Testimony of
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An Act Concerning Nondisclosure Agreements in Employment (LD 965)
Before the Maine State Legislature Committee on Labor and Housing

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Thank you for the opportunity to submit this testimony regarding LD 965, An Act Concerning Nondisclosure Agreements in Employment, on behalf of the National Women's Law Center. The National Women's Law Center has been working since 1972 to secure and defend women's legal rights and has long worked to remove barriers to equal treatment of women in the workplace, including workplace harassment. The National Women's Law Center Fund LLC also houses and administers the Legal Network for Gender Equity which connects people who face sex discrimination at work, at school, or when getting health care, with legal assistance, and the TIME'S UP Legal Defense Fund, which provides funding for legal representation and storytelling assistance in select matters challenging workplace sex harassment and related retaliation.

For too long, individuals have suffered workplace harassment in silence, with little or no accountability for harassers. As the case of Harvey Weinstein illustrated,[1] employers' use of nondisclosure agreements (NDAs) is longstanding and has played a disturbing role in silencing victims and allowing serial harassers to operate with impunity.

The COVID-19 crisis has made the need to address the abusive use of NDAs and strengthen our anti-harassment laws more urgent than ever. The pandemic has unleashed an economic recession that is hitting women hardest, with especially high levels of job loss for Black women and Latinas. Women are also 68% of front-line workers in Maine risking their lives in low-paid jobs.[2] With so many jobs being lost—and deep uncertainty as to whether or when they will return—low-paid women face mounting pressures to remain silent about the abuse they experience. Because many women in low-paid jobs also shoulder the majority of caregiving responsibilities in their families, they are also faced with the difficult choice between continuing to work under abusive conditions or losing the paychecks that keep their families alive and food on their tables. This reality increases the power supervisors have over their workers and workers' vulnerability to harassment and silencing.

LD 965 is an important step in the fight to end harassment in the workplace and hold harassers accountable. The National Women's Law Center supports this bill's effort to limit the use

[1] Ronan Farrow, *Harvey Weinstein's Secret Settlements*, THE NEW YORKER, Nov. 21, 2017, https://www.newyorker.com/news/news-desk/harvey-weinsteins-secret-settlements.
[2] NWLC calculations using 2014-2018 American Community Survey (ACS), 5-year sample, using IPUMS-USA, available at https://usa.ipums.org/usa/. Front-line workforce defined using methodology outlined in Hye Jin Rho, Hayley Brown, & Shawn Fremstad, Center for Economic Policy Research, A Basic Demographic Profile of Workers in Frontline Industries (Apr. 2020), available at https://cepr.net/a-basic-demographic-profile-of-workers-in-frontline-industries/.

of harmful NDAs in the workplace and urges the legislature to give serious consideration to our recommendations for further clarifying and strengthening the bill.

I. WORKPLACE HARASSMENT IS A PERVASIVE PROBLEM AGGRAVATED AND PERPETUATED BY THE ABUSIVE USE OF EMPLOYER-IMPOSED SECRECY AGREEMENTS.

Seventy percent of workers who experience sexual harassment say they have never reported it.[3] Whether experiencing harassment from supervisors, coworkers, or third parties, such as customers, most victims of harassment are suffering in silence. Working people are often afraid to report harassment and discrimination, not only because they fear jeopardizing their safety, jobs, financial security, and career prospects, but also because harassers and employers use a variety of legal tools to limit how, when, why, and to whom an employee can disclose details about harassment. Through employment agreements—entered into upon hiring at a new job—and settlement terms——agreed to when resolving a sexual harassment complaint—employees can be forbidden by contractual terms, like nondisclosure and nondisparagement agreements, from speaking out about sexual harassment and assault. Individuals who violate these agreements risk significant monetary penalties.

