No. 21- 1490

In The

Supreme Court of the United States

ARVIND GUPTA, *pro se*
Petitioner,

v.

MARTIN J. WALSH, in his official capacity as Secretary of the U. S. Department of Labor,
and,
Compunnel Software Group, Inc.
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: May 17, 2022

Petitioner

QUESTION PRESENTED FOR REVIEW

The question presented is:
Whether employers can have legally enforceable private settlement agreement with the nonimmigrant worker to pay less than the wages required under the 'INA'.

To provide context to the question presented the text of 8 U.S.C. § 1182 (n)(1)(A)(i)-(ii) is reproduced below:
No alien may be admitted or provided status as an H–1B nonimmigrant in an occupational classification unless the employer has filed with the Secretary of Labor an application stating the following:

(A) The employer—

(i) is offering and will offer during the period of authorized employment to aliens admitted or provided status as an H–1B nonimmigrant wages that are at least—

(I) the actual wage level paid by the employer to all other individuals with similar experience and qualifications for the specific employment in question, or

(II) the prevailing wage level for the occupational classification in the area of employment,

whichever is greater, based on the best information available as of the time of filing the application, and

(ii) will provide working conditions for such a nonimmigrant that will not adversely affect the working conditions of workers similarly employed.

PARTIES TO THE PROCEEDING

Petitioner Arvind Gupta, *pro se* is a citizen of India. He worked as a nonimmigrant worker under the H-1B work authorization program of the Immigration and Nationality Act, 1956 as amended, ('INA') with Compunnel Software Group, Inc. beginning in February 2007.

Respondent Honorable Martin J. Walsh is sued in his official capacity as the Secretary of the U.S. Department of Labor. He is responsible for the supervision and management of all decisions within the U.S. Department of Labor.

Founded in 1989 Respondent Compunnel Software Group, Inc. is a leading information technology consulting firm with offices in USA, UK and other European countries, and India. It has head office in Plainsboro, New Jersey.

RELATED PROCEEDINGS

1. *Compunnel*, DOL Case #1531643 Administrator (Wage-Hour). Determination including Summary of Violations and Remedies entered May 31, 2011. *(reproduced as Appendix G, at 104a – 109a)*

2. *Gupta v. Compunnel*, ALJ No. 2011-LCA-045, Office of Administrative Law Judges (OALJ), New Jersey, Decision and Order entered February 1, 2012.

3. *Gupta v. Compunnel*, ALJ No. 2011-LCA-045, Office of Administrative Law Judges (OALJ), New Jersey, Order [Denying Reconsideration] entered March 7, 2012.

4. *Gupta v. Compunnel*, ARB No. 12-049, Administrative Review Board (ARB), Washington, DC. Decision and Order of Remand entered May 29, 2014. (2014 WL 2536869) *(reproduced as Appendix F, at 57a – 103a)*

5. *Compunnel v. U.S. DOL, et al*, No. 14-2195, U.S. Court of Appeals for the Second Circuit, Order [Granting Compunnel's motion to withdraw appeal] entered June 30, 2014.

6. *Compunnel v. Gupta and Perez,* No. 14-cv-4790 (SAS), U.S. District Court for the Southern District of New York, Order [dismissing appeal] entered October 22, 2014.

7. *Compunnel v. Gupta and Perez,* No. 14-cv-4790 (SAS), U.S. District Court for the South. District of New York, Opinion and Order entered March 17, 2015 (2015 WL 1224298)

8. *Compunnel v. Gupta and Perez,* No. 14-cv-4790 (SAS), U.S. District Court for the Southern District of New York, Judgment entered March 19, 2015.

9. *Compunnel v. Gupta and Perez,* No. 14-cv-4790 (SAS), U.S. District Court for the South. District of New York, Memorandum Opinion and Order [Denying Reconsideration] entered April 13, 2015. (2015 WL 1808628)

10. *Gupta v. Compunnel,* ALJ No. 2011-LCA-045, Office of Administrative Law Judges (OALJ), New Jersey, Final Order Approving the Parties' Settlement Agreement entered March 11, 2016.
(reproduced as Appendix E, at 53a – 56a)

11. *Gupta v. Compunnel*, ARB No. 16-056, Administrative Review Board (ARB), Washington, DC. Final Decision and Order, entered April 29, 2016. (2016 WL 2892927) *(reproduced as Appendix D, at 45a – 52a)*

12. *Compunnel v. Gupta and Perez,* No. 14-cv-4790 (RA), U.S. District Court for the Southern District of New York, Order [Denying Compunnel's motion to dismiss] entered Sept. 1, 2017. (2017 WL 11514590)

13. *Compunnel v. Gupta and Perez,* No. 14-cv-4790 (RA), U.S. District Court for the Southern District of New York. Opinion and Order entered Sept. 30, 2018. (2018 WL 4757941) *(reproduced as Appendix B, at 10a – 42a)*

14. *Compunnel v. Gupta and Perez,* No. 14-cv-4790 (RA), U.S. District Court for the Southern District of New York. Judgment entered September 30, 2018. *(reproduced as Appendix C, at 43a – 44a)*

