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**Testimony of Ramya Sekaran, Workplace Justice Fellow, National Women's Law Center
Regarding Senate Bill No. 761, Section 2
before the Connecticut General Assembly Joint Committee on Judiciary
March 29, 2019**

Thank you for the opportunity to submit this testimony on behalf of the National Women's Law Center regarding Section 2 of Senate Bill No. 761. 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.

For too long, individuals have suffered workplace harassment in silence, with little or no accountability for harassers. As the case of Harvey Weinstein revealed,¹ nondisclosure agreements (NDAs) have played a disturbing role in silencing victims and allowing serial harassers to operate with impunity. The National Women's Law Center commends the Legislature for seeking to prohibit the use of nondisclosure agreements in employment contracts that prevent employees from discussing workplace discrimination and harassment and urges the Judiciary Committee to consider our recommendations for further strengthening Section 2 of Senate Bill No. 761.

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

Despite laws at the federal, state, and local levels prohibiting harassment in the workplace, workplace harassment continues to be a widespread problem, affecting workers in every state, in every kind of workplace setting and industry, and at every level of employment. In FY 2018, approximately 27,000 harassment charges were filed with the U.S. Equal Employment Opportunity Commission (EEOC); nearly one-quarter of those charges alleged sexual harassment.² But the rates of workplace harassment, particularly sexual harassment, are likely much higher than the data suggests. Approximately three out of four individuals who experience harassment never talked to a supervisor, manager, or union representative about the harassing conduct.³ Moreover, retaliation remains a significant problem, and continues to be the leading basis of charges filed with the EEOC.⁴ Too many people are still afraid to speak up and challenge and report harassment, assault and discrimination because of the threats to their jobs, reputations, careers, and safety.

Since the TIME'S UP Legal Defense Fund, housed and administered by the National Women's Law Center Fund, was launched on January 1, 2018, it has received over 4,000 requests for assistance. Overwhelmingly, the requests coming in are from women – particularly those in low-wage jobs, who are often the people with the most to lose by speaking up and often those who are most affected financially. Indeed, of the 56 requests from individuals in Connecticut related to workplace sex discrimination and harassment over 60 percent of those who provided their economic status identified as low income.⁵

Whether suffering harassment from supervisors, coworkers, or third parties, such as customers, most victims of harassment are suffering in silence, not only because they fear jeopardizing their safety, jobs, financial security, and career prospects by speaking up, but also because harassers and employers use a variety of legal tools in order 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 harassment or discrimination complaint—employees can be forbidden by nondisclosure and nondisparagement agreements from speaking out about harassment and discrimination.

Recent data shows that over one-third of the U.S. workforce is bound by a nondisclosure agreement.⁶ 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, and other violations of worker rights.⁷ The penalties for breaching an NDA can be severe: workers can face penalties ranging anywhere from \$25,000 to \$750,000 per breach. Some NDAs even require the worker to pay the employer's legal fees, should the parties have to go to court.⁸ The use of broad NDAs in employment contracts to cover up harassment was highlighted most recently in a lawsuit filed by a restaurant manager against restaurateur Mike Isabella. The complaint in that case alleged that since 2011, employees have 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.⁹

Individuals often accept employment at a company without knowing if harassment and discrimination are particular problems at that workplace. NDAs that have the effect of preventing employees from discussing harassment or discrimination can misinform workers as to their legal rights to report violations to civil rights or criminal law enforcement agencies and to speak with co-workers about employment conditions. They can also prohibit workers from publicly telling their story, which in turn makes it less likely that other victims of harassment and discrimination will be emboldened to speak out and hold their employers accountable.

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

II. SECTION 2 OF BILL NO. 761 WILL HELP RESTORE POWER TO WORKERS AND UNCOVER THE TRUE EXTENT OF HARASSMENT AND DISCRIMINATION IN A WORKPLACE.

We commend the sponsors of this bill for introducing legislation that would prohibit employers from imposing, as a condition of employment, continued employment, promotion, compensation or benefits, NDAs that prevent workers from speaking up about harassment and discrimination. This measure will help lift the veil of secrecy that enables predatory behavior and would clarify workers' rights to speak with enforcement agencies and act collectively to challenge harassment and discrimination. If Section 2 of Bill No. 761 is enacted, Connecticut would join California,¹⁰ Maryland,¹¹ Tennessee,¹² Vermont,¹³ Virginia,¹⁴ and Washington state,¹⁵ all of which recently enacted legislation prohibiting employers from requiring workers to sign, as a condition of employment, nondisclosure or nondisparagement agreements preventing them from speaking about harassment and/or sexual assault.

