No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

In re ELISABETH DEVOS,
Petitioner.

ON PETITION FOR A WRIT OF MANDAMUS TO THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA,
FORT PIERCE DIVISION

Relates to: Case No.: 2:21mc14073-JEM
The Hon. Jose E. Martinez

EMERGENCY PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA AND MOTION FOR STAY PENDING CONSIDERATION OF PETITION

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rule 26.1, the following is a complete list of all trial judges, attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates, parent corporations, any publicly held corporation that owns 10% or more of a party's stock, and other identifiable legal entities related to a party:

- Archibald, Chenelle – Plaintiff
- United States District Judge William Alsup
- Apodaca, Tresa – Plaintiff
- Boies Schiller Flexner LLP – Counsel for Petitioner
- Cardona, Miguel – Secretary of the Department of Education
- Cohen Milstein Sellers Toll, PLLC – Counsel for Plaintiffs
- Davis, Alicia – Plaintiff
- Deegan, Jessica – Plaintiff
- Devos, Elisabeth – Petitioner
- Dominguez, Manuel Juan – Counsel for Plaintiffs
- Ellis, Rebecca – Counsel for Plaintiffs
- Hancock, Kevin – Counsel for Departments of Education and Justice

- Hood, Samuel – Plaintiff
- Jacobson, Jessica – Plaintiff
- Legal Services Center of Harvard Law School – Counsel for Plaintiffs
- United States District Judge Jose E. Martinez
- Magistrate Judge Shaniek M. Maynard
- Merritt, R. Charlie – Counsel for Departments of Education and Justice
- O'Grady, Margaret – Counsel for Plaintiffs
- Panuccio, Jesse – Counsel for Petitioner
- Magistrate Judge Donna M. Ryu
- Sweet, Theresa – Plaintiff
- The United States Department of Education
- The United States Department of Justice

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

FEDERAL RULES

OTHER AUTHORITIES

INTRODUCTION AND RELIEF SOUGHT

Mandamus is extraordinary relief. Everything about this matter is extraordinary—at least to the extent that abandoning bedrock principles of administrative law, ignoring the Federal Rules of Civil Procedure, and the threat of two different constitutional violations is not something that often arises in a single case. This Court's immediate intervention is needed to set things back on track.

Petitioner, Elisabeth DeVos, is the former Secretary of Education. She was sued in her official capacity hundreds of times during her tenure, and many of those cases remain pending now that she is a private citizen. When regular order prevails, current officials substitute for predecessors in agency litigation, and those predecessors move on to their private lives. But litigants sometimes seek to keep former officials involved in agency litigation—say, through depositions—to generate publicity. Normally, these former officials are protected from such abuse because extra-record discovery in APA litigation is rarely permitted, *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U. S. 519, 549 (1978), and even if it is, former high-ranking officials can only be deposed if the demanding requirements of the apex doctrine are met. *See In re United States (Jackson)*, 624 F.3d 1368, 1376 (11th Cir. 2010) ("district court should rarely, if ever, compel the attendance of a high-ranking official in a judicial proceeding"). And for Cabinet secretaries, the Supreme Court has said unequivocally that it is "not the function of

the court to probe the[ir] mental processes" and they should not be "subjected to this examination" at all. *United States v. Morgan*, 313 U.S. 409, 422 (1941). *See also In re Dep't of Commerce*, 139 S. Ct. 16, 16-17 (2018) (granting stay of order requiring deposition of Cabinet secretary). These protections are meaningful, of course, only if courts enforce them.

Here, a district court in San Francisco has ordered, on its own motion, extra-record discovery in an APA case pending against the Department of Education and relating to student-loan forgiveness. That is extraordinary in and of itself, but was no longer Secretary DeVos's legal concern upon leaving office. But now the plaintiffs in that case have served a third-party subpoena commanding Secretary DeVos to sit for a deposition in Vero Beach, Florida, where she maintains a residence. *See* Fed. R. Civ. P. 45(c)(1)(A). Because the subpoena is abusive and such depositions are barred under *Morgan*, she moved to quash in the Southern District of Florida. *See id.* 45(d)(3)(A)(iv) ("the court for the district where compliance is required must quash or modify a subpoena that … subjects a person to undue burden"). That is where things really went off the rails.

The District Judge referred the matter to the Magistrate Judge without consent of the parties. *See* 28 U.S.C. § 636(b)(1)(A). Plaintiffs moved to transfer the motion to the California court, which can only occur in "exceptional circumstances" not present here. *See* Fed. R. Civ. P. 45(f). In opposing transfer, Secretary DeVos asked

that, if the Magistrate Judge granted transfer, such order be stayed to permit timely objections of right as required by Rule 72. *See* Fed. R. Civ. P. 72(a) ("A party may serve and file objections to [a magistrate judge's] order within 14 days …. The district judge in the case must consider timely objections…."). Nothing happened for over a month, and in the meantime the Motion to Quash was fully briefed. Then, without a hearing, the Magistrate Judge ordered transfer and purported to have the Clerk immediately effectuate that order and close the case. Secretary DeVos moved the District Judge to stay the Transfer Order so she could lodge her objections of right by April 21, 2021, but the Court responded by saying the immediate transfer rendered the request moot because the Court had lost jurisdiction. The District Court also noted it would overrule any possible objection that Secretary DeVos might file. The next day, the California court entered an order requiring Secretary DeVos to file a new brief by April 20, 2021.

So not only has Secretary DeVos been denied timely quashal of an abusive subpoena that runs afoul of the separation-of-powers guardrails identified in *Morgan*, but she has now also been stripped of her appeal rights under Rule 72(a)—appeal rights that ensure a magistrate judge's exercise of authority is constitutional under Article III. Accordingly, Secretary DeVos requests this Court's urgent intervention. She respectfully asks that the Court issue an immediate writ of mandamus to the Respondents, requiring the District Court to reverse the Transfer

Order, deny transfer, and quash the subpoena without delay. Secretary DeVos also asks the Court to impose an immediate stay of the Transfer Order, and of her deadline to file objections, while the Court determines the outcome of this Petition. Time is of the essence because of the impending briefing date in the California court (**April 20, 2021**) and the deadline for objections in the Florida court (**April 21, 2021**).

STATEMENT OF THE ISSUES

1. Does it violate Article III for a magistrate judge to enter an order that is unreviewable by the district judge where the parties have not consented to the referral to the magistrate judge?

2. Is it improper for a district court to transfer a motion to quash a subpoena of a Cabinet secretary where no exceptional circumstances exist to justify transfer?

3. Is it improper for a district court to refuse to exercise its duty under Rule 45 to quash a subpoena that places an undue burden on a former Cabinet secretary?

STATEMENT OF FACTS

A. The *Sweet* Litigation

In June 2019, student loan borrowers ("Plaintiffs") filed a class action complaint in the Northern District of California against the Secretary of Education in her official capacity and the Department of Education (the "Department"; collectively, the "federal Defendants"). The case is (or at least was) a standard Administrative Procedure Act challenge to the Department's alleged delay in issuing decisions on loan-forgiveness applications ("borrower defense"). *See Sweet, et al. v. Rosenfelt, et al.*, 3:19-cv-03674 (N.D. Cal.) (the "*Sweet* Litigation") Doc. 1 ¶¶ 377-89.[1] In April 2020, the parties executed a settlement agreement, in which the Department agreed to issue final decisions on a timeline. *Sweet* Doc. 97-2. The California court preliminarily approved of the settlement in May 2021, *Sweet* Doc. 103, and the Department continued to issue borrower-defense decisions. On September 17, 2020, the Plaintiffs moved for final approval of the settlement and also to enforce it, claiming that certain denial notices provided insufficient reasoning. *Sweet* Doc. 129.

The California court then took matters into its own hands. It denied the settlement agreement, declared that "[w]e will return to litigating the merits," found

[1] Filings in the *Sweet* Litigation are cited as "*Sweet* Doc." and citations to filings in the Southern District of Florida are cited as "Doc." Page numbers refer to internal pagination, not ECF pagination.

"a strong showing of agency pretext," and declared: "We need to know what is really going on." *Sweet* Doc. 146 at 11, 15. The court then *sua sponte* ordered extra-record discovery (despite recognizing that "discovery against agencies is disfavored") and directed that the Plaintiffs "shall move for summary judgment as to the lawfulness of the Secretary's delay, and the lawfulness of the perfunctory denial notice." *Id.* at 7-10, 16. The court permitted "five fact depositions of relevant decisionmakers" from offices "within the Office of the Under Secretary" and noted that "given '[h]eads of government agencies are not normally subject to deposition,' class counsel may not yet depose the Secretary." *Sweet* Doc. 146 at 16-17.

