UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RALPHS GROCERY COMPANY

& Case No. 21-CA-073942

TERRI BROWN, an Individual

BRIEF AMICI CURIAE OF SERVICE EMPLOYEES INTERNATIONAL UNION, NATIONAL WOMEN'S LAW CENTER, AND NATIONAL EMPLOYMENT LAW PROJECT

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QUESTIONS PRESENTED

On January 18, 2022, the National Labor Relations Board ("NLRB" or "Board") issued a notice and invitation to file briefs in this matter asking:

1. Should the Board abrogate the decision in *Anderson Enterprises*, where it overruled its earlier decision in the instant case? Does the arbitration policy at issue in the instant case interfere with employees' right to file Board charges or otherwise access the Board's processes?

2. Did the Board correctly hold in *California Commerce Club* that the Federal Arbitration Act ["FAA"] privileges employers' maintenance of confidentiality requirements in arbitration agreements that would otherwise violate Section 8(a)(1) by interfering with employees' exercise of their rights guaranteed by Section 7?

3. If, contrary to *California Commerce Club*, the FAA does not prevent the Board from reviewing arbitration confidentiality requirements under the National Labor Relations Act ["NLRA" or "Act"], what standard should the Board apply to determine whether such requirements are lawful?

This brief addresses only questions (2) and (3).

INTERESTS OF AMICI

The Service Employees International Union ("SEIU") is a union of approximately two million working people employed in health care, property services, and the public sector. SEIU also supports fast-food and other not-yet-unionized workers organizing throughout the United States. Workers represented by or organizing with SEIU rely on meaningful enforcement of the NLRA on a daily basis.

SEIU is very concerned about employer-imposed confidentiality requirements that stymie worker communication and organizing, especially in non-unionized workplaces. When employees cannot freely discuss the terms and conditions of their work, they cannot organize or lay the groundwork for future collective action. With respect to forced arbitration in particular, workers must be able to discuss, inter alia, the labor dispute that led to arbitration, information learned during arbitration proceedings, and the outcome of the arbitration process. If workers are

not able to discuss these things, they cannot organize or engage in collective action regarding the subject of the arbitration, which can of course be important to their work. Accordingly, SEIU has a strong interest in the Board's overruling its incorrect decision in *California Commerce Club* and adopting a standard that limits employer-mandated confidentiality requirements.

The National Women's Law Center ("NWLC") fights for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. We use the law in all its forms to change culture and drive solutions to the gender inequity that shapes our society and to break down the barriers that harm all of us—especially women of color, LGBTQ people, and low-income women and families. Since its founding in 1972, NLWC has worked to advance workplace justice, income security, educational opportunities, and health and reproductive rights for women and girls and has participated as counsel or amicus curiae in a range of cases including before the Supreme Court. NWLC is committed to advocating for workers' rights and ensuring greater workplace transparency so that working people may challenge a host of workplace harms including pay discrimination and sexual and racial harassment. NWLC has advocated for workers to have a range of options for pursuing their rights including through worker organizing, union grievance and arbitration procedures, and access to justice through court cases.

The National Employment Law Project ("NELP") is a non-profit legal organization with over fifty years of experience advocating for the employment rights of workers in low-wage industries. NELP's areas of expertise include workplace standards, access to good jobs and benefits, and worker collective action, especially in the non-union context. NELP collaborates closely with state and federal agencies, community-based worker centers, unions, and state policy groups. It has litigated and participated as amicus in numerous cases addressing workers'

rights under federal and state laws. NELP has submitted testimony to the U.S. Congress and state legislatures on numerous occasions on the importance of workplace rights and employer accountability to workers.

SUMMARY OF ARGUMENT

The NLRA protects workers' right to discuss the terms and conditions of their employment and prohibits employers from interfering with that right. Employee discussion of workplace arbitrations is in most cases doubly protected under this rule: The procedure used to resolve workplace disputes is always an important term and condition of employment that workers have a right to discuss, and any dispute giving rise to a workplace arbitration is likely about employment terms and conditions as well. Employer-imposed confidentiality clauses that prevent employees from discussing workplace arbitrations are therefore illegal in most cases because they interfere with worker communications that are protected by the NLRA.

