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United States District Court
Northern District of California

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

In the Matter of a Subpoena to Testify at a
Deposition in a Civil Action addressed to
The Hon. Kirstjen Nielsen, former Secretary
of Homeland Security

Case No. [4:23-mc-80280-KAW](#)

**ORDER GRANTING IN PART
MOTION TO QUASH SUBPOENA**

Re: Dkt. No. 1

REDACTED VERSION

On October 23, 2023, Kirstjen Nielsen, former Secretary of the United States Department of Homeland Security, filed the instant motion to quash the deposition subpoena issued in *P.G. v. United States*, No. 21-cv-04457-KAW. Originally filed in the U.S. District Court for the Southern District of California, the motion to quash was transferred to this district on October 27, 2023, and related to the underlying case.

On November 30, 2023, the Court held a hearing, and, after consideration of the arguments made in the extensive briefing and at oral argument, for the reasons set forth below, GRANTS IN PART the motion to quash, and MODIFIES the subpoena to require that it proceed by written question.

I. BACKGROUND

A. Family Separation Policy

On April 8, 2018, then-Attorney General Jefferson Sessions announced a “Zero Tolerance Policy” directing United States Attorney’s Offices along the southwest border to prosecute certain immigration offenses. (*See Compl.*, PG Dkt. No. 1 ¶ 45.)¹ On April 23, 2018, the Policy was

¹ For ease of citation, documents filed on the docket in the underlying case, *P.G. v. United States*, No. 21-cv-04457-KAW, will be cited as “P.G. Dkt. No. ___”.

1 referred to then-Secretary of Homeland Security Kirstjen Nielsen. (Am. Resp. to Interrogatory No.
2 7, PG Dkt. No. 98-2 at 4.)

3 On April 24, 2018, Department of Homeland Security General Counsel John M. Mitnick
4 sent a memorandum to Secretary Nielsen, carbon copying her Chief of Staff, titled “Criminal
5 Prosecution of Aliens Who Entered Unlawfully: Legal Guidance on Potential Separation of
6 Family Members.” (Mitnick Memo, Decl. of David J. Carroll ISO Reply, “Carroll Reply Decl.,”
7 Dkt. No. 45-1 ¶ 5, Ex. 5 at 3.²) The first paragraph of the memo is as follows:

8 The Immigration and Nationality Act (“INA”) authorizes the
9 detention of aliens who have entered the United States unlawfully
10 until they can be removed from the United States.¹ Inadmissible
11 aliens, including those who illegally enter the United States, are
12 subject to removal and may also be subject to criminal penalties.² The
13 Secretary of Homeland Security has broad legal authorities to carry
14 out her responsibility to enforce the immigration laws.³ **DHS could
15 permissibly direct the separation of parents or legal guardians
16 and minors so that the parent or legal guardian can be prosecuted
17 pursuant to those authorities.**

18 (Mitnick Memo at 1) (emphasis added.) The second paragraph provides that, “Generally,
19 individuals who have crossed the border illegally are subject to criminal penalties.” (Mitnick
20 Memo at 2.) It then proceeds to list statutes under which undocumented individuals may be
21 prosecuted. *Id.* The third paragraph lists the three proposals that were being considered “in
22 coordination with the Department of Justice (“DOJ”) ... [to] increase prosecutions against aliens
23 who cross the border illegally.” *Id.* “The third proposal would seek to refer all adults who commit
24 immigration violations for prosecution, including adults who are apprehended as part of a family
25 unit.” *Id.* “In referring all adults for such criminal prosecutions, it would be legally permissible to
26 separate minors from adult family members or other unrelated accompanying adults.” *Id.*

27 On May 4, 2018, Secretary Nielsen signed the Referral Policy Memorandum, which
28 resulted in the separation of the immigrant parents and minor children under the auspices of
criminal prosecution pursuant to the Zero Tolerance Policy. (*See* Am. Resp. to Interrogatory No.
7, PG Dkt. No. 98-2 at 4.)

² The first two pages of the exhibit are the FOIA cover letter disclosing the memo, so the Mitnick Memo starts of page 3. All further citations to the memo will be to the internal pagination, such that references to page 1 will be the first page of the memo, rather than page 3 of the exhibit.

1 **B. Pertinent Factual Background**

2 Plaintiffs are three pairs of parents and children who fled violence in Central America to
3 seek asylum in the United States only to be separated at Arizona’s southern border in May 2018
4 pursuant to the Trump administration’s Zero Tolerance Policy (“Policy”). (*See* Compl., P.G. Dkt.
5 No. 1 (“PG Compl.”) at ¶¶ 3, 4, 10-12, 41-57.) Plaintiffs were separated for months, and they
6 were only reunited after the U.S. District Court for the Southern District of California found that
7 the Policy was unconstitutional and ordered the Government to reunify all separated family
8 members within thirty days. Order Granting Pls.’ Motion for Classwide Prelim. Inj., *Ms. L v. U.S.*
9 *Immigr. & Customs Enf’t* (“*Ms. L.*”), No. 3:18-cv-00428-DMS-MDD (S.D. Cal. June 26, 2018),
10 ECF No. 83 (“*Ms. L. Order*”). Plaintiffs filed suit seeking relief under the Federal Tort Claims
11 Act (“FTCA”) for the Government’s conduct. Plaintiffs’ lawsuit is one of many similar actions
12 brought by separated families, including two actions pending in the District of Arizona. *C.M. v.*
13 *United States*, No. 19-cv-05217-PHX-SRB (D. Ariz.); *A.P.F. v. United States*, No. 20-cv-00065-
14 PHX-SRB (D. Ariz.) (collectively “Arizona litigation”).

15 Plaintiffs allege that the Government adopted the Policy with the intent to inflict harm on
16 the parents and children it separated, hoping to deter would-be migrants by demonstrating that
17 families seeking asylum in the United States would be met with cruelty. (PG Compl. ¶¶ 41-57; *see*
18 *also* Am. Resp. to Interrogatory No. 7, PG Dkt. No. 98-2 at 4 (confirming that the Policy was
19 meant to deter illegal immigration).) Among other claims, Plaintiffs bring a claim for intentional
20 infliction of emotional distress (“IIED”), which requires a showing that the Government acted
21 “with the intent to cause emotional distress or with reckless disregard of the near-certainty that
22 such distress would result.” (PG Compl. ¶ 215.)

