No. 20-36002

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTIN J. WALSH, SECRETARY OF LABOR,
U.S. DEPARTMENT OF LABOR,

Plaintiff-Appellee,

v.

GEORGE W. KATSILOMETES,

Defendant-Appellant.

On Appeal from the United States District Court
for the District of Idaho

RESPONSE BRIEF OF THE SECRETARY OF LABOR

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STATEMENT OF JURISDICTION

The district court had jurisdiction over this subpoena enforcement matter pursuant to section 9 of the Federal Trade Commission Act, 15 U.S.C. 49, as made applicable by section 9 of the Fair Labor Standards Act ("FLSA" or "Act"), 29 U.S.C. 209; 28 U.S.C. 1331 (federal question); and 28 U.S.C. 1345 (suits commenced by an agency or officer of the United States). This Court has

[1] Pursuant to Federal Rule of Appellate Procedure 43(c)(2), the current Secretary of Labor, Martin J. Walsh, is automatically substituted for Eugene Scalia as the plaintiff in this action.

jurisdiction to review the district court's October 19, 2020 Order Granting the Secretary's Petition to Enforce the Subpoena pursuant to 28 U.S.C. 1291 (final decisions of district courts). "[A]n order of a District Court enforcing an administrative subpoena is final and ripe for review." *EEOC v. Fed. Exp. Corp.*, 558 F.3d 842, 845 (9th Cir. 2009) (internal quotation marks omitted). Defendant-Appellant George W. Katsilometes filed a Notice of Appeal on November 18, 2020, ER-083[2] (Notice of Appeal), which was timely pursuant to Federal Rule of Appellate Procedure 4(a)(1)(B)(ii) (United States agency as a party).

STATEMENT OF THE ISSUE

Whether the district court abused its discretion by granting the Secretary of Labor's ("Secretary") petition to enforce an administrative subpoena *duces tecum* where it found that the Secretary made a prima facie case for enforcement of the subpoena and Katsilometes did not prove that the subpoena is overbroad or unduly burdensome.

STATUTORY ADDENDUM

All pertinent statutes are contained in the Addendum.

[2] References to the Excerpts of Record filed by Katsilometes are abbreviated as "ER."

STATEMENT OF THE CASE

A. The Department's Subpoena

In April 2020, the Department of Labor's ("Department") Wage and Hour Division ("WHD") initiated an investigation of the Lava Hot Springs Inn to ensure that the company is complying with the FLSA, 29 U.S.C. 201 *et seq*. ER-056 ¶ 1 (Decl. of Michelle Phillips). The Lava Hot Springs Inn is located in Lava Hot Springs, Idaho, and is owned and operated by George W. Katsilometes. *Id.* ¶ 4. On April 28, 2020, Michelle Phillips, Assistant District Director of the WHD Boise Field Office, served an administrative subpoena *duces tecum* on Katsilometes. *Id.* ¶ 5; *see also* ER-076–81 (Subpoena Duces Tecum). The subpoena sought specific documents concerning the Inn's employment and business practices, including time records, payroll records, employment policies, financial statements, and tax returns. ER-079–80. The subpoena required Katsilometes to produce the listed documents by May 5, 2020, and allowed him to submit the documents in person or via email or postal mail. ER-076.

Katsilometes did not produce any documents in response to the subpoena. ER-056 ¶¶ 6–7 (Phillips Decl.). A Department trial attorney, Natasha Magness, spoke with Katsilometes' counsel, Lance Schuster, on June 30, 2020 in an attempt to secure compliance with the subpoena without resort to litigation, but

Katsilometes declined to produce any documents. ER-061–62 ¶¶ 2–3 (Decl. of Natasha Magness).

B. The Enforcement Action

On July 24, 2020, the Secretary sought enforcement of the subpoena in the U.S. District Court for the District of Idaho. ER-070–075 (Sec'y's Pet. to Enforce Subpoena Duces Tecum). The Secretary's petition was supported by declarations of Phillips and Ruben Rosalez, Administrator of WHD's Western Region. Rosalez declared that the requested documents are relevant to determining "whether any person has violated the FLSA or its implementing regulations with respect to the workers at the Lava Hot Springs Inn." ER-059 ¶ 3 (Decl. of Ruben Rosalez). Similarly, Phillips declared that the documents "are relevant to the Secretary's FLSA investigation in that they will aid [WHD] in determining whether any person has violated the FLSA or its implementing regulations." ER-056 ¶ 8.

Katsilometes opposed the Secretary's petition to enforce the subpoena on the grounds that the subpoena was overbroad and unduly burdensome. ER-042 (Katsilometes Opp'n to Sec'y's Pet. to Enforce). He submitted a declaration containing general statements that the COVID-19 pandemic had disrupted his normal business operations, and asserting that producing the documents would be disruptive and burdensome to his business. ER-039–40 (Decl. of George

Katsilometes). Katsilometes also claimed that the Secretary had not alleged any wrongdoing on his part. ER-042.

