

David B. Barlow, United States Attorney (#13117)
Amy J. Oliver, Assistant U.S. Attorney (#8785)
District of Utah
185 South State Street, #300
Salt Lake City, Utah 84111-1506
(801) 325-3319
Email: amy.oliver@usdoj.gov
Associated Local Counsel

M. Patricia Smith, Solicitor of Labor
James E. Culp, Regional Solicitor
John Rainwater, Associate Regional Solicitor
Karen E. Bobela, Trial Attorney, CO #37190 (Pro Hac Vice)
Alicia Truman, Trial Attorney, CO #42235 (Pro Hac Vice)
Lydia Tzagoloff, Senior Trial Attorney and
Special Assistant United States Attorney, NY #2631299 (Pro Hac Vice)
1244 Speer Boulevard, Suite 515
Denver, CO 80204
(303) 844-1745
Email: bobela.karen.e@dol.gov; tzagoloff.lydia@dol.gov; truman.alicia.a@dol.gov

Attorneys for Petitioner

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF UTAH CENTRAL DIVISION**

<p>THOMAS E. PEREZ, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,</p> <p>PETITIONER,</p> <p>v.</p> <p>PARAGON CONTRACTORS CORPORATION, BRIAN JESSOP, DALE BARLOW; KEITH DUTSON; VERGEL STEED; and CORPORATION OF THE PRESIDING BISHOP OF THE FUNDAMENTALIST CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS,</p> <p>RESPONDENTS.</p>	<p>Case No. 2:13cv00281-RJS</p> <p>PETITIONER’S RESPONSE TO VERGEL STEED’S MOTION TO SUSTAIN OBJECTIONS TO QUESTIONS POSED DURING SUBPOENA TESTIMONY ON JANUARY 6, 2014, AND MEMORANDUM IN SUPPORT</p> <p>The Honorable Magistrate Judge Furse</p>
---	---

Petitioner hereby submits this Response to Vergel Steed's ("Steed") Motion to Sustain Objections to Questions Posed During Subpoena Testimony on January 6, 2014, and Memorandum in Support (Doc. 73).

I. INTRODUCTION

The Wage Hour Salt Lake City District Office learned of a news report aired by CNN in early December 2012 alleging that child labor violations involving hundreds of children were occurring at a pecan ranch in southern Utah. Wage Hour immediately opened an investigation. Due to the seriousness of the allegations Wage Hour acted quickly and utilized its investigative subpoena authority to issue subpoenas *duces tecum* and *ad testificandum* to Paragon Contractors Corporation ("Paragon"), one of the entities believed to be involved, as well as several individuals. Through the course of its investigation, Wage Hour learned of the possible involvement of the Fundamentalist Church of Jesus Christ of Latter-Day Saints ("FLDS church") in organizing and transporting the children to work at the pecan ranch, which implicates potential joint employment of the children by the FLDS church under the Fair Labor Standards Act ("FLSA"). Wage Hour is currently engaged in multiple subpoena enforcement actions before this Court related to this investigation. The only issue in the present motion is whether Steed should be compelled to answer Wage Hour's questions over his objections based on an alleged First Amendment privilege. For the reasons set forth below, the Court should find that the questions posed to Steed by the Department of Labor ("DOL") on January 6, 2014, do not infringe upon his First Amendment rights and the Court should enter an order compelling Steed to answer all questions asked as well as any necessary follow up questions.

II. PROCEDURAL BACKGROUND

Pursuant to its investigation, Wage Hour issued an administrative subpoena to Vergel Steed. The subpoena was served to Steed at the address of record for the Corporation of the Presiding Bishop of the Fundamentalist Church of Jesus Christ of Latter Day Saints (“Corporation of the Presiding Bishop”) and at his home address. When Steed failed to appear pursuant to the subpoena the Secretary initiated a subpoena enforcement action. Subsequently, Steed failed to appear at the Show Cause Hearing and the Secretary requested and obtained a bench warrant for his arrest. Upon learning of the bench warrant, Steed obtained counsel and agreed to appear for questioning on January 6, 2013. During the course of the administrative subpoena testimony proceeding, Steed routinely refused to answer questions on the basis of his alleged First Amendment rights.

