**Ralphs Grocery Company *and* Terri Brown.** Case 21–CA–073942

August 10, 2026

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN MURPHY AND MEMBERS PROUTY AND MAYER

In this case, before the National Labor Relations Board on remand from the United States Court of Appeals for the Ninth Circuit, we address the legality of the Respondent's mandatory arbitration policy under Section 8(a)(1) of the National Labor Relations Act (NLRA), considered in light of the Federal Arbitration Act (FAA). Only two aspects of the policy are at issue: (1) whether the confidentiality provision of the policy is lawful; and (2) whether the policy unlawfully interferes with employees' statutory right of access to the Board and its processes. For the reasons that follow, we conclude that the Respondent's arbitration policy does not unlawfully interfere with employees' statutory right of access to the Board and its processes and that the confidentiality provision violates Section 8(a)(1), but only insofar as it requires employees to "maintain the existence. . . of any arbitration proceeding . . . in the strictest confidence." The portion of the confidentiality provision requiring employees to keep confidential the content and outcome of the arbitration, however, is lawful.

I. FACTS AND PROCEDURAL HISTORY

The original decision in this case, *Ralphs Grocery I*, included a full accounting of the record facts, which we summarize here briefly.[1] In 2009, Charging Party Terri Brown, a security guard for the Respondent, filed a class action and Private Attorney General Act lawsuit in California state court against the Respondent, alleging that it failed to pay wages for missed lunch and rest breaks in violation of the California Labor Code. At all relevant times, the Respondent, applicants and employees, including the Charging Party, have been parties to a mandatory Mediation and Binding Arbitration Policy (the Arbitration Policy).

The Arbitration Policy requires that the parties resolve through arbitration "any and all . . . employment-related disputes that exist or arise between Employees and Ralphs . . . that would constitute cognizable claims or causes of action in a federal, state or local court or agency under applicable federal, state or local laws. . . ." (Par. 2, emphasis omitted.) Paragraph 6 of the agreement, however, contains a savings clause that states:

> 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.

Regarding confidentiality, the Policy states in Paragraph 11:

> Except and only to the extent it may be required by applicable law, the parties and the Qualified Arbitrator shall maintain the existence, content, and outcome of any arbitration proceeding held pursuant to this Arbitration Policy in the strictest confidence and shall not disclose the same without the prior written consent of all the parties.

Pursuant to the Arbitration Policy, the Respondent filed a petition in state court to compel arbitration and dismiss the proceeding. The Charging Party then filed an unfair labor practice charge with the Board in 2012, alleging that the Arbitration Policy was unlawful under the NLRA. In 2016, the Board issued a decision in *Ralphs Grocery I*, finding that the Respondent violated Section 8(a)(1) of the Act by maintaining and enforcing a mandatory individual arbitration policy that (1) required employees to waive their right to pursue class or collective actions; (2) interfered with employees' ability to file unfair labor practice charges with the Board; and (3) required employees to maintain the confidentiality of the existence, content, and outcome of any arbitration proceedings.

The Respondent filed a petition for review with the United States Court of Appeals for the Ninth Circuit. While the case was pending before the Ninth Circuit, however, the Supreme Court decided *Epic Systems Corp. v. Lewis*, 584 U.S. 497 (2017).[2] Rejecting the view of the Board, as set forth in *NLRB v. Murphy Oil* and reflected in *Ralphs Grocery I*, the Court held that employer-imposed arbitration policies prohibiting class or collective actions in any forum were lawful.

As a result of the Court's holding, the Ninth Circuit vacated the portion of the Board's order governed by *Epic Systems* and (at the Board's request) remanded the remainder of the case. As a result, there are two issues currently before us: whether the Respondent unlawfully

[1] *Ralphs Grocery Co*., 363 NLRB 1166 (2016) (Ralphs Grocery I).

[2] Epic Systems was consolidated before the Supreme Court with *NLRB v. Murphy Oil, USA, Inc.,* 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015).

maintained the Arbitration Policy's confidentiality provision and whether the Arbitration Policy unlawfully restricts access to the Board.[3]

## II. ANALYSIS

### *A. The Confidentiality Provision*

In *California Commerce Club,* 369 NLRB No. 106 (2020), the Board held that "provisions in an arbitration agreement requiring that arbitration be conducted on a confidential basis, including provisions precluding the disclosure of evidence, award, and/or decision beyond the arbitration proceeding, do not violate the Act and must be enforced according to their terms pursuant to the FAA." Slip op. at 6. The arbitration agreement at issue in *California Commerce Club* provided, among other things, that "[t]he arbitration shall be conducted on a confidential basis and there shall be no disclosure of evidence or award/decision beyond the arbitration proceeding." Id., slip op. at 1.

The Board recognized that an employee's interest in discussing terms and conditions of employment with coworkers "lies at the heart of protected Section 7 activity" and would likely outweigh an employer's interest in maintaining the confidentiality of arbitral proceedings if maintained as an employer work rule. Id., slip op. at 3–4. However, because the disputed provision was contained within an arbitration agreement, the Board reasoned that it would nevertheless be lawful if shielded by the FAA. Id., slip op. at 4–5. The Board concluded that the FAA requires that such provisions be enforced as written so long as they specify "the rules under which [the] arbitration will be conducted," but the FAA would not shield a provision that imposed confidentiality requirements beyond the scope of the arbitration proceeding and the rules under which it will be conducted. Id., slip op. at 5–6 (quoting *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 479 (1989)).