23 To develop facts to support their IIED claim and rebut the Government’s defense based on
24 the FTCA’s “discretionary function exception,” Plaintiffs served interrogatories seeking
25 information about the Government decisionmakers’ motives for adopting the Policy. (*See* PG Dkt.
26 98 at 3-5; Pls.’ Opp’n at 4.) The Government responded by identifying former Secretary Nielsen,
27 former Attorney General Jefferson Sessions, and three sub-Cabinet officials as the five people
28 whose intent it contended was relevant. *See ids.* Relying on that representation, Plaintiffs obtained

1 deposition testimony from two of the three sub-Cabinet officials with purported “policy goal”
 2 knowledge but did not initially seek to depose Secretary Nielsen or Attorney General Sessions
 3 because the Government did not identify them, specifically, as critical to the Government’s
 4 defense. *Ids.*

5 On September 8, 2023, the final day of fact discovery in the underlying case, the
 6 Government amended its relevant interrogatory response, asserting for the first time that “the goals
 7 that Defendant sought to achieve in adopting those policies are solely the goals for which former
 8 Attorney General Sessions and former Secretary Nielsen, respectively, adopted those policies.”
 9 (Am. Resp. to Interrogatory No. 7, PG Dkt. No. 98-2 at 4; Pls.’ Opp’n at 5.)

10 C. Procedural Background

11 Due to the Government’s reversal in position limiting the individuals whose intent
 12 mattered in implementing the Zero Tolerance Policy to Attorney General Sessions and Secretary
 13 Nielsen, the undersigned gave Plaintiffs leave to take their depositions. (9/25/23 Order, P.G. Dkt.
 14 No. 103 at 2.)

15 On October 13, 2023, counsel for Movant Secretary Nielsen accepted service of the
 16 subpoena. (*See* Mot., Dkt. No. 1 at 5.) On October 23, 2023, Secretary Nielsen filed the instant
 17 motion to quash the subpoena in the United States District Court for the Southern District of
 18 California. Secretary Nielsen also filed a motion to stay the deposition pending the resolution of
 19 the motion to quash. (Dkt. No. 2.)

20 On October 27, 2023, the Southern District magistrate judge found that exceptional
 21 circumstances existed to warrant the transfer of the pending motions to the Northern District of
 22 California pursuant to Federal Rule of Civil Procedure 45(f). (Transfer Order, Dkt. No. 19-1.)³

23 On October 31, 2023, Plaintiffs file an opposition to the motion to quash. (Pl.’s Opp’n,
 24 Dkt. No. 25.) On November 2, 2023, the Court granted the motion to stay, and ordered Secretary
 25 Nielsen to file her reply by November 7, 2023. (Dkt. No. 34.) On November 7, 2023, Secretary

26 _____
 27 ³ On November 13, 2023, Secretary Nielsen filed a motion for relief from the nondispositive
 28 transfer order, but the order was filed in this miscellaneous case rather than in the Southern
 District of California, so it was filed in the wrong court and terminated on that basis. (*See* Dkt.
 Nos. 57 & 58.)

1 filed a reply. (Reply, Dkt. No. 45.) On November 9, 2023, Plaintiffs filed an administrative
2 motion to supplement their opposition brief based on information obtained at the November 7,
3 2023 deposition of the Department of Homeland Security’s Rule 30(b)(6) designee. (Dkt. No. 51
4 at 1.) The Court granted the motion, and Plaintiffs filed their first supplemental brief on
5 November 16, 2023. (Pls.’ Br., Dkt. No. 60.) On November 13, 2023, Secretary Nielsen filed an
6 administrative motion to file a supplemental response, which was granted. (Dkt. Nos. 53 & 55.)
7 On November 17, 2023, Secretary Nielsen filed a first supplemental brief. (Movant’s Br., Dkt. No.
8 63.)

9 On December 19, 2023, the Court issued an order requiring further supplemental briefing.
10 (Dkt. No. 74.) On December 27, 2023, Plaintiffs filed a second supplemental brief. (Pls.’ 2d Br.,
11 Dkt. No. 76.) On January 3, 2024, Secretary Nielsen filed a second supplemental brief. (Movant’s
12 2d Br., Dkt. No. 81.)

13 II. LEGAL STANDARD

14 Federal Rule of Civil Procedure 45 governs discovery propounded by subpoena. A non-
15 party subject to a subpoena may file a motion to quash or modify the subpoena. Fed. R. Civ. P.
16 45(d)(3)(A). A court must quash or modify a subpoena that subjects a person to undue burden.
17 Fed. R. Civ. P. 45(d)(3)(A)(iv).

18 III. DISCUSSION

19 *United States v. Morgan*, 313 U.S. 409 (1941), is considered the seminal authority on the
20 deposition of cabinet secretaries, but it “is not an absolute bar against the taking of such
21 depositions, and [] cabinet secretaries may be deposed under extraordinary circumstances.” *In re*
22 *U.S. Dep’t of Educ. (DeVos)*, 25 F.4th 692, 700-07 (9th Cir. 2022). Absent such circumstances,
23 there is good reason to prevent the deposition of cabinet secretaries: (1) separation of powers, and
24 (2) the practical reality that cabinet secretaries face a potentially greater amount of litigation than
25 most other witnesses, and they cannot be expected to testify in every case involving their agency.
26 *See In re U.S. Dep’t of Educ. (DeVos)*, 25 F.4th at 701-02. In this circuit, former officials enjoy
27 the same protections. *Id.* at 706.

28 Even so, this “significant protection from depositions that cabinet secretaries enjoy does

1 not mean that they are above the law.” *In re U.S. Dep’t of Educ. (DeVos)*, 25 F.4th at 701. As the
 2 Ninth Circuit observed, and the dissent emphasized, “the Supreme Court wrote, quoting James
 3 Madison, that the separation between the powers does not mean that the courts can never burden
 4 the executive.” *Id.* (citing *Clinton v. Jones*, 520 U.S. 681, 703 (1997)).