B. The Rule 45 Subpoena

The Plaintiffs took four of the five depositions and did not take a Rule 30(b)(6) deposition. Instead, on January 6, 2021, the Plaintiffs informed the federal Defendants by telephone that they would seek to depose then-Secretary DeVos. *Sweet* Doc. 171 at 5. The next day, the federal Defendants requested from the *Sweet* Plaintiffs "precisely the information that you seek to solicit from the Secretary that you have not been able to obtain elsewhere," and stated that they were "open to exploring other, less intrusive means of providing your requested discovery," including "a different deponent who might have relevant knowledge." *Id.* The federal Defendants also pointed out that the parties had seven days to work out any

disputes on interrogatory responses. *Id.* Later that evening, Secretary DeVos announced her resignation, effective January 8, 2021.

The Plaintiffs responded on January 8, asserting that prior depositions "left holes that can only be filled by Secretary DeVos's personal knowledge" on topics "including but not limited to" (1) "[t]he development and approval of" the form denial notices; (2) "[w]ho ordered FSA to stop issuing borrower defense decisions" and why; and (3) "Borrower Defense Policy." *Sweet* Doc. 171 at 8-9. The *Sweet* Plaintiffs acknowledged that their first proposed topic was covered by an interrogatory that the federal Defendants still had time to amend, but stated that their desire to depose now-former Secretary DeVos "would not be satisfied by a more fulsome response." *Id.* at 1 & n.2, 9.

The federal Defendants responded on January 11, informing the *Sweet* Plaintiffs that the Department was exploring whether it could provide the information Plaintiffs sought through less intrusive means. *Id.* at 11. The federal Defendants requested a "reasonable amount of time for the Department to continue this investigation." *Id.* Two-and-a-half hours later, the *Sweet* Plaintiffs responded with a letter stating that they had "given you enough time to consider our request," and that "today we will move the Court." *Id.* at 14. About two hours later, the *Sweet*

Plaintiffs filed a letter brief with the California court seeking leave to depose former Secretary DeVos. *Sweet* Doc. 171. A press release immediately followed.[2]

On January 12, the California court issued a five-line order explaining that because "Citizen DeVos" is a private party "if counsel pursues such deposition, it must subpoena Ms. DeVos." *Sweet* Doc. 172. On January 13, counsel for the *Sweet* Plaintiffs asked the Department of Justice ("DOJ counsel") to accept email service of a third-party subpoena. Doc. 12-4 at 4.[3] Secretary DeVos authorized DOJ counsel to accept service on the condition that the parties "negotiate the subpoena's place of compliance and a reasonable compliance date that would allow sufficient time for motion-to-quash briefing and a decision." *Id.* at 3. The Plaintiffs agreed and stated they were "happy to negotiate a date that allows for briefing as necessary." *Id.* at 2.

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[2] *See* Press Release, Student Borrowers Ask Court to Allow Deposition of Betsy DeVos on Borrower Defense (Jan. 11, 2021), https://predatorystudentlending.org/news/press-releases/student-borrowers-ask-court-to-allow-deposition-of-betsy-devos-on-borrower-defense-press-release/ (last visited Feb. 8, 2021). The press release states Plaintiffs' view that a deposition of Secretary DeVos is necessary because she has a generalized "obligation to explain why defrauded student borrowers were ignored for years by the Education Department and then summarily denied their rights." *Id.*

[3] Undersigned counsel represents Secretary DeVos in her personal capacity. DOJ stated below that it represents the "former Secretary …in her official capacity … in light of DOJ's representation of the U.S. Department of Education in the underlying litigation and the government's interest in the information that former officials acquire during their time in government." Doc. 18 at 1 n.1.

On January 22, the parties agreed that, in accordance with Rule 45, Plaintiffs would require compliance with the subpoena in Vero Beach, Florida, where Secretary DeVos maintains a residence and where she would be residing on the compliance date. *See id.* at 2; Doc. 1-1 at 2. DOJ counsel explicitly noted that a motion to quash would be forthcoming, and the parties agreed "to stay any compliance date pending a final order" in order "to account for the significant possibility that necessary litigation [surrounding the Motion to Quash] will not be complete by February 25, 2021." Doc. 12-4 at 2.

On February 8, 2021, Secretary DeVos and the federal Defendants jointly filed, in the Southern District of Florida, a motion to quash the subpoena. Doc. 1 ("Motion to Quash"). The motion argued that, pursuant to binding Supreme Court and Eleventh Circuit precedent, a former Cabinet Secretary cannot be deposed under the circumstances presented here. The matter was assigned to the Honorable Jose E. Martinez, who the next day referred the matter to Magistrate Judge Shaniek M. Maynard "for all pretrial matters for appropriate disposition." Doc. 4.

The Plaintiffs' response to the Motion to Quash was due on February 22. In lieu of filing that paper, the Plaintiffs, on February 11, filed a seventeen-page motion to transfer the matter to the California court. Doc. 12 ("Motion to Transfer"). The motion, which addressed the substance of the Motion to Quash, argued that "exceptional circumstances" justified the transfer under Rule 45(f), and asked the

Court provide expedited treatment in light of (1) an upcoming discovery hearing in California court on February 24, and (2) the March 11 due date for the summary judgment motion. *Id.* at 1. Plaintiffs made this request despite their prior agreement to "allow[] for briefing as necessary" on the Motion to Quash and "to account for the significant possibility that necessary litigation will not be complete by February 25." Doc. 12-4 at 2, 4. The Motion to Transfer also asked that if expedited treatment was not granted, the due date for a response to the Motion to Quash be continued until after the Motion to Transfer was decided. *Id.* at 17.

In the meantime, Plaintiffs continued their publicity campaign about the subpoena. Counsel for Plaintiffs offered quotations for an article that refers to the "notoriously anti-government transparency Southern District of Florida," that uses an anonymous "source familiar with the litigation" to criticize the Motion to Quash, that claims Secretary DeVos "long ago forfeited the benefit of … norms" that protect former Cabinet officials, and that criticizes both undersigned counsel and DOJ counsel for defending the well-established legal principles barring abusive depositions of former Cabinet officials. The Plaintiffs feature this article on their publicity website for this case. *See* Doc. 19-2.

Six days after the Motion to Transfer was filed, on Wednesday, February 17 at 4:29 pm, the Magistrate Judge ordered the response to the Motion to Transfer be filed by Friday, February 19 at midnight. The response otherwise would have been

due on Thursday, February 25. Doc. 13.[4] Secretary DeVos filed her opposition, Docs. 18, 19, and requested "that any transfer not be executed until after Movants have had an opportunity to determine whether to seek appeal to the District Court pursuant to S.D. Fla. Local Magistrate Judge Rule 4(a)(1) within the 14 days allotted by that Local Rule." Doc. 18 at 19 n.6.

For over a month, there was no decision from the Magistrate Judge. In the meantime, the Plaintiffs: (1) had their February 24 discovery hearing in California, where the court extended the discovery period and granted them additional discovery on the very same topics on which they seek to depose Secretary DeVos, Doc. 27-1 at 31, *Sweet* Doc. 191; (2) had their summary judgment deadline postponed indefinitely, *Sweet* Doc. 191; and (3) filed their opposition to the Motion to Quash, the deadline for which the Magistrate Judge had left in place, Doc. 23. Secretary DeVos replied in support of the Motion to Quash on March 1, 2021. Docs. 26, 27.

Disregarding the fully briefed Motion to Quash, on April 7, 2021, the Magistrate Judge entered an order granting the Motion to Transfer. Doc. 28 ("Transfer Order"). The Magistrate Judge ignored the request to stay the Transfer Order until Secretary DeVos could timely file objections and instead directed the Clerk to transfer the case immediately. Doc. 28 at 12. The docket reflects that with

[4] Secretary DeVos asked to be granted the weekend to prepare her personal-capacity response, which the Magistrate Judge permitted. Docs. 16, 17.

the posting of the Transfer Order the case was immediately closed and "electronically transferred out to California Northern." App. Vol. 1 Docket Sheet. The next day, April 8, the Northern District of California acknowledged receipt and put the matter on its docket. Doc. 29.

C. The District Court States It Lacks Jurisdiction to Stay the Order on the Motion to Transfer.

Secretary DeVos immediately filed with the District Court an Expedited Motion to Stay the Transfer Order. Doc. 30. Because the Magistrate Judge purported to have immediately transferred the case to the Northern District of California before she was able to file her objections, Secretary DeVos requested a decision on the motion to stay by April 12, 2021, in order to protect her rights under Rule 72(a). *Id.* at 3.

On April 12, the District Court denied the motion to stay as moot, stating that because the "electronic transfer is effective immediately … the Court does not possess jurisdiction to stay the transfer order." Doc. 31 at 1. Further, even though Secretary DeVos had not yet filed objections to the Transfer Order, the District Court found that, "[a]pplying the review standards of Rule 72(a)," it agreed with the Transfer Order and so any objections would be pointless, "rendering Movant's procedural concern harmless." *Id.* at 1-2.

D. The California Court Sets a Briefing Schedule

On April 13, 2021, the California court entered an order directing Secretary DeVos to "update [her] briefing as necessary" and file by April 20 at noon. Case 3:21-mc-80075 (N.D. Cal.), Doc. 30.