In response, the Secretary submitted a supplemental declaration from Phillips stating that WHD "received a complaint that Katsilometes was violating child labor provisions of the [FLSA]." ER-029 ¶ 2. Attached to the declaration was an email that WHD Investigator James Keck sent to Schuster, Katsilometes' counsel, on April 22, 2020, stating that Keck observed that an employee who took his temperature when he visited the Lava Hot Springs Inn might have been under the legal employment age of 14. ER-031. Keck was also concerned that minors aged 14–15 might be using an oven with exposed flames in the kitchen, in violation of the applicable regulation, and he cautioned that minors are not permitted to work after 7:00 p.m. until the beginning of June. *Id.*

C. The District Court Decision

The district court granted the Secretary's petition to enforce the subpoena on October 19, 2020. ER-004–011 (Mem. Decision and Order). The court set forth the applicable legal principles: "an agency establishes a prima facie case for enforcement of an administrative subpoena if it shows that: (1) Congress granted it the authority to investigate; (2) the agency followed the necessary procedural requirements for issuing the subpoena; and (3) the evidence sought is relevant and material to the investigation." ER-006 (citing *EEOC v. Child.'s Hosp. Med. Ctr. of*

N. Cal., 719 F.2d 1426, 1428 (9th Cir. 1983) (en banc), *overruled on other grounds as recognized in Prudential Ins. of Am. v. Lai*, 42 F.3d 1299 (9th Cir. 1994)). If the agency makes this prima facie showing, the burden shifts to the defendant to demonstrate that the subpoena should not be enforced, or enforced only in modified form, by showing that the request "is 'unreasonable because it is overbroad or unduly burdensome.'" ER-007 (quoting *Child.'s Hosp.*, 719 F.2d at 1428).

The district court determined that the Secretary met his initial burden to establish a prima facie case for enforcement. ER-007. The court noted that the Secretary's petition was supported by the Phillips and Rosalez declarations, which "clearly explain that the Secretary has congressional authority to investigate labor violations, that the Secretary followed the legal requirements for the issuance of the subpoena in this case, and that the material sought is relevant to its investigation into Lava Hot Springs Inn." *Id.* Thus, the court explained, the burden shifted to Katsilometes.

The district court rejected Katsilometes' argument that the subpoena was overbroad. The court observed that, contrary to Katsilometes' contention that some type of reasonable suspicion or probable cause was required, the law is clear that the Secretary may investigate based on simple suspicion that the law is being violated or even just "official curiosity." ER-008–009 (citing, *inter alia*, *United*

States v. Morton Salt Co., 338 U.S. 632, 652 (1950) and *EEOC v. Karuk Tribe Hous. Auth.*, 260 F.3d 1071, 1076 (9th Cir. 2001)). Thus, WHD "need not disclose whether a complaint has been made—although as noted, it has actually received a complaint in this case—nor need it identify whether any law has been violated." ER-008. The court rejected Katsilometes' additional claim that the subpoena is overbroad because it seeks documents such as tax returns, ownership documents, and business records, and because it requests certain records for a three-year period even though the regulations require maintaining these records for only two years. ER-009. The court credited the Secretary's explanation that "these supporting documents are, in fact, necessary in order to determine the accuracy of the other records maintained by Katsilometes," and reasoned that because the FLSA has a three-year statute of limitations, a request for three years' worth of documents was appropriate. *Id.* The court also explained that "if Katsilometes does not have certain records, he can simply respond in kind." ER-010. Accordingly, the court concluded that the subpoena was not overbroad. ER-009–10.

The district court also determined that the subpoena was not unduly burdensome. ER-010–11. Katsilometes asserted that his age (78), the COVID-19 pandemic, the fact that he runs a small business, and the initial seven-day deadline to respond to the subpoena made compliance with the subpoena unduly burdensome. ER-010. The court was not persuaded, reasoning that while "these

may have all been valid reasons" why Katsilometes could not have responded to the subpoena "in April and May of 2020, they do not hold up now five months later." ER-010. In response to Katsilometes' concern that the subpoena's initial response deadline was too short, the court explained that "Katsilometes could have easily reached out to [WHD] to request an extension or negotiate a phased production of documents." *Id.* However, "Katsilometes did neither; he simply ignored the subpoena," which "was inappropriate." *Id.* Thus, the court concluded, "Katsilometes' general concerns and allegations do not rise to a level warranting modification or dismissal of the subpoena." ER-011.[3] Accordingly, the court determined that Katsilometes failed to demonstrate that the subpoena was unduly burdensome. *Id.* The court held that the Secretary's "requests are appropriate under the circumstances," and thus ordered Katsilometes to comply with the subpoena in full within 30 days. *Id.*

SUMMARY OF ARGUMENT

The district court correctly granted the Secretary's petition to enforce the subpoena and did not abuse its discretion in doing so. The FLSA gives WHD broad power to compel an employer to produce documents so that WHD can investigate

[3] The court noted that, at the conclusion of his brief, Katsilometes "modifie[d] his position" slightly to suggest that "the subpoena should not be enforced 'as currently written.'" ER-008 n.1 (quoting Mem. in Opp'n to Pet. to Enforce Subpoena). The court rejected this suggestion, concluding that modification of the subpoena was not warranted. ER-011.

the employer's compliance with the FSLA. Under this Court's precedent, an administrative subpoena should be enforced unless the material sought is clearly irrelevant to any lawful purpose of the agency, and judicial review is narrow and summary in nature. The Secretary must only make a prima facie showing that he is entitled to enforcement, at which point the burden shifts to the defendant to prove that the subpoena is overbroad or unduly burdensome, which is a heavy burden that is not easily met. This asymmetrical framework is designed to promote the quick, efficient enforcement of subpoenas, which are essential to the Secretary's ability to fulfill his mandate to enforce the FLSA.

Here, the district court correctly determined that the Secretary made a prima facie case for enforcement of the subpoena, and Katsilometes did not prove that the subpoena is overbroad or unduly burdensome. Contrary to Katsilometes' argument, relevancy is not limited to records relating to the child labor complaint that WHD received concerning the Lava Hot Springs Inn, because WHD may investigate an employer's compliance with any aspect of the FLSA at any time. The Secretary made a prima facie showing that the documents sought by the subpoena are relevant, because the Phillips and Rosalez declarations are sufficient to demonstrate relevancy under the applicable caselaw, which is highly deferential to the government in the subpoena enforcement context. In addition, the subpoena was appropriately cabined to the business's records, and did not seek any

individual's personal financial documents. Thus, the Secretary made a prima facie case for enforcement, and the district court properly shifted the burden to Katsilometes.

