No. 21-11239-D

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

In re ELISABETH DEVOS,
Petitioner.

PETITION FOR REHEARING EN BANC

On Petition for Writ of Mandamus
to the United States District Court for the Southern District of Florida

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1 and Local Rules 26.1 and 35-5(b), 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 Department of Education

- 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 Department of Education
- 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

ELEVENTH CIRCUIT RULE 35-5(c) STATEMENT OF IMPORTANCE

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:

1. Whether it violates Article III and the Federal Rules of Civil Procedure, and constitutes an unlawful usurpation of power, for a magistrate judge to enter an order purporting to immediately transfer an action to another judicial district, thereby insulating the order from review by the district judge?
2. Whether, under Fed. R. Civ. P. 45(f), a district court abuses its discretion by transferring a motion to quash a non-party deposition subpoena served on a former Cabinet secretary where no exceptional circumstances exist to justify transfer?
3. Whether, under *United States v. Morgan*, 313 U.S. 409 (1941), and Fed. R. Civ. P. 45(d)(1), a district court abuses its discretion, and fails to exercise a mandatory duty, when it does not timely quash a deposition subpoena served on a former Cabinet secretary?

I further express a belief, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and the precedents of this Circuit and that consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Court:

- *Sinclair v. Wainwright*, 814 F.2d 1516, 1519 (11th Cir. 1987) (referral to a magistrate judge is constitutional only if "the district court retains sufficient control over the magistrate");
- *Thomas v. Arn*, 474 U.S. 140, 153 (1985) (referral to magistrate judge is constitutional because "the entire process takes place under a district court's total control and jurisdiction") (quoting *United States v. Raddatz*, 447 U.S. 667, 681 (1980)).

/s/ *Jesse Panuccio*
Attorney of Record for Petitioner

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INTRODUCTION AND STATEMENT OF ISSUES MERITING REHEARING

The underlying question in this case is whether a former Cabinet secretary can be deposed about official action her Department took while she was in office. Under well-established separation-of-powers principles, the answer is no. *See United States v. Morgan*, 313 U.S. 409, 422 (1941); *In re Dep't of Commerce*, 139 S. Ct. 16 (2018). As the concurring opinion here concluded, "the subpoena should be quashed." Op. 3.

Accordingly, this straightforward matter should have been disposed of months ago. But the subpoena has not been quashed because the Magistrate Judge issued an erroneous order transferring the action to California. *See id.* ("the order to transfer was erroneous"). The Magistrate Judge purported to effectuate that transfer unilaterally and immediately, even though Petitioner has a right to have the transfer issue (and the motion to quash) determined by the District Judge in the Southern District of Florida. Accordingly, the issues that merit en banc reconsideration are:

1. Whether it violates Article III and the Federal Rules of Civil Procedure, and constitutes an unlawful usurpation of power, for a magistrate judge to enter an order purporting to immediately transfer an action to another judicial district, thereby insulating the order from review by the district judge?

2. Whether, under Rule 45(f), a district court abuses its discretion by transferring a motion to quash a non-party deposition subpoena served on a former Cabinet secretary where no exceptional circumstances exist to justify transfer?

3. Whether, under *United States v. Morgan*, 313 U.S. 409 (1941), and Rule 45(d)(1), a district court abuses its discretion, and fails to exercise a mandatory duty, when it does not timely quash a deposition subpoena served on a former Cabinet secretary?

COURSE OF PROCEEDINGS AND FACTS

In 2019, Plaintiffs filed a class action in the Northern District of California alleging that, under the APA, the Department of Education had unlawfully delayed deciding their loan-forgiveness applications. *See Sweet v. Cardona*, 19-03674 (N.D. Cal.), Doc. 1. In April 2020, the parties executed a settlement agreement, *Sweet* Doc. 97-2, but the district court rejected it. The court found "a strong showing of agency pretext," and held that "[w]e will return to litigating the merits" because "[w]e need to know what is really going on." *Sweet* Doc. 146 at 11, 15. The court *sua sponte* ordered extra-record discovery and directed that the Plaintiffs "shall move for summary judgment" after discovery is complete. *Id.* at 7-10, 16.