The Federal Arbitration Act does not save confidentiality clauses that are illegal under the Act. The FAA invalidates contract provisions or defenses that interfere with arbitration's "fundamental attributes," *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1622 (2018), but confidentiality is not and never has been a fundamental attribute of arbitration. By contrast, discussions among co-workers, especially about labor disputes, are at the core of the NLRA's protections. *See* 29 U.S.C. § 157; *cf. Epic Sys.*, 138 S. Ct. at 1625.

Because employer-mandated confidentiality clauses often interfere with employee rights protected by the Act and are not saved by any provision of the FAA, the Board should overturn its incorrect *California Commerce Club* decision and hold that employers violate the NLRA when they force employees to keep confidential information regarding terms and conditions of

employment, including information related to arbitration, unless one of the already recognized, limited exceptions to the Act's protections applies.

ARGUMENT

I. Employer Rules That Prevent Employees from Discussing Labor Disputes or Their Resolution Violate NLRA Section 7.

NLRA section 7 protects employees' right to engage in "concerted activities" for "mutual aid or protection." 29 U.S.C. § 157. By necessity, this right includes the right to discuss employment terms and conditions with co-workers, including terms and conditions regarding the resolution of workplace disputes. Employer rules that suppress protected employee discussions about dispute resolution or other terms and conditions of employment violate section 7, whether those employer rules are found in forced arbitration clauses or elsewhere.

A. Section 7 protects workers' right to discuss labor disputes and dispute resolution procedures.

Section 7 protects a broad range of concerted activities that "improve [employees'] lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 567 (1978). Not surprisingly, employee communication about terms and conditions of employment is core section-7-protected activity. *See, e.g.*, *Cintas Corp. v. NLRB*, 482 F.3d 463, 466 (D.C. Cir. 2007). Co-workers have the right not only to communicate with each other about working conditions but also to communicate with the public about them. *See, e.g.*, *Stanford Hosp. & Clinics v. NLRB*, 325 F.3d 334, 338–39 (D.C. Cir. 2003); *Quicken Loans*, 359 N.L.R.B. 1201, 1201 n.3, 1205 (2013), *aff'd and adopted as modified*, 361 N.L.R.B. 904 (2014), *enforced*, 830 F.3d 542 (D.C. Cir. 2016).

The resolution of workplace disputes and the procedures for resolving such disputes are of course important terms and conditions of employment. *See, e.g.*, *Georgia Power Co. v. NLRB*, 427 F.3d 1354, 1358 (11th Cir. 2005) (grievance procedures are a mandatory subject of bargaining). Indeed, dispute resolution and dispute resolution procedures are often the catalyst

for worker collective action. Higher education employees, for example, joined together to protest their employers' mishandling of sexual harassment complaints, formed unions in order to secure better procedures for handling those complaints, and organized to win strong grievance procedures in their union contracts.[1] Similarly, employees at Vox Media engaged in concerted protests against their employer's forced arbitration policies and, after unionizing, won a contract term prohibiting forced arbitration in their first collective bargaining agreement.[2]

Given that workplace disputes so often involve important employment terms, and workplace dispute resolution procedures are always an important employment term, worker communication about dispute resolution is both common and central to the Act's protections. In amici's experience, co-workers regularly discuss problems at work, solicit each other's assistance in bringing matters to management's attention, prepare and make complaints collectively, share information learned during a dispute resolution process, and discuss dispute resolution developments and outcomes. The Board has recognized as much, explaining that making "common cause" with co-workers over workplace grievances is a "hallmark of . . . solidarity," even if only one worker has "any immediate stake in the outcome" of a particular