15. *Compunnel v. Gupta and Perez,* No. 14-cv-4790 (RA), U.S. District Court for the Southern District of New York. Memorandum

Opinion and Order [Denying Reconsideration] entered May 20, 2019. (2019 WL 2174085) *(reproduced as Appendix I, at 112a – 121a)*

16. *Compunnel Software Group, Inc. v. Gupta et al*, No. 19-1761-cv, U.S. Court of Appeals for the Second Circuit. Summary Order entered September 20, 2021. (859 Fed. Appx. 596, 2021 WL 4256843) *(reproduced as Appendix A, at 1a - 9a)*

17. *Compunnel Software Group, Inc. v. Gupta et al*, No. 19-1761-cv, U. S. Court of Appeals for the Second Circuit. Order [Denying Rehearing] entered December 21, 2021. *(reproduced as Appendix H, at 110a – 111a)*

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Petitioner Arvind Gupta, *pro se*, respectfully prays that a writ of certiorari issue to review and to vacate and reverse the 'Summary Order' of the United States Court of Appeals for the Second Circuit entered in this proceeding on September 20, 2021, and the subsequent Order Denying Rehearing dated December 21, 2021.

OPINIONS BELOW

The 'Summary Order' of the Second Circuit is electronically reported at 859 Fed. Appx. 596, 2021 WL 4256843 and reproduced as *Appendix A* at 1a-9a. The Second Circuit's 'Order' [Denying Rehearing] is reproduced as *Appendix H* at 110a-111a.

The September 2018 'Opinion and Order' of the United States District Court for the Southern District of New York is available at 2018 WL 4757941 and 2018 U.S. Dist. LEXIS 170187 and reproduced as *Appendix B* at 24a-42a. The Judgment is reproduced as *Appendix C* at 43a-44a The May 2019 'Opinion and Order' [Denying Reconsideration] of the United States District Court for the Southern District of New York is available at 2019 WL 2174085 and 2019 U.S. Dist. LEXIS 84893 and reproduced as *Appendix I* at 112a-121a.

ARB 'Final Decision and Order' dated April 29,

2016, in ARB Case No. 16-056, is available at 2016 WL 2892927, and is reproduced as *Appendix D* at 45a-52a. The Administrative Law Judge (ALJ) 'Final Order Approving the Parties' Settlement Agreement' dated March 11, 2016, is reproduced as *Appendix E* at 53a-56a. ARB 'Decision and Order of Remand' dated May 29, 2014, in ARB Case No. 12-049, is available at 2014 WL 2536869, and is reproduced as *Appendix F* at 57a-103a. Administrator (Wage-Hour) Determination including Summary of Violations and Remedies issued in DOL Case #1531643 dated May 31, 2011 is reproduced as *Appendix G* at 104a-109a.

JURISDICTION

Second Circuit 'Summary Order' was issued on September 20, 2021. The petition for panel rehearing, or, in the alternative, for rehearing *en banc* was denied on December 21, 2021. Justice Sotomayor extended the time to file a petition for certiorari until May 20, 2022. (No. 21A507). The court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS AND REGULATIONS INVOLVED

The text of following statutes and regulatory provisions involved in this petition is included as *Appendix J* at 122a-144a.

5 U.S.C. § 706(2)
8 U.S.C. § 1182 (n)(1)(A)
8 U.S.C. § 1182 (n)(2)(A)
8 U.S.C. § 1182 (n)(2)(C)(iv)
8 U.S.C. § 1182 (n)(2)(C)(vii)(I)
8 U.S.C. § 1182 (n)(2)(C)(vii)(IV)
8 U.S.C. § 1182 (n)(2)(D)
8 U.S.C. § 1182 (n)(4)(C)

8 C.F.R. § 214.2(h)(2)(i)(E)
20 C.F.R. § 655.700(b)(1)-(3)
20 C.F.R. § 655.705(a), (c)
20 C.F.R. § 655.731(c)(1)-(2)
20 C.F.R. § 655.731(c)(7)(i)
20 C.F.R. § 655.731(c)(7)(ii)
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20 C.F.R. § 655.830(b)
20 C.F.R. § 655.850
29 C.F.R. § 18.10(a)
29 C.F.R. § 18.12(b)
29 C.F.R. § 18.30(b)(1)

The text of DOL's implementing regulations 20 C.F.R. §§ 655.700 – 855 (Subpart H and I) is available on the internet at: *https://www.ecfr.gov/current/title-20/chapter-V/part-655*

STATEMENT OF THE CASE

The H-1B work authorization program of the Immigration and Nationality Act, 1956 as amended ('INA') is a voluntary program that allows the temporary employment of "nonimmigrants" to fill "specialized" jobs in the United States. 8 U.S.C. §§ 1101(a)(15)(H)(i)(b), 1182(n).

At least three federal agencies are involved in authorizing H-1B employment of nonimmigrant workers in United States. The Labor Condition Application (LCA) is approved by Employment and Training Administration (ETA) a division of U. S. Department of Labor. 20 C.F.R. §§ 655.700(b)(1), 705(a). After the LCA is approved, the employer is required to petition the U. S. Department of Homeland Security (USCIS) on Form I-129 to grant H-1B work authorization for the nonimmigrant worker. 20 C.F.R. § 655.700(b)(2) Once USCIS grants the work authorization, the nonimmigrant can apply for H-1B visa with the consular office of the U. S. Department of State. 20 C.F.R. § 655.700(b)(3).