In particular, we commend the sponsors of this bill for ensuring that the legislation addresses not only sexual harassment, but all forms of workplace harassment and discrimination covered by Connecticut law. This feature of Section 2 is vital. In order to truly put an end to the workplace harassment that holds women back and enforces gender inequality, our policy response must be intersectional and address the multiple forms of workplace inequality workers, and particularly women, face that leave them more vulnerable to harassment.

The TIME'S UP Legal Defense Fund's requests for assistance have confirmed that sexual harassment often occurs along with other forms of sex discrimination – including pay discrimination and pregnancy

discrimination. It also occurs at the intersections of identities, with many women experiencing harassment based on their race and sex combined, or their national origin and sex, or their disability and sex.

For example, a Black woman may experience harassment based on both her sex and race combined; she may be paid less than her male coworkers and also be the target of sexual comments and racial epithets. Indeed, EEOC charge data indicate that women of color—and Black women in particular—are disproportionately likely to experience sexual harassment at work, highlighting how race and sexual harassment can be intertwined. An analysis of sexual harassment charges filed with the EEOC between 2012 and 2016 found that of the charges filed by women, 56% were filed by women of color; yet, women of color only make up 37% of women in the workforce.¹⁶

Legislation that focuses exclusively on sexual harassment would have the odd and impractical result of providing a worker who experiences multiple, intersecting violations with only partial protection. Moreover, workplace harassment and discrimination based on race, disability, color, religion, age, or national origin all undermine workers' equality, safety and dignity, and are no less humiliating. For these reasons, we strongly support the sponsors' decision to include all forms of harassment and discrimination in Section 2 of Bill No. 761.

We also commend the sponsors for ensuring that Section 2 not only covers harassment that occurs onsite at the workplace, but also work-related harassment that occurs off premises. Given the nature of work today, workplace interactions often occur outside the employer's four walls at, for example, off-site events, conferences, or while traveling to client sites. Section 2 recognizes the reality that work-related harassment can occur at the physical workplace and off premises and ensures that employees are not banned from speaking about workplace harassment, regardless of where it occurred.

III. RECOMMENDATIONS FOR FURTHER STRENGTHENING SECTION 2 OF BILL NO. 761.

a. Ensure that the protections in Section 2 extend to independent contractors, interns, fellows, volunteers, and trainees.

We urge the Committee to clarify that Section 2's protections extend to independent contractors, interns, fellows, volunteers, and trainees. Such individuals are particularly vulnerable to harassment and often without legal recourse. As currently written, the definition of "employee" in Section 2 does not clearly include these types of professional relationships.

b. Expand the protections in Section 2 to include all employment and labor law violations.

We urge the Committee to extend the scope of Section 2 to encompass 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 workers' rights laws, we must ensure that workers can speak up about all workplace abuses that undermine their economic and physical security.

c. Clarify that Section 2's prohibition on NDAs does not apply to NDAs in settlement agreements, separation agreements, or severance agreements.

We understand that the intent of Section 2 is to prohibit the inclusion of NDAs in employment contracts that employees are required to sign as a condition of employment, continued employment, promotion, or benefits; it is not to prohibit the use of NDAs in post-dispute settlement, separation, or severance agreements. We recommend that the Legislature clarify that Section 2 only applies to pre-dispute NDAs and does not reach NDAs in post-dispute settlement agreements, separation agreements, or severance agreements. Providing this clarification will help ensure that victims of workplace violations retain the option of requesting confidentiality in such post-dispute agreements.

d. Limit the use of NDAs in settlement, separation, and severance agreements as well.

We urge the Legislature to limit, but not ban, the use of post-dispute NDAs. Post-dispute NDAs also force harassment victims into silence, preventing them from speaking out publicly about the harassment they experienced. Here too secrecy can help hide the true extent of harassment at a workplace, shield a serial harasser from accountability, and prevent other victims from coming forward.

However, 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 a post-dispute agreement can provide victims with useful leverage in settlement negotiations. A policy prohibiting all NDAs in post-dispute agreements could make employers less likely to settle claims of workers' rights violations, forcing workers to take up the difficult, expensive, and time-consuming task of pursuing legal claims in court in order to obtain any restitution.