To begin, we note that the confidentiality provision here, by its terms, requires confidentiality "only to the extent it may be required by applicable law . . . ." As a matter of law, then, the provision does not independently impose any confidentiality restriction on the parties. Instead, it only operates to inform employees that the agreement requires confidentiality to the extent that some other law independently requires it. Nevertheless, the Board has held that ". . . [an overbroad] rule is not validated by the qualification, 'except as provided by law,' as an employer is not entitled to place upon its employees the burden of determining their legal rights in this manner." *Trailmobile*, 221 NLRB 1088, 1089 (1975) (citing *Fasco Industries, Inc*., 173 NLRB 522 (1968), enfd. 412 F.2d 589 (4th Cir. 1969).[4] We therefore consider whether this provision is overbroad.

We find that the portions of the confidentiality provision restricting the disclosure of the content and outcome of the arbitration are limited to the rules under which the arbitration will be conducted and are therefore lawful under *California Commerce Club* and subsequent cases in which we applied that precedent.[5] The provision prohibiting disclosure of the content of the arbitration is functionally equivalent to the provision that "all arbitration proceedings . . . shall be confidential" at issue in *Dish Network.* Similarly, the provision's requirement to maintain the confidentiality of "the outcome" of the arbitration is lawful because it is consistent with the finding in *California Commerce Club* that parties may lawfully agree that there shall be no disclosure of the "award/decision beyond the arbitration proceeding." 369 NLRB No. 106, slip op. at 6; see also *Covenant Care California, LLC*, 369 NLRB No. 112, slip op. at 2.[6]

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[3] On January 18, 2022, the Board issued a Notice and Invitation to File Briefs inquiring whether the Board should find that the Arbitration Policy unlawfully interfered with Board access and whether the confidentiality provision also violated Sec. 8(a)(1) of the Act. The Board received a brief and a responsive brief from the General Counsel and a brief from the Respondent. The Board also received briefs from the following amici: American Federation of Labor and Congress of Industrial Organizations (AFL–CIO); Coalition for a Democratic Workplace, Restaurant Law Center, National Association of Manufacturers, National Retail Federation, and HR Policy Association (CDW); Secretary of the United States Department of Labor (DOL); Public Justice and National Employment Lawyers Association (PJ-NELA); Service Employees International Union, National Women's Law Center, and National Employment Law Project (SEIU); Weinberg, Roger & Rosenfeld (WRR); and Workplace Policy Institute (WPI). After careful consideration, we have decided not to overrule extant precedent in this case.

[4] See also *Everglades College, Inc. d/b/a Keiser University*, 368 NLRB No. 123, slip op. at 3 (2019) (holding that provision making arbitration the exclusive forum for resolving workplace disputes "except where specifically prohibited by law" unlawfully interfered with NLRB charge filing).

[5] See also *Dish Network, LLC,* 370 NLRB No. 97, slip op. at 3–4 (2021) (finding lawful provision stating that "all arbitration proceedings, including but not limited to hearings, discovery, settlements, and awards shall be confidential. . ."); *Century Fast Foods, Inc.,* 370 NLRB No. 4, slip op. at 7 (2020) (finding valid arbitration clause requiring "confidential binding arbitration"); *Covenant Care California, LLC*, 369 NLRB No. 112, slip op. at 1, 2 (2020) (finding lawful provision requiring confidentiality of "proceedings before the arbitrator and any award or remedy").

We note that our dissenting colleague cites certain phrases, taken out of context, in California Commerce as supporting his position that the confidentiality provision is unlawful. We do not agree that either the facts, analysis, or holding of that case supports his position.

[6] Notwithstanding the existence of a confidentiality agreement protected by the FAA, an employer violates Sec. 8(a)(1) if it discharges or otherwise disciplines an employee for discussing terms and conditions of employment where the discussion is protected by Sec. 7. Covenant Care

We reach a different result, however, with respect to the portion of the confidentiality provision that prohibits disclosure of the existence of the arbitration. As the Board has held, "confidentiality requirements beyond the scope of the arbitration proceeding and 'the rules under which the arbitration *will be* conducted' receive no protection from the FAA." *California Commerce Club*, 369 NLRB No. 106, slip op. at 1 (emphasis added). Applying this principle, the Board found that a provision requiring that settlements be kept confidential was not shielded by the FAA in *Dish Network,* 370 NLRB No 97, slip op. at 3–4. We reach the same result here with respect to the prohibition on disclosing the existence of the arbitration. Prohibiting the disclosure of the fact that the arbitration ever happened long after it ended is a perpetual gag order against disclosing, *outside* the arbitral forum, that the arbitration ever occurred. It has nothing to do with the rules under which the arbitration will be conducted.[7]

Having found that the portion of the confidentiality provision prohibiting disclosing that the arbitration existed is not shielded by the FAA, we next determine whether the maintenance of this provision violates the Act. We find that it does. By its terms, the Arbitration Policy covers "any and all . . . employment-related disputes that exist or arise between Employees and Ralphs . . . that would constitute cognizable claims or causes of action in a federal, state or local court or agency under applicable federal, state or local laws. . . ." It therefore encompasses, among other things, disputes arising under the Act. Moreover, the *events* giving rise to *all* claims covered by the Arbitration Policy would concern wages, hours, or other terms or conditions of employment; employees' conversations with one another concerning those events do implicate the Act; and nothing in the Agreement's settlement-confidentiality provision limits its scope. See, e.g., *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007) ("It is axiomatic that discussing terms and conditions of employment with coworkers lies at the heart of protected Section 7 activity."), enfd. 519 F.3d 373 (7th Cir. 2008).