REASONS FOR GRANTING THE WRIT

Petitioner asks this Court to issue a writ of mandamus directing the District Court to take all steps necessary to stay, reverse, and deny transfer of this matter, and then to quash the subpoena without delay. "Mandamus is an extraordinary remedy, and it is appropriate only when no other adequate means are available to remedy a clear usurpation of power or abuse of discretion by the district court." *Carpenter v. Mohawk Indus., Inc*., 541 F.3d 1048, 1055 (11th Cir. 2008).

Secretary DeVos seeks to remedy three violations: (1) the Magistrate Judge's unlawful exercise of the judicial power; (2) the improper transfer of the Motion to Quash; and (3) the District Court's refusal to exercise its duty to avoid undue burden on third parties and quash an improper subpoena. Each of those issues is appropriate for this Court's mandamus review.

First, mandamus is the appropriate remedy where a federal district court's procedural violations threaten irreparable harm that cannot be later remedied. *See Hollingsworth v. Perry*, 558 U.S. 183, 190, 195-96 (2010) (holding mandamus is proper where district court's violation of procedural rules will cause irreparable harm, and noting that reviewing court's "interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes"); *In re Temple*, 851 F.2d 1269, 1272 (11th Cir. 1988) (mandamus proper where district court violated due process rights of party).

Second, this Court and other circuits have recognized that, under the All Writs Act,[5] "parties may petition … for mandamus" to achieve review of transfer orders. *In re Ricoh Corp.*, 870 F.2d 570, 572 n.4 (11th Cir. 1989). *See also Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982, 985-86, 987 (1982); *Carteret Sav. Bank, F.A. v. Shushan*, 919 F.2d 225, 233 (3d Cir. 1990); *In re Sealed Case*, 141 F.3d 337, 377 (D.C. Cir. 1998) ("This circuit has frequently exercised its mandamus jurisdiction to vacate transfer orders, especially where the transfer was beyond the district court's power…."); *In re Howmedica Osteonics Corp*, 867 F.3d 390, 399 (3d Cir. 2017) ("transfer orders are reviewable on a mandamus petition").

The District Court, in denying a stay of the Transfer Order, concluded that it had no appellate jurisdiction because the electronic transfer was "effective immediately." Doc. 31 at 1. In support of this proposition, the court cited *In re Southwestern Mobile Homes, Inc.*, 317 F.2d 65 (5th Cir. 1963). But in that case, the Court denied leave to file a mandamus petition on a transfer order where petitioner failed to "seasonably move[] for a stay"—hardly the situation here. *Id.* at 66. And, in any event, the case did not lay down the absolute rule suggested by the District Court; instead, the Court stated it might exercise jurisdiction in "a very extreme case." *Id.* Indeed, the modern rule is that "if a party contends that the district court

[5] The All Writs Act authorizes this Court to issue "all writs necessary or appropriate in aid of [its] respective jurisdictions." 28 U.S.C. § 1651(a).

lacked power to order the transfer … then its purported transfer is a nullity, and can be reviewed by the circuit in which the transferor court sits." 15 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3846 (4th ed. Apr. 2021 Update) (hereinafter, Wright & Miller). Accordingly, just a few years ago, the Third Circuit concluded that it had mandamus jurisdiction to reverse a transfer to the Northern District of California, even after the transferee court had entered scheduling orders. *In re Howmedica Osteonics Corp.*, 867 F.3d at 399-400. *See also Farrell v. Wyatt*, 408 F.2d 662, 664 (2d Cir. 1969) (when "the issue" is "whether the district court had power to order the transfer," the "clerk's physical transfer of the file" does not destroy appellate jurisdiction; "if the district court had no power to transfer, the transfer will be a nullity, the transferee court will have no jurisdiction …, and any judgment it may enter will be void").[6]

Third, this Court has recognized that mandamus is the appropriate remedy for quashal wrongfully withheld under *Morgan* and the apex doctrine. *Jackson*, 624 F.3d at 1372-73 (collecting cases).

I. THE MAGISTRATE JUDGE IMPROPERLY EXERCISED THE JUDICIAL POWER AND THE DISTRICT JUDGE FAILED TO EXERCISE THE NECESSARY SUPERVISION.

[6] In all events, this Court, in dicta, has explained that even if a physical transfer strips jurisdiction, the appellate court can still order the transferor court to "take every reasonable action possible in asking the transferee court to return the files in the transferred case." *Roofing & Sheet Metal Servs.*, 689 F.2d at 988 n.10.

Article III vests "[t]he judicial power in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." U.S. Const., art. III, § 1. "The Judges" of those courts must have life tenure, *id.*, and be nominated by the President and confirmed by the Senate, *id.* art. II, § 2, cl. 2. "The Judicial Power … extend[s] to all Cases … arising under th[e] Constitution [and] the laws of the United States." *Id.* art. III, § 2.

Magistrate judges are not life-tenured, presidentially-appointed, and Senate-confirmed Article III judges. *See* 28 U.S.C. § 631. Accordingly, they cannot independently exercise the judicial power and "the district court [must] retain[] sufficient control over the magistrate" to avoid constitutional problems. *Sinclair v. Wainwright*, 814 F.2d 1516, 1519 (11th Cir. 1987). *See also* Wright & Miller § 3069 (3d ed. Oct. 2020 Update) ("At bottom, the power to review is necessary to avoid constitutional difficulties, and an absolute prohibition on revision by the district judge creates risks of undermining that essential review authority."); *id.* ("it would turn the jurisprudential system on its head to ascribe irrevocably finality (akin to that of a final judgment) to any unreviewed discovery or evidentiary rulings by a Magistrate Judge"); *Wharton-Thomas v. United States*, 721 F.2d 922, 928 (3d Cir. 1983) ("the decision making power must remain in the Article III district court when the parties have not consented to a determination by a non-Article III office"). This

remains true for discovery orders, which though they "may not be dispositive, … can be extremely important." Wright & Miller § 3069 (3d ed. Oct. 2020 Update).[7]

Here, however, by purporting to effectuate the transfer immediately, the Magistrate Judge has created an unreviewable order and has therefore independently exercised "the judicial power." Indeed, the District Court concluded this is exactly what occurred, claiming it "does not possess jurisdiction to stay the transfer order." Doc. 31 at 1. This process—wherein the District Judge referred the case to the Magistrate Judge without consent from the parties, and then permitted the Magistrate Judge to enter an order the District Judge declares unreviewable—violated Secretary DeVos's clearly established right to have her case heard by an Article III court. *See Lawrence v. Governor of Georgia*, 721 F. App'x 862, 863–64 (11th Cir. 2018) (recognizing that the structure of the Federal Magistrates Act "is constitutionally permissible because the district court retains 'total control and jurisdiction' and 'exercises the ultimate authority to issue an appropriate order'" (quoting *Thomas v. Arn*, 474 U.S. 140, 153 (1985).

Moreover, Rule 72(a) ensures that the constitutionally required review of magistrate judge orders will be conducted by guaranteeing that a "party may serve and file objections to the order within 14 days after being served with a copy," and

[7] Moreover, in the context of a Rule 45 motion to quash, the discovery order *is* dispositive for the subpoenaed party.

requiring that "[t]he district judge in the case ***must consider*** timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a) (emphasis added). Here, the process denied Secretary DeVos that clear right, as the District Court concluded it could not and would not review any objections Secretary DeVos might file. It makes no difference that the District Judge stated he "agrees" with the Magistrate Judge's order, Doc. 31 at 1, because Secretary DeVos has not yet filed the objections that the District Judge "must consider."

Accordingly, because the process below violated Secretary DeVos's clearly established rights to have her case heard by an Article III judge, and to file objections to a Magistrate Judge's order, this Court should issue a writ to correct this "usurpation of power." *Carpenter*, 541 F.3d at 1055. *See also La Buy v. Howes Leather Co.*, 352 U.S. 249, 256 (1957) ("Where the subject concerns the enforcement of the … (r)ules which by law it is the duty of this court to formulate and put in force, mandamus should issue to prevent such action thereunder so palpably improper as to place it beyond the scope of the rule invoked."); *In re Bituminous Coal Operators' Ass'n, Inc.*, 949 F.2d 1165, 1169 (D.C. Cir. 1991) (Ginsburg, J.) (granting petition for mandamus where district court imposed on non-consenting party a "surrogate judge"). Moreover, because the order denying a stay states that "the same result would follow" before Secretary DeVos has filed any

objections, it would be proper for this Court to reassign the case to a different District Judge who has not indicated an "irrevocably closed" [mind] on the issues as they arise in the context of the specific case." *S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co.*, 740 F.2d 980, 991 (D.C. Cir. 1984). *See also Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 (11th Cir. 1997).