Accordingly, we recommend the Legislature permit post-dispute NDAs at the request of the complainant with the following additional protections for complainants:

- 1. Ensure informed consent.** Workers who request a post-dispute NDA should be afforded adequate time to review the NDA and the opportunity to obtain the advice of an attorney.
- 2. Require that any NDA provide a reasonable economic or other benefit to the worker that is on par with the benefit to the employer.** When a worker agrees to keep the resolution of a claim relating to workplace violations confidential, the worker should receive some reasonable benefit, economic or otherwise, in exchange. Adding a provision to this effect would help correct the power imbalances between workers, especially low-wage workers and those without legal counsel, and their employers.
- 3. Allow workers to withdraw from a post-dispute NDA without penalty.** Workers should never be subject to additional monetary damages for breaching an NDA.¹⁷ Low-wage workers often suffer significant economic hardship because of workplace violations and related retaliation, hardships that would be worsened by the harsh monetary penalties they could face for breaching an NDA.
- 4. Specify that NDAs cannot explicitly or implicitly limit an individual's ability to file claims with enforcement agencies or in court.** Any measures relating to NDAs in post-dispute agreements should clarify that such NDAs do not restrict workers' rights to file complaints with federal or state civil rights enforcement agencies, their right to report a crime to law enforcement, or their ability to provide testimony or evidence in state or federal litigation, including class or collective actions, against the employer. Such

measures should require employers to include a notice provision in settlement, separation, and severance agreements informing workers of these rights.¹⁸

We appreciate your efforts to address workplace harassment and discrimination with this important legislation and we thank you for your consideration of our recommendations.

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 U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N (EEOC), *All Charges Alleging Harassment (Charges filed with EEOC) FY 2010 - FY 2018*, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm.

³ EEOC, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, REPORT OF CO-CHAIRS CHAI R. FELDBLUM AND VICTORIA LIPNIC, Exec. Summary (June 2016), https://www.eeoc.gov/eeoc/task_force/harassment/report.cfm [EEOC TASK FORCE REPORT].

⁴ EEOC, *Retaliation-Based Charges (Charges filed with EEOC) FY 1997 - FY 2017*, <https://www.eeoc.gov/eeoc/statistics/enforcement/retaliation.cfm>; EEOC Task Force Report Part 2 C.

⁵ Figures provided by the TIME'S UP Legal Defense Fund. For a summary of the work of the TIME'S UP Legal Defense Fund, see TIME'S UP LEGAL DEFENSE FUND, ANNUAL REPORT 2018 (Jan. 2019), <https://nwlc.org/resources/times-uplegal-defense-fund-annual-report-2018/>.

⁶ 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>).

⁷ *Id.*

⁸ Ed Dickson, *What, Exactly, Is an NDA?*, ROLLING STONE, Mar. 19, 2019, <https://www.rollingstone.com/culture/culture-features/nda-non-disclosure-agreements-809856/>.

⁹ Complaint at paras. 5, 74, 75, *Caras v. Mike Isabella Concepts, et al.*, No. 1:18-cv-00749 (filed April 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=.068f1f84d2a7.

¹⁰ S.B. 1300, 2018 Reg. Sess. (Cal. 2018).

¹¹ H.B. 1596, 2018 Gen. Assemb., Reg. Sess. (Md. 2018).

¹² H.B. 2613, 110th Gen. Assemb., Reg. Sess. (Tenn. 2018).

¹³ H.707, 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).

¹⁴ H. 1820, 2019 Reg. Sess. (Va. 2019).

¹⁵ S.B. 5996, 65th Leg., 2018 Reg. Sess. (Wash. 2018).

¹⁶ Amanda Rossie, Jasmine Tucker, and Kayla Patrick, *Out of the Shadows: An Analysis of Sexual Harassment Charges Filed by Working Women* at 22, National Women's Law Center (2018), <https://nwlc.org/wp-content/uploads/2018/08/SexualHarassmentReport.pdf>.

¹⁷ *See, e.g.*, H.B. 2020, 53rd Leg., 2nd Reg. Sess. (Ariz. 2018); S.B. 121, 218th Leg., 2018-2019 Sess. (N.J. 2019).

¹⁸ *See, e.g.*, Vermont Act 183, H.707, Sec. 1(h), 2017-2018 Gen. Assemb., Reg. Sess. (Vt. 2018).