5 **A. Separation of Powers concerns**

6 Secretary Nielsen argues that “compelling a Cabinet secretary to sit for a deposition to
 7 explain his or her decisions as a Principal Officer in the Executive Branch raises grave separation
 8 of powers concerns under the Constitution.” (Mot. at 7.) While the undersigned tends to generally
 9 agree, as explained below, this is not one of those situations.

10 *Morgan* and its progeny involved relatively minor policy decisions that certainly did not
 11 violate the most basic constitutional rights of those it impacted. *Morgan* involved a decision by
 12 the Secretary of Agriculture setting maximum rates to be charged by market agencies at the
 13 Kansas City Stockyards, which was made after multiple, formal hearings. *United States v.*
 14 *Morgan*, 313 U.S. 409, 413, 422 (1941). But there were multiple *Morgan* cases before the
 15 Supreme Court. In an earlier case, which was quoted in part in the later, seminal decision, the
 16 Supreme Court held that “we agree with the Government's contention that it was not the function
 17 of the court to probe the mental processes of the Secretary in reaching his conclusions **if he gave**
 18 **the hearing which the law required.**” *Morgan v. United States*, 304 U.S. 1, 18, 58 S. Ct. 773,
 19 776, 82 L. Ed. 1129 (1938) (emphasis added). The later *Morgan* omitted the emphasized portion,
 20 which assumes that a formal and public administrative process occurred that led to a specific
 21 policy decision rendering the decision one that came from “collaborative instrumentalities of
 22 justice”. *United States v. Morgan*, 313 U.S. 409, 422 (1941) (citing *United States v. Morgan*, 307
 23 U.S. 183, 191 (1939)). As the Supreme Court reasoned

24 We are in the legislative realm of fixing rates. This is a task of striking
 25 a balance and reaching a judgment on factors beset with doubts and
 26 difficulties, uncertainty and speculation. On ultimate analysis the real
 27 question is whether the Secretary or a court should make an appraisal
 28 of elements having delusive certainty. Congress has put the
 responsibility on the Secretary and the Constitution does not deny the
 assignment.

United States v. Morgan, 313 U.S. 409, 417 (1941). It should be no surprise that, absent

1 unconstitutional, the Supreme Court would not disturb the Secretary’s determination of the
2 proper market rate—which was a power properly delegated by Congress—and it would find that
3 the Secretary should not have been subjected to deposition, when the agency amassed an
4 “enormous record” after holding formal proceedings involving the market agencies where an
5 examiner heard the evidence. *Id.* at 417, 422.

6 None of that happened here. While the Secretary of Homeland Security may have broad
7 legal authority to enforce immigration laws, the family separation policy was not the result of
8 formal rule promulgation nor, based on the Government’s amended interrogatory response, was it
9 the result of significant collaboration or formal proceeding where evidence was received from
10 those impacted by the Policy. Rather, after relatively scant deliberation,⁴ Secretary Nielsen
11 directed the separation of minor children from their families so that the parent or legal guardian
12 could be prosecuted⁵ pursuant to the Zero Tolerance Policy. (*See* Am. Resp. to Interrogatory No.
13 7, PG Dkt. No. 98-2 at 4.)

14 Moreover, this case involves conduct that courts have found to likely be unconstitutional.
15 (*See* Ms. L. Order.) As the *Ms. L.* court noted in finding that the plaintiff would likely succeed on
16 their due process claim, “although parents and children may lawfully be separated when the parent
17 is placed in criminal custody, the same general rule does not apply when a parent and child present
18 together lawfully at a port of entry seeking asylum.” *Id.* at 13. Moreover, in *Ms. L.*, the family
19 separation practice “resulted in the casual, if not deliberate, separation of families that lawfully
20 present at the port of entry, not just those who cross into the country illegally. ... The
21 Government’s treatment ... is unlikely to pass constitutional muster.” *Id.* at 14. Thus, this case is
22 factually distinguishable from *Morgan, In re U.S. Department of Education (DeVos)* or any other
23 case in which the subpoena of a cabinet secretary or high ranking official was quashed, because it
24 raises a fundamental human rights issue that had such a high likelihood of violating the U.S.
25 Constitution that a district judge took the extraordinary measure to enter a preliminary injunction

26 _____
27 ⁴ The DHS Referral Policy Memorandum, dated April 23, 2018, was signed by Secretary Nielsen
on May 4, 2018. (Am. Resp. to Interrogatory No. 7, PG Dkt. No. 98-2 at 4.)

28 ⁵ As it turns out, minor children were also frequently separated from their parents or guardians,
despite the latter not being criminally prosecuted.

1 and ordered that the families be reunited. In fact, the United States Government has condemned
2 the Zero Tolerance Policy’s resulting family separations as a “human tragedy.” *Establishment of*
3 *Interagency Task Force on the Reunification of Families*, Exec. Order 14,011, § 1, 86 Fed. Reg.
4 8273, 8273 (Feb. 5, 2021) [<https://www.federalregister.gov/d/2021-02562>]. Today, five years
5 later, hundreds of children remain separated from their families, and they may never be reunited.
6 If this situation is not one in which the judicial branch may properly review the Executive’s policy
7 decision making process, then we are not a coequal branch of government, and the Constitution’s
8 promise of checks and balances is merely illusory.

9 For these reasons, the Court finds that the prospect of ordering Secretary Nielsen to
10 undergo deposition does not raise separation of powers concerns present in *Morgan* and its
11 progeny.

12 **B. Whether Extraordinary Circumstances Exist**

13 The Court will next address whether extraordinary circumstances exist to permit the
14 deposition of Secretary Nielsen. “[E]xtraordinary circumstances sufficient to justify the taking of
15 a cabinet secretary’s deposition exist when the party seeking the deposition can demonstrate: (1) a
16 showing of agency bad faith; (2) the information sought from the secretary is essential to the case;
17 and (3) the information sought from the secretary cannot be obtained in any other way.” *In re U.S.*
18 *Dep’t of Educ. (DeVos)*, 25 F.4th 692, 702 (9th Cir. 2022).