Katsilometes did not sustain his burden. He did not show that the subpoena was overbroad, nor could he have, because all of the documents sought are relevant to investigating the Inn's compliance with the FLSA. Katsilometes did not attempt to disprove this fact, but simply asserted that the documents are not relevant and the subpoena is an overbroad fishing expedition. He also failed to prove that the subpoena was unduly burdensome, having relied on his own bare assertions that compliance would be costly and impose a burden on his business without providing any evidence to demonstrate what compliance would entail. Therefore, the district court correctly granted the Secretary's petition to enforce the subpoena, and that ruling should be affirmed.

STANDARD OF REVIEW

This Court reviews a district court's decision to enforce an administrative subpoena for abuse of discretion. *McLane Co. v. EEOC*, 137 S. Ct. 1159, 1170 (2017); *see also United States v. Exxon Mobil Corp.*, 943 F.3d 1283, 1287 (9th Cir. 2019) (reviewing decision not to enforce administrative subpoena for abuse of discretion, citing *McLane*). Appellate courts afford deferential review because subpoena enforcement is a "case-specific" determination that turns on whether the

evidence sought is relevant and unduly burdensome to produce, which "are the kind of fact-intensive, close calls better suited to resolution by the district court than the court of appeals." *McLane*, 137 S. Ct. at 1167–68 (internal quotation marks omitted). Thus, a district court's decision to enforce a subpoena should be affirmed "unless it rests upon a misapprehension of the relevant legal standard or is unsupported by the record." *FTC v. GlaxoSmithKline*, 294 F.3d 141, 146 (D.C. Cir. 2002) (internal quotation marks omitted); *see also Rodde v. Bonta*, 357 F.3d 988, 994 (9th Cir. 2004) (a district court "abuses its discretion when it bases its decision on an erroneous legal standard or on clearly erroneous findings of fact" (internal quotation marks omitted)).

As part of its abuse-of-discretion review, the Court "determine[s] *de novo* whether the district court identified the correct legal rule," because a "district court ruling predicated on an erroneous view of the legal standard is an abuse of discretion." *Exxon Mobil*, 943 F.3d at 1287 (internal quotation marks omitted).

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ENFORCING THE SECRETARY'S ADMINISTRATIVE SUBPOENA.

A. The Secretary Has Broad Subpoena Powers In Aid Of Enforcing The FLSA, And Judicial Review Of Such Subpoenas Is Narrow.

The FLSA requires covered employers to pay employees a minimum wage for all hours worked and a premium rate for overtime hours worked, and regulates

the employment of minors. 29 U.S.C. 206, 207, 212.[4] The FLSA also requires covered employers to create and preserve employment records. 29 U.S.C. 211(c); *see also* 29 C.F.R. Part 516 (setting forth an employer's recordkeeping requirements under the FLSA). The Secretary is responsible for administering and enforcing the FLSA. 29 U.S.C. 204, 211(a), 216(c), 217. The FLSA authorizes WHD to investigate the wages, hours, and working conditions of employers subject to the law, including inspecting workplaces, reviewing and copying an employer's records, which must be produced at WHD's request, questioning employees, and investigating possible violations of the FLSA or investigating more generally to aid in the enforcement of the FLSA. 29 U.S.C. 211(a), (c); *see also* 29 C.F.R. 516.7, .8. The statute also gives WHD the power to subpoena documents and witnesses. 29 U.S.C. 209.

The power to compel employers to produce documents plays a critical role in enabling the Secretary to fulfill his duty to ensure that employers comply with the FLSA. As with any enforcement agency granted subpoena power, that power is the "very backbone of an administrative agency's effectiveness in carrying out the congressionally mandated duties of industry regulation." *Fed. Mar. Comm'n v.*

[4] An FLSA-covered employer is an enterprise that: (1) has employees either engaged in interstate commerce or handling or working on goods or materials that have been moved in or produced for interstate commerce, and (2) has annual sales or business of at least $500,000. 29 U.S.C. 203(b), (s)(1).

Port of Seattle, 521 F.2d 431, 433 (9th Cir. 1975). As such, "the rapid exercise of the power to investigate" and the right to have district courts enforce subpoenas are crucial to the agency's ability to fulfill its mission. *Id.* The purpose of an administrative subpoena is "not to prove a pending charge or complaint," but instead to "discover and procure evidence" to provide an evidentiary basis to bring a claim "if, in the [agency's] judgment, the facts thus discovered should justify doing so." *Okla. Press Pub. Co. v. Walling*, 327 U.S. 186, 201 (1946). An agency may subpoena records simply to satisfy itself that the law is not being broken. *Morton Salt*, 338 U.S. at 642.

Given the purpose and importance of the agency's subpoena power, judicial review of an agency subpoena enforcement proceeding is "quite narrow." *Exxon Mobil*, 943 F.3d at 1287 (quoting *Fed. Exp.*, 558 F.3d at 848)); *see also Lynn v. Biderman*, 536 F.2d 820, 824 (9th Cir. 1976) (review of administrative subpoena is "summary" in nature). Review is circumscribed "because 'judicial review of early phases of an administrative inquiry results in interference with the proper functioning of the agency and delays resolution of the ultimate question whether the Act was violated.'" *Fed. Exp.*, 558 F.3d at 848 (quoting *EEOC v. Shell Oil Co.*, 466 U.S. 54, 81 n.38 (1984)). The imposition of any additional limits on an agency's subpoena power could "cripple[e] the effectiveness of the agency." *Port of Seattle*, 521 F.2d at 434.