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[1] *See* Danielle Douglas-Gabriel, *Harvard's graduate students union demands better sexual harassment protections*, Wash. Post (April 12, 2019), https://www.washington post.com/education/2019/04/12/harvards-graduate-student-union-demands-better-sexual-harassment-protections/ ("Student workers want an independent grievance process for survivors [of discrimination and harassment] guaranteed through a union contract"); Sarah Jaffe, *Graduate Student Workers Organize Against Sexual Harassment on Campus*, Truthout (July 30, 2018), https://truthout.org/articles/graduate-student-workers-organize-against-sexual-harassment-on-campus/ (quoting student employee: "A grievance procedure [in a union contract] is the way to remove that fear of this [harassment] following you your entire career").

[2] *See* Jeremy Barr, *Vox Media Drops Mandatory Arbitration Clauses Amid Union Push*, The Hollywood Reporter (Feb. 26, 2019, 2:28 PM), https://www.hollywoodreporter.com/ business/business-news/vox-media-drops-mandatory-arbitration-clauses-union-push-1190939/; David Robb, *Vox Media Staffers Unanimously Ratify First WGA East Contract*, Deadline (June 14, 2019, 8:27 AM), https://deadline.com/2019/06/vox-media-staffers-unanimously-ratify-first-wga-east-contract-1202632738/.

dispute. *Fresh & Easy Neighborhood Mkt., Inc.*, 361 N.L.R.B. 151, 361 N.L.R.B. No. 12, *8 (Aug. 11, 2014) (quoting *NLRB v. Peter Cailler Kohler Swiss Chocolates Co.*, 130 F.2d 503, 505 (2d Cir. 1942)). Thus, the Board has repeatedly found communication about labor disputes and dispute processes to be protected concerted activity. *See, e.g.*, *Ellison Media Co.*, 344 N.L.R.B. 1112, 1112, 1113–1114 (2005) (workers' conversations about supervisor's comments, including one worker's urging another to report the comments, was protected); *Dreis & Krump Mfg., Inc.*, 221 N.L.R.B. 309, 314 (1975) (worker's efforts to publicize his grievance proceeding and solicit support from co-workers was protected), *enforced*, 544 F.2d 320 (7th Cir. 1976).

B. Employer rules that prohibit employees from discussing workplace dispute resolution violate the Act.

NLRA section 8(a)(1) broadly prohibits employers from interfering with, restraining, or coercing workers in the exercise of their section 7 rights. 29 U.S.C. § 158(a)(1). Because the Act protects workers' right to discuss labor disputes and their resolution, *see supra* Part I, broad employer prohibitions on such discussions, whether imposed via work rules, contracts, or arbitration clauses, violate section 8(a)(1). In a case called *Double Eagle Hotel & Casino*, for example, the Board invalidated an employer rule that prohibited workers from discussing "disciplinary information" or "grievance/complaint information" as unlawful under 8(a)(1). 341 N.L.R.B. 112, 115 (2004), *enforced*, 414 F.3d 1249 (10th Cir. 2005); *see also, e.g.*, *In re SKD Jonesville Div. L.P.*, 340 N.L.R.B. 101, 102–03 (2003) (employer violated the Act by issuing warning to worker because she discussed "work-related problems with co-workers instead of . . . the manager or member of management"); *Phoenix Transit Sys.*, 337 N.L.R.B. 510 (2002) (employer unlawfully prohibited employees from discussing sexual harassment complaints with each other), *enforced*, 63 F. App'x 524 (D.C. Cir. 2003)

Confidentiality requirements that prohibit discussion of labor dispute resolution may violate the Act just as any other employer rule with that effect. If employees would reasonably construe a confidentiality requirement to prohibit discussion of terms and conditions of employment, like dispute resolution procedures, then that requirement is illegal under the NLRA. *See Cintas Corp.*, 482 F.3d at 467–70 (applying *Lutheran Heritage Village-Livonia*, 343 N.L.R.B. 646 (2004)); *see also Double Eagle*, 341 N.L.R.B. at 114–15 (citing other cases invalidating confidentiality rules).[3] And any attempt by an employer to have its workers waive their rights by "agreeing" to confidentiality is without effect. *See, e.g.*, *SW Design Sch. LLC*, 370 N.L.R.B. No. 77, *2 (Feb. 10, 2021) ("Employers cannot require employees to waive their rights protected by the Act . . . .").