Private agreements inconsistent with the LCA attestations are neither required nor recognized by Government agencies under the H-1B program.

As part of the H-1B program, the employer must pay the nonimmigrant a "required wage." 8 U.S.C. § 1182(n)(1)(A); 20 C.F.R. §§ 655.705(c), 715, 731(a)(1), (2). Specifically, an employer who places an H-1B employee "in nonproductive status due to a decision by the employer (based on factors such as lack of work), or due to the nonimmigrant's lack of a permit or license" must pay the employee full-time wages for all nonproductive time. 8 U.S.C. § 1182(n)(2)(C)(vii)(I); 20 C.F.R. § 655.731(c)(7)(i).

Under 20 C.F.R. § 655.750(b)(3), "An employer shall comply with the "required wage rate" and "prevailing working conditions" statements of its labor condition application required under §§ 655.731 and 655.732 of this part, respectively, even if such application is withdrawn, at any time H-1B nonimmigrants are employed pursuant to the application, unless the application is superseded by a subsequent application which is certified by ETA." (emphasis added). 20 C.F.R. §§ 655.731(c)(1)-(2) describes the "required wages".

See, 20 C.F.R. § 655.731(c)(7)(i) *Circumstances where wages must be paid.* "If the H-1B nonimmigrant

is not performing work and is in a nonproductive status due to a decision by the employer (e.g., because of lack of assigned work), lack of a permit or license, or any other reason *except as specified in paragraph (c)(7)(ii) of this section*, the employer is required to pay the salaried employee the full pro-rata amount due, ..." (emphasis added)

See 20 C.F.R. § 655.731(c)(7)(ii) *Circumstances where wages need not be paid.* "If an H–1B nonimmigrant experiences a period of nonproductive status due to conditions unrelated to employment which take the nonimmigrant away from his/her duties at his/her voluntary request and convenience (e.g., touring the U.S., caring for ill relative) or render the nonimmigrant unable to work (e.g., maternity leave, automobile accident which temporarily incapacitates the nonimmigrant), then the employer shall not be obligated to pay the required wage rate during that period, ... Payment need not be made if there has been a *bona fide* termination of the employment relationship."

A private agreement or release between the employer and nonimmigrant worker is not a valid reason for the employer to escape its statutory obligation to pay the required wages. *See*, 8 U.S.C. §§ 1182(n)(2)(C)(vii)(I), (IV). If there is material change in terms and conditions of employment, then

employer is required to file a new H-1B petition with USCIS with a current or new certified labor condition application. *See*, 8 C.F.R. § 214.2(h)(2)(i)(E)

Petitioner Arvind Gupta entered into employment with Compunnel in December 2006 under the H-1B nonimmigrant worker authorization program of the 'INA'. 8 U.S.C. § 1182(n)(4)(C) Compunnel voluntarily submitted a Labor Condition Application ("LCA") to United States Department of Labor ("DOL") mentioning the period of employment starting December 1, 2006, to November 30, 2009. In the LCA the wage rate is mentioned as $20/hr. Based on Compunnel's H-1B petition that included the DOL certified LCA, United States Citizenship and Immigration Services ("USCIS") authorized Gupta's period of employment up to April 30, 2009.

Gupta started working on fee producing assignments for Compunnel in February 2007. Compunnel started paying wages to Gupta @ $52/hr. (actual wage rate) effective February 5, 2007. After June 11, 2007, Gupta joined a new client project in New York, NY, and Compunnel started paying wages @ $60/hr. (actual wage rate) up to July 20, 2007. In addition to actual wage rate of $60/hr. Compunnel also paid Gupta cash bonus or similar compensation (fringe benefit) @ $35/hr. On December 11, 2007, Gupta started working on another project for

Compunnel in New Jersey that lasted until end of March 2008. Compunnel paid wages to Gupta @ $64/hr. for the period beginning December 11, 2007, and up to March 31, 2008.

During Gupta's employment with Compunnel under the H-1B program and later, Compunnel frequently violated its LCA attestations to pay the required wage rate (higher of actual or prevailing wage rate) to Gupta for both productive and nonproductive periods of employment.

Under 'INA' Gupta lacks private right of action to directly prosecute Compunnel in the first instance. His remedy is to file a complaint with Administrator (Wage-Hour) and appeal with ALJ and ARB, if necessary. 20 C.F.R. §§ 655.806, 820, 845. The final decision of the agency can be appealed in federal court for judicial review under Administrative Procedure Act (APA). 20 C.F.R. § 655.850.

Gupta filed a timely complaint with U.S. DOL in November 2008 for his wages and other claims. 8 U.S.C. § 1182(n)(2)(A). In December 2008 Gupta also asked for his required wages from Compunnel. In violation of 8 U.S.C. § 1182 (n)(2)(C)(iv) Compunnel retaliated and sent Gupta overseas in travel status and withdrew his H-1B petition by a back dated letter sent to USCIS in February 2009.