After Secretary DeVos left office, Plaintiffs served on her a non-party deposition subpoena, with the place of compliance specified as Vero Beach, Florida, where she maintains a residence. Plaintiffs explained that they seek to question Secretary DeVos about "the real reasons" and "rationale for[] the delay," and about her alleged "hostility to the borrower defense program." *Sweet* Doc. 171 at 2, 3. In a press release, Plaintiffs' counsel described the California court as having "slammed" Secretary DeVos, and explained that the purpose of this deposition is to

have her "explain why defrauded student borrowers were ignored for years by the Education Department and then summarily denied their rights."[1]

Because such a deposition is impermissible under *Morgan*, 313 U.S. at 422, Secretary DeVos filed a motion to quash in the U.S. District Court for the Southern District of Florida. The District Judge referred the matter to the Magistrate Judge, without consent of the parties, "for all pretrial matters for appropriate disposition." Doc. 4. On February 11, 2021, Plaintiffs moved to transfer the action to the California court, Doc. 12, which can only occur in "exceptional circumstances." Fed. R. Civ. P. 45(f). Secretary DeVos asked that, if the Magistrate Judge granted transfer, such order be stayed so that she could exercise her right to file objections. Doc. 18 at 15 n.6.

On April 7, the Magistrate Judge entered an order granting transfer. Doc. 28. The Magistrate Judge ignored the stay request and directed the Clerk to transfer the case. Doc. 28 at 12. The case was immediately closed and "electronically transferred out to California Northern." App. Vol. 1 Docket Sheet.

Petitioner filed with the District Court an Expedited Motion to Stay, explaining that she planned to exercise her right to file objections under Rule 72. Doc. 30. The District Court denied the motion as moot, stating that because the

[1] *See* https://predatorystudentlending.org/news/press-releases/student-borrowers-ask-court-to-allow-deposition-of-betsy-devos-on-borrower-defense-press-release/.

"electronic transfer is effective immediately … the Court does not possess jurisdiction to stay the transfer order." Doc. 31 at 1. Further, even though Petitioner had not yet filed objections to the Transfer Order, the District Court stated that it agreed with the order. *Id.* at 1-2. The California court docketed the matter, ordered the parties to "update their briefing as necessary," and set a hearing for May 18, 2021. *In re DeVos*, No. 21-80075 (N.D. Cal.), Docs. 29, 30.

On April 15, 2021, Secretary DeVos filed the Petition in this Court, seeking a writ that: (i) at a minimum, vacates the Transfer Order and instructs the District Court to exercise the constitutionally required supervision over the Magistrate Judge; and (ii) instructs the District Judge to deny transfer and quash the subpoena. On May 7, the Court denied the Petition.

ARGUMENT

"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," and the right to relief is "clear and indisputable." *Carpenter v. Mohawk Indus., Inc.*, 541 F.3d 1048, 1055 (11th Cir. 2008). That standard is met here, and Secretary DeVos respectfully asks the full Court to rehear the Petition and issue a writ.

I. The Court Should Issue a Writ Vacating the Transfer Order and Directing the District Judge to Exercise Supervision of the Magistrate Judge.

1. *Petitioner Has a Right to a Decision by an Article III Judge.*

The request for mandamus relief on this issue rests on two premises. First, litigants have a right to have courts abide by the Federal Rules of Civil Procedure. *See Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1988) (The Federal Rules are "as binding as any statute duly enacted by Congress, and federal courts have no more discretion to disregard [a Rule's] mandate than they do to disregard constitutional or statutory provisions."); *Hollingsworth v. Perry*, 558 U.S. 183, 199 (2010) ("If courts are to require that others follow regular procedures, courts must do so as well."). Rule 45 establishes that a party seeking to quash a subpoena can bring the motion in "the court for the district where compliance is required" and that court "must quash" the subpoena if it "subjects [the] person to undue burden." Fed. R. Civ. P. 45(d)(3)(A)(iv). The court may grant a motion to transfer the motion to quash "if the person subject to the subpoena consents." *Id.* at 45(f). If not, the court may only transfer if "exceptional circumstances" exist. *Id.* Here, Petitioner opposed transfer, and thus the District Court had to decide if exceptional circumstances exist.