*B. The Arbitration Policy Does Not Unlawfully Interfere With Employees' Access to Board Processes*

The second issue presented in this case is whether the Arbitration Policy violates Section 8(a)(1) of the NLRA by interfering with employees' ability to access and use the Board's processes. As explained below, we find that it does not.

In *Anderson Enterprises*, 369 NLRB No. 70 (2020), the Board considered whether a mandatory arbitration agreement violated Section 8(a)(1) of the Act by potentially interfering with employees' right to file Board charges and participate in Board proceedings. The arbitration agreement at issue contained the following savings clause:

> Claims may be brought before an administrative agency but only to the extent applicable law permits access to such an agency notwithstanding the existence of an agreement to arbitrate. Such administrative claims include without limitation claims or charges brought before . . . the National Labor Relations Board.

Id., slip op. at 3.

In analyzing the legality of the arbitration agreement, the Board first discussed *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10 (2019), and *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72 (2019), setting forth the relevant background law guiding its decision. Importantly, the Board noted that in *Briad Wenco*, the Board concluded that because "the savings clause explicitly informed employees that they retained the right to file charges with the Board and access its processes . . . employees could not reasonably interpret the agreement[ ] to prohibit them from filing Board charges or participating in Board proceedings." Id., slip op. at 3.

Turning to the savings clause at issue in *Anderson E-terprises*, set forth above, the Board concluded that, in light of the fact that the savings clause was "sufficiently prominent" and "specifically and affirmatively state[d] that the employees may bring claims and charges before the National Labor Relations Board," the arbitration agreement was lawful under the Board's test for reviewing employer rules set forth in *Boeing Co*., 365 NLRB 1494 (2017). The Board specifically found that the rule was lawful "because, when reasonably interpreted, [it] would have no tendency to interfere with section 7 rights." Slip op. at 4. In so holding, the Board overruled *Ralphs Grocery I* and similar cases holding otherwise.[8]

In *Stericycle, Inc*., 372 NLRB No. 113 (2023), the Board overruled *Boeing* and adopted a new standard for determining whether facially neutral workplace rules and policies violate the Act. Under *Stericycle*, the Board analyzes the Policy under the "reasonably could" standard. That is, the agreement would be presumptively lawful if employees could not reasonably interpret it to interfere with their right to file charges with the Board. Consistent with *Anderson Enterprises*, where the Board applied the

California, supra, slip op. at 2, fn. 4 (citing *California Commerce Club*, slip op. at 6). No such conduct is at issue in this case.

[7] A prohibition on disclosing the existence of an arbitration after it has ended plainly has nothing to do with the rules under which an arbitration will be conducted. We find it unnecessary to decide whether a provision that only prohibited such disclosures while the arbitration was in progress would similarly fall outside the protection of the FAA.

[8] Any suggestion that the Board could not properly have overruled Ralphs Grocery I in Anderson Enterprises necessarily fails. See *Boeing Co*., 366 NLRB No. 128 (2018) (rejecting argument).

*Boeing* standard for analyzing employee work rules to the arbitration agreement at issue, we apply this current standard.[9]

We find that the arbitration agreement meets the standard set forth in *Stericycle*. The Arbitration Policy, a three-page document, includes a prominent stand-alone paragraph addressing employees' ability to pursue administrative remedies.[10] That paragraph expressly states, "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') . . . ." Under *Stericyle*, the provision is presumptively unlawful only if "an employee could reasonably interpret" it to restrict or prohibit Section 7 activity. As the Board held in *Anderson Enterprises,* with respect to the provision at issue in this case, "objectively reasonable employees would understand that the inclusion of such language in a legal document is intended to, and does, describe their legal rights in precisely the manner that the text explicitly states: employees have the right to file charges with the Board." Consistent with this holding, a reasonable employee could not interpret the Arbitration Policy to restrict their right to file charges with the Board.

Further, we find that, as in *Anderson Enterprises*, the Policy does not give employees the impression that filing charges would be futile,[11] does not require employees to file an arbitral claim either before or at the same time as they file a charge with the Board,[12] and does not "'necessarily' interfere with employees' statutory right to the Board" by requiring individual employees to arbitrate their employment-related disputes.[13]

The holding in *Anderson Enterprises* is clear. Where an arbitration agreement contains prominent language in a savings clause expressly stating that employees retain their ability to file charges with the Board, that specific language is deemed to resolve any ambiguity created by the more generalized language in the agreement. As a result, no reasonable employee could understand the agreement to prevent them bringing their employment-related disputes to the Board. *Anderson Enterprises* also establishes that the savings clause at issue in this case is sufficiently prominent and clear. Applying that clear holding here, we find that no reasonable employee could understand the Arbitration Policy as interfering with their ability to access the Board and its procedures, and we find that the Policy does not violate Section 8(a)(1) of the Act.