On Gupta's complaint and subsequent appeal Administrator (Wage-Hour) and Administrative Review Board (ARB) granted him back wages for various periods of time.

After investigation, in May 2011 Administrator (Wage-Hour) ordered Compunnel to pay back wages to Gupta for certain periods of time and ordered Compunnel to comply with the requirements of 20 C.F.R. § 655.731 in the future. Compunnel paid the back wages per the Administrator's Determination at the required wage rate. Gupta appealed with ALJ and later with ARB for additional periods of wage violations by Compunnel and for interest on back pay.

By Order dated May 29, 2014, ARB found Compunnel in violation of required wage requirements for additional periods of employment and ordered the ALJ to calculate back wages due to Gupta at least for the following periods,

(i) February 3, 2007,
(ii) July 23, 2007 to December 10, 2007,
(iii) April 1, 2008 to April 30, 2009,

ARB ordered payment of interest on back pay including Administrator's back pay award. ARB also ordered the ALJ to issue a new decision on Gupta's retaliation claim. 20 C.F.R. § 655.801(a).

The required wages under 'INA' (without interest and benefits) for these periods, based on actual wage rate, is about $193,792. 8 U.S.C. § 1182 (n)(2)(D); 20 C.F.R. § 655.810(a) providing that, "The back wages or fringe benefits shall be equal to the difference between the amount that should have been paid and the amount that actually was paid to (or with respect to) such nonimmigrant(s)." With interest and benefits this amount will be even higher.

After ARB issued its decision, Compunnel filed a petition for review in the Second Circuit, No. 14-2195 against the U. S. Secretary of Labor and Gupta as the respondents. In June 2014 Compunnel withdrew that petition and refiled it in the district court (SDNY), Case No. 14-cv-4790 (SAS).

By Order dated October 22, 2014, the district court (SDNY) dismissed Compunnel's petition from the ARB May 2014 decision and also dismissed some of Gupta's counter/cross claims that were based on ARB decision and 'INA'. The district court (SDNY) remanded the case to the ALJ with directions to issue a decision within 30 days. By Order dated March 17, 2015, the district court (SDNY) dismissed Gupta's state law counterclaims for breach of contract and other counterclaims. By a subsequent Order dated April 13, 2015, the district court (SDNY) denied Gupta's motion for altering, amending and/or

vacating judgment and also denied him leave to file an amended complaint and add new claims.

While the computation of damages per ARB order was in progress with the ALJ, in March 2016 Compunnel presented a disputed settlement agreement with Gupta for $28,000 to the ALJ that is denied by Gupta. (The dispute involved whether the agreement covered claims only in India after Gupta travelled to India in April 2009 or also that in the USA during the H-1B employment period. The dispute over the settlement agreement does not impact the legal resolution of the question presented to this court which is a matter of statutory interpretation.)

ALJ granted approval to the agreement, dismissed Gupta's claims and denied him relief even though no joint motion for approval is in record and the administrative record was already closed for new issues and filings. As the prosecuting party, Gupta never filed a motion to withdraw or dismiss his claims with the ALJ. The consideration for the agreement $28,000 is also in conflict with the mandatory 'INA' wage requirements that is at least $193,792 (plus interest). Gupta appealed but by Order dated April 29, 2016, ARB declined to review the ALJ dismissal order.

Gupta petitioned for APA review of agency's decision in district court (SDNY). 5 U.S.C. § 706(2).

The administrative record is filed by the U.S. Secretary of Labor at district court (SDNY) Dkt. #202. In September 2018 the district court (SDNY) granted summary judgment to the U.S. Secretary of Labor and Compunnel on the basis of the disputed private settlement agreement and denied Gupta's motion for partial summary judgment.

In May 2019 the district court (SDNY) denied Gupta's motion for reconsideration on the issue of ALJ/ ARB jurisdiction, futility of remand proceedings and conflict preemption with 'INA'.

Gupta appealed the district court (SDNY) Orders with the United States Court of Appeals for the Second Circuit. By Summary Order dated Sept. 20, 2021, a Second Circuit panel affirmed the decision of the district court (SDNY) and denied relief to Gupta. By a subsequent order dated Dec. 21, 2021, the court denied Gupta's petition for rehearing. Second Circuit issued its mandate on Jan. 24, 2022.

REASONS FOR GRANTING THE PETITION

I. Second Circuit's decision in this case is in conflict with the law of other circuits.

In its summary order the Second Circuit affirmed the judgment of the district court (SDNY)

finding the private settlement agreement in violation of 'INA' valid and enforceable. This decision creates a split with the Sixth and Seventh Circuit.

See, Kutty v. USDOL, No. 05-cv-510, 2011 WL 3664476, at *9 (E.D. Tenn. Aug. 19, 2011) (H-1B "wages [a]re set by statute, not by contract," "[r]egardless of [any] private contracts"); (*aff'd. Kutty v. DOL*, 764 F.3d 540, (6th Cir. Aug. 20, 2014); *See also, Id.* at 64 F.3d 544, 2014 WL 4085824 at *2 ("In order to employ H-1B nonimmigrants, employers must complete and file with the DOL a Labor Condition Application (LCA) that provides for wage-level guarantees, and have it certified by the DOL. 20 C.F.R. § 655.700(a)(3)"). *See also, Patel v. Boghra,* 369 Fed. Appx. 722, 724 (7th Cir. 2010) (Illinois does not enforce agreements to violate federal or state law; it leaves the parties where it found them.).