Second, where litigants have a right to a decision by a district court, that decision ultimately must issue from a life-tenured district judge, as only those judges may exercise "[t]he judicial Power," which "extend[s] to all Cases … arising under

th[e] Constitution [and] the Laws of the United States." U.S. Const., art. III, §§ 1, 2. Article III provides litigants with a personal "right to have claims decided before judges who are free from potential domination by other branches of government" and "this guarantee serves to protect primarily personal … interests." *CFTC v. Schor*, 478 U.S. 833, 848 (1986).

Magistrate judges are not 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*, 814 F.2d at 1519; *see also Lawrence v. Governor of Georgia*, 721 F. App'x 862, 863-64 (11th Cir. 2018) (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*, 474 U.S. at 153); *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"). "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." 12 Charles Alan Wright & Arthur R. Miller, Federal Practice & Procedure § 3069 (3d ed. Oct. 2020 Update)

(hereinafter "Wright & Miller"). This remains true for discovery orders, which though they "may not be dispositive, … can be extremely important." *Id.*

The Federal Rules have a mechanism for ensuring that district judges exercise the constitutionally required supervision over magistrate judges. Rule 72(a) provides that "[w]hen a pretrial matter not dispositive of a party's claim or defense is referred to a magistrate judge," a "party may serve and file objections to the [magistrate judge's] order within 14 days after being served with a copy." Fed. R. Civ. P. 72(a). "The 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." *Id.* (emphasis added). Likewise, objections to magistrate judge recommendations on dispositive "pretrial matter[s]" "must" be heard and decided by the district judge. Fed. R. Civ. P. 72(b).

In other words, when parties have matters involuntarily assigned to a magistrate judge, they have a clear and indisputable right to file objections to the magistrate judge's decisions and to have those objections heard and decided by the Article III judge. *See Bank of Nova Scotia*, 487 U.S. at 255. Here, the purported immediate transfer by the Magistrate Judge, and the District Judge's refusal to act, means the Magistrate Judge independently and improperly exercised "the judicial

Power"—and thus violated Petitioner's clear and indisputable rights under Article III and Rule 72.[2]

Accordingly, 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 … 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").[3]

2. *The Cases Cited by the Panel Do Not Strip Petitioner of Her Rights*.

The panel concluded that Petitioner failed "to show that her right to relief is clear and indisputable." Op. 2. The opinion provides no explanation but cites two cases: *In re Southwestern Mobile Homes, Inc.*, 317 F.2d 65 (5th Cir. 1963), and *Roofing & Sheet Metal Services, Inc. v. La Quinta Motor Inns, Inc.*, 689 F.2d 982 (11th Cir. 1982). The concurring opinion also cites *Roofing & Sheet Metal* and states

[2] The violation is not rendered "harmless" by the District Judge stating, after finding no jurisdiction, that he "agrees" with the Transfer Order, Doc. 31 at 1, because Petitioner has yet to file objections that the District Judge "must" consider.

[3] Because the District Judge has indicated how the Court would decide the objections before they have been filed, it would be proper to reassign the case on remand. *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 (11th Cir. 1997).

that the "only issue before us is whether the district court erred in declining to request the return of the transferred case." Op. 3.

Respectfully, the refusal to "request the return of the transferred case" is not the error Petitioner seeks to have this Court address. At a minimum, Petitioner seeks a writ "vacating the transfer order and instructing the District Court on remand" to follow the dictates of Article III and the mandatory procedures of Rule 72. *In re Howmedica Osteonics Corp.*, 867 F.3d 390, 411 (3d Cir. 2017) (vacating order improperly transferring claims to the Northern District of California).

The two cited cases do not preclude such relief. *Southwestern Mobile Homes* is a four-paragraph opinion in which a party sought mandamus review of a transfer order (that was, unlike here, issued by a district judge). 317 F.2d at 66. The court denied mandamus, noting that, unlike here, petitioner had not "seasonably moved for a stay … to seek review … by mandamus." *Id.* The court expressed skepticism as to whether it still had jurisdiction once "the transfer was complete," but it did not so hold. *Id.* Instead, the Court reserved the right to vacate such an order in "a very extreme case." *Id.* This is such a case, because the issue is not simply whether transfer was proper, but whether a Magistrate Judge has unconstitutionally arrogated the powers of Article III.