II. THE DISTRICT COURT ABUSED ITS DISCRETION IN ORDERING A TRANSFER.

A court presiding over a motion to quash a third-party subpoena may transfer the motion to the issuing court only "if the court finds ***exceptional circumstances***." Fed. R. Civ. P. 45(f) (emphasis added). Exceptional means just that. Transfer is to be a "rare event" and "unusual." 9A Wright & Miller § 2451 (3d ed. Apr. 2016 Update); 9 James Wm. Moore, et al., Moore's Federal Practice § 45.50[4] (3d ed.). The "prime concern should be avoiding burdens on local nonparties subject to subpoenas, and it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions." Fed. R. Civ. P. 45(f), Advisory Committee Notes (2013). The lack of a burden imposed on the nonparty by transfer is not in itself an exceptional circumstance and is insufficient to warrant transfer." *Woods ex rel. United States v. SouthernCare, Inc.*, 303 F.R.D. 405, 407 (N.D. Ala. 2014). Indeed, the only circumstance the Advisory Committee Notes recognize as exceptional is where transfer would "avoid disrupting the issuing court's management of the underlying litigation, as when that court has already ruled on

issues presented by the motion or the same issues are likely to arise in discovery in many districts." Fed. R. Civ. P. 45(f), Advisory Committee Notes (2013).

The transfer proponent bears the burden of establishing these exceptional circumstances. *Id.* Even if exceptional circumstances are found, transfer "is appropriate only if such interests outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion." *Id.* *See Inter-Am. Dev. Bank v. Venti S.A.*, No. 16-MC-21016, 2016 WL 5786982, at *3 (S.D. Fla. Oct. 4, 2016); *Woods*, 303 F.R.D. at 406–07. In conducting this balancing, every consideration must be given to the subpoenaed nonparty. *See* Fed. R. Civ. P. 45(f), Advisory Committee Notes (2013).

This case does not present the "exceptional circumstances" that must exist to justify transfer.

1. The overriding rationale of the Transfer Order is that the California court is in a better position to address the Motion to Quash. Doc. 28 at 5–8. But as explained below, *Morgan* entirely forecloses "prob[ing] the mental process of" a Cabinet secretary. 313 U.S. at 422. There is no lengthy analysis needed, and the history of the litigation, the parties' interactions, and prior orders are irrelevant. Accordingly, the California court is no better position than the Florida court to decide the Motion to Quash.

2. The District Court completely disregarded that transfer is a particularly important inquiry in the context of apex doctrine depositions. Former high-ranking officials are potentially subject to dozens of subpoenas after they leave office. For example, a review of PACER reveals that during Secretary DeVos's tenure, the Department was sued nearly 200 times, with Secretary DeVos named as an official-capacity defendant in at least 47 cases, and with at least 48 cases still pending. The circumstances identified in the Transfer Order—that the court in the underlying action can better determine relevance and uniqueness, has a better understanding of the parties' interactions to date, and is already managing discovery—will exist in every apex doctrine case. Under the Transfer Order's reasoning, the exceptional circumstances that must be shown to satisfy the apex doctrine themselves become the rationale for transfer. This would turn the apex doctrine on its head. Former high-ranking officials will be left to bear the burden and expense of constantly litigating subpoenas in courts around the country—with different lawyers, different rules, different precedent—instead of having the convenience of a home forum. That is hardly enforcing the duty to avoid undue burden, Fed. R. Civ. P. 45(d)(1), and it exacerbates some of the very problems the apex doctrine is meant to avoid. If the very purpose of the apex doctrine is to provide these officials protection—if courts "should rarely, if ever, compel the attendance" of such officials for a deposition, *Jackson*, 624 F.3d at 1376—it follows that courts should be equally hesitant to

ignore the burden-reducing mechanism of Rule 45, which calls for local resolution in all but rare and unusual circumstances.

3. Even taking the Transfer Order on its terms, the District Court has not identified any circumstances that qualify as "exceptional." First, the Transfer Order states that the California court is in a better position to decide the relevance and uniqueness of Secretary DeVos's proposed testimony. Doc. 28 at 5–6. But that is always true in Rule 45 cases. Foreseeing that such analysis could take hold, Rule 45(f) warns that courts should not assume that "the issuing court is in a superior position to resolve subpoena-related motions," Fed. R. Civ. P. 45(f), Advisory Committee Notes (2013), and courts applying that rule routinely reject the notion that "greater familiarity" is a basis for transfer. *See, e.g., Garden City Emps.' Ret. Sys. v. Psychiatric Sols., Inc.*, No. 13-238, 2014 WL 272088, at *3 (E.D. Pa. Jan. 24, 2014); *Woods*, 303 F.R.D. at 408–09; *Inter-Am Dev. Bank*, 2016 WL 576982, at *8.

Second, the Transfer Order relies on Plaintiffs' use of the subpoena for publicity and harassment as a factor justifying transfer because the California court "has had the opportunity to observe how the parties and their counsel have conducted themselves." Doc. 28 at 7. But this gets it backwards. Harassment is a form of undue burden, and "[t]he court for the district *where compliance is required* must enforce th[e] duty" to "avoid imposing undue burden." Fed. R. Civ. P. 45(d)(1). Moreover, if harassment and publicity by the subpoenaing party are enough to justify

transfer, then it will only provide an incentive for the subpoenaing party to engage in such abuse, as the party would always prefer the forum in which it chose to file a lawsuit. In all events, harassment of high-ranking officials with discovery is not exceptional—it is one consideration underpinning the apex doctrine. *See K.C.R. v. Cty. of Los Angeles*, No. CV 13-3806, 2014 WL 3434257, *3 (C.D. Cal. July 11, 2014) ("Courts have often observed that discovery seeking the deposition of high-level executives (so-called 'apex' depositions) creates 'a tremendous potential for abuse or harassment'…." (quoting *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 282 F.R.D. 259, 263 (N.D. Cal. 2012))).

Third, the Transfer Order relies on the purported need to determine whether the subpoena is outside of the scope of the discovery topics permitted by the California court. Doc. 28 at 7-8. But determining the applicability of the apex doctrine will always involve discerning whether a proposed deposition falls within the bounds of relevant discovery, so there is nothing exceptional there.

Fourth, the Transfer Order also points to the need to interpret the California court's (1) initial discovery order that said no deposition of the Secretary was yet permitted, *Sweet* Doc. 146, and (2) three sentences in a later order explaining that the court no longer had jurisdiction over Secretary DeVos after she resigned, *Sweet* Doc. 172. Doc. 28 at 8, 10. But neither order requires any interpretation. The first order decided nothing. The second order simply applied Rule 45, which points right

back to the Southern District of Florida. There is no dispute that the California court has not ruled on the permissibility of Secretary DeVos's deposition. Doc. 24 at 6 (Plaintiffs admitting that they "nowhere contend that [the California court] has *already* ruled on the applicability of the apex doctrine to Ms. DeVos") (emphasis added). Exceptional circumstances justifying transfer are found when a court "has *already* ruled on the issues, not if it might or will rule on them in the future." *Woods*, 303 F.R.D. at 408 (emphasis in original).

4. The Transfer Order states that ruling on the Motion to Quash would upset the "short discovery window" in the *Sweet* Litigation. Doc. 28 at 8–9. Yet the Motion to Quash was fully briefed on March 1, 2021, and the District Court failed to rule for five weeks. In any event, the short discovery window has lengthened substantially, at Plaintiffs' request. Discovery will now extend at least through May 20, 2021. *Sweet* Docs 194, 195.

Because there are no exceptional circumstances justifying transfer of the Motion to Quash, there was no need to conduct the balancing that is the next step in the analysis. *Woods*, 303 F.R.D. at 407. But the Transfer Order also misapplies that step by improperly discounting the burdens on Secretary DeVos. The Transfer Order primarily relies on the availability of remote appearances in the California court to discount any burden of transfer. Doc. 28 at 11–12. But such electronic appearances are always available, and it is equally true that Plaintiffs can appear

remotely in the Florida court. Moreover, such remote appearances do not alleviate the expense and burden of supplemental briefing in the California court (which has now been ordered, as predicted by Secretary DeVos in her opposition, Doc. 19 at 17) and of the possible need to use additional counsel.

Because no exceptional circumstances exist, the District Court did not have the power to transfer and "must" hear the Motion to Quash. Fed. R. Civ. P. 45(d)(1), (d)(3)(A). This Court should issue a writ requiring the District Court to reverse the Transfer Order and deny transfer.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN REFUSING TO ENFORCE RULE 45'S DUTY TO AVOID UNDUE BURDEN.

The party issuing a subpoena must avoid "imposing undue burden or expense on a person subject to the subpoena," and the "court for the district where compliance is required ***must*** enforce this duty" and "***must quash*** or modify a subpoena that … subjects a person to undue burden." Fed. R. Civ. P. 45(c)(1)(A), (d)(1), (d)(3)(A)(iv) (emphasis added). Because the subpoena here plainly runs afoul of the doctrines preventing depositions of Cabinet officials, it imposes an undue burden. Accordingly, the District Court was required to enforce the duty to avoid undue burden but failed to do so, even after the Motion to Quash was fully briefed and pending for over a month.