II. The FAA Does Not Save Otherwise Unlawful Confidentiality Rules.

In *Epic Systems*, the Supreme Court upheld class-action-banning forced arbitration clauses because it held that individual proceedings are a "fundamental attribute of arbitration" and because rules of an arbitral forum fall within the FAA's "sphere[] of influence," rather than the NLRA's. 138 S. Ct. at 1619, 1622. Applying the same two considerations leads to the opposite result here. Confidentiality is not a "fundamental attribute of arbitration," and employer rules that apply within the workplace fall within the NLRA's sphere of influence, not the FAA's. Accordingly, the FAA does not save employer confidentiality rules that are unlawful under the Act.

[3] Although the Board has recently deviated from the "reasonably construe" standard, it should re-adopt that standard for all the reasons given in SEIU's amicus brief filed in the *Stericycle* case. Corrected Br. of SEIU as Amicus Curiae, *Stericyle, Inc*., Case No. 04-CA-137660 (filed Mar. 17, 2022).

A. Confidentiality is not fundamental to arbitration.

Without much analysis, the Board suggested in *California Commerce Club*, 369 N.L.R.B. No. 106, *8 (June 19, 2020), that confidentiality is fundamental to arbitration, but that assertion is wrong. Confidentiality has never been a "fundamental attribute" of arbitration.

Arbitrations are typically "private in the sense that non-participants . . . are excluded from the proceedings," but arbitrations are *not* typically confidential. *Dish Network, LLC*, 370 N.L.R.B. No. 97, *17 (Mar. 18, 2021) (Chair McFerran, concurring in part, dissenting in part). Instead, parties to arbitration "have generally been free to disclose information about such proceedings, including non-public information revealed in the proceeding and details of any arbitral award." *Id*.; *see also* Christopher R. Drahozal, *Confidentiality in Consumer and Employment Arbitration*, 7 Yearbook on Arb. & Mediation 28, 45–46 (2016); Amy J. Schmitz, *Untangling the Privacy Paradox in Arbitration*, 54 U. Kan. L. Rev. 1211 (June 2006). Arbitrators may not be permitted to discuss cases without party consent, but parties themselves are generally free to do so. *See, e.g.*, Am. Arb. Ass'n, *AAA Statement of Ethical Principles*, https://www.adr.org/StatementofEthicalPrinciples (last visited Mar. 19, 2022) ("The parties always have a right to disclose details of the proceeding . . . ."); 29 C.F.R. § 1404.14 (2019) (regulations of Federal Mediation and Conciliation Service "encourag[ing] the publication of arbitration awards").

In addition to being permitted and in some cases encouraged, arbitration transparency is necessary for arbitral award enforcement and often furthers arbitration's goals of "lower costs" and "greater efficiency and speed." *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 348 (2011). First, the FAA itself requires public disclosure of arbitration awards when a party aims either to enforce or confirm an arbitration award in court. 9 U.S.C. § 13(b). In other words, "accessing enforcement mechanisms expressly provided by the FAA itself would require

violating the plain terms" of any relevant confidentiality rule. *Dish Network*, 370 N.L.R.B. No. 97 at *17 (Chair McFerran, concurring in part, dissenting in part).[4] Second, the public availability of arbitrator decisions furthers efficiency and cost-reduction goals because parties can turn to past decisions as precedent and avoid re-litigating issues already decided in a previous arbitration. *See* Frank Elkouri & Edna A. Elkouri, How Arbitration Works 243 (1960) (arbitrators produce "a tremendous mass of hard, practical experience," which has precedential value for subsequent arbitral decision-making and "lessen[s] the economic and social cost of industrial disputes"). For these reasons, unions often maintain records of arbitration decisions, both to support future grievances and to avoid wasting time and money on grievances unlikely to succeed.