Roofing & Sheet Metal supports, rather than undermines, Petitioner's position. This Court held that—as the Circuit overseeing a ***transferee*** court—it "lack[ed]

jurisdiction to review the [transfer] decision of a district court embraced by the Eighth Circuit." *Id.* at 985-86. The opinion explained, however, that this did not leave the objecting party without options because "courts of appeals [with jurisdiction over transferor courts] ***have been particularly hospitable to petitions for mandamus challenging transfer orders*** entered … without a hearing." *Id.* at 987 (emphasis added). "Logic, policy, and precedent" dictate that, "if given the opportunity," a transferor circuit "would … review[]" such orders by exercising mandamus jurisdiction. *Id.* at 988. That is precisely the case here. The Magistrate Judge entered the Transfer Order without a hearing, and this Court may exercise its mandamus authority "in aid of [its] jurisdiction" and consistent with logic, policy, and precedent. *Id.* at 987.

The panel opinion does not discuss this reasoning but cites to footnote 10. That footnote cites *Southwestern Mobile Homes* and says "[o]ne potential hurdle" to mandamus jurisdiction in the transferor circuit is that the transferor court loses jurisdiction once "the files in a case are physically transferred." *Id.* at 988 n.10. But this footnote speculation about physical files in 1982—pure dicta issued prior to electronic dockets—does not reflect current law. The modern rule is that "if a party contends that the district court 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 Wright & Miller § 3846 (4th ed. Apr. 2021 Update); *see*

also In re Sealed Case, 141 F.3d 337, 377 (D.C. Cir. 1998) (noting in a Rule 45 transfer case, "[t]his circuit has frequently exercised its mandamus jurisdiction to vacate transfer orders, especially where the transfer was beyond the district court's power"). "[S]hifting papers cannot validate an otherwise invalid transfer." *In re United States*, 273 F.3d 380, 383 (3d Cir. 2001); *see also In re Warrick*, 70 F.3d 736, 739-40 (2d Cir. 1995) ("the clerk's physical transfer of the file [does not] destroy[ ] our jurisdiction where … the petitioner contends that the transferor court lacked power to issue the order of transfer").

For example, the Third Circuit has held that there was "no jurisdictional defect" to mandamus review of an order transferring claims to the Northern District of California, even after the files had been transferred and the transferee court had already "issued two case management scheduling orders." *Howmedica*, 867 F.3d at 399-400. The Third Circuit found the transfer improper and thus "issue[d] a writ of mandamus vacating the transfer order and instructing the District Court on remand to … retain jurisdiction over [certain previously transferred] claims." *Id.* at 411. The Northern District of California transferred the case back. *See Howmedica Osteonics Corp. v. Sarkisian*, No. 16-05079, 2018 WL 3428755 (N.D. Cal. July 16, 2018).[4]

[4] Even if footnote 10 were not stale dicta, it still would not support denial of mandamus. Footnote 10 explained that even where papers have transferred,

Finally, even if footnote 10 were binding, the en banc Court can overrule it to bring this Circuit in line with more recent precedent, or clarify that it has no applicability in this context. A clerk's notation on a docket that a matter is "electronically transferred" cannot be enough to strip this Court of jurisdiction if the transfer order was void ab initio. If so, even a clerical error on the ECF system would strip jurisdiction. An event of jurisdictional significance is only significant if valid. *Cf. Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 61 (1982) (invalid notice of appeal does not strip jurisdiction).

3. *Mandamus Is Appropriate Because There Is No Other Appellate Avenue to Correct this Error.*

Mandamus is the appropriate remedy where a federal district court's procedural violations threaten irreparable harm. *See Hollingsworth*, 558 U.S. at 190, 195-96 (mandamus is proper where district court's violation of procedural rules will cause irreparable harm); *In re Temple*, 851 F.2d 1269, 1272 (11th Cir. 1988). This holds true where an "order of transfer approache[s] the magnitude of an unauthorized exercise of judicial power." *Carteret Sav. Bank, F.A. v. Shushan*, 919 F.2d 225, 233 (3d Cir. 1990). Here, if the Magistrate Judge's Transfer Order is unreviewable by

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mandamus review "would probably … be[] available," as the circuit court could direct the transferor court "to take every reasonable action possible in asking the transferee court to return the files," and "there is no reason to assume the transferee court would deny a request for their return." *Id.* This is a far cry from the panel's conclusion that "petitioner has not met her burden to show her right to relief is clear and indisputable." Op. 2.

this Court, there is no appellate path for Petitioner to take to guarantee effectuation of her right to have the transfer issue heard by a Southern District of Florida judge.