In the Third Circuit the district court (DNJ) rejected the use of private release and agreements by H-1B employers to escape 'INA' statutory wage requirements. *See, Pegasus Consulting Group v. Admin. Rev. Bd.*, No. 3:05-cv-05161-FLW, slip op. at 37, 2008 WL 920072 at *19 (D.N.J. March 31, 2008) (Court affirming ARB award of required wages and finding of willful violations despite H-1B employer obtaining a private release of wage claims from its nonimmigrant workers)

Also, 65 Fed. Reg. 80110, 80171, (Dec. 20, 2000) ("Nor will the Department relieve an employer from liability simply because the employee agreed to periods without pay in the employment contract.")

Other circuits that have considered the issue of private settlement and release in administrative cases have required the involvement of U.S. Secretary of Labor as a precondition to finding an agreement valid and enforceable. *See, Macktal v. Secretary of Labor*, 923 F.2d 1150, 1153 (5th Cir. 1991) (case under ERA-Energy Reorganization Act) (Once a complaint is filed, the statutory language authorizes only three options: (1) an order granting relief; (2) an order denying relief; or (3) a consensual settlement *involving all three parties.*) (emphasis added); *Walton v. United Consumers Club, Inc.*, 786 F.2d 303, 307 (7th Cir. 1986) (FLSA case) (the court held that the mere cashing of a check issued under a DOL-supervised settlement did not release the employees' claims where the DOL did not send out the applicable release forms."). Here DOL neither supervised the settlement nor sent any applicable release form to Gupta.

In *Oubre v. Entergy Ops.*, 522 U. S. 422, 428 (1998) also this court held that "the release cannot bar the ADEA [statutory] claim because it does not conform to the statute". *Also*, *Kaiser Steel Corp. v.*

Mullins, 455 U. S. 72, 77 (1982) ("[O]ur cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law."); *New York State Dept. of Social Servs. v. Dublino,* 413 U. S. 405, 419–420 (1973) ("We cannot interpret federal statutes to negate their own stated purposes.")

Under APA 5 U.S.C. § 706(2)(A) a reviewing court is required to hold unlawful and set aside agency action, findings, and conclusions found to be "not in accordance with law" and "... it is beyond dispute that a federal statute ordinarily is a "provision of law" whereas a private contract is not.") *Norfolk S. Ry. Co. v. Perez*, 778 F.3d 507, 512 (6th Cir. 2015) The district court (SDNY) and Second Circuit orders that upheld agency's approval of Compunnel's private agreement in violation of 'INA' statute and regulations are not consistent with APA standard of review.

The cases cited in the Second Circuit 'Summary Order' and the district court opinion do not arise under the 'INA' H-1B employment program. *Powell v. Omnicom*, 497 F.3d 124 (2d Cir. 2007) arises under Title VII and ADEA. *Da Silva v. Musso*, 53 N.Y.2d 543, 550 (1981) is a case for specific performance of a binder for purchase of an apartment building. *Pampillonia v. RJR Nabisco, Inc.*, 138 F.3d 459 (2d Cir. 1998) involves a general release signed by a U. S citizen and does not concern any H-1B wage claims

and APA review. *Skluth v. United Merchants & Mfrs., Inc.*, 559 N.Y.S.2d 280 (1st Dep't 1990), a case cited in *Pampillonia* involves claims of age discrimination.

Second Circuit decisions rejecting private settlement of wage claims in FLSA cases are instructive for 'INA' cases. *Caserta v. Home Lines Agency*, 273 F.2d 943, 946 (2d Cir. 1959) ("Appellant's argument of estoppel ignores that this case lies in an area where agreements and other acts that would normally have controlling legal significance are overcome by Congressional policy."); *Bormann v. AT&T Comm.*, 875 F.2d 399, at 401-402 (2d Cir. 1989), *cert. denied*, 493 U.S. 924 (1989) (analogizing settlement of ADEA claims to Title VII but distinguishing from private settlement of FLSA claims that are precluded). For similarity of FLSA wage protection requirements with the 'INA' wage protection requirements for nonimmigrant workers *see, Matter of I-Corp.*, Adopted Decision 2017-02, slip op., at 3, 2017 WL 1397675 at *3 (AAO April 12, 2017) ("While wage laws are not expressly restated in the Act, it is implied that authorized employment must comply with both the Act and the FLSA. Only when it sought to exceed FLSA protections has Congress included specific wage-related provisions in the Act")

In a decision issued in a different case the Second Circuit acknowledged that H-1B employers

are required to pay the statutory wages regardless of private agreements with employees. *United States v. Bedi, et al.*, 15 F.4th 222, 228, 2021 WL 4468410 at *5 (2d Cir. Sept. 30, 2021) ("We do not dispute the premise of either argument: .... federal law requires H-1B employers to pay the required wage regardless of whether the employee signs an agreement accepting lower compensation.") (*citing* at 15 F.4th 229 n. 45, 8 U.S.C. § 1182(n)(1)(A)(i) requiring employer to certify that it will pay the required wage). Gupta cited this decision in his petition for rehearing, but his petition was denied.