## REMEDY

The Respondent contends that the case is moot because it rescinded the Arbitration Policy in 2012 and replaced it with a new arbitration agreement that assertedly does not violate the Act and that it is Respondent's policy not to enforce the Arbitration Policy against any employee who signed it. We reject this contention because there is no record evidence that the Respondent ever notified employees of the rescission. See *Prime Healthcare Paradise Valley, LLC,* 368 NLRB No. 10, slip op. at 7–8 (2019) (rejecting argument).[14]

Even though the case is not moot, the General Counsel does not dispute the Respondent's assertion that the Arbitration Policy has already been revised and the offending provisions removed. Accordingly, we shall not include an affirmative rescission requirement. In addition, rather than requiring that the Respondent distribute inserts informing the employees that the unlawful provisions have been eliminated, we shall modify the notice to inform employees of the background circumstances.[15] Nothing in our order precludes the Respondent from promulgating a lawful arbitration agreement as a condition of employment.

## ORDER

The Respondent, Ralph's Grocery Company, Compton, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an Arbitration Policy that employees reasonably would believe prohibits them from disclosing the existence of an arbitration under the Policy.

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[9] Chairman Murphy and Member Mayer did not participate in Stericycle and express no view on whether it was correctly decided. They apply it here for institutional reasons.

[10] See Briad Wenco, slip op. at 3 (finding savings clause in paragraph 11 of the arbitration agreement sufficiently prominent, in part because it was contained in same document as, and was separated by only one page of text from, the language alleged to be unlawful).

[11] Slip op. at 4–5. Our dissenting colleague takes a contrary view, reasoning that because the Policy indicates that arbitration is the exclusive means of resolving employment disputes, including Federal statutory claims before administrative agencies, "it reasonably follows that filing Board charges, while permitted, could not result in the Board's own independent resolution of the dispute but would instead be just a preliminary step to arbitration." We disagree. It does not reasonably follow because, of course, the existence of a private arbitration agreement does not and cannot prevent the Board from processing charges. And we do not believe that a reasonable employee could read the express language of the Policy allowing for the filing of Board charges and conclude that filing such charges would be futile.

[12] Slip op. at 5.

[13] Slip op. at 5 (quoting *Ralphs I,* 363 NLRB 1166, 1168).

[14] The Respondent's position statement after the court's remand asserts that it entered into a Compliance Stipulation that provided for the circulation of a notice in a newspaper of general circulation that the Arbitration Policy had been rescinded but there is no record evidence of this stipulation nor is there any evidence that the Respondent has complied with it.

[15] See, e.g., *Lily Transportation Corp.*, 362 NLRB 406, 407 (2015).

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at all facilities where the Arbitration Policy applied copies of the attached notice marked "Appendix." Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice marked "Appendix" to all current employees and former employees employed by the Respondent at any time since August 7, 2011.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 10, 2026

James R. Murphy, Chairman

Scott A. Mayer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER PROUTY, dissenting in part.

This case raises two important questions about unilaterally imposed employer arbitration agreements. The first is whether broad language in an arbitration agreement requiring employees to keep the "content" of an arbitration proceeding confidential imposes confidentiality requirements that go beyond the scope of the arbitration proceeding and the rules under which arbitration will be conducted and therefore is unlawful under the National Labor Relations Act (NLRA or Act). The second is whether a mandatory arbitration agreement that could reasonably be interpreted to cover claims under the Act, and therefore would be unlawful under the Act, can be "saved" by language stating that employees remain free to file unfair labor practice charges with the National Labor Relations Board.

At all relevant times, the Respondent maintained a Mediation and Binding Arbitration Policy (Arbitration Policy), which states in its introduction that it "is the exclusive mechanism for formal resolution of disputes and awards of relief that otherwise would be available to Employees or the Company in a court of law or equity or in an administrative agency." Paragraph 2 of the Arbitration Policy states that except for disputes arising out of the terms and conditions of a collective-bargaining agreement, "this Arbitration Policy applies to any and all other employment-related disputes that exist or arise between Employees and Ralphs (or any of them) ***that would constitute cognizable claims or causes of action in a federal, state or local court or agency under applicable federal, state or local laws*** *(*referred to in this Arbitration Policy as 'Covered Disputes')" (emphasis in original). Paragraph 4 of the Arbitration Policy designates arbitration as "the sole and exclusive remedy for any and all Covered Disputes that exist or may arise" and describes "Covered Disputes" as including "all Employees' individual statutory claims or disputes under federal, state and local laws including, for example and without limitation, any claims or disputes arising under" a list of specific Federal and State laws, which does not include the NLRA. Paragraph 6 of the Arbitration Policy, which includes in its final sentence purported "savings" language, states, in full, as follows:

> The Arbitration Policy does not prevent or excuse any Employee or Ralphs (or any of them) from satisfying any applicable statutory conditions precedent or jurisdictional prerequisites to pursuing their Covered Disputes by, for example, filing administrative charges with or obtaining right to sue notices or letters from federal, state, or local agencies. However, final and binding arbitration as described in this Arbitration Policy is the sole and exclusive remedy or formal method of resolving the Covered Disputes. If there is no applicable statutory condition precedent or jurisdictional prerequisite to pursuing a Covered Dispute, all parties must proceed directly to arbitration under and pursuant to this Arbitration Policy. 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.