At Petitioner’s request, Magistrate Judge Furse intervened in the proceeding. Petitioner asked the Court to compel Steed to answer the questions posed to him, and if he refused to do so, to find Steed in civil contempt based on his refusal to testify and impose a sanction of incarceration as well as a fine of \$1,000 a day until he complied with the subpoena and answered questions related to Wage Hour’s investigation. The Court asked Steed to brief the legal issues related to his assertion of the First Amendment as a basis for his refusal to testify. Petitioner contends that Wage Hour’s questions do not infringe upon Steed’s First Amendment rights. Petitioner seeks an order compelling Steed to comply with the subpoena and provide testimony related to Wage Hour’s investigation.

III. FACTUAL BACKGROUND

A. Wage Hour Promptly Responds to Allegations of Hundreds of Children Working in Violation of the FLSA’s Child Labor Provisions.

In December 2012 CNN aired a series of news reports entitled “Forced Child Labor: Picking Pecans for Their Polygamist Prophet,” “Warren Jeffs Ordering Child Labor?,” and “Warren Jeffs Child Labor.” *See* Affidavit of Joseph Doolin (“Doolin Aff.”) ¶ 3, attached hereto as Exhibit A. The reports allege that Warren Jeffs, the “polygamous leader” of the FLDS church ordered the use of child labor on the Southern Utah Pecan Ranch (“SUPR”) located in Hurricane, UT. *Id.* The reports include footage of “hundreds of children” (per the reporter) working on the pecan ranch at noon in the middle of a school day. *Id.* The footage depicts very young children working on the farm. *Id.* Following these allegations the Wage Hour Salt Lake City District Office opened an investigation. *Id.*

Through its investigation Wage Hour learned that Paragon had managed and operated SUPR since at least 2008, including at the time CNN took the video footage. *Id.* at ¶ 4. Wage Hour has investigated Paragon before. In 2007, Wage Hour investigated Paragon for child labor violations in construction work. *Id.* As a result of the investigation, Paragon, Brian Jessop, and James Jessop are permanently enjoined from violating the FLSA’s child labor provisions as well as its minimum wage, overtime, and record keeping provisions. *Id.* The Permanent Injunction was entered by the Honorable Tena Campbell on November 29, 2007 in Case No. 2:06cv700TC (Doc. 26).

B. Through Its Investigation Wage Hour Learned that Up To 1,400 FLDS Children Were Allowed to Work Without Pay During School Hours at SUPR While Paragon Was Managing and Operating the Property.

Wage Hour subpoenaed the testimony Dale Barlow (“Barlow”), an agent of Paragon who managed the SUPR property on Paragon’s behalf from 2011 to the present. Doolin Aff. ¶ 5. Barlow testified that he facilitated and organized between 200-300 school age children and their

parents entering SUPR to pick the “ground nuts” on the ranch property in 2008, 2009, and 2010. *Id.*; *see also* Transcript of Dale Barlow at 20:8-11, 21:2-3, 22:12-14, 29:3-30:19, which is attached hereto as Exhibit B.¹ In 2011, up to 600 school age children and their parents entered SUPR to pick up the “ground nuts” (*Id.* at 36:9-38:3); and in 2012, up to 1,400 individuals were present to do the work. *Id.* at 101:18-102:21. Barlow refers to these individuals as “my ladies, my family, my girls” and as “my friends.” *Id.* at 127:14-128:9. Yet he refused to provide any of their names, first or last, ages, or contact information. *Id.* at 36:22-40:11, 128:6-129:4. He also refers to these individuals as members of the FLDS church. *Id.* at 20:3-6, 21:19-20, 22:2, and 29:5.

Through its investigation, Wage Hour obtained a voicemail recording that was allegedly sent to all FLDS church members. Doolin Aff. at ¶ 6. The recording states “Good afternoon, this is a message from the Bishop’s Office. This is a call for all schools to take the rest of the week off of school to help with the nut harvest.” *Id.* The individual on the message provided directions where to meet (“at the Foothills School at 8:00 a.m.”), and ordered that all available 15-passenger vans be brought to the Foothills School. *Id.* Finally, the message directs the recipients of the call to contact Dale Barlow at the cell phone provided with any questions. *Id.*

C. Wage Hour Continues to Investigate the Facts and all Possible Avenues of Liability Under the FLSA.

Wage Hour has issued numerous subpoenas and is actively engaged in several subpoena enforcement actions with the primary goal of obtaining the names, ages, an contact information of all persons who worked at SUPR or were given permission to enter SUPR to participate in the

¹ The cover page and all pages of Dale Barlow’s transcript cited herein are attached as Exhibit B.

pecan harvest, and all supporting documentation reflecting the dates and times those individuals were there. Doolin Aff. at ¶ 7. Wage Hour is also working to identify the employment relationships between Paragon, the FLDS church, and SUPR. *Id.* This information goes to the heart of Wage Hour's investigation of the alleged child labor violations. *Id.*