Here the alleged private settlement agreement is signed only by Compunnel and Gupta. The Administrator (Wage-Hour) did not enter into any settlement with Compunnel for the violations found by the ARB, nor has the Administrator (Wage-Hour) offered any settlement to Gupta for his claims. *See* 20 C.F.R. § 655.800(a) "... the Administrator shall perform *all* the Secretary's investigative and enforcement functions ..." (emphasis added); *Cyberworld Enter. Techs., Inc. v. Napolitano*, 602 F.3d 189, 198 (3d Cir. 2010) (The Department of Labor's enforcement of LCAs "vindicate[s]" rights that "are of a 'public' nature, since [the Department] is acting to protect the U.S. workforce from displacement by [nonimmigrant visa] recipients and to enforce the rules of the immigration system.").

In violation of 20 C.F.R. § 655.830(b), Compunnel did not serve the Administrator with copies of any motion or private agreement at the time of submitting the same to ALJ on March 10, 2016. In violation of 29 C.F.R. § 18.30(b)(1) no certificate of service accompanied Compunnel's documents. No motion to reopen the closed record was filed. The ALJ accepted and approved Compunnel's documents the same day without observing the required procedures.

ALJ and ARB orders approving the private agreement in violation of 'INA' are also contrary to the Administrator's Determination that ordered Compunnel to comply with 20 C.F.R. § 655.731 (required wages) that had become the final decision of the U.S. Secretary of Labor because neither Gupta nor Compunnel appealed from this part of the determination. Neither the ALJ, ARB or the federal courts specifically modified or vacated this order of the Administrator (Wage-Hour).

Under 'INA' Compunnel cannot legally settle or release any claims privately because Gupta has no authority to interpret or enforce 'INA'. *Alexander v. Sandoval*, 532 U. S. 275, 284 (2001) ("A Congress that intends the statute to be enforced through a private cause of action intends the authoritative interpretation of the statute to be so enforced as well."

(citations omitted)). Here Gupta lacks private right of action against Compunnel for its 'INA' violations and unlike U.S. Secretary of Labor he lacks legal authority to interpret the 'INA' or enforce the regulations.

The purely private agreement between Compunnel and Gupta, in violation of 'INA' required wage regulations, is insufficient to relieve Compunnel of its wage obligation arising from the certified labor condition application that is the basis of USCIS approving Compunnel's H-1B petition for Gupta's employment. 8 U.S.C. § 1182 (n)(2)(C)(vii)(IV); 20 C.F.R. §§ 655.731(c)(7)(ii), 655.740(c).

For the requirement to file a new or amended H-1B petition with U. S. Department of Homeland Security (USCIS) *see, Matter of Simeio Solutions, LLC*, 26 I & N Dec. 542, 547, 2015 WL 1632652 at *4 (AAO 2015), "When there is a material change in the terms and conditions of employment, the petitioner must file an amended or new H-1B petition with the corresponding LCA. 8 C.F.R. § 214.2(h)(2)(i)(E)."

Compunnel cannot rely on Gupta's failure to return the agreement money to justify its knowing and willful violations of 'INA'. *See Oubre v. Entergy Operations, Inc.*, 522 U. S. 422, 428 (1998) (ADEA case) ("[T]he employer cannot invoke the employee's failure to tender back as a way of excusing its own

failure to comply.") Gupta has, however, offered to adjust the private payment, if necessary, from the amount of H-1B wages owed by Compunnel because Gupta is denied his statutory wages for several years and he lacks the means to repay the amount readily. *See Oubre* 522 U. S. at 527, "In many instances a discharged employee likely will have spent the moneys received and will lack the means to tender their return .... We ought not to open the door to an evasion of the statute by this device."

The statutory construction rule *expressio unius est exclusio alterius* provides that the express mention of one thing of a type may exclude others of that type. *United States v. Vonn*, 535 U.S. 55, 64 (2002). Because the 'INA' statute and regulations already provide the limited exceptions when the statutory wages are not required to be paid, the agency and courts are not at liberty to create more judge made exceptions. *United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth.")

ARB has found Compunnel in violation of required wage obligations for various periods of time and the required wage rate for these periods is set by

the 'INA' statute and regulations. Calculation of the wages due and interest is a mathematical exercise with no scope of any settlement for less than the required wages in violation of 'INA'.

