UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

RALPHS GROCERY COMPANY, Respondent, And TERRI BROWN, AN INDIVIDUAL, Charging Party.	Case 21-CA-073942

BRIEF OF AMICI CURIAE COALITION FOR A DEMOCRATIC WORKPLACE, THE RESTAURANT LAW CENTER, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL RETAIL FEDERATION, AND HR POLICY ASSOCIATION

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I. INTERESTS OF THE AMICI CURIAE

The following Amici Curiae ("Amici") submit this brief pursuant to the Board's Notice and Invitation to File Briefs in order to preserve the validity of employment arbitration agreements in accordance with applicable law and U.S. Supreme Court holdings.

- The Coalition for a Democratic Workplace ("CDW") represents employers and associations and the interests of their employees, including nearly 500 member organizations and businesses of all sizes. The majority of CDW's members are covered by the NLRA or represent organizations covered by the NLRA, and therefore have a strong interest in the way that the NLRA is interpreted and applied by the NLRB. Many employers belonging to the associations who form the CDW coalition rely on lawful, voluntary arbitration agreements with their employees to reduce litigation costs and reach timely resolution of employment disputes through neutral fact finding and decision making, consistent with the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq*.

- The Restaurant Law Center ("RLA") is the only independent public policy organization created specifically to represent the interests of the food service industry in the courts. This labor intensive industry is comprised of over one million restaurants and other foodservice outlets employing 15 million people—approximately 10 percent of the U.S. workforce. Restaurants and other foodservice providers are the second largest in the United States. Through *amicus* participation, the Restaurant Law Center provides courts with perspectives on legal issues that have the potential to significantly impact our members and their industry.

- The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12.5 million men and women, contributes $2.57 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States. The NAM regularly submits amicus briefs in cases presenting issues of importance to the manufacturing community.

- The National Retail Federation ("NRF") is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. NRF has filed briefs in support of the retail community on dozens of topics.

- HR Policy Association ("HRPA" or "Association") is a public policy advocacy organization that represents the chief human resource officers of more than 400 of the largest corporations doing business in the United States and globally. Collectively, their

companies employ more than ten million employees in the United States, nearly nine percent of the private sector workforce. Since its founding, one of HRPA's principal missions has been to ensure that laws and policies affecting human resources are sound, practical, and responsive to labor and employment issues arising in the workplace.

II. SUMMARY RESPONSE TO BOARD'S QUESTIONS

This brief will address the following questions posed by the Board:

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?

The Amici submit that *Anderson Enterprises, Inc. d/b/a Royal Motor Sales*, 369 NLRB No. 70 (2020), was correctly decided and should be adhered to. The arbitration policy at issue in the present case expressly preserves employees' right to file Board charges and should be approved.

2. Did the Board correctly hold in *California Commerce Club* that the Federal Arbitration Act 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?

The Amici further submit that *California Commerce Club, Inc.*, 369 NLRB No. 106 (2020), was correctly decided, and the Board lacks jurisdiction to penalize confidentiality provisions in arbitration agreements covered by the FAA, which do not in any event interfere with employees' exercise of Section 7 rights.

III. ARGUMENT

A. The Board Should Not Abrogate the Ruling in *Anderson Enterprises*, Which Correctly Upheld an Arbitration Agreement Recognizing the Right of Employees to File Administrative Claims with the NLRB.

In *Epic Systems v. Lewis*, 138 S. Ct. 1612, 1621-23, 1626-27 (2018), the Supreme Court held employers and employees are legally entitled to agree to arbitrate employment disputes under the FAA; and the Court further held the FAA prevents the NLRB from challenging enforcement

of such agreements according to their terms. The Board correctly followed the Supreme Court's ruling in the subsequent decision in *Anderson Enterprises*, 369 NLRB No. 70 (2020), by holding that an arbitration agreement explicitly and prominently assuring employees of their right to file charges with the Board does not interfere with such employee rights under the NLRA. The Board's holding in *Anderson* is consistent with the numerous Supreme Court cases that have permitted private parties to agree to arbitrate statutory claims. As the Supreme Court declared, the entire point of the FAA was to end hostility to arbitration agreements, and arbitration provisions must therefore be enforced as written. *See, e.g.*, *Epic Systems v. Lewis*, 138 S. Ct. at 1621-1623; *see also 14 Penn Plaza, LLC v. Pyett*, 556 U.S. 247, 258 (2009) (holding that a collective bargaining agreement could lawfully require the arbitration of statutory claims).[1]

As noted by the Board's dissenting members in the Notice and Invitation to *Amici* in the instant case, Ralph's Grocery's arbitration agreement is even more specific than the clause upheld in *Anderson*, and plainly preserves the right of employees to file charges with the Board.[2] As in *Anderson*, the only reasonable interpretation of the agreement's specific language is that employees retain the right to pursue charges with the Board regardless of whatever else the arbitration agreement may state.