The *Sweet* Plaintiffs have explained that the purpose of the proposed deposition is to probe Secretary DeVos' mental processes regarding the formation

of government policy while she served in the Cabinet.[8] *See, e.g.*, Doc. 23 at 19 (seeking "first-hand knowledge regarding the reasons put forth for ED's decision"); *id.* at 27 (seeking testimony on "[t]hen-Secretary DeVos's apparent directive of speed over substance"); Doc. 23-3 at 2, 3 (seeking to question Secretary DeVos on "the ***real*** reasons for the delay" and about her alleged "hostility to the borrower defense program").[9] Longstanding precedent prohibits such discovery.

In *Morgan*, the Supreme Court addressed the appropriateness of a deposition during which the Secretary of Agriculture was "questioned at length regarding the process by which he reached the conclusions of his order, including the manner and extent of his study of the record and his consultation with subordinates." 313 U.S. at 421-22. The Court held that "the Secretary should never have been subjected to this examination" because it is "not the function of the court to probe the mental processes of the Secretary." *Id.* The Supreme Court reaffirmed this principle just three years ago, when the Solicitor General sought, and the Court granted, an extraordinary stay of a district court's order permitting the deposition of the

[8] The Plaintiffs have not demonstrated Secretary DeVos actually possesses any of the information they seek.

[9] Depositions of other officials in this case have betrayed Plaintiffs' determination to probe the Secretary's mental processes. *See, e.g.*, Doc. 1-2 at 78:20-79:16 ("What caused Secretary DeVos's extreme displeasure?"), 227:21-230:7 ("Have you ever heard Ms. DeVos in your private meetings with her express these same sentiments?"); Doc. 1-4 at 69:20-70:4 ("After [the Secretary] signed this document, did you talk to her about her extreme displeasure?").

Secretary of Commerce—a deposition that the plaintiffs claimed they needed for the very same reasons the Plaintiffs claim here (alleged agency pretext). *See* Renewed Application for a Stay at 29-32, *In re Dep't of Commerce*, 139 S. Ct. 16 (2018) (No. 18A375) (citing *Morgan* and arguing that "in a challenge to an agency decision, it is 'not the function of the court to probe the mental processes of the Secretary'"); *In re Dep't of Commerce*, 139 S. Ct. at 16-17 (granting stay of order requiring deposition of Cabinet Secretary); *Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2574 (2019) (noting that even where extra-record discovery was justified in APA challenge, it "did not include the deposition of the Secretary"). The Plaintiffs cannot identify a single case that has departed from this bedrock rule for Cabinet secretaries.

Far from permitting such depositions, courts have routinely applied *Morgan* more broadly—in what is now known as the "apex doctrine"—to prevent depositions of high-level officials. *See, e.g.*, *Jackson*, 624 F.3d at 1372-73; *In re United States (Kessler)*, 985 F.2d 510, 512 (11th Cir. 1993).[10]

[10] *See also A.R. v. Dudek*, No. 12-60460, 2016 WL 3753706, at *2 (S.D. Fla. Apr. 8, 2016); *In re McCarthy*, 636 F. App'x 142, 145 (4th Cir. 2015); *Lederman v. N.Y.C. Dep't of Parks & Recreation*, 731 F.3d 199, 203-04 (2d Cir. 2013); *Spadaro v. City of Miramar*, No. 11-61607, 2012 WL 3614202, at *4 (S.D. Fla. Aug. 21, 2012); *City of Fort Lauderdale v. Scott*, No. 10-61122-CIV, 2012 WL 760743, at *2 (S.D. Fla. Mar. 7, 2012); *Hernandez v. Tex. Dep't of Aging & Disability Servs.*, No. 11-856, 2011 WL 6300852, at *4 (W.D. Tex. Dec. 16, 2011); *RI, Inc. v. Gardner*, No. 10-1795, 2011 WL 4974834, at *3 (E.D.N.Y. Aug. 11, 2011); *Murray v. U.S. Dep't of Treasury*, No. 08-15147, 2010 WL 1980850, at *6 (E.D. Mich. May 18, 2010); *Bogan v. City of Boston*, 489 F.3d 417, 423 (1st Cir. 2007); *Holder*,

Further, courts of appeals, including this one, have repeatedly granted writs of mandamus to prevent such testimony from being compelled. *See, e.g.*, *In re Commodity Future Trading Comm'n*, 941 F.3d 869, 874 (7th Cir. 2019); *In re McCarthy*, 636 F. App'x 142, 145 (4th Cir. 2015); *Jackson*, 624 F.3d at 1369-70; *In re Cheney*, 544 F.3d 311, 314 (D.C. Cir. 2008); *In re United States (Holder)*, 197 F.3d 310, 316 (8th Cir. 1999); *In re FDIC*, 58 F.3d 1055, 1057 (5th Cir. 1995); *Kessler*, 985 F.2d at 513.

Three separate rationales underlie the protection. First, it threatens the separation of powers "between two coequal branches of government" to allow parties litigating against federal agencies to ascertain the thoughts and mental processes by which high-ranking agency officials exercise official discretion. *See Jackson*, 624 F.3d at 1372; *see Morgan*, 313 U.S. at 422 ("Just as a judge cannot be subjected to such a scrutiny, ... so the integrity of the administrative process must be equally respected."); *Marllantas, Inc. v. Rodriguez*, 806 F. App'x 864, 867 (11th Cir. 2020) ("[J]udicial inquiry into executive motivation represents a substantial intrusion into the workings of another Branch of Government[.]").

Second, "subjecting officials to interrogation about how they reached particular decisions would impair that decision-making process by making officials

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197 F.3d at 316; *Franklin Sav. Ass'n v. Ryan*, 922 F.2d 209, 211 (4th Cir. 1991); *Simplex Time Recorder Co. v. Sec'y of Labor*, 766 F.2d 575, 586-87 (D.C. Cir. 1985); *Warren Bank v. Camp*, 396 F.2d 52, 56 (6th Cir. 1968).

less willing to explore and discuss all available options, no matter how controversial." *Walker v. NCNB Nat'l Bank of Fla.*, 810 F. Supp. 11, 12 (D.D.C. 1993); *see also Sykes v. Brown*, 90 F.R.D. 77, 78 (E.D. Pa. 1981) ("Should the agency head be subject to deposition in every resulting case … the decision may be his last."); *Lederman*, 731 F.3d at 203.

Third, allowing depositions of high-ranking Government officials as a matter of course would create "a tremendous potential for abuse or harassment[,]" *K.C.R.*, 2014 WL 3434257, *3 (quoting *Apple, Inc.*, 282 F.R.D. at 263), and "would likely discourage [people] from accepting positions as public servants," *United States v. Wal-Mart Stores, Inc.*, No. 01-152, 2002 WL 562301, at *3 (D. Md. Mar. 29, 2002). *See also Gray v. Kohl*, No. 07-10024, 2008 WL 1803643, at *1 (S.D. Fla. Apr. 21, 2008) ("[Courts] generally restrict parties from deposing high ranking officials lacking personal knowledge of the issues being litigated because they are vulnerable to numerous, repetitive, harassing, and abusive depositions."). As this case shows, for Secretary DeVos, these concerns became real, not theoretical, the moment she left office. And if the courts fail to act, more discovery abuse is surely on her horizon. As discussed above, many cases remain pending from Secretary DeVos's tenure.

As various courts have recognized, these rationales apply fully to high-ranking public officials after they leave office with respect to depositions about their

decisionmaking while in office. *See, e.g.*, *Lederman*, 731 F.3d at 203-04; *Raymond v. City of New York*, No. 15-6885, 2020 WL 1067482, at *5 (S.D.N.Y. Mar. 5, 2020); *Cruz v. Green*, No. 18-60995, 2019 WL5208913, at *2-4 (S.D. Fla. Feb. 7, 2019); *Buckler v. Israel*, No. 13-62074, 2014 WL 7777678, at *1 (S.D. Fla. Nov. 13, 2014); *City of Fort Lauderdale v. Scott*, No. 10-61122-CIV, 2012 WL 760743, at *2 (S.D. Fla. Mar. 7, 2012) (a contrary rule "would serve as a significant deterrent to qualified candidates for public service"); *Wal-Mart*, 2002 WL 562301, at *3, 5 ("[S]uch public servants should very well expect a mailbag full of deposition subpoenas on the day they depart office. If the immunity *Morgan* affords is to have any meaning, the protections must continue upon the official's departure from public service."); *Fed. Deposit Ins. Corp. v. Galan-Alvarez*, No. 1:15-MC-00752 (CRC), 2015 WL 5602342, at *4 (D.D.C. Sept. 24, 2015) ("[t]he integrity of administrative proceedings and the underlying decisionmaking process of agency officials are [*sic*] just as important where the official to be questioned no longer serves in the same position").