II. Administrative Review Board (ARB) decision in this case is in conflict with prior decisions of the agency

A number of agency cases support Gupta's litigation position including, *Administrator v. Prism Enterprises*, ARB No. 01-080, ALJ No. 2001-LCA-008, slip op., at 5, 2003 WL 22855211 at *3 (ARB Nov. 25, 2003) ("payment made by employer pursuant to the terms of a voluntary agreement is separate and apart from the H-1B wage requirements."); *Chelladurai v. Infinite Sol.*, ARB No. 03-072, ALJ No. 2003-LCA-004, slip op., at 8 n. 7, 2006 WL 1151942 at *8 n. 7 (ARB April 26, 2006) ("It is, however, the representations [H-1B employer] made to the United States Government, not the expectations or agreement of the parties, which are relevant here."); *Administrator v. Wings Digital Corp.*, ALJ No. 2004-LCA-030, slip op., at 16, 2005 WL 774014 at *12 (ALJ March 21, 2005) (finding that an employee was owed back wages when the employer reduced the employee's salary, with his consent, to an amount below that which was listed on the LCA); *Administrator v. Kutty*, ARB No. 03-022, ALJ Nos. 2001-LCA-010 through 2001-LCA-025, slip

op., at 6, 2005 WL 1359123 at *4 (ARB May 31, 2005) (rejecting employer argument based on private agreements that were never submitted to DOL with LCAs and enforcing LCA attestations for wages);

In the summary order (at n. 2) Second Circuit has referred to the OALJ website for settlement cases. However, the cases listed on the OALJ website are those where the Administrator (Wage-Hour) or the nonimmigrant worker(s) have entered into voluntary settlement with the H-1B employer and then jointly filed consent findings or motion to withdraw or dismiss the claims. There is no case (except Gupta's two cases – this *Compunnel* and another case of *Headstrong*) where the agency has enforced alleged private settlement agreement that is submitted only by the H-1B employer without the participation and request of the nonimmigrant worker (as the prosecuting party).

An instructive case is *Shaikh v. Vision Systems Group*, ARB No. 04-094, ALJ No. 2004-LCA-005, 2005 WL 1794425 at *2 (ARB July 27, 2005) in which where there was dispute about a private settlement agreement, the H-1B employer filed its complaint and enforced the release agreement in the state court against the nonimmigrant worker. Only when the nonimmigrant worker filed his letter with the Board to withdraw his appeal did ARB dismiss the case.

Compunnel is found in violation of required wage obligations by ARB and the party to prosecute and to enter into any settlement with Compunnel, if necessary, is the Administrator (Wage-Hour) 20 C.F.R. § 655.815(c)(1) ("... in the case of a finding of violation(s) by an employer, [Administrator shall] prescribe any remedies, ..."); *Manoharan v. HCL America,* ARB No. 2020-007, ALJ No. 2018-LCA-029, slip op., at 7, 2020 WL 8182910 at *4 (ARB Dec. 21, 2020) ("*only* the Administrator has the discretionary power to prosecute claims under Subsection 2 [of 20 C.F.R. § 655.820(b)]") (emphasis added); *Mikami v. Administrator (WHD) and A. G. Schmidt*, ARB No. 13-005, ALJ No. 2012-LCA-025, slip op., at 3, 2014 WL 3385879 at *1 (ARB June 16, 2014) (Administrator entered into settlement with the employer for violations and informed the H-1B worker's attorney).

See also, Brooklyn Savings Bank v. O'Neil, 324 U. S. 697, 704-05, 65 S. Ct. 895, 900-01 (1945) ("It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy.")

In *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U. S. 137 (2002) this court concluded "that allowing the [NLRB] Board to award backpay to illegal aliens would unduly trench upon explicit

statutory prohibitions critical to federal immigration policy, as expressed in IRCA." *Id.* at 151. The instant case requires this court to prevent the opposite situation where the ALJ and ARB are rewarding the employer for its 'INA' required wage violations and denying back wages to a legal nonimmigrant worker despite him succeeding in proving the wage violations by the employer. Gupta worked legally with Compunnel under the protection of 'INA' H-1B program wage guarantees. Depriving Gupta of his statutory wages because of an illegal private agreement would trivialize immigration laws and condone and encourage future violations of 'INA' required wage obligations by the employers. The ALJ, ARB and federal court decisions to the contrary need to be vacated or reversed.

III. Under 'INA' the agency and federal court lack jurisdiction to enforce a private settlement agreement

Several DOL cases have discussed lack of jurisdiction of the agency over private agreements. *Kersten v. LaGard*, ARB No. 06-111, ALJ No. 2005-LCA-017, slip op., at 8 n. 23, 2008 WL 4820115 at *7 n. 23 (ARB Oct. 17, 2008) ("DOL's jurisdiction under the INA extends only to employment relationships that arise under, or are terminated pursuant to, the INA's H-1B provisions."); *Jain v. Infobahn Tech.*, ARB

No. 08-077, ALJ No. 2008-LCA-008, slip op., at 12 n. 87, 2009 WL 3614509 at *6 n. 87 (ARB Oct. 30, 2009) ("Private employment agreements are outside the scope of the INA and are beyond our jurisdiction."); *Administrator v. XCEL Sol.*, ARB No. 12-076, ALJ No. 2011-LCA-016, slip op., at 9, 2014 WL 3886827 at *6 (ARB July 16, 2014) (XCEL failed to point to any legal authority empowering the Administrator or the DOL to consider and resolve alleged breaches of a private contract as potential offsets to XCEL's wage obligations under the INA.); *Batyrbekov v. Barclays*, ARB No. 13-013, ALJ No. 2011-LCA-025, slip op., at 17, 2014 WL 3886828 at *11 (ARB Jul. 16, 2014) ("The separation agreement entered into by Batyrbekov and Barclays constituted a private employment agreement outside the scope of the INA.").