Transparency has an additional benefit as well. The public availability of arbitration decisions encourages arbitrator accountability and helps to ensure a high-quality process. Knowing that a decision will be publicly available incentivizes sound arbitrator decision-making because adjudicators and parties understand that "if the product of labor arbitration is worthy, it can survive open-market inspection." *Id*. at 243–44.

In short, confidentiality is not and never has been a "fundamental attribute" of arbitration. Disclosure and transparency are common and often encouraged, are needed for the enforcement of arbitral awards, and further arbitration's goals of efficient, cost-effective, and fair resolution.

[4] Given the necessity of disclosure for FAA enforcement, several courts have refused to allow arbitration awards to be filed under seal, even when the parties agree to confidentiality. Drahozal, *supra*, at 32 (citing examples).

B. Employer confidentiality rules that limit discussion of dispute resolution proceedings are within the NLRA's sphere of influence, not the FAA's.

In deciding *Epic Systems*, the Supreme Court drew a distinction between activities that employees "'just do' for themselves in the course of exercising their right to free association in the workplace" and the "highly regulated, courtroom-bound 'activities' of class and joint litigation." *Epic Systems*, 138 S. Ct. at 1625 (citation omitted). The former fall within the NLRA's ambit and are protected by section 7; the latter are not. According to the *Epic Systems* majority, the NLRA and FAA "have long enjoyed separate spheres of influence," and the NLRA "says nothing about how judges and arbitrators must try legal disputes that leave the workplace and enter the courtroom or arbitral forum." *Id*. at 1619.

But what about matters that leave the arbitral forum and re-enter the workplace in the form of worker conversations? To state the obvious, employer confidentiality rules that govern workers' conversations with each other are not the rules of any court or arbitral forum. They are rules that operate predominantly in the workplace, where even the *Epic Systems* majority recognized that the NLRA holds sway. Under *Epic Systems*, workers may not be able to pierce the locked doors of forced arbitration proceedings to "reshape" them into collective actions, *id.* at 1623, but nothing about *Epic Systems* permits employers to muzzle workers on the shop floor.

In *California Commerce Club*, the Board asserted without evidence that "disclosing an arbitral award, or disseminating evidence or information obtained solely through participating as a party in an arbitral proceeding, are not things that employees 'just do.'" 369 N.L.R.B. No. 106, *8. But that assertion defies common sense, amici's experience, and available evidence. Of course workers frequently discuss labor disputes and their outcomes: They share experiences in order to identify perpetrators and patterns of conduct, to warn each other, to learn from each

other's experiences, and, in unionized workplaces, to pursue grievances, to decide whether to take grievances to arbitration, and to predict arbitral outcomes.

Employees also discuss arbitration proceedings in order to engage in collective action around dispute resolution itself. In 2018, 20,000 Google employees and contractors walked off the job to protest the company's handling of sexual harassment claims and its forced arbitration policy. As Claire Stapleton, one of the employee organizers, explained, the walkout grew from organic workplace conversations: "I was . . . hearing all these women I knew in the office telling their stories . . . . I [previously] had no idea [my colleagues] were forced into arbitration . . . ."[5]

The Google example shows how wrong *California Commerce Club*'s analysis was and how worker discussion of dispute resolution procedures lies in the heartland of section 7 protections.

III. Employer-Mandated Confidentiality Requirements Harm Workers, Especially Unrepresented Workers, Women Workers, and Workers of Color.

When employers force confidentiality on workers in arbitration, employees are prevented from disclosing harmful employer conduct like sexual and racial harassment, unequal pay, and other workers' rights violations. Forced confidentiality operates to isolate victims, shield serial wrongdoers from workplace and public accountability, and allow unlawful conduct to persist. Women workers, workers of color, and others workers who have been marginalized are most likely to suffer the harms of confidentiality, both because they are often victims of the employer misconduct that disclosure would deter and because they often lack the bargaining power and economic wherewithal to resist confidentiality when it is forced upon them.