19 **i. Whether there has been a showing of agency bad faith.**

20 “A showing of bad faith is a threshold issue to justifying taking a cabinet secretary’s
21 deposition.” *In re U.S. Department of Education (DeVos)*, 25 F.4th at 702. Secretary Nielsen
22 argues that Plaintiffs have failed to establish bad faith. (Mot. at 10.) Specifically, the Secretary
23 contends that Plaintiffs’ position is that all that is required to “establish ‘bad faith’ sufficient to
24 depose a Cabinet secretary is allege a substantive constitutional violation in a policy that was
25 adopted.” (Mot. at 11.) As Secretary Nielsen acknowledges, *DeVos* requires an evidence-based
26 showing of bad faith. (Mot. at 12 (citing *In re U.S. Dep’t of Educ.*, 25 F.4th at 702-703).)

27 As an initial matter, the Secretary argues in reply that the undersigned did not make a
28 finding that the Mitnick Memo was evidence of unlawful intent. (Reply at 4-5 n. 5.) In the prior

1 order, the undersigned stated that “while the Court may agree that the Mitnick Memo suggests that
2 family separation was a policy goal of the Zero Tolerance Policy, rather than an unfortunate
3 byproduct, the undersigned cannot find that the memo’s disclosure constitutes a subject matter
4 waiver over the related communications.” (P.G. Dkt. No. 113 at 3-4.) The order resolved a dispute
5 regarding whether the disclosure of the Mitnick memo resulted in the waiver of privilege over
6 related documents, rather than addressing whether the Mitnick Memo was evidence of bad faith or
7 unlawfulness. *See id.* In an effort to disabuse all involved of any assumptions to the contrary, the
8 Court finds that the Mitnick Memo is evidence of bad faith, in that it very clearly advised
9 Secretary Nielsen that “DHS could permissibly direct the separation of parents or legal guardians
10 and minors so that the parent or legal guardian can be prosecuted pursuant to those authorities.”
11 (Mitnick Memo at 1.)

12 Moreover, Plaintiffs satisfactorily cite to several other pieces of evidence that show that the
13 agency acted in bad faith. (*See* Pls.’ Opp’n at 8-10.) As discussed above, in *Ms. L.*, the district
14 court found that the practice of separating families “resulted in the casual, if not deliberate,
15 separation of families that lawfully present at the port of entry,” which expanded the prior
16 separation policy “beyond its lawful reach”. (*Ms. L.* Order at 14.) The Court acknowledged that

17 asylum seekers like *Ms. L.* and many other class members may be
18 fleeing persecution and are entitled to careful consideration by
19 government officials. Particularly so if they have a credible fear of
20 persecution. We are a country of laws, and of compassion. We have
21 plainly stated our intent to treat refugees with an ordered process, and
22 benevolence, by codifying principles of asylum. *See, e.g.*, The
23 Refugee Act, PL 96-212, 94 Stat. 102 (1980). The Government’s
24 treatment of *Ms. L.* and other similarly situated class members does
25 not meet this standard, and it is unlikely to pass constitutional muster.

26 *Id.*

27 Additionally, in denying the Government’s motion for summary judgment, the district
28 court in the Arizona litigation found that “evidence suggests an inconsistency between the
pronounced purpose of the Referral Policy—to refer all amenable adults for prosecution—and the
Policymakers’ underlying intent.” Order, *C.M. v. United States*, No. 19-cv-05217-PHX (D. Ariz.
Oct. 24, 2023), ECF No. 434 at 20. There, evidence was also offered to show “that the
Policymakers intended to separate families irrespective of whether the parents were ever

1 prosecuted to deter other potential migrants from entering the United States.” *Id.* Indeed, in those
2 cases and this one, families were separated despite the parents not being prosecuted. *See id.* As the
3 Arizona court found, “[t]his could serve no compelling or legitimate government interest.” *Id.*

4 Thus, given the abundance of evidence produced, in this case and in related litigation,
5 indicating that the actual intent of the Zero Tolerance Policy was to separate families to deter
6 illegal immigration, the bad faith element is satisfied. Indeed, it was well documented by the
7 media that the Zero Tolerance Policy resulted in separated children being placed into literal cages,
8 where they were forced to sleep on the floor with Mylar blankets and denied the most basic of
9 care. When these atrocities were being inflicted on children, Secretary Nielsen was on record
10 saying that the children were well cared for, and she repeatedly denied that they were being
11 housed in cages despite media coverage showing the contrary. *See, e.g.,* Rosie Gray, *The Trump*
12 *Administration’s Shifting Story on Family Separations*, The Atlantic, Jun. 18, 2018,
13 [https://www.theatlantic.com/politics/archive/2018/06/the-trump-administrations-shifting-story-on-](https://www.theatlantic.com/politics/archive/2018/06/the-trump-administrations-shifting-story-on-family-separations/563111/)
14 [family-separations/563111/](https://www.theatlantic.com/politics/archive/2018/06/the-trump-administrations-shifting-story-on-family-separations/563111/) [<https://perma.cc/GP2C-NF66>]; *cf. See The Way Forward on Border*
15 *Security: Hearing Before the H. Comm. on Homeland Security*, 116th Cong. 116-4 (Mar. 6, 2019)
16 (Testimony of Secretary Nielsen), O’Brien Decl., Ex. 7 at 47-49 (“March 6, 2019 H. Comm.
17 Hearing Test.”).

18 Accordingly, the Court finds that Plaintiffs have made a showing of bad faith.

19 **ii. Whether the information sought is essential to the case**

20 Plaintiffs contend that the Government’s litigation position makes Secretary Nielsen’s
21 testimony essential to the case. (Pls.’ Opp’n at 10.) Here, after Plaintiffs had obtained testimony
22 and developed evidence from other, non-Cabinet-level decisionmakers that the Government had
23 identified, the Government changed course to claim that only former Secretary Nielsen’s and
24 former Attorney General Sessions’s intent mattered for purposes of establishing its liability under
25 the FTCA. Plaintiffs allege that the prosecution policy was pretext to separate undocumented
26 immigrants from their minor children, and, based on the Government’s amended interrogatory
27 response, Secretary Nielsen’s intent is essential to this case to prove the constitutional and the
28 intentional infliction of emotional distress claims because she was the ultimate decisionmaker.

1 (See Pls.' Opp'n at 4-5, 10-11.) In the Arizona litigation, the Government took the position on
 2 summary judgment that Plaintiffs needed to provide admissible evidence of Secretary Nielsen's
 3 intent, and that testimony from other sources were not an adequate substitute for the ultimate
 4 decisionmaker's. *Id.* at 5, 15.