Recent data shows that over one-third of the U.S. workforce is bound by some form of NDA.[4] NDAs have grown in number, and are now used not only in the context of settlement agreements, but also imposed as a condition of employment in employment contracts, where they have grown beyond traditional trade secret protections to encompass speaking up about a range of workplace conditions, including harassment, discrimination, or other violations of worker rights.[5] In Washington, D.C., the use of broad nondisclosure agreements to cover up harassment was highlighted in a lawsuit filed by a restaurant manager against restauranteur Mike Isabella. The complaint in that case alleged that since 2011, employees had been required to sign NDAs preventing them from sharing any "details of the personal and business lives of Mike Isabella, his family members, friends, business associates and dealings," on pain of a $500,000 penalty per breach.[6] Through the Time's Up Legal Defense Fund we also see firsthand how survivors across the country have been halted in coming forward or speaking up by NDAs.[7]

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[3] HUFFINGTON POST & YOUGOV, *Poll of 1,000 Adults in United States on Workplace Sexual Harassment* (Aug. 2013), http://big.assets.huffingtonpost.com/toplines_harassment_0819202013.pdf.

[4] Orly Lobel, *NDAs Are Out of Control. Here's What Needs to Change*, HARV. BUS. REV., Jan. 30, 2018, https://hbr.org/2018/01/ndas-are-out-of-control-heres-what-needs-to-change (citing Randall S. Thomas, Norman Bishara, and Kenneth J. Martin, *An Empirical Analysis of Non-Competition Clauses and Other Restrictive Post-Employment Covenants*, last revised Sept. 6, 2017, VAND. L. REV., Vol. 68, No. 1, 2015; VAND. L. & ECON. RES. Paper No. 14-11. https://ssrn.com/abstract=2401781).

[5] *Id.*

[6] Complaint at paras. 5, 74, 75, Caras v. Mike Isabella Concepts, et al., No. 1:18-cv-00749 (filed 4/3/2018); *see also* Maura Judkis and Tim Carman, *Mike Isabella's restaurants used nondisclosure agreements to silence sexual harassment accounts, lawsuit alleges*, WASH. POST, April 3, 2018, https://www.washingtonpost.com/lifestyle/food/mike-isabellas-restaurants-used-nondisclosure-agreements-to-silence-sexual-harassment-accounts-new-lawsuit-alleges/2018/04/03/aaf6f766-373e-11e8-9c0a-85d477d9a226_story.html?utm_term=.e34684196e8b.

[7] TIME'S UP Legal Defense Fund & National Women's Law Center Fund LLC, *Coming Forward: Key Trends and Data From the TIME'S UP Legal Defense Fund* (Oct. 2020), https://nwlc.org/resources/coming-forward-key-trends-and-data-from-the-times-up-legal-defense-fund/

Such contractual tools operate to isolate victims, shield serial predators from accountability, and allow harassment to persist at a company. Policy efforts to increase transparency regarding the incidence of harassment in a workplace are necessary to redress the power imbalance exacerbated by employer-imposed secrecy provisions and restore victims' voices.

II. BY PASSING LD 965 MAINE WOULD JOIN THE QUICKLY GROWING MOVEMENT ACROSS STATES TO LIMIT THE ABUSIVE USE OF NDAS

Since #MeToo went viral in 2017, we have seen a remarkable groundswell of states working to limit the abusive use of NDAs, constituting the biggest trend in workplace harassment legislation in the last 3 years.[8] Beginning in 2018, 15 states—from Tennessee to California—have enacted legislation limiting or prohibiting employers from requiring employees to sign nondisclosure agreements as a condition of employment or as part of a settlement agreement.[9] Reflecting recently on California's 2018 law limiting NDAs in settlements—one of the first laws to pass—an employee rights attorney shared that the law "has really allowed people to step into their own power and feel their own voice and make that choice themselves, which has been hugely impactful in regaining some of what was stolen by the harasser."[10]

States have taken different approaches to limiting the use of NDAs to silence survivors of discrimination and harassment, but we encourage all states to follow these foundational principles:

A. Legislation must prohibit employers from imposing NDAs as a condition of employment.

Too frequently, employers impose on new hires, as a condition of their employment, employment contract provisions that prevent employees, including victims of sexual assault or other forms of harassment, from publicly disclosing details about their employment and employment conditions, which can include details of sexual harassment or assault. These contractual provisions can mislead employees as to their legal rights to report harassment or assault to civil rights or criminal law enforcement agencies and their legal rights to speak with coworkers about employment conditions. They can also prohibit employees from telling their story, which in turn makes it less likely that other victims of harassment will be emboldened to speak out and hold their employers accountable.