Accordingly, even if *Morgan's* blanket prohibition did not apply to Secretary DeVos, Plaintiffs would still have to show that she possesses information that is essential and not obtainable from another source. *Kessler*, 985 F.2d at 512. Plaintiffs have treated the deposition of a Cabinet official not as the last resort, but as a high-profile end in itself. Plaintiffs have not taken a 30(b)(6) deposition,

exhausted available depositions or interrogatories, or propounded a single request for admission. *Kessler*, 985 F.2d at 512 (quashing deposition subpoena where "[t]he record discloses that testimony was available from alternate witnesses"); *City of Fort Lauderdale*, 2012 WL 760743, at *4 (denying deposition because plaintiffs "never attempted to obtain the information sought through a Rule 30(b)(6) deposition of the City's representative"). *See also* Doc. 1 at 9-10, 17-20 (detailing Plaintiffs' rejection of the Department's offers to "explor[e] other, less intrusive means of providing your requested discovery"). Indeed, two days after claiming to the Florida court that *only* Secretary DeVos's testimony has "the answer to what was 'really going on'" with borrower-defense decisions, Doc. 23 at 19, Plaintiffs told the California court that "the reason why we are *seeking documents* is because discovery so far hasn't been able to clearly answer … how and why it came to be that the Department of Education stopped issuing Borrower Defense decisions." Doc. 27-1 at 3:16-20. This failure to exhaust is dispositive. *See Sun Cap. Partners, Inc. v. Twin City Fire Ins. Co.*, 310 F.R.D. 523, 527 (S.D. Fla. 2015).

Accordingly, given that the District Court "must quash … a subpoena that … subjects a person to undue burden," Fed. R. Civ. P. 45(d)(3)(A)(iv), and that the *Morgan* doctrine prohibits the deposition at issue here, this Court should issue a writ of mandamus requiring the District Court to perform its clear duty and quash the subpoena.

CONCLUSION

Secretary DeVos respectfully requests that this Court issue a writ of mandamus requiring the District Court to reverse the Transfer Order, deny transfer, and grant the Motion to Quash. Secretary DeVos also respectfully moves for an immediate stay of the Transfer Order, and of her deadline for objections, to permit this Court to consider and dispose of this Petition.

Dated: April 15, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY under Federal Rule of Appellate Procedure 32(g)(1) that this petition complies with the word limit set forth in Federal Rule of Appellate Procedure 21(d)(1) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), that it contains 7,791 words.

This petition complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font.

By: /s/ *Jesse Panuccio*
Jesse Panuccio

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on April 15, 2021, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. Service has been accomplished via e-mail and third-party commercial carrier to the following counsel and the District Judge:

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Exhibit A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-MC-14073-MARTINEZ/MAYNARD

IN RE SUBPOENA SERVED
ON ELISABETH DEVOS
_____/

ORDER GRANTING PLAINTIFFS' EXPEDITED MOTION TO TRANSFER ELISABETH DEVOS'S MOTION TO QUASH TO THE NORTHERN DISTRICT OF CALIFORNIA (DE 12)

THIS CAUSE comes before this Court upon an Order of Reference, DE 4, and the above Motion. The undersigned has carefully reviewed the Motion, Responses in Opposition, DE 18, 19, and Reply, DE 24, and is otherwise fully advised in the premises. For the reasons stated below, the undersigned finds that exceptional circumstances exist under Federal Rule of Civil Procedure 45(f) to warrant transfer of the pending Motion to Quash Rule 45 Deposition Subpoena, DE 1.[1]

BACKGROUND

Former Secretary Elisabeth DeVos and the United States Department of Education ("the DOE") (collectively, "Movants") jointly filed, in the Southern District of Florida, a motion to quash a deposition subpoena issued to Ms. DeVos by the Plaintiffs in the underlying case *Sweet, et al. v. Rosenfelt, et al.*, No. 3:19-cv-03674-WHA.[2] The *Sweet* case is a class action currently pending in the Northern District of California. The Plaintiffs brought the class action under the Administrative Procedures Act, alleging that the Secretary and the DOE unreasonably delayed in

[1] The issue of whether to transfer a subpoena-related motion to the court that has jurisdiction over the underlying case is a non-dispositive matter. *Edwards v. Maxwell*, 2016 WL 7413505, at *1 (S.D. Fla. Dec. 22, 2016). *See also Jordan v. Comm'r, Mississippi Dep't of Corr.*, 947 F.3d 1322, 1327 (11th Cir. 2020).

[2] Although Ms. DeVos and the DOE are the respondents in the motion to transfer, they are the movants in the motion to quash and so are referred to as "Movants" in this Order.

issuing a decision on borrower defense applications.[3] DE 12 at 5. Ms. DeVos was previously a named defendant in that case, having been sued in her official capacity, but she has since resigned from her position as Secretary. The Plaintiffs issued their deposition subpoena following her resignation.[4] DE 1 at 16; DE 1-1 at 2. The subpoena's place of compliance is Vero Beach, Florida where Ms. DeVos currently resides. DE 1-1 at 2; DE 12-4.

Plaintiffs have now moved to have the motion to quash transferred to the Northern District of California, arguing the existence of exceptional circumstances to warrant a transfer. According to Plaintiffs, deciding the motion to quash separately from the underlying case would risk disrupting the *Sweet* litigation in California. DE 12 at 10. Plaintiffs argue that exceptional circumstances exist because the case is a complex class action that has been pending for over a year and a half, the issuing court is more familiar with the case, the arguments raised in the motion to quash are intertwined with issues that have already been presented to the issuing court, and the issuing court has already made related discovery rulings including finding Ms. Devos' emails relevant to the case. *Id*. at 11. Plaintiffs also argue that deciding the motion to quash in this Court would risk inconsistent rulings as District Judge William Alsup—the judge presiding over the *Sweet* litigation—has previously considered arguments about whether Ms. DeVos could be deposed. DE 12 at 11-12. According to Plaintiffs, deciding the motion to quash would require this Court to interpret two of Judge Alsup's prior orders: 1) an order setting the scope of a limited discovery period; and 2) an order advising Plaintiffs they must subpoena Ms. DeVos as a private citizen if they wish to dispose her now that she is no longer the DOE Secretary. *Id*. at 14-15; DE

[3] The "borrower defense" allows the Secretary to cancel certain student federal loan debt. *Sweet v. DeVos*, No. C 19-03674 WHA, 2020 WL 4876897, at *1 (N.D. Cal. May 22, 2020).

[4] Ms. DeVos is being represented in her official capacity by the United States Department of Justice, and in her personal capacity by private counsel. DE 18 at 5 fn 1.

12-3. Plaintiffs further argue that transferring the motion would not impose any burden on Ms. DeVos or her counsel for two reasons. First, because court proceedings have been remote, Ms. DeVos would not have to travel in order to litigate the motion to quash if the motion were transferred to Judge Alsup. DE 12 at 15. Second, Ms. DeVos' government counsel has been involved in the underlying litigation since June 2019 and her private attorney's law firm has an office in San Francisco, where the *Sweet* case is being litigated. DE 12 at 17.

Ms. DeVos and the DOE both oppose the transfer of their motion to quash, arguing that Plaintiffs have failed to demonstrate the exceptional circumstances required for transfer. DE 18 at 11; DE 19 at 13. The DOE contends that a decision by this Court on the motion to quash will not disrupt the *Sweet* case because the question of whether Ms. DeVos should be deposed is independent of the other discovery issues pending in that litigation. DE 18 at 13. The DOE further argues that this Court is capable of deciding the issues presented in Ms. DeVos' motion to quash. *Id*. at 15. In her Response, Ms. DeVos disputes Plaintiffs' claim that Judge Alsup has already addressed issues raised in her the motion to quash. DE 19 at 13-14. She further argues that Plaintiffs' other arguments for transfer do not constitute exceptional circumstances as contemplated by Fed.R.Civ.P. 45(f). *Id*. at 15. Ms. DeVos also contends that transferring the motion to quash will increase her costs and burden of litigation. *Id*. at 22. Movants argue that the law favors local resolution of motions to quash, a transfer of the motion would burden Ms. DeVos who is not a party to the action, and the remote nature of the proceeding does not change the Rule 45(f) analysis. They say granting the motion to transfer would set a dangerous precedent whereby former Cabinet officials would be forced to defend against subpoenas in whatever district a lawsuit

against their former agency is pending. This would undermine the Apex Doctrine which seeks to protect high-ranking officials from intrusive or burdensome discovery. [5]

DISCUSSION

Federal Rule of Civil Procedure 45 requires subpoena-related motions to be filed in the court where compliance with the subpoena is required. Fed.R.Civ.P. 4(c), (d)(2)(B)(i), and (d)(3)(A); *The Dispatch Printing Co. v. Zuckerman*, 2016 WL 335753, at *2 (S.D. Fla. Jan. 27, 2016). If the court where compliance is required is not the court that issued the subpoena however, Rule 45(f) allows the compliance court to transfer the motion to the issuing court "if the person subject to the subpoena consents or if the court finds exceptional circumstances." Fed. R. Civ. P. 45(f). Because Ms. DeVos does not consent to transfer, the undersigned must determine whether exceptional circumstances exist to warrant transfer of the motion to quash to the issuing court.