5 This situation stands in stark contrast with *DeVos*, in which neither the plaintiffs nor the
 6 Government posited that the secretary's testimony was essential to the case. *See In re U.S. Dep't of*
 7 *Educ (DeVos)*, 25 F.4th at 704. In fact, there, plaintiffs' counsel "even acknowledged that
 8 plaintiffs likely could win relief on the existing record...." *Id.* Here, however, Plaintiffs expect the
 9 Government to raise the discretionary function exception defense in response to the constitutional
 10 claims, and intent is an essential element of the IIED claim, rendering Secretary Nielsen's intent
 11 essential. (See Pls.' Opp'n at 4.)

12 a. Prior testimony is insufficient

13 Next, Secretary Nielsen argues she has already been questioned under oath and testified
 14 regarding her intent before Congress. (Mot. at 17-18; Reply at 10.) Secretary Nielsen's March 6,
 15 2019 testimony before the House of Representatives' Committee on Homeland Security is hardly
 16 exhaustive or enlightening. The Court notes that—even after the media coverage showed the
 17 world that children were being kept in cages, which led to public pressure to suspend the
 18 separation policy—Secretary Nielsen refused to admit that what the public saw were cages.
 19 (March 6, 2019 H. Comm. Hearing Test. at 47-49.) Moreover, Secretary Nielsen argues that she
 20 already answered the question of intent when she testified before Congress. (Reply at 10.)
 21 Secretary Nielsen was asked, "Did you initiate the separation of families for the express purpose
 22 of deterring families from coming to the United States?" (March 6, 2019 H. Comm. Hearing Test.
 23 at 46.) To which she replied, "No. I did not. Again, the whole purpose of that was to increase
 24 consequences for those who choose to break the law. That is a bedrock of our criminal- as you
 25 know- the way that our criminal system works." *Id.* Secretary Nielsen then clarified that, "The
 26 consequence of any adult going to jail in this country is they are separated from their child. That
 27 wasn't the point of it. The point was to increase prosecutions for those breaking the law and not
 28 exempt any class of aliens." (Reply at 10 (quoting March 6, 2019 Committee Test. at 48).)

1 There are multiple reasons why the Secretary’s prior testimony is inadequate. First, it may
2 be a matter of semantics, but the use of the word “express” in the question she answered refers to
3 the publicly stated reason for the Policy, rather than the actual purpose. Second, Secretary
4 Nielsen’s response is a gross oversimplification of how the American criminal justice system
5 treats minors when their parent or guardian is incarcerated. While the system is far from perfect,
6 most American children are placed with a family member, and those without an appropriate
7 familial placement are put in foster care. Shaila Dewan, *Family Separation: It’s a Problem for*
8 *U.S. Citizens, Too*, N.Y. Times, Jun. 22, 2018, [https://www.nytimes.com/2018/06/22/us/family-](https://www.nytimes.com/2018/06/22/us/family-separation-americans-prison-jail.html)
9 [separation-americans-prison-jail.html](https://www.nytimes.com/2018/06/22/us/family-separation-americans-prison-jail.html) [<https://perma.cc/6QQK-EEPF>]. In short, American
10 children separated due to incarceration can be located by the Government; they are not lost. The
11 arrested parent still retains parental rights; and reunification is generally the goal.

12 Third, the family separations that occurred in connection with the Zero Tolerance Policy
13 were very different than separations due to “domestic” criminal prosecution. As was keenly
14 observed by the *Ms. L.* court, the many families that presented at the port of entry to seek lawful
15 asylum were not breaking the law. (*Ms. L.* Order at 13-14.) Also, as was the case with the three
16 adult plaintiffs in this case, some parents were in custody for short periods of time or were not
17 prosecuted at all. As a result, the parents were only in federal custody long enough for their
18 children to be placed in the custody of U.S. Department of Health and Human Services’ Office of
19 Refugee Resettlement (“ORR”) resulting in prolonged separation for ostensibly no reason. The
20 undersigned notes that the *Ms. L.* preliminary injunction order, requiring the reunification of
21 parents and children separated by the Zero Tolerance Policy, was issued almost nine months
22 before Secretary Nielsen testified before Congress, so she should have known that her explanation
23 was not adequate and was, in fact, inaccurate. Congressional hearings do not provide the same
24 opportunity as a deposition to cross-examine witnesses, so Secretary Nielsen was not held
25 accountable to fully answer the questions asked. (*See* March 6, 2019 H. Comm. Hearing Test. at
26 43-49.)

27 Furthermore, to the extent that Secretary Nielsen testified that she “had not been directed”
28 to separate parents from children to deter immigration, this does not explain her intent in enacting

1 the Policy. (*See* Reply at 10 n. 10.)

2 For these reasons, the undersigned finds that the information sought is essential to the case,
3 and that the prior testimony does not sufficiently explain Secretary Nielsen’s intent at the time the
4 Policy was implemented.

5 **iii. Whether the information may be obtained in another way**

6 To demonstrate that the information sought is not obtainable any other way, Plaintiffs must
7 show that they have exhausted “all reasonable alternative sources.” *See In re U.S. Dep’t of Educ*
8 (*DeVos*), 25 F.4th at 704. Secretary Nielsen argues that Plaintiffs have made no effort to do so.
9 (Mot. at 18.) To the extent that the Secretary argues that her prior congressional testimony and
10 record evidence satisfies Plaintiffs’ needs, the Court has found that it does not. *See* discussion,
11 *supra*, Part III.B.ii.a.

12 In reply, Secretary Nielsen argues that the undersigned should quash the instant subpoena
13 for the same reasons the United States District Court for the Southern District of Alabama quashed
14 the subpoena of former Attorney General Sessions that was served in the underlying action.
15 (Reply at 10.) The Court will first address the Sessions order before addressing the other *DeVos*
16 considerations.

- 17 a. The Alabama order is not persuasive, because the identified individuals do not
18 have knowledge of Secretary Nielsen’s intent.