The voicemail and the CNN news reports directly link the child labor activities at SUPR to the FLDS church. *Id.* at ¶ 8. Based on this link, Wage Hour has reason to believe that the FLDS church and Paragon may be joint employers of the children in violation of child labor laws. *Id.* Wage Hour is in the process of investigating the FLDS church's connection with Paragon and the child labor activities that took place at SUPR. *Id.* To that end, Wage Hour issued three subpoenas: one to the Corporation of the Presiding Bishop, which Wage Hour believes is the "Bishop's Office" referred to in the message; one to Nephi Jeffs, whom Wage Hour has reason to believe is "second-in-command" of the FLDS church and as such is likely to have information relevant to Wage Hour's investigation; and one to Vergel Steed, whom Wage Hour has reason to believe worked for the Corporation of the Presiding Bishop at all times relevant to Wage Hour's investigation as an administrative assistant or in a similar capacity.² *Id.*

Wage Hour believes that Steed likely has information regarding the voicemail message and other information relevant to its investigation, including how and to whom voicemails from the "Bishop's Office" are distributed (including the voicemail obtained by Wage Hour in the course of its investigation); who recorded and distributed the voicemail that Wage Hour obtained

² In his brief, Steed appears to make a distinction between the capacities in which he was subpoenaed (i.e. personal capacity versus some capacity on behalf of the church). This is a distinction without a difference. Steed was subpoenaed to provide information known to him in any capacity that is relevant to Wage Hour's investigation.

(and/or directed that the voicemail be recorded and distributed); whether and at whose direction church vehicles were used to transport FLDS families to and from SUPR; the identity of the records custodian for the FLDS church; the location of the church's office where records are likely stored; the location of any documents related the FLDS church's activities at SUPR; and the names and contact information of other church leaders who would have information regarding the church's involvement at SUPR. *Id.* at ¶ 9. Steed also likely has information regarding the pecan harvest at issue, including Paragon's and the FLDS's involvement with the harvest. *Id.* All of this information is material and relevant to Wage Hour's investigation of the child labor activities that took place at SUPR. *Id.*

IV. LEGAL ARGUMENTS

A. WAGE HOUR'S QUESTIONS DO NOT IMPLICATE STEED'S ALLEGED FIRST AMENDMENT RIGHTS

i. Steed Has Failed to Identify a Bona Fide Religious Belief

A threshold issue in assessing a First Amendment claim is whether the person asserting the First Amendment has a sincerely held bona fide religious belief. *Welsh v. United States*, 398 U.S. 333, 339 (1970); *United States v. Seeger*, 380 U.S. 163, 185 (1965). To be bona fide, a belief must be "sincerely held" and, within the believer's "own scheme of things," religious. *Id.* If the belief asserted is "merely a matter of personal preference" and not "one of deep religious conviction, shared by an organized group," it will not be entitled to protection. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972).

Steed's alleged belief is purportedly a "religious vow" that he took "not to discuss matters related to the internal affairs or organization of the Fundamentalist Church of Jesus

Christ of Latter-Day Saints.” Steed Aff. at ¶ 4.³ At the time of Steed’s subpoenaed testimony, Steed alleged had a closely held religious belief that “requires him not to speak about the affairs of the church, about individuals involved with the church, or his involvement to a certain degree.” Steed Transcript at 30:22-31:3.⁴ However, secrecy is not a bona fide religious belief that warrants protection under the First Amendment.

Steed failed to make any showing that his alleged belief in secrecy about church matters is “sincerely held” or that it is rooted in deep religious conviction. *See Wisconsin*, 406 U.S. at 216. To the contrary, Steed merely states in an affidavit that disclosing matters related to the FLDS church would “alter his relationship with his church leaders and other church members.” *See Steed Aff.* at ¶ 6. Steed’s personal preference to keep church matters private and fear of reprisal from his church leaders does not trigger protection under the First Amendment. Without a showing of a sincerely held religious belief that is rooted in deep religious conviction, the First Amendment does not apply.

In *International Society for Krishna Consciousness, Inc. v. Barber*, the Second Circuit outlined factors that indicate insincerity, noting that “an adherent’s belief would not be ‘sincere’ if there is evidence that the adherent materially gains by fraudulently hiding secular interests behind a veil of religious doctrine.” 650 F.2d 430, 441 (2d Cir. 1981). Here, Steed’s alleged belief in secrecy gives him an obvious advantage against Petitioner by shielding him from participation in Wage Hour’s child labor investigation and allowing him to hide secular interests behind a veil of religious doctrine.