Paragraph 11 of the Arbitration Policy includes a confidentiality provision that states that "[e]xcept and only to the extent it may be required by applicable law, the parties and the Qualified Arbitrator shall maintain the existence, content and outcome of any arbitration proceedings held pursuant to this Arbitration Policy in the strictest confidence and shall not disclose the same without the prior written consent of all the parties."

For the reasons discussed below, unlike my colleagues, I would not find that the portion of the confidentiality provision requiring employees to keep the "content . . . of any arbitration proceedings" confidential is lawful or that the Arbitration Policy contains a sufficiently prominent "savings" clause in Paragraph 6 that renders the policy lawful even though employees could otherwise reasonably interpret it to restrict their access to the Board and its processes.

## I. THE CONFIDENTIALITY PROVISION

In *California Commerce Club, Inc.*, 369 NLRB No. 106 (2020), the Board held that the Federal Arbitration Act (FAA) shields confidentiality provisions in arbitration agreements to the extent that they specify the rules under which arbitration will be conducted and that the Board is therefore precluded from finding that arbitral confidentiality provisions violate the NLRA so long as they do not impose confidentiality requirements that go beyond the scope of the arbitration proceeding and the rules under which it will be conducted. Id., slip op. at 1, 6–7. For the reasons discussed in my concurrence in *Pfizer, Inc.*, 374 NLRB No. 55 (2026), I continue to believe that the Board's decision in *California Commerce Club* "failed to give sufficient weight to fundamental employee rights under the NLRA and incorrectly concluded that the [FAA] must displace the NLRA when an employer imposes confidentiality requirements that would be unlawful in any other context as part of an arbitration agreement." *Pfizer*, 374 NLRB No. 55, slip op. at 3–4 (Member Prouty, concurring) (internal footnotes omitted). However, I apply *California Commerce Club* as extant precedent in this case in the absence of a three-member majority to overrule it. For the reasons discussed by my colleagues, I agree that the portion of the confidentiality provision requiring employees to keep the "outcome of any arbitration proceedings" confidential is lawful under *California Commerce Club* and its progeny, and I also agree that the portion of the confidentiality provision requiring employees to keep the "existence . . . of any arbitration proceedings" confidential is unlawful, even applying *California Commerce Club*. However, for the reasons discussed below, I do not agree with my colleagues that the portion of the confidentiality provision requiring employees to keep the "content . . . of any arbitration proceedings" confidential is lawful.

The requirement that employees keep the "content . . . of any arbitration proceedings" confidential does not merely specify the rules under which arbitration will be conducted. Rather, the "content" of an arbitration proceeding would reasonably be understood by employees to sweep so broadly as to encompass any information raised during that proceeding—including an employee's "claims against the employer, the legal issues involved, [and] the events, facts, and circumstances that gave rise to the arbitration proceeding," *California Commerce Club*, 369 NLRB No. 106, slip op. at 4—regardless of whether an employee acquired that information independent of the arbitration proceeding. As the Board explained in *California Commerce Club*, "[c]ommunicating with each other about events, facts, and circumstances they either know about firsthand or have heard about from their colleagues is something employees 'just do,'" and "[a] confidentiality provision that [] sweep[s] that broadly [to restrict such communications] would exceed the scope of an arbitral dispute-resolution procedure." Id., slip op. at 6. Thus, the portion of the confidentiality provision requiring employees to keep the "content . . . of any arbitration proceedings" confidential is not shielded by the FAA and "must be assessed under the same standards that apply to confidentiality rules generally" to determine if its maintenance is lawful under the NLRA. Id., slip op. at 1.

In *Stericycle, Inc.*, 372 NLRB No. 113 (2023), the Board overruled *Boeing Co.*, 365 NLRB 1494 (2017), and set forth the following standard for analyzing allegedly overbroad work rules:

> As under *Lutheran Heritage*, our standard requires the General Counsel to prove that a challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights. We clarify that the Board will interpret the rule from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity. Consistent with this perspective, the employer's intent in maintaining a rule is immaterial. Rather, if an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry her burden, even if a contrary, noncoercive interpretation of the rule is also reasonable. If the General Counsel carries her burden, the rule is presumptively unlawful, but the employer may rebut that

> presumption by proving that the rule advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule. If the employer proves its defense, then the work rule will be found lawful to maintain.

*Stericycle*, 372 NLRB No. 113, slip op. at 2. As discussed in detail below, employees certainly could read the Arbitration Policy to cover disputes under the NLRA. Further, as my colleagues acknowledge, the events giving rise to all claims and disputes covered by the Arbitration Policy would concern wages, hours, and other terms and conditions of employment. Thus, the portion of the confidentiality agreement requiring employees to keep the "content . . . of any arbitration proceedings" confidential undoubtedly has a reasonable tendency to interfere with employees' interest in discussing their terms and conditions of employment with their coworkers, which "lies at the heart of protected Section 7 activity." *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 205 (2007), enfd. 519 F.3d 373 (7th Cir. 2008). The Respondent has not put forward any legitimate and substantial business interest for interfering with this fundamental Section 7 right that could not be advanced by a more narrowly tailored confidentiality provision. The portion of the confidentiality provision requiring employees to keep the "content . . . of any arbitration proceedings" confidential therefore does not pass muster under *Stericycle*.