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[5] Shirin Ghaffary and Eric Johnson, *After 20,000 workers walked out, Google said it got the message. The workers disagree.*, Recode – Vox (Nov. 21, 2018, 10:36 AM), https://www.vox.com/2018/11/21/18105719/google-walkout-real-change-organizers-protest-discrimination-kara-swisher-recode-decode-podcast.

A. Forced confidentiality allows unlawful conduct to persist.

Employer-mandated confidentiality agreements enable the continuation of gender and racial wage gaps. Women in the United States who work full-time and year-round are typically paid only 83¢ for every dollar paid to their male counterparts. Nat'l Women's L. Ctr., *The Wage Gap: The Who, How, Why, and What to Do* 1 (Sept. 2021), https://nwlc.org/wp-content/uploads/2021/11/2021-who-what-why-wage-gap.pdf. This pay gap translates into $10,435 less per year in median earnings, leaving women and their families shortchanged. *Id.* When we compare the pay of Black women, Latinas, and other women of color with non-Hispanic white men, the gender wage gap widens significantly.[6]

Forced confidentiality is one factor that makes it very difficult to close these gaps. Workers must be able to talk openly about their wages in order even to identify differences in pay. But notwithstanding section 7's protections, many employers prohibit or discourage employees from sharing information that would help them uncover discriminatory pay gaps—worsening a pervasive culture of pay secrecy and making unequal pay one of the most difficult forms of discrimination to uncover.[7]

The lack of public accountability enabled by employer-mandated confidentiality has also played a harmful role in allowing workplace sexual harassment and assault to continue in the

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[6] For instance, Black women typically make only 64¢ and Latinas make only 57¢ for every dollar paid to their white, non-Hispanic male counterparts. *Id.*

[7] In 2017-2018, 12.8% of US workers were "prohibited" from discussing pay, and 35.4% of workers were "discouraged" from doing so. Shengwei Sun et al., Inst. for Women's Pol'y Rsch., *On the Books, Off the Record: Examining the Effectiveness of Pay Secrecy Laws in the US*, IWPR #C494 Policy Br. 4 (Jan. 2021), https://iwpr.org/wp-content/uploads/2021/01/Pay-Secrecy-Policy-Brief-v4.pdf; *see also* Nat'l Women's L. Ctr., *Promoting Pay Transparency to Fight the Gender Wage Gap: Creative International Models* (Mar. 2020), https://nwlc.org/wp-content/uploads/2018/06/International-Pay-Transparency-Models-v2.pdf; Nat'l Women's L. Ctr., *Combating Punitive Pay Secrecy Policies* (Feb. 2019), https://nwlc.org/wp-content/uploads/2019/02/Combating-Punitive-Pay-Secrecy-Policies.pdf.

shadows. In the four years since #MeToo went viral, many thousands of workers, mostly women, have come forward to share their experiences and demand justice. When workers who have experienced assault and harassment share their stories, others find the courage to come forward as well and help hold harassers accountable. Public accountability is, in turn, a critical tool in preventing future harassment and in beginning to change toxic workplace cultures. *See* Br. Amici Curiae Nat'l Women's L. Ctr. et al. 15–17, *Pambakian v. Blatt*, 9th Cir., Case No. 20-55076, ECF No. 21 (July 2020). When those who report assault and harassment are pressured into employer-mandated confidential arbitration, however, that secretive process further silences survivors and enables employers to protect serial sexual harassers on staff.[8]

The harms of confidential arbitration rose to national prominence again recently in connection with the Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021, which President Biden signed into law on March 3, 2022.[9] When the House Judiciary Committee held a hearing on the bill on November 16, 2021, four survivors of sex harassment testified about their experiences. But in order to testify, all four—notwithstanding their NLRA-protected right to speak publicly about their working conditions—had to be compelled by