In its original decision in this case, the Board majority in 2016 held that employees would somehow be confused about their right to file charges with the Board notwithstanding the clear statement in the arbitration agreement, because the agreement also states that employment-related

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[1] Indeed, in *Epic Systems*, the Supreme Court overruled the Board's decision in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, on which the Board relied in part for the holding at issue in this case. *See Ralphs Grocery*, 363 NLRB at 1166.

[2] The clause at issue in this case reads as follows: "Notwithstanding any other provision of this Arbitration Policy, all Employees retain the right under the National Labor Relations Act ('NLRA') to file charges with the National Labor Relations Board ('NLRB'), and to file charges with the United States Equal Employment Opportunity Commission ('EEOC') under federal equal employment opportunity laws within the EEOC's administrative jurisdiction." *Ralphs Grocery*, 363 NLRB 1166, 1175 (2016) (emphasis added).

disputes must be arbitrated. *Id.* at 1167. Contrary to that Board majority, there is no reason to assume reasonable employees do not understand the plain meaning of the word "notwithstanding," either in the agreement at issue or in the *Anderson* case. And any remaining confusion is clarified by the policy's specific reference to filing charges with the "NLRB." *See Anderson Enters*., 369 NLRB No. 70, slip op. at 3 (finding that the policy's specification of "the Board" cleared up any confusion an average worker might have over which administrative agency to bring claims "notwithstanding the existence of an agreement to arbitrate").

Finally, as the Supreme Court recognized in *Epic Systems*, 132 S. Ct. at 1626-27, Congress does not alter the fundamental details of one statutory scheme (the FAA) through vague pronouncements in another (the NLRA). Therefore, any effort by the Board to read out of an arbitration agreement the explicit language protecting employee rights to file NLRB charges would be in direct conflict with the Supreme Court's decision. In sum, any action by the Board to overrule *Anderson* and impose liability on the employer here would violate the FAA and lead to another confrontation with the Supreme Court. The Board should therefore adhere to the straightforward holding in *Anderson Enterprises.*

B. **The Board Should Also Adhere to *California Commerce Club* by Upholding Lawful Confidentiality Provisions of Arbitration Agreements.**

Arbitration agreements, including those that provide that arbitration filings and awards be treated as confidential, do not violate or burden employees' NLRA right "to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." 29 U.S.C. § 157. Confidentiality in arbitration concerns the procedures under which parties obtain an adjudication of legal claims under other law, including under federal statutes other than the NLRA. An agreement to maintain the confidentiality of arbitration filings and awards in an arbitration

proceeding does not impose upon an employee any general obligation of confidentiality regarding the facts underlying a legal claim that is adjudicated in an arbitral forum.

As it did in the class-action waiver cases, the Board majority is again improperly focusing its attention on the procedures that litigants use to adjudicate legal claims. *See, e.g.*, *D.R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013) and *Murphy Oil USA, Inc.*, 361 NLRB No. 72 (2014), enf. denied in relevant part, 808 F.3d 1013 (5th Cir. 2015). However, the adjudication of legal claims, whether in a judicial or arbitral forum, is outside the scope of Section 7.

In *Epic Systems Corp.,* the Supreme Court observed that "the question before us is whether courts must enforce particular arbitration agreements according to their terms" and that "it's the [FAA] that speaks directly to the enforceability of arbitration agreements, while the NLRA doesn't mention arbitration at all." 138 S.Ct. at 1631-1632. The Supreme Court proceeded to reason that the Board, in seeking to regulate adjudicatory procedures that have nothing to do with claims under the NLRA, moves outside of its authority. As the Supreme Court reasoned:

> [T]he term "other concerted activities" should, like the terms that precede it, serve to protect things employees "just do" for themselves in the course of exercising their right to free association in the workplace, rather than "the highly regulated, courtroom-bound 'activities' of class and joint litigation." *Alternative Entertainment,* 858 F. 3d, at 414–415 (Sutton, J., concurring in part and dissenting in part) (emphasis deleted). None of the preceding and more specific terms [in Section 7] speaks to the procedures judges or arbitrators must apply in disputes that leave the workplace and enter the courtroom or arbitral forum, and there is no textually sound reason to suppose the final catchall term should bear such a radically different object than all its predecessors.

