel forum-shopping.

CONCLUSION

The Superior Court’s refusal to acknowledge the mandatory nature of the stay of a non-individual PAGA claim while the individual PAGA claim is arbitrated sets a harmful standard that may result in forum shopping and the premature use of judicial resources in cases far beyond the instant case. The decision below also defies the California Supreme Court’s framework for CCP § 1281.4 in PAGA cases and risks conflicting results in arbitration and the courts. This Court should grant Bath & Body Works’ Petition and reverse the Superior Court’s denial of the stay.

Respectfully submitted,
CALL & JENSEN
A Professional Corporation
Julie R. Trotter
Madeleine K. Lee

By: 

Madeleine K. Lee
Attorneys for Amicus Curiae
RETAIL LITIGATION CENTER, INC.

cc: See attached Proof of Service

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF ORANGE

I am employed in the County of Orange, State of California. I am over the age of 18 and not a party to the within action; my business address is 610 Newport Center Drive, Suite 700, Newport Beach, CA 92660.

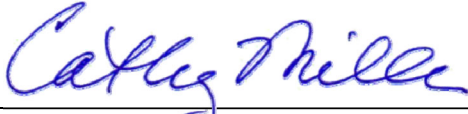
On July 2, 2024, I served the foregoing document described as **AMICI CURIAE LETTER IN SUPPORT OF PETITION FOR WRIT OF MANDATE** on the following person(s) in the manner indicated:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct, and that this declaration was executed on July 2, 2024, at Newport Beach, California.



Cathy Miller

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<p>Carolyn H. Cottrell Esther L. Bylsma Philippe M.J. Gaudard SCHNEIDER WALLACE COTTRELL KONECKY LLP 2000 Powell Street, Suite 1400 Emeryville, CA 94608 Tel: (415) 421-7100 Fax: (415) 421-7105 ccottrell@schneiderwallace.com ebylsma@schneiderwallace.com pgaudard@schneiderwallace.com</p>	<p>Attorneys for Plaintiff and Respondent SHAMIYA TUCKER</p> <p><i>Served via TrueFiling</i></p>
<p>Phillip Jon Eskenazi Kerri Haru Sakaue BAKER & HOSTETLER, LLP 1900 Avenue of the Stars, Ste 2700 Los Angeles, CA 90067 peskenazi@bakerlaw.com ksakaue@bakerlaw.com</p>	<p>Attorneys for Defendant and Petitioners BATH & BODY WORKS, LLC, ET AL.</p> <p><i>Served via TrueFiling</i></p>
<p>Hon. Brad Seligman c/o Clerk of the Court Alameda Superior Court Rene C. Davidson Courthouse 1225 Fallon Street Oakland, CA 94612</p>	<p>Trial Judge Case No. 24CV062098</p> <p><i>Served via Overnight Mail</i></p>