The judicial review of an administrative subpoena is thus limited to asking: "(1) whether Congress has granted the authority to investigate; (2) whether procedural requirements have been followed; and (3) whether the evidence is relevant and material to the investigation." *F.D.I.C. v. Garner*, 126 F.3d 1138, 1142 (9th Cir. 1997) (internal quotation marks omitted). A declaration or affidavit from an agency official "is sufficient to establish a *prima facie* showing that these requirements have been met." *Id.* (citing *United States v. Stuart*, 489 U.S. 353, 360 (1989)).[5] "[I]f the agency establishes these factors, the subpoena should be enforced unless the party being investigated proves the inquiry is unreasonable because it is overbroad or unduly burdensome." *Id.* Thus, once the agency satisfies its burden to make a prima facie showing, the burden shifts to the defendant to demonstrate that the subpoena is overbroad or unduly burdensome.

B. The District Court Did Not Abuse Its Discretion In Holding That The Secretary Made A Prima Facie Case For Enforcement.

The district court correctly determined that the Secretary established a prima facie case for enforcement of the administrative subpoena. As the district court correctly noted, Katsilometes has never argued that the Secretary did not satisfy the first two requirements. ER007–08. Katsilometes focuses on the third factor,

[5] While *Garner* refers to affidavits, a written unsworn declaration, subscribed to as true under penalty of perjury, may substitute for an affidavit. 28 U.S.C. 1746; *see also Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1303 n.2 (11th Cir. 2016) ("[D]eclarations are afforded the same legal weight as affidavits . . . .").

contending that the district court abused its discretion in holding that the Secretary demonstrated that the documents sought are relevant and material to investigating whether the Lava Hot Springs Inn violated the FLSA. He argues that because WHD received a complaint of a child labor law violation, relevancy must be measured in relation to that complaint; he asserts that the documents sought were not relevant because the declarations of the WHD officials were insufficient to make a prima facie case for enforcement; and he claims, for the first time on appeal, that the subpoena can be read to seek personal financial records, which would not be relevant. None of these contentions has any merit.

1. The Secretary May Investigate An Employer's Compliance With Any Aspect Of The FLSA, Regardless Of A Particular Complaint.

Katsilometes contends that because WHD received a complaint that the Lava Hot Springs Inn may have violated child labor laws, the Secretary is permitted to investigate only whether the Inn had violated child labor laws, and cannot investigate the Inn's compliance with any other provision of the FLSA; thus, only documents related to the Inn's employment of minors are relevant. Appellant's Opening Br. 11–14. That argument is plainly wrong. The FLSA does not restrict the Secretary to investigating only when he receives a complaint or to investigating only the subject of a complaint; rather, it empowers WHD to investigate whether any person has violated any provision of the FLSA, whenever

WHD believes it is necessary or appropriate to do so. 29 U.S.C. 211(a) (WHD may "investigate such facts, conditions, practices, or matters *as [it] may deem necessary or appropriate* to determine whether *any* person has violated *any* provision of" the FLSA (emphasis added)); *id.* at 211(c) (requiring employers to make and keep employment records, and to provide information in such records to WHD, as prescribed by regulation, "as necessary or appropriate for the enforcement of" the FLSA); *see also* 29 C.F.R. 516.7 (records that employers are required to keep shall be made available to WHD for inspection and transcription); *id.* at 516.8 (employers shall submit to WHD the records they are required to maintain concerning persons employed, and the wages, hours, and other conditions and practices of employment, as WHD may request in writing). There is nothing in the statute to indicate that this power is somehow circumscribed upon receipt of a complaint or by the subject of the complaint.

Moreover, as a general matter, administrative subpoenas are not limited to gathering evidence to prove a specific charge for which there is already existing probable cause; rather, an agency may use a subpoena to evaluate whether any regulated individual or entity is complying with the law. *Morton Salt,* 338 U.S. at 642–43 (comparing agency's investigative and subpoena powers to those of a grand jury, which may investigate based on suspicion alone without a showing of probable cause, or even simply for assurance that the law is not being violated);

Okla. Press, 327 U.S. at 215 ("Congress has made no requirements in terms of any showing of 'probable cause.'"). In *Karuk Tribe*, this Court made clear that "courts should not refuse to enforce an administrative subpoena" where the defendant advances a fact-based claim that it is not covered by or has complied with the law, because such a claim is "simply irrelevant" to the determination of whether an administrative subpoena should be enforced. 260 F.3d at 1076 (citing *Morton Salt*, *Okla. Press*, and *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501 (1943)). The question of whether there is any merit to such a claim is properly raised and considered if and when the agency ultimately brings an action against the defendant to enforce the statute. *Children's Hosp.*, 719 F.2d at 1429.

Katsilometes cites a single case from nearly a hundred years ago, *FTC v. Am. Tobacco Co.*, 264 U.S. 298 (1924), to argue that an agency may seek only documents that relate to an allegation of wrongdoing. Appellant's Opening Br. 11–12. His reliance on this case is unavailing. The reasoning in *American Tobacco* was clearly abrogated by later cases, particularly *Morton Salt*, 338 U.S. 632 and *Oklahoma Press*, 327 U.S. 186. *In re McVane*, 44 F.3d 1127, 1134 (2d Cir. 1995) (explaining that *American Tobacco*'s condemnation of an agency seeking documents "on the possibility that they may disclose evidence of crime . . . was decisively abandoned in *Oklahoma Press* and *Morton Salt*" (citing 1 Kenneth C. Davis & Richard J. Pierce, Jr., *Admin. Law Treatise* §§ 4.1, 4.2, 4.5 (3d ed.

1994))). In contrast to *American Tobacco*, modern cases provide that an agency may investigate out of official curiosity, "just because it wants assurance" that a regulated entity is not violating the law. *Morton Salt*, 338 U.S. at 642–43; *Port of Seattle*, 521 F.2d at 435 (same, citing *Morton Salt*, 338 U.S. at 642–43).