By prohibiting employers from requiring employees to agree to a NDA that waives their right to discuss workplace harassment and discrimination, LD 965 would lift the veil of secrecy that enables predatory behavior and would protect employees' right to speak with enforcement agencies and act collectively to challenge harassment, thereby increasing employer accountability. In passing this legislation, Maine would join California, Hawai'i, Illinois, New Jersey, New Mexico, New York, Oregon, Tennessee, Vermont, Virginia, and Washington state which, over the past year three years have all enacted legislation prohibiting employers from requiring employees to sign NDAs or nondisparagement agreements as a condition of employment.[11]

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[8] National Women's Law Center (NWLC), *2020 Progress Update: MeToo Workplace Reforms in the States* (Sept. 2020), https://nwlc.org/wp-content/uploads/2020/09/v1_2020_nwlc2020States_Report-MM-edits-11.11.pdf
[9] *Id.*
[10] *Id.*
[11] *Id.*

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B. NDAs in settlement agreements should be permitted in limited circumstances.

Nondisclosure clauses in agreements resolving disputes (including settlement, separation, and severance agreements) with a harasser or employer also often operate to hide the true extent of sexual harassment at a workplace, shield a serial harasser from accountability, prevent survivors from warning others about a particular individual's misconduct, and prevent other victims from coming forward. Survivors are too often pressured into signing these NDAs which prevent a survivor from speaking out publicly about the harassment they experienced, the fact of a legal dispute and the settlement of that dispute, the settlement terms, and/or the identity of the parties.

NDAs in post-dispute agreements create barriers to justice and accountability that are especially pronounced for workers in low-wage jobs. These workers may lack resources for securing legal counsel and be more vulnerable to economic pressure from an employer to accept an NDA in order to get some minimal level of severance pay, for example.

Post-dispute NDAs also can misinform workers about their rights to answer questions about workplace conditions when asked by the EEOC or in the course of an EEOC investigation of the workplace, or to report workplace crime to law enforcement. These are rights that cannot be legally waived in a settlement, separation, or severance agreement,[12] but some NDAs do not note that individuals retain these rights.

However, it is important to note that victims sometimes want to ensure confidentiality as to these matters in order to protect themselves from retaliation or damage to their professional reputations and job prospects. Moreover, the promise of mutual nondisclosure as to some or all aspects of the settlement can provide victims with useful leverage in settlement negotiations. A policy banning all nondisclosure agreements in sexual harassment settlement agreements could make employers less likely to settle claims of harassment, forcing victims of harassment to take up the difficult, expensive, and time consuming task of pursuing legal claims in court in order to obtain any restitution.

In light of these competing interests, we commend the sponsors of this bill for not completely banning NDAs in the settlement agreement context, and instead allowing NDAs at the request of an employee, intern, or applicant. California, Illinois, Louisiana, New Jersey, New Mexico, New York, Nevada, Oregon, Tennessee, and Vermont have all enacted legislation to limit, but not entirely ban, the use of settlement NDAs that would prevent survivors from speaking about harassment, discrimination, and/or sexual assault.[13]

While we offer recommendations below for ensuring that the "employee, intern, or applicant for employment initiates a request" clause does not become a loophole rendering the prohibition ineffective, we commend the legislature for seeking to restore power to victims to decide what should be confidential.

C. Legislation must address all forms of harassment and discrimination.

[12] See Fomby-Denson v. Dep't of Army, 247 F.3d 1366, 1377–78 (Fed. Cir. 2001); Lachman v. Sperry-Sun Well Surveying Co., 457 F.2d 850, 853 (10th Cir. 1972) and Cosby v. Am. Media, Inc., 197 F. Supp. 3d 735, 740–43 (E.D. Pa. 2016); EEOC Enforcement Guidance on Non-Waivable Employee Rights Under EEOC-Enforced Statutes, No. 915.002, at 7. III. A. (Apr. 10, 1997), https://www.eeoc.gov/policy/docs/waiver.html.
[13] NWLC, 2020 Progress Update, *supra* note 8.