19 In parallel proceedings to this motion, on November 6, 2023, the district court quashed the
20 Sessions subpoena on the grounds that Plaintiffs had not demonstrated the existence of
21 “extraordinary circumstances or special need.” (*See* Order, *In the Matter of a Subpoena to Testify*
22 *at a Deposition in a Civil Action for Jefferson B. Sessions*, No. 23-mc-00016-JB-B (S.D. Ala.
23 Nov. 6, 2023), Carroll Reply Decl., ¶ 1, Ex. 1 at 4 (“Sessions Order”).) There, the district court
24 found that Plaintiffs failed to show (1) that Sessions’s testimony was essential to the case and (2)
25 that the information could not be obtained by any other means. (*See* Sessions Order at 4.) The
26 district court observed that, after providing that the goals of Nielsen and Sessions in adopting the
27 Policy were solely theirs, the Government’s amended interrogatory response identified six
28 individuals “with knowledge about the Policy goals identified above.” *Id.* at 5. Those individuals

1 named were Sessions, Nielsen, Thomas Homan (Former Acting Director, ICE), Kevin McAleenan
 2 (Former Commissioner, Customs and Border Protection (“CBP”)), Carla Provost (Former Chief,
 3 CBP), and Gene Hamilton (Former Counselor to the Attorney General, DOJ). (Am. Resp. to
 4 Interrogatory No. 7 at 5.) The district court then found that, while Plaintiffs obtained copies of the
 5 depositions of two of the identified individuals taken in a similar case, Plaintiffs “made no
 6 showing that the testimony of those individuals was somehow insufficient to prove the necessary
 7 intent for this case.” (Sessions Order at 5.) Furthermore, the district court observed that “Plaintiffs
 8 have not attempted to depose the other two non-cabinet officials.” *Id.* As a result of Plaintiffs’
 9 failure to exhaust the witnesses identified as having relevant information, the district court found
 10 that they had failed to both demonstrate that Sessions’s testimony was essential to the case and
 11 that any information possessed by Sessions was unobtainable by any other means. *Id.*

12 Setting aside that the Sessions court was not bound by the Ninth Circuit’s *DeVos* decision,
 13 the undersigned is not persuaded by the district court’s rationale, because, here, Plaintiffs have
 14 demonstrated a far more robust discovery record. First, one day after the issuance of the Sessions
 15 order, Plaintiffs took the deposition of the Department of Homeland Security’s Rule 30(b)(6)
 16 deponent, who could not answer questions regarding the Secretary’s intent. *See* discussion, *infra*,
 17 Part III.B.iii.b.

18 Second, Plaintiffs have explained how they had reasonably exhausted discovery of the four
 19 non-cabinet officials listed in the amended response. At the hearing, Plaintiffs explained that they
 20 used the depositions of Homan and McAleenan taken in the Arizona litigation, because the
 21 Government took the position that they could not be deposed again. (11/30/23 Hearing Tr., Dkt.
 22 No. 69 at 19:9-13.) Regardless of the propriety of the Government’s position regarding
 23 depositions, the deposition transcripts indicate that these individuals were unable to testify
 24 regarding Nielsen’s intent and mental state in approving the Policy. (*See* Homan Tr., Decl. of
 25 Brook Dooley ISO Pls.’ 2d Suppl. Br., “2d Suppl. Dooley Decl.,” Dkt. No. 76-1 ¶ 2, Ex. A at
 26 58:22-25; McAleenan Tr., Decl. of Brook Dooley, “Dooley Decl.,” Dkt. No. 25-1 ¶ 19, Ex. R at
 27 298:15-18.) In response to being asked [REDACTED]

28 [REDACTED], McAleenan testified that, [REDACTED]

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1 [REDACTED] (McAleenan Tr. at 298:15-18.) Similarly,
 2 Homan testified that, [REDACTED]
 3 [REDACTED] (Homan Tr. at 54:25-55:2.) Homan further testified that, [REDACTED]
 4 [REDACTED]
 5 [REDACTED] (Homan Tr. at 58:22-25.)
 6 The Court is not persuaded by Secretary Nielsen’s arguments in her second supplemental brief that
 7 Homan’s testimony undermines Plaintiffs’ arguments, because, [REDACTED]
 8 [REDACTED]
 9 [REDACTED] (*See* Movant’s 2d Br. at 2.)

10 Plaintiffs also obtained a copy of the deposition of Gene Hamilton, which was taken in the
 11 Arizona litigation. (11/30/23 Hearing Tr. at 19:23-25; Pls.’ Hamilton Tr., 2d Suppl. Dooley Decl.
 12 ¶ 9, Ex. H.) Hamilton was counselor to Sessions, rather than Secretary Nielsen, so he did not have
 13 insight as to the Secretary’s thinking regarding the Referral Memo, and his testimony indicates
 14 that he does not even have a clear recollection of the meetings held with Nielsen. (*See* Pls.’
 15 Hamilton Tr. at 236-240, 295-300, 296:5-297:4.)⁶ Given these circumstances, the Court is
 16 unpersuaded by the Secretary’s arguments that he could be a reasonable source of evidence
 17 regarding her intent. (*See* Movant’s 2d Br. at 3.)

18 As to Carla Provost, Plaintiffs explained at the hearing that she was not deposed because
 19 there was testimony from several other CBP officials, and the Government provided a written
 20 response with a list of individuals involved in the drafting, proposing or approving the Policy at
 21 issue, and Ms. Provost was not included, such that she is not a reasonable alternative source of
 22 evidence. (11/30/23 Hearing Tr. at 20:12-21:8; Def.’s Written Resp. to DHS 30(b)(6) Topic 1, 2d
 23 Dooley Decl. ¶ 6, Ex. E at 2-3.) Furthermore, [REDACTED]
 24 [REDACTED]
 25 [REDACTED]

27 _____
 28 ⁶ The Court notes that Secretary Nielsen concedes that Mr. Hamilton’s name was added to the
 Government’s interrogatory response on the last day of discovery. (*See* Mot. at 3-4.) Thus,
 Plaintiffs had no reason to depose him prior to the close of fact discovery.

1 [REDACTED] 2d Suppl. Dooley Decl. ¶ 7, Ex. F at 274:4-25; 276:15-18, 277:1-22.) To the
2 extent that the Secretary argues that Provost is able to testify regarding the goals of the Policy, it
3 defies reason that she would be privy to knowledge of the Secretary's intent that others more
4 intimately involved in briefing Secretary Nielsen lacked. (*See* Movant's 2d Br. at 3.)