Accordingly, Katsilometes' insistence that the relevancy of the documents sought by WHD must be evaluated in relation to the child labor complaint is specious. WHD is entitled to subpoena documents to investigate whether the Lava Hot Springs Inn violated any provision of the FLSA. Thus, the relevancy question in this case turns on whether the documents sought by the subpoena relate to WHD's investigation of the Inn's compliance with any aspect of the FLSA, not just its child labor provisions.

2. The Secretary Made A Prima Facie Showing Of Relevancy.

The district court correctly determined that the Secretary made a prima facie showing that the documents sought by the subpoena are relevant to WHD's investigation of the Lava Hot Springs Inn's compliance with the FLSA. In concluding that the Secretary met his burden, the district court cited the Phillips and Rosalez declarations as explaining that the "material sought is relevant to [WHD's] investigation into Lava Hot Springs Inn." ER-007. Katsilometes argues that the Phillips and Rosalez declarations, standing alone, were not detailed enough to sustain the Secretary's burden. Appellant's Opening Br. 15–20. However, the

applicable caselaw makes clear that the declarations were sufficient and the district court was entitled to credit them.

Because a subpoena must be enforced unless "plainly incompetent or irrelevant," *Port of Seattle*, 521 F.2d at 434, and judicial review is extremely limited, *Exxon Mobil*, 943 F.3d at 1287, the Secretary's "burden to make a *prima facie* case is minimal," *United States v. Transocean Deepwater Drilling, Inc.*, 767 F.3d 485, 489 (5th Cir. 2014) (internal quotation marks omitted). In addition, this Court has made clear that "[t]he relevance requirement is 'not especially constraining,' but is instead 'generously construed' to 'afford the [agency] access to virtually any material that might cast light on [the matter under investigation].'" *Exxon Mobil*, 943 F.3d at 1287 (quoting *Fed. Exp.*, 558 F.3d at 854)).

Applying that standard here, the Phillips and Rosalez declarations were sufficient to establish that the records sought are relevant to investigating the Lava Hot Springs Inn's compliance with the FLSA. The declarations both stated, under penalty of perjury, that the documents requested by the subpoena are relevant to evaluating whether any person violated the FLSA or its implementing regulations with respect to the workers at the Lava Hot Springs Inn. ER-056 ¶ 8 (Phillips Decl.); ER-059 ¶ 3 (Rosalez Decl.). Thus, the declarations identified the particular statute at issue, the business that is the subject of the investigation, and the individuals whose employment WHD is investigating (the Inn's workers), as

limited to the time period specified by the subpoena (April 23, 2017 through the date of production, ER-076). This is sufficient to discharge the Secretary's "minimal" burden to show that the documents are not "plainly . . . irrelevant," where relevancy is "generously construed." *Transocean*, 767 F.3d at 489; *Port of Seattle*, 521 F.2d at 434; *Exxon Mobil*, 943 F.3d at 1287.

Moreover, the district court was permitted to find the Phillips and Rosalez declarations credible, and to rely on them in determining that the Secretary made a prima facie case. This Court has previously recognized that "[a]n affidavit from a government official is sufficient to establish a *prima facie* showing" of relevancy. *Garner*, 126 F.3d at 1142 (citing *Stuart*, 489 U.S. at 359). This is consistent with the "well-established" presumption that government officials properly discharge their duties. *Kohli v. Gonzales*, 473 F.3d 1061, 1068 (9th Cir. 2007). To that end, the Fifth Circuit recently determined that a "simple affidavit" from a government official stating, verbatim, that "[t]he information sought is relevant and material to a legitimate law enforcement inquiry" is sufficient to satisfy the agency's burden to make a prima facie case, despite the respondent's objection that it was "conclusory." *United States v. Zadeh*, 820 F.3d 746, 757–58 (5th Cir. 2016) (quoting affidavit); *see also Mazurek v. United States*, 271 F.3d 226, 230 (5th Cir. 2001) (requiring only a "simple affidavit" from government official to make prima facie case for enforcement of subpoena). The Second Circuit has similarly held that

"the government may even establish its *prima facie* case by the affidavit of an agent involved in the investigation averring each . . . element" of the prima facie case. *United States v. White*, 853 F.2d 107, 111–12 (2d Cir. 1988) (applying similar standard in analogous context of IRS subpoena enforcement, and determining that simple affidavit from government official was sufficient to make prima facie case); *see also Alphin v. United States*, 809 F.2d 236, 238 (4th Cir. 1987) (same). Here, the Phillips and Rosalez declarations contain even more detail beyond a simple assertion that the documents sought are "relevant . . . to a legitimate . . . inquiry," and the district court did not abuse its discretion in relying on them.

In the alternative, if this Court finds the Phillips and Rosalez declarations lacking in some way, it may also consider the additional explanation set forth in the Secretary's brief in support of his petition, which was filed at the same time as the Phillips and Rosalez declarations. The brief stated that the records would assist in "determin[ing] the identity of all possible employees, employers, hours worked by those employees, and rates of pay," and that the financial records specifically would allow WHD "to confirm the accuracy of other records maintained by the employer." ER-067–68 (Mem. in Supp. of Pet. to Enforce Subpoena). Because the district court did not state that it was relying exclusively on the Phillips and Rosalez declarations to determine that the Secretary made his prima facie case, it is

possible that the explanation in the Secretary's brief informed the court's determination. Even if the district court considered only the Phillips and Rosalez declarations, however, this Court is not limited to affirming the district court's holding on that basis; rather, the Court may affirm the holding that the Secretary made a prima facie case on any basis supported by the record. *See Seller Agency Council, Inc. v. Kennedy Ctr. for Real Est. Educ., Inc.*, 621 F.3d 981, 986 (9th Cir. 2010) ("[W]e may affirm on any basis supported by the record, whether or not relied upon by the district court." (internal quotation marks omitted)). Thus, this Court is permitted to determine that the Phillips and Rosalez declarations, combined with the explanation in the Secretary's brief, were sufficient to make a prima facie case that the requested documents are relevant to the investigation.