³ Steed’s Affidavit is attached as Exhibit B (Doc. 73-2) to his Motion to Sustain Objections.

⁴ The transcript of Steed’s subpoenaed testimony is attached as Exhibit A (Doc. 73-1) to Steed’s Motion to Sustain Objections.

To find a good faith religious belief in secrecy of all church matters in this case would reduce the First Amendment analysis to insignificance and it would lead to absurd results. Such a finding would effectively thwart Wage Hour's child labor investigation by shielding Steed and other members of the FLDS church from participation; and it would block Wage Hour from obtaining the factual information and evidence it needs to fulfil its obligation to enforce the child labor requirements of the FLSA. Wage Hour has video footage of FLDS children picking pecans, testimony from a member of the church stating that up to 1,400 FLDS children were involved in child labor activities, and a voicemail message linking the FLDS church to the use of child labor in a large scale pecan harvest. Questions surrounding the voicemail and the church's involvement in the child labor activities are relevant to Wage Hour's investigation and cannot be avoided on the basis of an alleged bona fide religious belief in secrecy regarding all church matters.

The only basis identified by Steed to invoke the First Amendment privilege is his alleged religious belief in secrecy. Because Steed failed to establish that this belief is bona fide, sincerely held, or rooted in deep religious conviction, the Court should find that the First Amendment privilege does not apply and is not a proper basis for Steed's refusal to testify.

ii. Steed's Assertion of the First Amendment Privilege to All Questions Asked is Overbroad

Steed asserts that the First Amendment protects him from testifying about "matters related to the internal affairs or organization of the [FLDS Church]." It is on this basis that Steed refused to answer the majority of questions from Wage Hour during his subpoenaed testimony. For example, the Secretary asked Steed whether he was employed by the Corporation of the

Presiding Bishop of the FLDS Church, to which Steed responded: “I feel that is a religious question and I should not answer.” *See* Steed Transcript at 12:2-6. Steed’s counsel followed up with the following objection: “I believe he – the question infringes on his free exercise of religion and he doesn’t want to answer that question.” *Id.* at 12:11-13. Steed asserted a blanket objection to all questions that related in any way to the Corporation of the Presiding Bishop on the basis of his alleged First Amendment rights. *Id.* at 19:18-23. He then refused to answer an entire series of questions related to his involvement with and knowledge of the Corporation and other information relevant to Wage Hour’s child labor investigation.⁵ *See* Steed Transcript at 41:14-54:7. This is an overbroad and improper application of the First Amendment.

The First Amendment protects an individual from being forced to reveal his beliefs. *Doe v. McMillan*, 412 U.S. 306, 328 (1973) (“[O]ne’s conscience and thoughts are matters of privacy as is the whole array of one’s beliefs or values.”) However, First Amendment rights do not preclude enforcement of child labor laws enacted by the government to accomplish the overriding governmental objective of protecting the health and welfare of the people. *Tony and Susan Alamo Foundation v. Secretary of Labor*, 471 U.S. 290 (1985). In the context of Wage Hour’s investigation, Steed can answer all of the questions posed to him without revealing his or others’ personal adherence to any particular religious beliefs. *See* Steed Transcript at 41:14-54:7.

⁵ Steed fails to identify how the First Amendment applies to each and every question posed to him by Wage Hour. Each of Wage Hour’s questions is clearly articulated from pages 41 to 57 of the transcript. Petitioner takes the position that the First Amendment is inapplicable to each and every question. Steed has made no showing otherwise on a question by question or any other basis.

Steed is not claiming that the First Amendment privilege attaches to any specific request made by Wage Hour, and he does not claim that any of the questions would force him to reveal his beliefs. Rather, he argues that the privilege attaches to all questions that Wage Hour asked him that in any way involve the FLDS church on the basis that answering them would infringe on his closely held religious belief in secrecy. Notably, Steed has failed to cite any authority supporting his position. Although convenient, this is a misuse and overbroad assertion of the First Amendment.

iii. Steed Has Failed to Make a Prima Facie Showing of First Amendment Infringement

In the Tenth Circuit, the party claiming a First Amendment privilege bears the initial burden of establishing the factual predicate for the privilege and making a prima facie showing of the privilege's applicability. *See In re Motor Fuel Temperature Sales Practice Litigation*, 641 F.3d 470, 488 (10th Cir. 2011). It is only after a party has made a prima facie showing of infringement that the burden shifts to the government to make the appropriate showing of need for the material. *See In re First Nat'l Bank, Englewood, Colo.*, 701 F.2d 115, 118 (10th Cir. 1983).