Although Rule 45(f) does not define what qualifies as "exceptional circumstances," the Advisory Committee Notes provide the following considerations:

> In the absence of consent, the court may transfer in exceptional circumstances, and the proponent of transfer bears the burden of showing that such circumstances are present. The prime concern should be avoiding burdens on local nonparties subject to subpoenas, and it should not be assumed that the issuing court is in a superior position to resolve subpoena-related motions. In some circumstances, however, transfer may be warranted in order to avoid disrupting the issuing court's management of the underlying litigation, as when that court has already ruled on issues presented by the motion or the same issues are likely to arise in discovery in many districts. Transfer is appropriate only if such interests outweigh the interests of the nonparty served with the subpoena in obtaining local resolution of the motion.

Advisory Committee Notes to Fed. R. Civ. P. 45(f)'s 2013 Amendment.

[5] The Apex Doctrine is the principle that "[h]igh-ranking government officials 'should not, absent extraordinary circumstances, be called to testify regarding their reasons for taking official actions.'" *Fed. Deposit Ins. Corp. v. Galan-Alvarez*, 2015 WL 5602342, at *3 (D.D.C. Sept. 4, 2015). It exempts such officials from testifying if they lack unique, personal knowledge about the matters in dispute and the information can be obtained from a different source. *Id*. at *1.

Courts have also found exceptional circumstances warranting transfer "when transferring the matter is in 'the interests of judicial economy and avoiding inconsistent results.'" *Wultz v. Bank of China, Ltd*, 304 F.R.D. 38, 46 (D.D.C. 2014) (quoting *F.T.C. v. A+ Fin. Ctr., LLC*, 2013 WL 6388539, at *3 (S.D. Ohio Dec. 6, 2013)). Factors to consider "include the complexity, procedural posture, duration of pendency, and the nature of the issues pending before, or already resolved by, the issuing court in the underlying litigation." *Judicial Watch, Inc. v. Valle Del Sol, Inc.*, 307 F.R.D. 30, 34 (D.D.C. 2014). In some cases, the issuing court will be in a better position to rule on a subpoena-related motion because of the court's "familiarity with the full scope of issues involved as well as any implications the resolution of the motion will have on the underlying litigation." *Wultz*, 304 F.R.D. at 46.

Here, the relevant factors warrant transfer of the motion to quash to the Northern District of California. To start, the *Sweet* court is in a better position than this Court to address three arguments Movants make in their motion to quash. First, Movants argue that the discovery Plaintiffs seek from Ms. DeVos is both non-essential and irrelevant to Plaintiffs' case. DE 1 at 29-32. Plaintiffs, on the other hand, contend that Ms. DeVos has unique knowledge about issues at the heart of their case. DE 12 at 14. Where a motion to quash raises questions about the relevance of the discovery sought, courts have found this to weigh in favor of transfer since the issuing court has a deeper understanding of the facts and issues in the case. *See e.g. Flynn v. FCA US LLC*, 216 F. Supp. 3d 44, 47 (D.D.C. 2016) ("Because the Judge and the Magistrate Judge involved in the underlying case are knee-deep in the nuances of the underlying litigation, they are in a much better position than this Court to evaluate relevance."); *Patriot Nat. Ins. Grp. v. Oriska Ins. Co.*, 973 F. Supp. 2d 173, 176 (N.D.N.Y. 2013) ("[T[he relevance argument advanced emphasizes the need for the court where the underlying matter lies to decide the matter."). Determining whether Ms.

DeVos has information relevant to the underlying litigation is a question better suited for Judge Alsup, who is significantly more familiar with the issues in dispute. This question of relevance is one key difference between this case and *Federal Deposit Insurance Corporation v. Galan-Alvarez* on which Movants rely. *Galan-Alvarez*, 2015 WL 5602342. In *Galan-Alvarez*, a negligence action, the plaintiff moved to quash subpoenas issued to high-ranking officials under the Apex Doctrine. *Id*. at *1. The defendants opposed the motion to quash and moved to have the motion to quash transferred from the District of Columbia to the District of Puerto Rico where the underlying case was being litigated. *Id*. at *2. The court denied the request to transfer on the ground that the legal and factual issues presented in the motion to quash did not require deep familiarity with the underlying case. *Id*. at *1. Rather, the motion to quash presented "a legal question severable from the merits of the underlying litigation." *Id*. at *3. In this case, however, the Court is being asked to do more than determine whether the Apex Doctrine protects Ms. DeVos from deposition. It appears from Movants' argument that this Court must also determine if what Ms. DeVos has to say is even relevant to the dispute. The court in *Galan-Alvarez* noted the difficulties that presents. *Id*. at *3 ("Ruling on the subpoenaed documents' relevance would have required the Court to delve into the intricacies of the underlying dispute. Given the close relationship between the motion to quash and the merits of the complex underlying dispute, the issuing court was in a better position to rule on the motion."). Unlike in *Galan-Alvarez*, the motion to quash in this case is not easily separable from the merits of the underlying litigation. Because of his familiarity as the presiding judge, Judge Alsup is better positioned to assess the value of Ms. DeVos' testimony to the Plaintiffs' case. *CFA Inst. v. Am. Soc'y of Pension Pros. & Actuaries*, 2020 WL 1695050, at *2 (D.D.C. Apr. 7, 2020).

Second, Movants' argument that Plaintiffs are using this deposition subpoena for publicity or to harass Ms. DeVos is another factor weighing in favor of transfer. DE 1 at 25. When this kind of allegation is made, transfer to the issuing court is often appropriate because that judge has had the opportunity to observe how the parties and their counsel have conducted themselves over the course of the litigation. *Flynn,* 216 F. Supp. 3d at 48; *Lipman v. Antoon*, 284 F. Supp. 3d 8, 14 (D.D.C. 2018). The issuing court is therefore in the best position to determine whether a subpoena is being used for improper means. Such is the case here. The undersigned is not familiar with the parties or their history and cannot say based only on the pleadings in this case whether Plaintiffs are pursuing this deposition solely for improper means as Movants allege.

Third, Movants' argument that Ms. DeVos' deposition is outside the scope of the limited discovery topics allowed by the *Sweet* court weighs heavily in favor of transfer. On October 19, 2020, Judge Alsup entered an order identifying three specific areas in which Plaintiffs were permitted to conduct expedited discovery:

> 1. The development and use of the form denial letters…; 2. The extent to which the difficulty of reviewing borrower defense applications actually caused or justified the Secretary's eighteen-month delay; 3. The extent to which the Secretary has denied applications of students who have attended schools subject to findings of misconduct by the Secretary or any other state or federal body or agency, and the rationale underlying those denials.

See DE 12-1 at 17. Whether Ms. DeVos' deposition falls within one of those three areas is a question that requires this Court to interpret Judge Alsup's prior order, an exercise best left to the court that issued the order. *In re Managed Care Litig.*, 2020 WL 6044557, at *5 (D. Or. Oct. 13, 2020) (finding that "Judge Moreno or the SDFL would be in the best position to interpret and rule on the effect of Judge Moreno's Stipulated Order."); *E4 Strategic Sols., Inc. v. Pebble Ltd. P'ship*, 2015 WL 12746706, at *4 (C.D. Cal. Oct. 23, 2015) (finding that the issuing judge was in the "best

position to interpret his prior orders and to determine the scope of non-party discovery in the Underlying Action."). Since Judge Alsup is the one who set the scope of discovery, he is best suited to determine whether the information Plaintiffs seek falls outside that scope.

This also applies to a second order in the underlying action. In response to a letter from Plaintiffs requesting permission to depose Ms. DeVos following her resignation, Judge Alsup issued the following short order:

> The Court appreciates class counsel's request to depose Elisabeth DeVos, but the prior order restricted deposition of "*the Secretary*" (Dkt. No. 146) (emphasis added). It imposed no such restriction regarding Citizen DeVos. Now, given her new status, if counsel pursues such deposition, it must subpoena Ms. DeVos. For that matter, the Department of Education shall please identify our new defendant. The Clerk shall then please update the caption.

DE 12-3. Plaintiffs argue that this order suggests the *Sweet* court will no longer require a finding of "extraordinary circumstances" for Plaintiffs to depose Ms. DeVos since she is no longer Secretary of the DOE. DE 24 at 6. Ms. DeVos contends that this order simply instructed Plaintiffs that they would have to proceed under Rule 45 to issue a subpoena since Ms. DeVos, in her personal capacity, is a not a party to the underlying litigation. DE 19 at 14-15. The undersigned finds that Judge Alsup, and not this Court, should resolve this dispute.