Second Circuit cited 29 C.F.R. § 18.12(b) in support for ALJ jurisdiction to dismiss the case. But this is a procedural rule and not a jurisdiction granting statute. *Union Pacific R. Co. v. Locomotive Engineers*, 558 U. S. 67, 71 (2009), "Congress authorized the [NRAB] Board to prescribe rules for the presentation and processing of claims, ... but Congress alone controls the [NRAB] Board's jurisdiction."

29 C.F.R. § 18.10(a) (2015) states in part, "To the extent that these rules may be inconsistent with a

governing statute, regulation, or executive order, the latter controls. If a specific Department of Labor regulation governs a proceeding, the provisions of that regulation apply, and these rules apply to situations not addressed in the governing regulation."; also, *Hoffman v. Fuel Economy,* No. 1987-ERA-033, Order Denying Request to Reconsider, at 3 n. 1, 1989 WL 549890 at *2 n. 1 (Sec'y Aug. 4, 1989) ("The provisions of the Rules of Practice and Procedure for Administrative Hearings before the Office of Administrative Law Judges, 29 C.F.R. Part 18 (1988), upon which Respondents rely in part, do not apply where they are inconsistent with specific statutes or regulations. 29 C.F.R. § 18.1(a).") The 'INA' statute and regulations specifically require payment of required wages from Compunnel once the violations were found so a procedural rule like 29 C.F.R. § 18.12(b) is inapplicable to dismiss Gupta's case.

The case of *Talukdar v. Dep't of Veterans Affs.,* ARB No. 04-100, ALJ No. 2002-LCA-025, 2007 WL 352434, at *2 (ARB Jan. 31, 2007) cited by the Second Circuit is inapposite. There, as in all other settlement cases, the parties Virdee (employee) and VAMC (employer) settled their claims in federal court and jointly represented to ARB that the action should be dismissed. The parties had resolved their issues as part of district court (North Dakota) Case No. 3:04-cv-12 litigation. The ARB also discussed that the ALJ

may "permit negotiation of a settlement" "before providing the initial decision in a INA case". Here prosecuting party Gupta never filed any motion to dismiss or withdraw his claims with the ALJ after he already prevailed before the ARB.

See, 85 Fed. Reg. 13186, 13187, 2020 WL 1065013 (March 6, 2020) ("The Board [ARB] shall not have jurisdiction to pass on the validity of any portion of the Code of Federal Regulations that has been duly promulgated by the Department of Labor and shall observe the provisions thereof, where pertinent, in its decisions. The Board also shall not have jurisdiction to review decisions to deny or grant exemptions, variations, and tolerances and does not have the authority independently to take such actions."). Secretary's Order 01-2020 delegating authority to ARB does not grant jurisdiction to ARB to approve private agreements in violation of 'INA'. 85 Fed. Reg. 13187. There is no finding by the agency that the private agreement is in compliance with 'INA'.

Administrator's (Wage-Hour) Determination and Order for Compunnel to comply with 20 C.F.R. § 655.731 became a "final order" of the U.S. Secretary of Labor because neither Gupta nor Compunnel appealed from this part of the Determination. 20 C.F.R. § 655.815(c)(3); *Genesis Healthcare v. Symczyk*, 569 U. S. 66, 72 (2013) ("Acceptance of respondent's

argument to the contrary now would alter the Court of Appeals' judgment, which is impermissible in the absence of a cross-petition from respondent.") (citations omitted). Compunnel's obligation to pay required wages to Gupta for the period of violations found by the ARB is not subject to private settlement, and ALJ and ARB have no jurisdiction to issue orders contrary to the portions of Administrator's (Wage-Hour) Determination that was not appealed by Gupta (or Compunnel). *Chao v. Russell P. Le Frois Builder, Inc*, 291 F.3d 219, 227-229 (2d Cir. 2002) (Commission and courts lacks jurisdiction where the employer did not timely contest the Secretary's citation); (In sum, we do not think that the Commission can "reconsider" that which it is prevented by law from considering in the first place.) (*Id.* at 229 n. 9)

See, Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 382 (1994) ("... [E]nforcement of the settlement agreement is for state courts, unless there is some independent basis for federal jurisdiction.") Here the federal courts did not have jurisdiction to enforce Compunnel's alleged private agreement with Gupta and their orders should be vacated or reversed. Neither the district court (SDNY) or the Second Circuit discussed how the district court (SDNY) could exercise jurisdiction over Compunnel's and U.S. Secretary' of Labor's motion for summary judgment that was based on a private settlement agreement.

Under *Kokkonen* (*Id.)* the ALJ and ARB also did not have jurisdiction to dismiss Gupta's 'INA' based claims and deny him statutory relief based on Compunnel's allegation of a private settlement.

Arizona v. United States, 567 U. S. 387, 409 (2012) ("Policies pertaining to the entry of aliens and their right to remain here are . . . entrusted exclusively to Congress. . .") So Compunnel as H-1B employer is not at liberty to enter into private settlement of its 'INA' violations with Gupta, a nonimmigrant worker, and DOL and federal courts have no jurisdiction to approve or enforce the same.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted and the Second Circuit order below vacated and reversed.

Respectfully Submitted,

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