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We strongly commend the legislature for seeking to protect workers from employer-imposed NDAs that would prevent them from speaking up about all forms of harassment and discrimination, not just sexual harassment. Workplace discrimination and harassment based on race, sexual orientation, disability, color, religion, age, or national origin all undermine workers' equality, safety and dignity, and are no less harmful. Moreover, sexual harassment does not occur in a vacuum, but often occurs alongside or in combination with other forms of harassment and discrimination. For example, a Black woman may experience harassment based on both her sex and race combined; her harasser may repeatedly target her with sexual comments and racial epithets, for example. As a result, legislation that focuses exclusively on sexual harassment would have the odd result of providing a worker who experiences multiple, intersecting violations with only partial protection. The Me Too movement recognizes that in order to truly put an end to the workplace harassment that holds women back and enforces gender inequality, the movement—and our policy response—must be intersectional and address the multiple forms of workplace inequality women face that leave women more vulnerable to harassment. Therefore, it is absolutely essential that this bill encompass not only harassment based on sex, which includes sexual orientation and gender identity, but also other forms of workplace harassment and discrimination.

III. LD 965 SHOULD BE STRENGTHENED IN SEVERAL KEY WAYS.

For this bill to truly be effective at increasing accountability and preventing harassment, we urge the legislature to strengthen this bill in several important ways:

A. Ensure independent contractors, volunteers, and former employees are clearly covered by the law.

While we commend the sponsors for extending the bill's protections to interns, we also strongly urge you to extend the protections to independent contractors and volunteers, as they are often without any legal recourse for sexual harassment but particularly vulnerable to it. We also encourage the legislature to clarify that the law applies not just to current employees and applicants for employment, but also former employees, interns, independent contractors, and applicants as many of those intended to be protected by this law may no longer be with the employer at the time they are negotiating a settlement, separation, or severance agreement.

B. Ensure power is truly shifted to employees to choose confidentiality.

While we support the sponsors' decision not to ban NDAs in the settlement context completely, but instead put the power into victims' hands to decide if they want confidentiality, it is important for the bill to include additional protections to ensure that the employee, intern, or applicant is voluntarily and willingly initiating the request for a settlement NDA and not being coerced into making that request. Given the inherent power imbalances between employer and employee—imbalances that are often magnified in the settlement context, especially when a victim may be dealing with trauma or when a victim is not represented by counsel—we are concerned that the bill as drafted may still permit employers to continue to unduly push victims into silence.

Given these concerns, we encourage the legislature to consider amendments to this bill to shift the power balance in the settlement negotiation context and ensure that victims truly have a voice in the process. Such provisions include:

i. **Ensuring informed consent regarding nondisclosure clauses in settlement agreements**. The bill should afford individuals adequate time to review the NDA and the opportunity to obtain the advice of an attorney. For example, New York passed a similar law in 2018 prohibiting employers from using NDAs in settlement agreements for claims involving sexual harassment unless the condition of confidentiality is the complainant's preference. The legislation further provides that where NDAs are included, the complainant must first be given twenty-one days to consider the term or condition, and then at least seven days following the execution of such an agreement to revoke the agreement. The agreement will not become effective or be enforceable until the revocation period has expired.[14] Similarly, in California, agreement to a settlement nondisparagement clause must be voluntary, deliberate, and informed, and the worker must be represented by an attorney or given notice and an opportunity to retain an attorney.[15]

ii. **Providing that an agreement to keep a settlement confidential should provide a reasonable economic or other benefit to the individual that is on par with the benefit to the employer.** When a victim of workplace harassment or discrimination agrees to keep the resolution of a claim confidential, the worker should receive some meaningful benefit, economic or otherwise, in exchange, in addition to anything of value to which the individual is already entitled.[16] Requiring this type of equity in the settlement process would help correct the power imbalances between workers, including workers in low-wage jobs and those without legal counsel, and their employers.