Katsilometes asserts that the additional explanation set forth in the Secretary's brief should not be considered because it is "merely argument." Appellant's Opening Br. 17. But there is no requirement that an agency's entire relevancy explanation be set forth solely within a declaration or affidavit in order to make a prima facie case for enforcement. Imposing such a requirement for the first time here would elevate form over substance, contradicting this Court's previous admonishment against introducing new limits on the subpoena enforcement process. *See Port of Seattle*, 521 F.2d at 434. It would also be inconsistent with the Court's limited, deferential review in the subpoena

enforcement context. *See Exxon Mobil*, 943 F.3d at 1287; *Fed. Exp.*, 558 F.3d at 848. In *Zadeh*, the Fifth Circuit even accepted the government attorney's representation at oral argument that the subpoena at issue was limited to a certain subset of patients as further indication that the subpoena sought relevant material. 820 F.3d at 758. Katsilometes has not identified any case in which a court imposed a requirement that the relevancy explanation be contained entirely within the agency's supporting declaration or affidavit.[6] Thus, should the Court reach this issue, it may consider the additional explanation contained in the Secretary's brief,

[6] Neither of the two cases Katsilometes cites in support of his argument concerned the government's burden to make a prima facie showing of relevancy to enforce an administrative subpoena. Appellant's Opening Br. 18. These cases do not provide helpful guidance in the subpoena enforcement context, and Katsilometes acknowledges as much in stating that these cases arose in "other contexts." *Id.* *Dole v. Local Union 375, Plumbers International Union of America, AFL-CIO*, 921 F.2d 969, 972 (9th Cir. 1990), concerned a subpoena *recipient's* burden to make a prima facie showing that a subpoena should *not* be enforced on First Amendment grounds. The Court's determination that the recipient did not satisfy its burden is consistent with the presumption that administrative subpoenas should be enforced. *See Port of Seattle*, 521 F.2d at 434. And *Thornhill Publishing Co. v. General Telephone & Electronics Corp.*, 594 F.2d 730, 738 (9th Cir. 1979), addressed a party's evidentiary burden to survive summary judgment—where a party must demonstrate there is a genuine issue for trial—which is a much higher burden than that of an agency seeking enforcement of an administrative subpoena, which occurs before the agency even brings a charge. *See Okla. Press*, 327 U.S. at 201 (purpose of administrative subpoena is not to prove a claim, but to provide evidentiary basis to *bring* a claim if facts justify doing so); *Karuk Tribe*, 260 F.3d at 1076 ("[C]ourts *must* enforce administrative subpoenas unless the evidence sought by the subpoena is plainly incompetent or irrelevant to any lawful purpose of the agency." (emphasis added) (internal quotation marks omitted)).

which further demonstrates that the documents requested by the subpoena are relevant to evaluating the Inn's compliance with the FLSA.

3. The Subpoena Does Not Seek Personal Financial Records.

Katsilometes also contends, for the first time on appeal, that the subpoena seeks the personal tax returns and financial records of the Lava Hot Springs Inn's individual officers, directors, representatives, attorneys, and accountants. Appellant's Opening Br. 12–13. Because Katsilometes did not raise this concern before the district court, it has been waived. *In re E.R. Fegert, Inc.*, 887 F.2d 955, 957 (9th Cir. 1989) (argument not "raised sufficiently for the trial court to rule on it" is waived).

Even if not waived, however, the subpoena as a whole plainly indicates that it is seeking the records of the Lava Hot Springs Inn, and not any individual's personal records. The subpoena is directed to the Inn and states that it is requesting information concerning the "wages, hours, and other conditions and practices of employment maintained by any of the following: Lava Hot Springs Inn, Lava Hot Springs Inn, LLC, and any and all related enterprises (herein called 'the Company')." ER-076. And the list of documents to be produced is focused solely on the Lava Hot Springs Inn's records, including documents pertaining to the company's structure, its affiliates, and its finances, as well as its employees. ER-079–80. Katsilometes apparently had the same understanding below, having

described the subpoena as "directing [him] to produce . . . documents related to Lava Hot Springs Inn." ER-042 (Mem. in Opp'n to Pet. to Enforce Subpoena). If he thought otherwise, he could have asked for clarification. He did not do so. And the district court appeared to have the same understanding as Katsilometes. The court described the subpoena as requiring Katsilometes to produce documents "*related* to the Lava Hot Springs Inn" and explained that the material sought in the subpoena is relevant to WHD's "*investigation of the Lava Hot Springs Inn*." ER-005, 007 (emphasis added).

Katsilometes' new concern that the subpoena's definition of "[e]mployer" to include certain individuals, such as the Inn's accountant and attorney, means that the subpoena sought those individuals' personal financial records is unwarranted. The reference to these individuals is meant to specify that any records maintained by those individuals on behalf of the Lava Hot Springs Inn are subject to the subpoena. This prevents Katsilometes from withholding responsive documents on the basis that he does not physically possess them when in fact he can obtain them from an individual acting on behalf of the Lava Hot Springs Inn, such as the Inn's accountant or attorney. This Court should not credit Katsilometes' belated attempt to read the subpoena in any other manner.