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[8] To be sure, amici recognize that in some limited circumstances, employees may seek confidentiality. Workers may not want details about the harassment or other discrimination they endured to be disclosed to the public, either to prevent re-traumatization or to avoid harming their career prospects. Confidentiality can also be an important bargaining chip in settlement negotiations. Employers may be more motivated to settle (at a higher amount and without expensive litigation) if they are confident that the allegations against them will remain confidential. In these cases, agreed-to confidentiality can help, rather than hurt, a worker seeking justice, so long as the confidentiality provision accepted by the worker is "narrowly tailored to the facts giving rise to the settlement and the employee receives some benefit in return . . . ." *S. Freedman & Sons, Inc.*, 364 N.L.R.B. No. 82, *2 (Aug. 25, 2016). But these individualized circumstances are a far cry from the kind of workplace-wide, pre-dispute, forced confidentiality rules at issue here.

[9] The Act makes pre-dispute arbitration clauses unlawful in sexual assault and harassment cases. It represents an important restoration of individuals' rights to seek justice and is a critical first step toward ending employer-mandated confidential arbitration for all claims.

subpoena. They could not testify voluntarily without running afoul of the employer-mandated confidentiality requirements associated with their arbitration proceedings.[10]

In another example, confidential forced arbitration proceedings silenced hundreds of employees of the multibillion-dollar conglomerate Sterling Jewelers. For years, workers could not share their statements regarding the sexual harassment and assaults they suffered as their case proceeded in an employer-mandated confidential arbitration that began in 2008 but came to light only in 2017.[11] The conglomerate wielded gag orders as a sword to keep evidence of rampant sexual assault secret from employees (including other survivors) and from the general public. Serial harassment that continues with impunity endangers not only current victims but also all others who may come into contact with the serial harasser in the future.

B. Women, especially women of color, often lack the bargaining power and economic means to resist forced confidentiality.

Employer-mandated confidentiality creates barriers to justice and accountability that are especially pronounced for workers in low-paid jobs, who are more likely to be women and people of color.[12] Although women are slightly less than half the U.S. workforce, they represent

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[10] *Silenced: How Forced Arbitration Keeps Victims of Sexual Violence and Sexual Harassment in the Shadows: Hearing Before the H. Comm. on the Judiciary*, 117th Cong. (Nov. 16, 2021) (statement of Rep. Jerrold Nadler, Chairman, H. Comm. on the Judiciary at 5:29–5:41) ("The four victims who appear before us today are only here because a congressional subpoena has compelled their testimony. Without that subpoena they would still be unable to share their stories."), https://judiciary.house.gov/calendar/eventsingle.aspx?EventID=4779.

[11] Drew Harwell, *Hundreds allege sex harassment, discrimination at Kay and Jared jewelry company*, Wash. Post (Feb. 27, 2017), https://www.washingtonpost.com/business/economy/hundreds-allege-sex-harassment-discrimination-at-kay-and-jared-jewelry-company/2017/02/27/8dcc9574-f6b7-11e6-bf01-d47f8cf9b643_story.html; Taffy Brodesser-Akner, *The Company That Sells Love to America Had a Dark Secret*, N.Y. Times (Apr. 23, 2019), https://www.nytimes.com/2019/04/23/magazine/kay-jewelry-sexual-harassment.html.