Another factor justifying transfer is that this Court's ruling on the motion to quash would greatly risk disrupting the issuing court's procedural management of the underlying litigation. In the October 19th Order Judge Alsup gave Plaintiffs until December 24, 2020 to take limited discovery. DE 12-1 at 17-18. He emphasized that discovery should move quickly. *See id*. at 16 ("In sum, we are faced with a strong showing of agency pretext and the class has been prejudiced by delay enough. We need to know what is really going on. This compels expedited discovery."). Courts have found that "[t]ransfer can be appropriate when it would avoid interference with a time-sensitive discovery schedule issued in the underlying action." *Lipman,* 284 F. Supp. 3d at 12

(quoting *Duck v. United States Sec. & Exch. Comm'n*, 317 F.R.D. 321, 325 (D.D.C. 2016) (internal quotations omitted); *Flynn*, 216 F. Supp. 3d at 48 ("The time-sensitive nature of discovery and the specific discovery procedures implemented in the underlying litigation weigh in favor of transferring the instant motion to quash."). In *Lipman*, the district court held that ruling on a subpoena-related motion two months from the close of discovery in the underlying litigation was a factor weighing in favor of transfer. *Lipman*, 284 F. Supp. at 12. Similarly, in *Flynn*, the district court there found that refusing to transfer the motion to quash approximately six weeks before the close of discovery risked disrupting the well-managed, streamlined discovery procedure in the underlying case. *Flynn*, 216 F. Supp. 3d at 48. Here, the short discovery window allowed by the issuing court likewise weighs in favor of transfer. Discovery in the *Sweet* case has been extended into April 2021. *See* DE 27-1 at 33. Any ruling issued by this Court on the motion to quash at this stage of the discovery period would likely interfere with Judge Alsup's management of the case. Further, if either party moved for reconsideration of this Court's ruling, that would present an additional delay, further disrupting the need for expediency in the case.

A ruling by this Court on the motion to quash would also risk disrupting the *Sweet* court's substantive management of the case. One specific situation which may create an exceptional circumstance is "when the issuing court has already ruled on issues presented by the [subpoena–related] motion." *Inter-Am. Dev. Bank v. Venti S.A.*, 2016 WL 5786982, at *3 (S.D. Fla. Oct. 4, 2016) (citation and internal quotations omitted); *In re Nonparty Subpoenas to PPG Indus., Inc.*, 2020 WL 1445844, at *2 (W.D. Pa. Mar. 25, 2020) ("District courts have found that … the risk of inconsistent rulings present exceptional circumstances warranting transfer to the issuing court."). Ms. DeVos and the DOE argue that situation is not present here because the issuing court has never ruled on the Plaintiffs' request to depose Ms. DeVos. DE 18 at 12-13; DE 19 at 13-15. In support,

they rely on *Woods ex rel. U.S. v. SouthernCare, Inc*., 303 F.R.D. 405, 408 (N.D. Ala. 2014). In *Woods*, the court held that the risk of future overlapping rulings, standing alone, was not an exceptional circumstance warranting transfer. *Id*. The court reasoned: "This distinction is consistent with the requirement of the rule—that exceptional (i.e. unusual) circumstances exist. Most nonparty subpoenas will raise issues that are related to the underlying litigation and that are somewhat likely to require future resolution by the issuing court. If judicial efficiency is the primary concern, transfer would almost always be appropriate in order to avoid multiple rulings on the same issues."

Here, it is not just the risk of overlapping inconsistent decisions in the future that provides exceptional circumstances; it is the fact that Judge Alsup has already begun to consider the possibility of Ms. DeVos being deposed and has already started setting some chronological parameters around that request. In his October 19th Order, Judge Alsup wrote, "at *this time*, given '[h]eads of government agencies are not normally subject to deposition,' class counsel *may not yet* depose the Secretary… Extraordinary circumstances, however … may justify such a deposition *at a later date*." DE 12-1 at 17 (emphasis added). Thus, Judge Alsup has not said "no" to Plaintiffs request to depose Ms. DeVos, but instead has said "not yet." Further, Judge Alsup has already ruled that Ms. DeVos' emails must be produced. *See* DE 24 at 6 (explaining that the *Sweet* court ordered the DOE to produce Ms. DeVos' relevant emails). *See also Valle del Sol, Inc. v. Kobach*, 2014 WL 3818490, at *3 (D. Kan. Aug. 4, 2014) (where the motion to compel raised issues that were intertwined with issues already decided by the issuing court, transfer was necessary "to ensure avoidance of inconsistent discovery rulings in that case"). For the undersigned to inject a potentially conflicting ruling into the case at this point creates a real potential for disruption of the

underlying litigation. Accordingly, the undersigned finds that exceptional circumstances exist which permit transfer pursuant to Rule 45.

Having found exceptional circumstances, this Court must still weigh the burden on Ms. DeVos because the burden on local non-parties is the primary concern. Most of Judge Alsup's civil proceedings are being conducted remotely, as they are in this Court. There is therefore no practical difference between Ms. DeVos appearing before this Court or appearing before the Northern District of California. In fact, the discovery hearing held in the underlying case on February 24th was telephonic. DE 27-1. Courts have found the option of a remote appearance mitigates the burden imposed on the subpoenaed non-party by a transfer because it minimizes, if not eliminates, any travel costs. Thus, transfer is often appropriate in these cases. *United States v. 3M Co.*, 2020 WL 6587052, at *3 (S.D. Miss. Nov. 10, 2020); *In re Nonparty Subpoenas to PPG Indus., Inc.*, 2020 WL 1445844, at *4 (W.D. Pa. Mar. 25, 2020); *Exist, Inc. v. Shoreline Wear, Inc.*, 2015 WL 13694080, at *3 (S.D. Fla. Oct. 16, 2015) ("[B]ecause the Advisory Committee notes to Rule 45 encourage the court to permit telephonic participation after transfer to minimize travel costs to non-parties in these situations, the Court finds that any additional burden on [the subpoenaed non-party] associated with pursuing its motion in California will be minimal."). Moreover, Ms. DeVos' argument that a transfer order by this Court would increase the cost of litigation for her is unpersuasive. Any costs incurred by the transfer of the motion to quash are outweighed by the factors discussed above. *See*, *e.g.*, *Moon Mountain Farms, LLC v. Rural Cmty. Ins. Co.*, 301 F.R.D. 426, 430 (N.D. Cal. 2014) (finding that costs to the subpoenaed party from a transfer were outweighed by the importance of judicial economy and the consistent management of the underlying case); *Wultz v. Bank of China, Ltd*, 304 F.R.D. 38, 45 (D.D.C. 2014) (finding the cost of relitigating issues in a new district did not outweigh the extraordinary circumstances

favoring transfer, particularly when transfer would only require few modifications to the written submissions).

CONCLUSION

Accordingly, Plaintiffs' Expedited Motion to Transfer Elisabeth DeVos's Motion to Quash to the Northern District of California (DE 12) is **GRANTED**. The Clerk of Court is directed to transfer this case to the United States District Court for the Northern District of California for consideration of the Motion to Quash Rule 45 Deposition Subpoena (DE 1) in the pending case *Sweet, et al. v. Rosenfelt, et al.*, Case No. 3:19-cv-03674-WHA (N.D. Cal.).

DONE AND ORDERED in Chambers at Fort Pierce, Florida, this 7th day of April, 2021.

SHANIEK M. MAYNARD
UNITED STATES MAGISTRATE JUDGE

Exhibit B

UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-MC-14073-MARTINEZ/MAYNARD

IN RE SUBPOENA SERVED ON
ELISABETH DEVOS
_____/

ORDER

THIS MATTER is before the Court upon Elisabeth Devos's Expedited Motion to Stay the Magistrate Judge's Order on the Expedited Motion to Transfer ("Motion") (DE 30). Upon careful consideration, it is

ORDERED AND ADJUDGED that the Motion is **DENIED AS MOOT**.

The Clerk of Court has already transferred this matter electronically to the Northern District of California, as confirmed by the docket in this case. The electronic transfer is effective immediately. Accordingly, at this juncture, the Court does not possess jurisdiction to stay the transfer order. *See Forbes v. Lenox Fin. Mortg., LLC*, 2008 WL 11331979, at *2 (S.D. Fla. Sept. 10, 2008) ("Upon the physical transfer of the case file to the transferee forum, the transferor court is stripped of jurisdiction to review its transfer order.") (citing *In re Southwestern Mobile Homes, Inc*., 317 F.2d 65, 66 (5th Cir. 1963) (per curiam) (denying mandamus review of a transfer order, concluding that the transferor court, and appellate court, had lost jurisdiction where a formal order of transfer was entered in the transferor court, and the transferee court received and docketed the papers)).

In respect to a hasty transfer, litigants are not without remedies. *See generally Roofing & Sheet Metal Servs., Inc. v. La Quinta Motor Inns, Inc*., 689 F.2d 982, 985-990 (11th Cir. 1982). In this particular case, however, the Court has reviewed the record and given careful consideration to Movant's arguments. Applying the review standards of Rule 72(a), the Court agrees that "exceptional circumstances" exist here and warrant a transfer to the Northern District of California for all of the reasons articulated by Magistrate Maynard.

Put differently, although the transfer was effectuated prior to the objections period, the same result would follow—rendering Movant's procedural concern harmless.

DONE AND ORDERED in Chambers at Miami, Florida, this 12th day of April, 2021.

JOSE E. MARTINEZ
UNITED STATES DISTRICT JUDGE