C. The District Court Did Not Abuse Its Discretion In Holding That The Subpoena Was Not Overbroad Or Unduly Burdensome.

For the reasons discussed above, the district court correctly concluded that the Secretary made a sufficient prima facie case for enforcement of the subpoena, at which point the burden shifted to Katsilometes to prove that the subpoena was overbroad or unduly burdensome. *See Garner*, 126 F.3d at 1146; *NLRB v. N. Bay Plumbing, Inc.*, 102 F.3d 1005, 1007 (9th Cir. 1996). Katsilometes did not sustain his burden.

1. The Subpoena Was Not Overbroad.

Katsilometes failed to show that the subpoena is overbroad. He focuses his overbreadth argument on the subpoena's request for the Inn's tax returns, financial statements, and other related documents, asserting that these documents are not relevant to investigating the Inn's compliance with the child labor provisions of the FLSA and that the request is nothing more than a "fishing expedition." Appellant's Opening Br. 20–21. However, Katsilometes has made no showing beyond a simple assertion that the documents sought in the subpoena are not relevant and therefore the subpoena is overbroad.[7] Thus, Katsilometes has not sustained his burden to show that the subpoena should not be enforced as written.

[7] Katsilometes also emphasizes the fact that the district court described the subpoena as "expansive," Appellant's Opening Br. 9, 23, but this Court has used similar language in upholding a subpoena it found was not overbroad. *Garner*, 126 F.3d at 1146 (upholding "extensive" subpoena).

A subpoena is overly broad only where there is no realistic expectation that the agency could discover something that would "cast light" on the employer's compliance with the law, *Fed. Exp.*, 558 F.3d at 854, and here, the financial documents have the potential to help WHD determine whether the Inn is complying with the FLSA. Where a party "fail[s] to . . . enunciate how [a] subpoena[] constitute[s] a 'fishing expedition,'" this Court has refused to deem a subpoena overbroad "absent a showing by [the defendant] of additional support for this position." *Garner*, 126 F.3d at 1146.

As an initial matter, much of Katsilometes' argument that the financial documents are not connected to whether the Lava Hot Springs Inn violated the FLSA's child labor requirements simply reprises his relevancy argument and fails for the same reasons his relevancy argument fails. In *Federal Express*, this Court rejected the defendant's overbreadth argument because it "simply rehashe[d] the relevancy argument that [the Court has] already rejected," and went on to explain that "[t]he subpoena need not request only evidence that is specifically relevant to proving discrimination; the requested information need only be relevant and material *to the investigation*." 558 F.3d at 855 (emphasis in original) (internal quotation marks omitted). Here, WHD is investigating the Lava Hot Springs Inn's compliance with the entire FLSA, not just its compliance with the FLSA's child

labor provisions, and therefore the documents sought need not be limited to those concerning the Inn's employment of minors.

Furthermore, as the Secretary explained to the district court, WHD seeks access to the Inn's financial records in order to evaluate the accuracy of the Inn's employment records. *Federal Express* makes clear that the Secretary is permitted to seek such documents, as they are relevant to investigating whether the Inn is complying with the FLSA. *See Fed. Exp.*, 558 F.3d at 854 ("Relevancy is determined in terms of the investigation rather than in terms of evidentiary relevance."). WHD is not required to limit the subpoena to employment records, such as payroll documents and timesheets, that would obviously constitute evidence if WHD ultimately brings a claim against the Lava Hot Springs Inn and/or Katsilometes. Rather, WHD is permitted to seek any documents that would cast light on the accuracy of the Inn's employment records.[8] Moreover, should the

[8] To illustrate how financial records could be used to assess the accuracy of employment records, as one example, it is not uncommon for employers to attempt to evade the requirement to pay a premium rate for overtime hours worked by classifying some wage payments as a per diem, bonus, or other type of payment that can be excluded from the overtime premium calculation. *See* 29 U.S.C. 207(a)(1) (requiring overtime compensation for hours worked over forty in a week at "a rate not less than one and one-half times the regular rate" at which the employee is employed); *see, e.g., Gagnon v. United Technisource, Inc.*, 607 F.3d 1036, 1041–42 (5th Cir. 2010) (holding that employer "tried to avoid paying [employee] a higher 'regular rate' by artificially designating a portion of [his] wages . . . as 'per diem'"). A review of a business's financial records could indicate wage payments that are improperly labeled as another type of payment.

Secretary discover a discrepancy between the Inn's financial records and its employment records, the financial records could potentially serve as evidence to prove a violation.[9] Therefore, the subpoena is not overbroad in seeking these financial records, and Katsilometes has not sustained his burden to prove that the subpoena is overbroad.

2. The Subpoena Was Not Unduly Burdensome.

Katsilometes likewise did not demonstrate that complying with the subpoena would be unduly burdensome. While the Secretary is sympathetic to the difficulties caused by the COVID-19 pandemic as well as the challenges of operating a small business, Katsilometes made only generalized assertions that complying with the subpoena during the pandemic would be disruptive and costly. Appellant's Opening Br. 22–23. Compliance with a subpoena will frequently impose some burden; the key question is whether the burden is unreasonable. *See, e.g., Garner*, 126 F.3d at 1143 (subpoena must be enforced unless "*unduly* burdensome" (emphasis added) (internal quotation marks omitted)). Where an agency's

[9] Additionally, the Inn's financial records are relevant to answering a necessary preliminary question in most FLSA investigations: whether the employer is a covered enterprise subject to the FLSA's minimum wage, overtime, child labor, and recordkeeping provisions, which turns, in part, on whether the employer has an annual dollar volume of sales or business in excess of $500,000. 29 U.S.C. 203(s)(1)(A), 206(a), 207(a)(1), 211(c), 212(c). Though the Secretary did not explicitly point to the enterprise coverage inquiry as one of the reasons to request the financial records in this case, such coverage is always a threshold inquiry in any FLSA investigation.

investigation is authorized by law and its subpoena seeks materials relevant to the investigation, the defendant's burden to show that the subpoena is unreasonable "is not easily met." *Lynn*, 536 F.2d at 825.