The concurring opinion recognizes that "transfer was erroneous" but suggests that Petitioner can "raise[] this argument[] again in the transferee court, and that court must be the one to rule" on it. Op. 3. Respectfully, that is not right. There are *two* reasons why transfer was erroneous. The first is that it stripped Petitioner of her right to a decision by an Article III judge in the Southern District of Florida. The second is that Rule 45's "exceptional circumstances" requirement was not met. It is not obvious that the transferee court can revisit the second issue, as neither Respondents nor the concurring opinion point to a mechanism for such review. *See Nascone v. Spudnuts, Inc.*, 735 F.2d 763, 765 (3d Cir. 1984) (noting that some transfers can be reheard by transferee court and some cannot). But even if the transferee court can revisit whether exceptional circumstances exist, the transferee court cannot issue an order that guarantees a remedy on the first issue—i.e., the transferee court cannot instruct the Florida District Judge to follow the process prescribed by Rule 72. Only this Court, with jurisdiction over the Southern District of Florida, can issue such an order. *See* 28 U.S.C. § 1294(1).

4. *En Banc Review Is Appropriate Because the Issue Is One of Exceptional Importance, and Is Necessary to Ensure Uniformity.*

As explained, Petitioner has a right that can be only vindicated through exercise of this Court's mandamus jurisdiction. And that right—to have an Article

III judge decide—protects fundamental interests. *Schor*, 478 U.S. at 848. That alone is enough to justify en banc review. *See, e.g., United States v. Brown*, No. 17-15470 (11th Cir. May 6, 2021) (denial of constitutional judicial process rights by "judge [who has not] … respect[ed] the limits of [the court's] authority" merits en banc review).

But this case is also about this Court's "interest in ensuring compliance with proper rules of judicial administration," which "is particularly acute when those rules relate to the integrity of judicial processes." *Hollingsworth*, 558 U.S. at 196. Judicial administration of Petitioner's motion to quash was deeply flawed from the outset. The Magistrate Judge granted the Plaintiffs' motion to expedite briefing on the Motion to Transfer, then issued no decision for nearly two months—well beyond the date that supposedly prompted expedited treatment. In opposing transfer, Petitioner explicitly requested that any transfer order be stayed to allow the timely review, which many courts automatically grant as "standard procedure." *In re United States*, 273 F.3d at 384. Yet the Magistrate Judge ignored this request and—without a hearing or explanation—had the clerk effectuate the transfer *immediately*. This unusual directive stripped Petitioner of her right to have a vexatious subpoena expediently quashed. And, of course, this is not an ordinary third-party subpoena. Petitioner is a former "principal Officer" of the United States, U.S. Const., art. II, § 2, cl. 1, and courts have recognized that such officials "are vulnerable to numerous,

repetitive, harassing, and abusive depositions." *Gray v. Kohl*, No. 07-10024, 2008 WL1803643, at *1 (S.D. Fla. Apr. 21, 2008). If this kind of process is countenanced—if former Cabinet officials can be put to this trouble and expense simply to quash an invalid subpoena—there is little doubt litigants will accept the invitation, and seek the extended publicity that such gambits bring to their case, as the record here well demonstrates. The process here was grossly improper, and this Court should step in to supervise the court under its jurisdiction.

En banc review is also necessary to ensure uniformity of judgments. Both the Supreme Court and this Court have flatly held that the use of magistrate judges is constitutional *only* if a district judge retains sufficient control. *Thomas*, 474 U.S. at 153; *Sinclair*, 814 F.2d at 1519; *Lawrence*, 721 F. App'x at 863-64. That control was absent here, yet the panel opinion holds there is no "clear and indisputable right" to such control. The cases cannot stand together.

II. The Court Should Issue a Writ Directing the District Court to Deny Transfer and Enter an Order Quashing the Subpoena.