In sum, the requirement that employees keep the "content . . . of any arbitration proceedings" confidential does not "fall[] on the side of the line governed by the FAA," but instead falls on the side of the line in which the NLRA prevails because it "interfere[s] with what employees 'just do for themselves in the course of exercising their right to free association in the workplace'—i.e., discuss workplace matters of mutual concern, whether or not they are also the subject of an arbitral proceeding." *California Commerce Club*, 369 NLRB No. 106, slip op. at 6–7 (quoting *Epic Systems Corp. v. Lewis*, 584 U.S. 497, 512 (2018)). Accordingly, I would find that the Respondent violated Section 8(a)(1) of the Act by maintaining that portion of the confidentiality provision.[1]

### II. RESTRICTION ON ACCESS TO THE BOARD AND ITS PROCESSES

"Section 7 of the Act protects the right of employees to utilize the Board's processes, including the right to file unfair labor practice charges." *Prime Healthcare Paradise Valley, LLC*, 368 NLRB No. 10, slip op. at 4 (2019) (citing *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983)). In *Prime Healthcare*, the Board held, consistent with the clear Congressional command in Section 10(a) of the Act,[2] that the Federal Arbitration Act (FAA) does not authorize the maintenance or enforcement of arbitration agreements that restrict employees' access to the Board or its processes. *Prime Healthcare*, 368 NLRB No. 10, slip op. at 5. "[A]n arbitration agreement that explicitly prohibits the filing of claims with the Board or, more generally, with administrative agencies . . . constitutes an explicit prohibition on the exercise of employee rights under the Act" and therefore violates Section 8(a)(1) of the Act. Ibid. As my colleagues recognize, where an arbitration agreement does not contain such an explicit prohibition and is therefore facially neutral, the Board will apply the governing standard used to evaluate employer work rules to determine if the agreement unlawfully restricts employees' access to the Board or its processes. See *Prime Healthcare*, 368 NLRB No. 10, slip op. at 5 (applying the work-rule standard established in *Boeing* to an arbitration agreement); *U-Haul Co. of California*, 347 NLRB 375, 377 (2006) (applying the work-rule standard established in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), which was subsequently overruled in *Boeing*, to an arbitration agreement), enfd. mem. 255 F. App'x 527 (D.C. Cir. 2007). This case presents the first opportunity for the Board to apply the *Stericycle* work-rule standard to an arbitration agreement that allegedly restricts employees' access to the Board or its processes. In doing so, I agree with, and would reaffirm, the Board's finding in *Prime Healthcare* that, "as a matter of law, there is not and cannot be any legitimate justification for provisions, in an arbitration agreement or otherwise, that restrict employees' access to the Board or its processes." 368 NLRB No. 10, slip op. at 6. Thus, the question before the Board in this case is whether employees could reasonably interpret the Respondent's Arbitration Policy to restrict their access to the Board or its processes.

My colleagues acknowledge that the scope of the Arbitration Policy encompasses disputes arising under the Act. However, applying *Anderson Enterprises, Inc. d/b/a Royal Motor Sales*, 369 NLRB No. 70 (2020)—which my colleagues describe as holding that "[w]here an arbitration agreement contains prominent language in a savings clause expressly stating that employees retain their ability to file charges with the Board, that specific language is deemed to resolve any ambiguity created by the more generalized language in the agreement"—my colleagues find

[1] My colleagues claim that in reaching this conclusion, I have taken "certain phrases" from California Commerce Club out of context. This is untrue, as any review of my dissent and of California Commerce Club demonstrates.

[2] Sec. 10(a) provides that the Board's power to prevent unfair labor practices "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise." 29 U.S.C. § 160(a).

that the Arbitration Policy does not violate Section 8(a)(1) of the Act because "no reasonable employee could understand the Arbitration Policy as interfering with their ability to access the Board and its procedures" in light of the purported "savings" clause in Paragraph 6.[3] For the reasons discussed below, I disagree with my colleagues and would reaffirm the Board's finding in its earlier decision in this proceeding that the Arbitration Policy restricts employees' access to the Board and its processes in violation of Section 8(a)(1) of the Act. See *Ralphs Grocery Co.*, 363 NLRB 1166, 1166–1168 (2016) (*Ralphs I*).