Katsilometes fell far short of proving that the subpoena is unduly burdensome. He failed to provide any information as to what compliance would entail or how it would impact his business. Courts typically expect a defendant to quantify the estimated cost of compliance within the context of the business's total operations, or to provide a similarly detailed explanation of what compliance would entail. *See EEOC v. Randstad*, 685 F.3d 433, 452 (4th Cir. 2012) (rejecting argument that subpoena was overly burdensome, even though employer estimated that "compiling the requested information would require three employees to spend 40 hours each, at a total cost [of] $14,000 to $19,000," where employer provided no evidence of its "normal operating costs"); *EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993) (respondent failed to prove subpoena was unduly burdensome where it did "not offer[] any specific estimate of cost involved nor show[] how compliance would impact the normal operations of" the business); *FTC v. Shaffner*, 626 F.2d 32, 38 (7th Cir. 1980) (respondent failed to show subpoena was unduly burdensome where it made "no showing of the number of files involved, the number of estimated work hours required to effect compliance, nor the estimated costs of compliance"). Here, Katsilometes did not estimate the

cost of compliance within the context of the Inn's operations, nor did he provide any other details that would illustrate the burden of compliance, such as a description of the Inn's filing system or an estimation of the number or volume of files that he would need to access. Thus, he failed to show how compliance would be unduly burdensome.

Moreover, Katsilometes is required by the FLSA and its implementing regulations to maintain many of the records listed in the subpoena and to produce them upon WHD's request. 29 U.S.C. 211(c) (requiring covered employers to create and maintain records of "wages, hours, and other conditions and practices of employment," to preserve records for certain periods of time, and to make such records available to WHD as it deems necessary); 29 C.F.R. 516.7 (employer must produce employment records upon request from WHD). The fact that Katsilometes is legally required to maintain these records, and to produce them upon request, further undermines his assertion that the subpoena is unduly burdensome. Lastly, while the pandemic may have made responding to the subpoena more difficult, it does not relieve him of his obligation to comply with the law.[10]

[10] Katsilometes also specifically objects to the district court's statement that his concerns that the pandemic, his age, and the fact that the Lava Hot Springs Inn is a small business made responding to the subpoena unduly burdensome "may have all been valid reasons in April and May of 2020," but "they do not hold up now five months later." Appellant's Opening Br. 6, 22 (quoting ER-010). In context, the district court was explaining that, given these concerns and the difficulties of the pandemic in particular, the initial subpoena response deadline of seven days was

Accordingly, because Katsilometes failed to prove that the subpoena is overbroad or unduly burdensome, the district court correctly determined that the subpoena should be enforced.

CONCLUSION

For the foregoing reasons, the district court's order enforcing the Secretary's subpoena should be affirmed.

Dated: April 28, 2021

Respectfully submitted,

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insufficient, however, it would have been easy and reasonable for Katsilometes to request more time from WHD or negotiate a phased production of documents, but he did not do so. ER-010. Indeed, for nearly three months after the Secretary served Katsilometes with the subpoena, Katsilometes simply ignored it, eventually prompting the Secretary to file a petition to enforce it. Thus, the district court did not err in reasoning that the passage of several months' time had diminished the validity of Katsilometes' objections regarding the burden of compliance.

STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6, there is no related case or proceeding pending before this Court.

s/ Sarah M. Roberts
SARAH M. ROBERTS

CERTIFICATE OF COMPLIANCE

FORM 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s): 20-36002

I am the attorney or self-represented party.

This brief contains 7,561 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

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CERTIFICATE OF SERVICE

I hereby certify that, on April 28, 2021, I electronically filed the foregoing Response Brief of the Secretary of Labor via the Court's CM/ECF Electronic Filing System. All participants in the case are registered CM/ECF users and service on them will be accomplished by the appellate CM/ECF system.

s/ Sarah M. Roberts
SARAH M. ROBERTS

ADDENDUM

RELEVANT STATUTORY PROVISIONS

FAIR LABOR STANDARDS ACT,
29 U.S.C. 201 *et seq*.

29 U.S.C. 209

§ 209. Attendance of witnesses

For the purpose of any hearing or investigation provided for in this chapter, the provisions of sections 49 and 50 of Title 15 (relating to the attendance of witnesses and the production of books, papers, and documents), are made applicable to the jurisdiction, powers, and duties of the Administrator, the Secretary of Labor, and the industry committees.

29 U.S.C. 211

§ 211. Collection of data

(a) Investigations and inspections

The Administrator or his designated representatives may investigate and gather data regarding the wages, hours, and other conditions and practices of employment in any industry subject to this chapter, and may enter and inspect such places and such records (and make such transcriptions thereof), question such employees, and investigate such facts, conditions, practices, or matters as he may deem necessary or appropriate to determine whether any person has violated any provision of this chapter, or which may aid in the enforcement of the provisions of this chapter. Except as provided in section 212 of this title and in subsection (b) of this section, the Administrator shall utilize the bureaus and divisions of the Department of Labor for all the investigations and inspections necessary under this section. Except as provided in section 212 of this title, the Administrator shall bring all actions under section 217 of this title to restrain violations of this chapter.

* * * * *

(c) Records

Every employer subject to any provision of this chapter or of any order issued under this chapter shall make, keep, and preserve such records of the persons

employed by him and of the wages, hours, and other conditions and practices of employment maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by regulation or order as necessary or appropriate for the enforcement of the provisions of this chapter or the regulations or orders thereunder. The employer of an employee who performs substitute work described in section 207(p)(3) of this title may not be required under this subsection to keep a record of the hours of the substitute work.

* * * * *