iii. **Allowing victims of discrimination and harassment to withdraw from an NDA without financial penalty**. Victims of discrimination and harassment should never be subject to monetary damages or penalties for breaching an NDA. Workers in low-wage jobs, in particular, often suffer significant economic hardship because of worker rights violations and related retaliation, hardships that would be worsened by the monetary penalties they could face for breaching an NDA. New Jersey, for example, enacted legislation that allows nondisclosure provisions in settlement agreements relating to claims of discrimination, retaliation, or harassment but makes them unenforceable against the employee, such that an employee would not be penalized for breaking a nondisclosure provision. However, if an employee discloses details about a claim against the employer, such that the employer becomes identifiable, the nondisclosure provision is no longer enforceable against either the employee or the employer.[17] This is one approach to preventing victims of worker rights violations from incurring harsh monetary penalties for speaking out about their experiences.

iv. **Ensuring that NDAs do not limit an individual's ability to access justice or basic necessities.** We commend the sponsors for including in the bill a requirement that NDAs

[14] N.Y. C.P.L.R. § 5003-b (McKinney 2018).
[15] S.B. 1300, Sec. 4, 2017-2018 Reg. Sess. (Cal. 2018).
[16] American Civil Liberties Union, The Leadership Conference On Civil And Human Rights, The National Women's Law Center, A Call For Legislative Action To Eliminate Workplace Harassment: Principles and Priorities (Dec. 2018), at para. 4, https://nwlc-ciw49tixgw5lbab.stackpathdns.com/wp-content/uploads/2018/10/Workplace-HarassmentLegislative-Principles.pdf
[17] S. 121, § 2, 2018–2019 Reg. Sess. (N.J. 2019); N.J. STAT. § 10:5-12.8 (2019)

clearly state that the "individual retains the right to report, testify or provide evidence to federal and state agencies that enforce employment or discrimination laws…." We encourage the legislature to also require that such disclaimer note that individuals retain the right to report a crime to law enforcement and to participate in collective action to address workplace violations.

Vermont, for example, enacted legislation in 2018 that requires settlements of sexual harassment claims to expressly state that the worker is free to file a complaint or participate in an investigation with state or federal agencies, such as the EEOC. Additionally, settlements must notify workers of their right to participate in collective action to address workplace violations.[18] Similarly, New York requires NDAs to notify employees that such a provision does not prohibit the complainant from speaking with law enforcement, the EEOC, the state division of human rights, a local commission on human rights, or an attorney.[19]

Moreover, the bill should ensure that NDAs do not limit an individual's ability to obtain public benefits. A worker who leaves a job because of harassment should be free to explain to government agencies why she left her job in order to obtain unemployment insurance, for example.

C. **Provide for a private right of action with the ability to recover damages, civil penalties and attorneys' fees if a victim of worker rights violations is forced to sign an unlawful NDA or the employer seeks to enforce such an NDA against the victim**. We commend the sponsors for including civil penalties for a violation of this law, but we also encourage the legislature to include a private right of action . Laws are only meaningful when they can be enforced by impacted individuals. A private right of action would allow workers to file lawsuits to enforce laws prohibiting unlawful NDAs.

D. **Extend protections against NDAs to other employment and labor law violations.** We urge the legislature to extend the protections set forth in this bill to NDAs that prevent workers from speaking up about other employment and labor violations, in addition to harassment and discrimination. Violations of employment and labor laws, such as wage and hour laws, deepen the power imbalances between workers and their employers and leave workers more vulnerable to harassment. If we wish to truly address the policies and structures that allow harassment to persist, and if we seek robust enforcement of worker rights laws, we must ensure that workers can speak up about all workplace abuses that undermine their economic and physical security.

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We appreciate your efforts to address workplace harassment and we thank you for your consideration of our recommendations. I am happy to serve as a resource as you continue to evaluate this legislation and can be reached at ajohnson@nwlc.org.

[18] Vermont Act 183, H.707, Sec. 1(h)(2), 2017–2018 Gen. Assemb., Reg. Sess. (Vt. 2018)
[19] N.Y. C.P.L.R. § 5003-b (McKinney 2018).