To begin, as mentioned above, my colleagues do not dispute that employees could reasonably interpret the Arbitration Policy to cover disputes arising under the NLRA. Indeed, the Arbitration Policy lays the foundation for that reasonable interpretation before employees even reach its formal terms, as its introduction states that it "is the exclusive mechanism for formal resolution of disputes and awards of relief that otherwise would be available . . . in an administrative agency." With regard to the actual terms of the Arbitration Policy, employees certainly could interpret the statement in Paragraph 2 that the Arbitration Policy applies to employment-related disputes "that would constitute cognizable claims or causes of action in a federal . . . agency under applicable federal . . . laws" (emphasis omitted) to encompass claims under the NLRA. In turn, Paragraph 4 of the Arbitration Policy could reasonably be interpreted the same way, as it recites that "Covered Disputes subject to this Arbitration Policy include all Employees' individual statutory claims or disputes under federal . . . laws." To be sure, the NLRA is not listed in Paragraph 4, but Paragraph 4 specifically states that the laws listed therein are "for example and without limitation." Failure to mention the NLRA, then, cannot signal that a claim under the Act is excluded from the coverage of the Arbitration Policy. Reading Paragraphs 2 and 4 of the Arbitration Policy in conjunction with the introduction, a reasonable employee could easily conclude that any claim that they make under the NLRA would necessarily be resolved through arbitration, not through the Board's processes.[4]

Further, I disagree that the language in Paragraph 6 of the Arbitration Policy stating that "[n]otwithstanding any other provision of this Arbitration Policy, all Employees retain the right . . . to file charges with the . . . Board" transforms the three-page Arbitration Policy into one that no reasonable employee could interpret as restricting their right to access the Board and its processes.

As an initial matter, I conclude that employees would be unlikely to focus on the purported "savings" clause in Paragraph 6 given its lack of prominence in the Arbitration Agreement—as it is buried in the middle of the Arbitration Policy and at the end of a paragraph riddled with confusing legalese—especially compared to the language emphasizing that the Arbitration Policy makes arbitration the exclusive means of resolving all employment disputes, including claims based on Federal statutes and pursued administratively—which is bolded and underlined in Paragraph 2 and repeated throughout the Arbitration Policy and was acknowledged by employees when they filled out the Respondent's employment application. Even when the Board applied the less-protective *Boeing* work-rule standard, it considered the prominence of language in an arbitration agreement that arguably preserved employees' right of access to the Board, notwithstanding other language in the agreement. See, e.g., *Briad Wenco, LLC d/b/a Wendy's Restaurant*, 368 NLRB No. 72, slip op. at 2 (2019) (finding arbitration agreements lawful based on "savings" language that was "sufficiently prominent within the agreements"). I agree that, as implied in such cases, the Board should consider the prominence of language that purportedly renders lawful an arbitration agreement that otherwise could be reasonably interpreted to restrict employees' access to the Board or its processes. The lack of prominence of the purported "savings" clause in the Arbitration Policy fatally undermines my colleagues' claim that it renders the Arbitration Policy lawful here.

But in addition to, and independent of, its lack of prominence, Paragraph 6 is substantively inadequate to "save" this Arbitration Policy, as the purported "savings" clause in Paragraph 6 does not clearly assure employees that,

[3] In Anderson Enterprises, the Board applied the Boeing work-rule standard in determining whether the relevant arbitration agreement unlawfully restricted employees' access to the Board or its processes. See *Anderson Enterprises*, 369 NLRB No. 70, slip op. at 3. In light of the Board's overruling of Boeing in Stericycle, cases involving arbitration agreements or policies are no longer viable precedent to the extent that they applied the Boeing work-rule standard. See Stericycle, 372 NLRB No. 113, slip op. at 2 (stating that the Board overruled Boeing, *LA Specialty Produce Co*., 368 NLRB No. 93 (2019), and the cases relying on those decisions).

[4] Employees' reasonable understanding that the Arbitration Policy requires arbitration of disputes arising under the NLRA would have been reinforced by the employment application that the Respondent required employees to fill out, which required employees to initial next to a statement incorporating the Arbitration Policy into the application to indicate their understanding of, and agreement to, that statement. That statement reiterates that the Arbitration Policy "applies to any employment-related disputes that exist or arise between the Employees and the Company" including "statutory claims or disputes" and tells employees that they "waive any right that [they] have or may have to have any formal dispute resolution proceedings concerning any Covered Disputes take place in a . . . federal . . . agency and to have such proceedings heard or presided over by an . . . administrative officer." The employment application does not mention employees' right to file unfair labor practice charges with the Board.

despite the language in the Arbitration Policy indicating that claims under the NLRA are covered by the Arbitration Policy, they retain full access to the Board and its processes. Employees' Section 7 right to access the Board includes more than the right to file unfair labor practice charges. In fact, the Board has emphasized, with judicial approval, that "Congress intended employees to be completely free to file charges with the Board, to participate in Board investigations, and to testify at Board hearings." *Prime Healthcare*, 368 NLRB No. 10, slip op. at 5 (citing *NLRB v. Scrivener*, 405 U.S. 117, 121–122 (1972)). Thus, employees must be able to utilize the Board's processes as a whole from start to finish. As the Board explained in *Ralphs I*, "[t]o be meaningful, the right to file charges with the Board must entail the right to have the Board exercise its statutory powers under Section 10 of the Act: i.e., to investigate the charge, to determine its merits, and to pursue appropriate relief through the Act's procedures." 363 NLRB at 1167–1168. While the Arbitration Policy expressly permits employees to *file charges* with the Board, it also expressly provides that arbitration is the exclusive means of *resolving* all employment-related disputes, including Federal statutory claims before administrative agencies. It reasonably follows that filing Board charges, while permitted, could not result in the Board's own independent resolution of the dispute but would instead be just a preliminary step to arbitration. Accordingly, employees could reasonably view the prospect of filing charges with the Board as an exercise in futility, chilling employees from exercising their right to access the Board.[5]