5 Secretary Nielsen's apparent position at the hearing that reasonable exhaustion requires
6 that the deponents be directly asked if they knew the Secretary's intent or rationale in signing the
7 memo is unreasonable in light of their testimony that they could not testify to her thought process.
8 (11/30/23 Hearing Tr. at 15:7-11.) Reasonable exhaustion should not require magic words when
9 the deposition testimony clearly indicates that the deponents most likely to possess this
10 information all testified that they ultimately do not know why the Secretary chose option 3.

11 Thus, unlike the record presented in connection with the Sessions motion to quash,
12 Plaintiffs have provided sufficient evidence to demonstrate that they have reasonably sought
13 information from the individuals listed in the amended interrogatory response and could not obtain
14 the information required to effectively prosecute their case. *See In re U.S. Dep't of Educ. (DeVos)*,
15 25 F.4th at 704. For that reason, this court is not persuaded by the order quashing the subpoena of
16 Attorney General Sessions and declines to adopt that court's rationale.

17 b. Plaintiffs performed more discovery than the DeVos plaintiffs.

18 In *DeVos*, the Ninth Circuit found that the plaintiffs' failure to take a Rule 30(b)(6)
19 deposition of the U.S. Department of Education and to use their interrogatories to attempt to
20 ascertain the information sought constituted a failure to exhaust all reasonable alternatives. *In re*
21 *U.S. Dep't of Educ (DeVos)*, 25 F.4th at 704. The Secretary argues that Plaintiffs have ignored
22 less intrusive means of discovery, including interrogatories or a Rule 30(b)(6) deposition. (Reply
23 at 18 (citing *In re U.S. Dep't of Educ (DeVos)*, 25 F.4th at 704).) This representation is inaccurate.
24 First, as discussed above, there is no public record indicating what Secretary Nielsen's actual
25 intent was. *See In re U.S. Dep't of Educ (DeVos)*, 25 F.4th at 704 (citing *In rep McCarthy*, 636 F.
26 App'x 142, 144 (4th Cir. 2015)). Second, unlike *DeVos*, Plaintiffs have used interrogatories, and
27 taken numerous depositions, including the Rule 30(b)(6) deposition of the Department of
28 Homeland Security designee, and did not obtain the information sought. (*See* Pls.' Br. at 1.)

1 On November 7, 2023, Plaintiffs deposed the DHS Rule 30(b)(6) designee. (Pls.’ Br. at 1.)
2 Despite having thoroughly prepared for deposition, the DHS witness could not answer questions
3 about Secretary Nielsen’s intent in adopting and continuing the Policy or what information she
4 had before her on May 4, 2018, when she accepted the “Option 3 recommendation” and directed
5 Border Patrol to refer immigrant parents for prosecution. *Id.* (citing Pls.’ Opp’n at 3.) Plaintiffs
6 cite to two documents that would support their contention of pretext if only they had confirmation
7 that Secretary Nielsen reviewed them prior to adopting option 3. (Pls.’ Br. at 1-3.) The first was
8 the “Nealon Memo,” which was sent to then-Acting DHS Secretary Elaine Duke in October 2017,
9 and, if seen, would have put Secretary Nielsen on notice [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED] (See Pls.’ Br. at 1; Nealon Memo, Suppl. Decl. of Travis Silva, “Suppl. Silva Decl., Dkt.
13 No. 60-1 ¶ 5, Ex. B at 1-2 (direct quote).) The second was the “Unaccompanied Alien Children
14 (“UAC”) Options Memo,” dated December 16, 2017, which [REDACTED]
15 [REDACTED] *Id.* at
16 2 (citing UAC Options Memo, Silva Suppl. Decl. ¶ 7, Ex. D at 1.) Plaintiffs contend that if
17 Secretary Nielsen was privy to the UAC Options Memo, she would have been on notice that the
18 actual purpose of the Policy was to separate families. (Pls.’ Br. at 2.) In opposition, the Secretary
19 argues that the two documents were prepared for DHS, including one from before Secretary
20 Nielsen was appointed, [REDACTED], and that she ultimately
21 approved a policy that focused on prosecution. (Movant’s Br. at 2.) The Secretary contends that,
22 to the extent that Plaintiffs want to know whether she reviewed certain documents, they can seek
23 discovery from those individuals who briefed her. (Movant’s Br. at 4-5.) These individuals
24 included [REDACTED]. *Id.* at 5. Since Plaintiffs did not
25 seek that discovery, [REDACTED]
26 [REDACTED], Plaintiffs have not shown that they have exhausted all alternatives. *Id.*
27 Secretary Nielsen is overstating the requirement of *DeVos*, which only requires the “[e]xhaustion
28 of all reasonable alternative sources.” *In re U.S. Dep’t of Educ. (DeVos)*, 25 F.4th at 704. While

1 the individuals who briefed her may be able to testify to Secretary Nielsen being provided certain
2 briefing materials, they are unlikely to be able to testify to which documents she relied on when
3 approving the Policy. We know that two of those individuals testified that they did not know what
4 the Secretary's reasoning was in approving option 3, and the third was not listed by the
5 Government as an individual with knowledge in the amended interrogatory. *See* discussion, *supra*,
6 Part III.B.iii.a. As a result, the Court finds that requiring Plaintiffs to take the depositions of those
7 employees to ask which documents Secretary Nielsen actually read is unlikely to result in the
8 evidence to which Plaintiffs are entitled.

9 Additionally, Plaintiffs contend that Secretary Nielsen has made retrospective statements
10 about the Policy, her knowledge at the time of the Policy's implementation, and her intent. (Pls.'
11 Opp'n at 14, nn. 6-7 (citing Caitlin Dickerson, *The Secret History of Family Separation*, THE
12 ATLANTIC (August 7, 2022), [<https://perma.cc/U3S5-Z3X5>].) Secretary Nielsen apparently told a
13 reporter that she did not want to adopt option 3, because she doubted that DHS had adequate
14 resources for implementation. (Pls.' Br. at 3 (citing *The Secret History of Family Separation* at
15 45).) Relatedly, Plaintiffs contend that the DHS designee was unable to testify as to whether
16 Secretary Nielsen had [REDACTED]
17 [REDACTED] (Pls.' Br. at 3 (citing DHS Rule 30(b)(6) Dep., Suppl. Decl. of Travis
18 Silva, Dkt. No. 50, Ex. A.) Plaintiffs contend that this is relevant to determining whether
19 Defendant adopted the Policy with reckless disregard to its consequences, and that Secretary
20 Nielsen is the only person who can confirm or deny her prior statements, her consultations with
21 other government agencies, and whether she received and considered information about ORR's
22 operational capacity before adopting the option 3 recommendation. (Pls.' Br. at 3-4.)