[12] *See, e.g.*, *Public Hearing on Sexual Misconduct Sunshine Amendment Act of 2018 (B22-0907) before Comm. on the Judiciary & Pub. Safety*, Council of the District of Columbia (Oct. 4, 2018) (statement of Laura Brown, Executive Director, First Shift Justice Project at 48:33-48:53), http://dc.granicus.com/MediaPlayer.php?view_id=44&clip_id=4669.

nearly two thirds of those in the country's forty lowest-paying jobs. Nat'l Women's L. Ctr., *When Hard Work is Not Enough: Women in Low Paid Jobs (Executive Summary)* 1 (2020), https://nwlc.org/wp-content/uploads/2020/04/Women-in-Low-Paid-Jobs-report_ES_pp01.pdf. Women of every race, but especially Latinas, Native American women, and Black women, are overrepresented in low-paid work, and their economic insecurity is exacerbated by the gender and racial pay gaps discussed above. These low-paid workers do not have enough bargaining power at the beginning of their employment to resist confidentiality rules forced upon them; cannot afford legal counsel to fight against gag orders; and are more vulnerable to economic pressure in settlement negotiations when asked to accept confidentiality in exchange for minimal recovery.

Pressure to accept employer-mandated confidentiality is particularly significant for women who are their families' primary breadwinners. More than 25% of women in the low-paid workforce have at least one child at home, and more than two-thirds of mothers in the low-paid workforce (69%) are sole or primary breadwinners, bringing home at least half their household's total earnings. *Id.* at 2. Among Black mothers in the low-paid workforce, 84% are sole or primary breadwinners. *Id.* Women with primary responsibility for supporting their families may be in a weaker bargaining position vis-à-vis their employers and may not be able to weather any penalty that could flow from violating a confidentiality requirement.

In sum, ending employer-mandated confidentiality is critical for ensuring that workplaces are safe, especially for marginalized workers who lack money and bargaining power.

IV. When Assessing Confidentiality Rules, the Board Should Apply a Modified "Reasonably Construe" Standard with Limited Exceptions.

SEIU's *Stericycle* amicus brief urged the Board to return to *Lutheran Heritage*'s "reasonably construe" standard for assessing work rules with the modification that the standard

should be applied in light of employees' economic dependence on their employer. Corrected Br. of SEIU as Amicus Curiae 12–13, *Stericyle, Inc*., Case No. 04-CA-137660 (Mar. 17, 2022). We adhere to that position here. Under that standard, confidentiality rules (no matter where found) must be invalidated if employees who are economically dependent on their employer will reasonably construe the rules to prohibit discussion of terms and conditions of employment, including dispute resolution procedures and proceedings.

The Board has recognized some limited circumstances where confidentiality may be appropriate, and amici agree that these already-recognized limited exceptions should continue to apply. For example, a confidentiality rule specifically related to a workplace investigation may be upheld under *Banner Estrella Medical Center*, 362 N.L.R.B. 1108, 1110 (2015), if the relevant employer carries its burden of showing that confidentiality is necessary to preserve the investigation's integrity. Likewise, a confidentiality rule may be acceptable to the extent it protects against disclosures that are prohibited by statute (e.g., the Health Insurance Portability and Accountability Act ("HIPAA")). *But cf*. *Rocky Mountain Eye Ctr.*, 363 N.L.R.B. 325 (2015) (confidentiality rule unlawful where broader than HIPAA required). And, of course, the standard amici propose would invalidate only those confidentiality rules that apply to terms and conditions of employment; it would not invalidate "rules . . . sufficiently limited by specific context or language so as to be clear to employees that the rules did *not* restrict employees' section 7 rights." *Cintas Corp.*, 482 F.3d at 469 (emphasis added); *see also id*. at 470 (citing as examples rules restricting only disclosure of company trade secrets, "financial information," and the like).

CONCLUSION

For all the reasons given above, *California Commerce Club* was wrongly decided, and the Board should apply the same "reasonably construe" standard to confidentiality requirements that it applies to other work rules, subject to the modification and limited exceptions just described. This approach will ensure that employees' section 7 rights are protected and will create no conflict with the FAA because confidentiality has never been a "fundamental attribute" of arbitration, *Epic Sys.*, 138 S. Ct. at 1622, and confidentiality rules that apply within the workplace are not with the FAA's traditional "sphere[] of influence," *id*. at 1619.

Dated: March 21, 2022

Respectfully submitted,

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