Even if employees were to focus narrowly on only Paragraph 6 of the Arbitration Agreement, they could still reasonably conclude that while they "retain the right . . . to file charges with the . . . Board," their claims under the NLRA would still be subject to "final and binding arbitration" as "the sole and exclusive remedy or formal method of resolving the Covered Disputes." Indeed, they could reasonably read Paragraph 6 to say that filing Board charges is an example of the "administrative charges" that constitute "statutory conditions precedent or jurisdictional prerequisites" to pursuing a dispute covered by the Arbitration Policy. What Paragraph 6 does *not* clearly say is that a claim under the NLRA is entirely excluded from the Arbitration Policy, i.e., is not a "Covered Dispute." Thus, even an employee who reads Paragraph 6 in isolation could still reasonably view the prospect of filing Board charges as an exercise in futility.

My colleagues cite *Anderson Enterprises* to support their claim that the Arbitration Policy "does not give employees the impression that filing charges would be futile." In *Anderson Enterprises*, the Board rejected the position of the *Ralphs I* Board that employees would view the exercise of their right to file charges with the Board as futile if they would understand the arbitration agreement to require that any disputes under the NLRA must nonetheless be resolved in arbitration—which led the *Anderson Enterprises* Board to overrule *Ralphs I*. See *Anderson Enterprises*, 369 NLRB No. 70, slip op. at 4–5. The *Anderson Enterprises* Board found that this position "unreasonably attributes to employees the inclination to simply disregard the savings clause as though it were meaningless surplusage." Id., slip op. at 5. As discussed above, in *Anderson Enterprises*, the Board applied the *Boeing* work-rule standard, which was subsequently discarded in *Stericycle* because, among other things, it was insufficiently protective of employees' Section 7 rights and failed to account for employees' economic dependence on their employers. See 373 NLRB No. 113, slip op. at 1. Under *Stericycle*, the Board's task is not to construe a mandatory arbitration policy as if it were deciding a dispute about the correct meaning of a contract, using canons of construction and other traditional interpretive tools. Rather, the Board must determine whether the arbitration policy—imposed on employees by their employer just as work rules are—has a reasonable tendency to chill employees from accessing the Board or utilizing its processes. To make this determination, the Board puts itself in the place of a reasonable employee, who is economically dependent on the employer and who reads the policy as a layperson, not a lawyer. See id., slip op. at 8–9. As I have explained, reasonable employees could easily draw the impression from the Respondent's Arbitration Policy as a whole that accessing the Board and utilizing its processes would be futile because their dispute with the Respondent would ultimately be resolved in arbitration, even if the Arbitration Policy permits them to file unfair labor practice charges with the Board.[6]

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[5] This interpretation of the Arbitration Policy is a reasonable one for an employee to make, even if not the only reasonable one. No more is required for the General Counsel to carry her burden under Stericycle.

[6] Although I agree with my colleagues that "the existence of a private arbitration agreement does not and cannot prevent the Board from processing charges," I disagree with them that the unassailability of this legal conclusion means that employees can reasonably be expected to understand that despite the Arbitration Policy's repeated declarations that arbitration is the sole and exclusive method for resolving "Covered Disputes"—which employees would reasonably understand to include claims under the NLRA—the Arbitration Policy will not function as written when it comes to unfair labor practice charges filed with the Board. As the Board has previously explained, "[r]ank-and-file employees do not generally carry lawbooks to work or apply legal analysis to company rules as do lawyers, and cannot be expected to have the expertise to examine company rules from a legal standpoint." *Ingram Book Co.*, 315 NLRB 515, 516 fn. 2 (1994).

As a general matter, I do not think that purported "savings" language like that found in Paragraph 6 of the Arbitration Policy can ever suffice to render lawful an arbitration agreement that otherwise could be reasonably interpreted to restrict employees' access to the Board or its processes. In order for an employer to save such an arbitration agreement from illegality, it should include in the agreement unconditional and sufficiently prominent language that provides that employees retain the right to file unfair labor practice charges with the Board *and* unconditional and sufficiently prominent language that excludes or carves out claims under the NLRA from the scope of the arbitration agreement. I believe that a combination of such a "savings" clause and such an "exclusion" clause would clearly assure employees that they retain full access to the Board and its processes. Here, the Respondent's Arbitration Policy contains neither sufficiently prominent "savings" language nor any "exclusion" language. As a result, I would find that the Respondent violated Section 8(a)(1) by maintaining the Arbitration Policy, which restricts employees' access to the Board and its processes.

Accordingly, I respectfully dissent.

Dated, Washington, D.C. August 10, 2026

David M. Prouty, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

In June 2012, we distributed to you a new arbitration policy. That new policy revised the prior policy and eliminated aspects that were alleged to violate Federal labor law. The National Labor Relations Board has now found that the prior policy was unlawful in one aspect.

WE WILL NOT maintain a mandatory arbitration policy that requires employees to maintain the confidentiality of the existence of all arbitration proceedings.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE HAVE rescinded the foregoing policy and removed those aspects from the arbitration policy distributed in June 2012.

RALPHS GROCERY COMPANY

The Board's decision can be found at https://www.nlrb.gov/case/ 21-CA-073942 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940