23 Furthermore, Plaintiffs argue that DHS could not confirm whether, at the time option 3
24 was adopted, Secretary Nielsen intended for Border Patrol to separate immigrant children from
25 their parents when the parents were not referred for prosecution. (Pls.' Br. at 4.) Plaintiffs contend
26 that Border Patrol referred parents for prosecution, purportedly to justify family separation, even
27 when it was obvious that DOJ was receiving more referrals than they could prosecute. *Id.* Indeed,
28 two of the sets of parents in this case were never prosecuted at all, and yet the families were still

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1 separated. *Id.* Plaintiffs contend that, if Secretary Nielsen knew that Border Patrol was making
2 prosecution referrals knowing that most of them would never result in prosecution, that knowledge
3 would support Plaintiffs’ argument that the “prosecution policy” was pretextual. *Id.*

4 The Secretary argues that Plaintiffs have made no showing that the persons who had
5 knowledge about briefing Secretary Nielsen on the decision could not answer that question.
6 (Movant’s Br. at 5.) The Secretary further contends that the [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED] *Id.* at 5 [REDACTED]
10 [REDACTED] Suppl. Decl. of David J. Carroll, “Suppl. Carroll Decl.,” Dkt. No. 63-1 ¶ 2, Ex. A at
11 214:8-13.) Thus, Secretary Nielsen argues that while Plaintiffs may not like the answer given, it is
12 not accurate to say that DHS could not explain whether the Policy took into account the limits of
13 the U.S. Attorney’s Office’s prosecution capacity. *Id.* The undersigned disagrees. [REDACTED]

14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED] As a result, the undersigned finds that the testimony
18 to which the Secretary cites does not sufficiently address her intent.

19 Accordingly, the undersigned finds that the information sought—Secretary Nielsen’s intent
20 in implementing the Family Separation Policy— is generally not obtainable in any other way. *See*
21 *In re U.S. Dep’t of Educ (DeVos)*, 25 F.4th at 704.

22 **iv. Modification is appropriate.**

23 While the Court finds that the *DeVos* test is satisfied, the undersigned recognizes that no
24 cabinet secretary has been compelled to undergo oral deposition in more than 80 years, and that
25 every Court of Appeals that has been petitioned by writ of mandamus to quash such a subpoena
26 has elected to do so. Federal Rule of Civil Procedure 45(d)(3) permits the court to quash or
27 modify a subpoena that would subject a person to an undue burden. The Court finds that it is an
28 undue burden for Secretary Nielsen to be deposed in a way that a non-party witness would be

1 deposed, which would require that she testify for up to 7 hours and appear in-person. *See* Fed. R.
2 Civ. P. 30.

3 In recognition of this extraordinary situation, the Court finds it appropriate to modify the
4 subpoena and require that the deposition proceed by written question, pursuant to Federal Rule of
5 Civil Procedure 31. As Secretary Nielsen acknowledged at the hearing, deposition by written
6 question is a less intrusive means of discovery than oral deposition, and it represents an
7 “incremental approach” that is “more respectful of the separation of powers concerns involved
8 here.” (11/30/23 Hearing Tr. at 53:24-54:15.) To further reduce the burden on Secretary Nielsen,
9 Plaintiffs are limited to 25 direct questions, including all discrete subparts. The Government is
10 limited to 25 cross-questions, including all discrete subparts. The parties are each limited to 10
11 redirect and recross-questions. The parties should consider her prior testimony and public
12 statements when fashioning their questions. The Court trusts that Plaintiffs and the United States
13 will work together to ensure that Secretary Nielsen’s discovery burden is minimized to the extent
14 possible.

15 IV. CONCLUSION

16 For the reasons set forth above, the Court GRANTS IN PART Secretary Nielsen’s motion
17 to quash and MODIFIES the subpoena to be by written question pursuant to Federal Rule of Civil
18 Procedure 31. The parties shall immediately meet and confer regarding who will serve as the
19 deposing officer pursuant to Rule 31(a)(3). Within 14 days of this order, Plaintiffs are directed to
20 serve an amended notice on Secretary Nielsen and the parties in the underlying litigation, *P.G. v.*
21 *United States*, 21-cv-04457-KAW, and in accordance with the procedures set forth in Rule 31. In
22 light of the current case schedule, the Court finds good cause to alter the timing of additional
23 questions, as set forth in Rule 31(a)(5) as follows: cross-questions shall be provided within 7 days
24 after being served with the notice and direct questions; redirect questions, within 4 days after
25 being served with cross-questions; and recross-questions, within 4 days after being served with
26 redirect questions.

27 Secretary Nielsen shall undergo written deposition within 7 days of the delivery of all
28 questions to the officer in accordance with Rule 31(b). The officer shall then have 3 days to

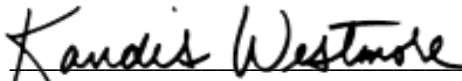
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1 prepare, certify, and send it to the noticing party, as required by Rule 31(b).

2 Should Plaintiffs find the Secretary’s written responses inadequate, the parties are directed
3 to meet and confer and either agree to a limited oral deposition or file a joint discovery letter
4 consistent with the undersigned’s standing order.⁷ Since the Court has found that the *DeVos* test
5 has been satisfied, in the event that the parties require court intervention, they need only address
6 the sufficiency of the written deposition testimony, what testimony Plaintiffs believe they are
7 missing, and why it can only be obtained by oral deposition. The parties must also include their
8 respective proposals regarding time limits.

9 IT IS SO ORDERED.

10 Dated: January 24, 2024


KANDIS A. WESTMORE
United States Magistrate Judge

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⁷ Available at: <https://cand.uscourts.gov/judges/westmore-kandis-a-kaw/>