Steed asserts that the government's questions infringe on his First Amendment rights based on his religious belief in secrecy of church affairs.⁶ This general assertion is insufficient to make the requisite prima facie showing. Although Steed asserts religious grounds to support his refusal to testify, he has gone no further than merely reciting the word "religion" (or

⁶ Steed also makes a generic statement that compelling him to answer Wage Hour's questions would have a chilling effect on other FLDS members, but this statement is not supported by any factual assertions or legal authority to show how it implicates his alleged First Amendment privilege under the facts of this case.

“religious vows” and “religious beliefs”). “The mere assertion of generic religious objections is not sufficient to invoke first amendment protections.” *Dunn v. White*, 880 F.2d 1188, 1197 (10th Cir. 1989). Steed has failed to assert objective and articulable facts or to make an evidentiary showing of any kind of First Amendment infringement to satisfy his prima facie burden. *See In re Motor Fuel*, 641 F.3d at 489. In addition to finding that Steed failed to establish a bona fide religious belief and that his assertion of the First Amendment privilege is overbroad, the Court should also find that Steed failed to make a prima facie showing of infringement.

iv. Petitioner Has a Compelling Interest in the Information Sought

Even if the Court finds that Steed made a prima facie showing of First Amendment infringement, the government’s compelling interest in protecting the health, safety and welfare of children and enforcing the country’s child labor laws outweighs Steed’s alleged religious belief in privacy. *See Price v. Massachusetts*, 321 U.S. 158, 168-70 (1944). The government’s need for the information sought from Steed is of overwhelming significance under the circumstances.

As stated above, Wage Hour has video footage of FLDS children picking pecans, testimony from a member of the church stating that up to 1,400 FLDS children were involved in child labor activities, and a voicemail message that suggests that the FLDS church organized and facilitated the use of child labor in a large scale pecan harvest. Wage Hour needs to be able to ask questions of Steed and other witnesses to develop an understanding of the church’s corporate structure, its status as an employer under the FLSA, and its participation in the pecan harvest. The government’s interest in investigating credible allegations of child labor that implicate up to 1,400 children far outweighs Steeds interest in maintaining secrecy surrounding all church matters. *See In re Grand Jury Proceedings of John Doe v. United States*, 842 F.2d 244 (10th Cir.

1988) (finding that a witness' refusal to testify based on alleged fundamental religious beliefs that prohibit him from being compelled to testify against members of his family was outweighed by the government's interest in investigating crimes and enforcing laws).

B. THE COURT SHOULD COMPEL VERGEL STEED'S TESTIMONY AND FIND STEED IN CIVIL CONTEMPT IF HE REFUSES TO TESTIFY

Petitioner requests that the Court enter an order denying Steed's motion and compelling Steed to answer the questions asked of him by Wage Hour as set forth on pages 41-57 of the transcript, as well as any necessary follow up questions. Should Steed continue to refuse to cooperate with Wage Hour's investigation and provide testimony in accordance with the subpoena Petitioner requests that the Court: (1) hold Steed in civil contempt and impose a fine of \$1,000 day and incarceration until he agrees to comply with the subpoena; and (2) order Steed to reimburse the Secretary for all travel costs associated with traveling to Salt Lake City both on January 6, 2014, and on a date set in the future for Steed's continued testimony, based on the waste of government resources due to Steed's refusal to cooperate.

V. CONCLUSION

WHEREFORE, the Secretary prays that this Court DENY Steed's Motion to Sustain Objections to Questions Posed During Subpoena Testimony on January 6, 2014, and Memorandum in Support (Doc. 73) and issue an order compelling Steed's testimony, and other relief as requested.

DATED this 10th day of February, 2014.

Respectfully submitted,

M. Patricia Smith, Solicitor of Labor
James E. Culp, Regional Solicitor
John Rainwater, Associate Regional Solicitor

Lydia Tzagoloff, Trial Attorney and Special
Assistant United States Attorney
Alicia A.W. Truman, Trial Attorney

/s/ Karen E. Bobela

Karen E. Bobela, Trial Attorney

United States Department of Labor
Attorneys for Plaintiff

David B. Barlow
United States Attorney
District of Utah
Amy J. Oliver
Assistant U.S. Attorney

Associated Local Counsel for Plaintiff