138 S.Ct. at 1625.

In addition, the Board, when it attempts to regulate adjudicatory procedures and proceedings that involve legal claims under law other than the NLRA, moves outside of its expertise and is entitled to no deference. As the Court further explained:

> Here, . . . the Board hasn't just sought to interpret its statute, the NLRA, in isolation; it has sought to interpret this statute in a way that limits the work of a second statute, the [FAA]. And on no account might we agree that Congress implicitly delegated to an agency authority to address the meaning of a second statute it does not administer. One of *Chevron's* essential premises is simply missing here.
>
> It's easy, too, to see why the "reconciliation" of distinct statutory regimes "is a matter for the courts," not agencies. *Gordon* v. *New York Stock Exchange, Inc.,* 422 U. S. 659, 685–686 (1975). An agency eager to advance its statutory mission, but without any particular interest in or expertise with a second statute, might (as here) seek to diminish the second statute's scope in favor of a more expansive interpretation of its own—effectively "'boot-strap[ping] itself into an area in which it has no jurisdiction.'" *Adams Fruit Co.* v. *Barrett,* 494 U. S. 638, 650 (1990). All of which threatens to undo rather than honor legislative intentions. To preserve the balance Congress struck in its statutes, courts must exercise independent interpretive judgment. *See Hoffman Plastic Compounds, Inc.* v. *NLRB,* 535 U.S. 137, 144 (2002) (noting that this, Court has "never deferred to the Board's remedial preferences where such preferences potentially trench upon federal statutes and policies unrelated to the NLRA").

138 S. Ct. at 1629. The NLRA does not delegate to the Board the power to regulate how other decision makers adjudicate legal claims under other statutes and law. Nor does the NLRA empower the Board to overrule agreements covered by the FAA that set forth the procedures under which legal claims under other statutes will be adjudicated.

In any event, the Board's second question in this case with regard to its *California Commerce Club* holding is based on a false premise, namely, that "confidentiality requirements in arbitration agreements" necessarily violate Section 8(a)(1) "by interfering with employees' exercise of their rights guaranteed by Section 7." *Ralphs Grocery Co.*, 371 NLRB No. 50, slip op. at 1. To the contrary, an agreement that a legal dispute will be settled by confidential arbitration does not prevent employees from engaging in concerted activity for their mutual aid and protection.[3] In practice, while arbitration *proceedings* and *awards* are often confidential,

[3] Certainly the arbitration agreement at issue here, properly read, does not contain any language that interferes with protected, concerted employee activity, but merely calls upon the parties to maintain confidentiality of the "existence, content, and outcome of all arbitration proceedings. *Ralph's Grocery*, 363 NLRB 1166, 1179 (2016).

arbitration does not bar employees from discussing their workplace grievances with co-workers or the public.[4]

This distinction is made clear in *California Commerce Club* itself, in which the Board majority opinion explained that its protection of arbitration confidentiality does not extend to "the ability of employees to communicate with each other about 'events, facts, and circumstances they either know about firsthand or have heard about from their colleagues.'" The Board held that such communications among employees "would exceed the scope of an arbitral dispute-resolution procedure and would, to that extent, violate the Act." 369 NLRB No. 106, slip op. at 6.

IV. CONCLUSION

For the reasons set forth above, the Board should adhere to both *Anderson* and *California Commerce Club* and should avoid another confrontation with the U.S. Supreme Court.

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Respectfully submitted,

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[4] For example, the default employment arbitration rules of leading arbitration administrators International Institute for Conflict Prevention & Resolution ("CPR"), the American Arbitration Association ("AAA"), and JAMS concern only the arbitration proceedings and awards. *See, e.g.*, Rule 20 of CPR's Administered Employment Arbitration Rules (available at: https://www.cpradr.org/resource-center/rules/pdfs/CPR-Administered-Employment-Arbitration-Rules.pdf); Rule 23 of the AAA's Employment Arbitration Rules and Mediation Procedures (available at: https://www.adr.org/employment); Rule 26 of the JAMS Employment Arbitration Rules and Procedures (available at: https://www.jamsadr.com/rules-employment-arbitration/.)

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the BRIEF OF AMICI CURIAE COALITION FOR A DEMOCRATIC WORKPLACE, THE RESTAURANT LAW CENTER, NATIONAL ASSOCIATION OF MANUFACTURERS, NATIONAL RETAIL FEDERATION, AND HR POLICY ASSOCIATION was filed today, March 21, 2022, using the NLRB's e-Filing system and was served by email upon the following individuals:

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