The panel opinion does not address Petitioner's other requests for relief, so Petitioner will add only this to the arguments already made:

Rule 45 dictates that the "court for the district where compliance is required ***must*** enforce th[e] duty" "to avoid imposing undue burden or expense on a person subject to the subpoena," and "***must*** quash … a subpoena that … subjects a person to undue burden." Fed. R. Civ. P. 45(d)(1), (3)(A)(iv) (emphasis added). The

concurring Judge here has already found the "transfer was erroneous and that the subpoena should be quashed." Op. 3. This is unquestionably correct. Respondents cannot point to a single case in which a Cabinet secretary (current or former) was deposed, over objection, about official decisionmaking. Yet Petitioner's motion to quash languished in the District Court for months, and now additional months have passed as she has been sent across the country to re-brief the issue, while simultaneously seeking this Court's emergency intervention. It is time for this saga to end. *See In re United States ex rel. Drummond*, 886 F.3d 448, 450 (5th Cir. 2018) ("a writ may be appropriate to address a district court's undue delay in adjudicating a case properly before it").

CONCLUSION

Petitioner respectfully requests that the en banc Court issue a writ of mandamus.

Dated: May 14, 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 35(b)(2) because, excluding the parts of the document exempted by 11th Cir. R. 35-1, it contains 3896 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 May 14, 2021, I electronically filed the foregoing with the Clerk of the Court by using the appellate CM/ECF system. All parties to this action were served using the appellate CM/ECF system.

Service has been accomplished via e-mail and third-party commercial carrier to the District Judge:

The Hon. Jose E. Martinez
The United States District Court for the Southern District of Florida
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By: /s/ *Jesse Panuccio*
Jesse Panuccio

EXHIBIT A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11239-D

In re: ELISABETH DEVOS,

Petitioner

On Petition for a Writ of Mandamus to the United States District Court for the Southern District of Florida

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BEFORE: ROSENBAUM, JILL PRYOR, and BRASHER, Circuit Judges.

BY THE COURT:

Before the Court is a petition for a writ of mandamus filed by Petitioner Elisabeth DeVos. The petition seeks a writ of mandamus directing the district court to reverse a transfer order issued by the magistrate judge below, deny the respondents' motion to transfer a motion to quash to a different district court under Fed. R. Civ. P. 45(f), and grant the petitioner's motion to quash a subpoena for her deposition. On direction from this Court, the respondents filed responses to the petition. The district judge declined to file a response.

A writ of mandamus is "a drastic and extraordinary remedy reserved for really extraordinary causes amounting to a judicial usurpation of power or a clear abuse of discretion." *In re Wellcare Health Plans, Inc.*, 754 F.3d 1234, 1238 (11th Cir. 2014) (quotation marks omitted). The writ is available "only . . . when no other adequate means [of remedy] are available." *Jackson v. Motel 6 Multipurpose, Inc.*, 130 F.3d 999, 1004 (11th Cir. 1997) (quotation marks omitted). This "condition [is] designed to ensure that the writ will not be used as a substitute for the regular appeals process." *Rohe v. Wells Fargo Bank, N.A.*, 988 F.3d 1256, 1267 (11th Cir. 2021) (citing

Cheney v. U.S. Dist. Court, 542 U.S. 367, 380 (2004)). The petitioner has the burden of showing that she has no other avenue of relief and that her right to relief is "clear and indisputable." *Mallard v. United States District Court*, 490 U.S. 296, 309 (1989).

The petitioner raises three arguments. First, she argues that the magistrate judge improperly exercised the judicial power and the district judge failed to exercise the necessary jurisdiction. Second, she argues that the district court abused its discretion in ordering a transfer. Third, she argues that the district court abused its discretion in refusing to enforce Rule 45's duty to avoid undue burden.

Addressing the petitioner's first argument, the petitioner has not met her burden to show that her right to relief is clear and indisputable. Because she did not meet her burden on her first argument, this Court lacks jurisdiction to consider her remaining arguments. *See In re Southwestern Mobile Homes, Inc.*, 317 F.2d 65, 66 (5th Cir. 1963); *Roofing and Sheet Metal Servs, Inc. v. LaQuinta Motor Inns, Inc.*, 689 F.2d 982, 988 n.10 (11th Cir. 1982). The petition for a writ of mandamus is DENIED.

BRASHER, Circuit Judge, concurring:

I agree that the petition does not meet the extraordinarily high standard for issuing a writ of mandamus. The only issue before us is whether the district court erred in declining to request the return of the transferred case so that the petitioner's objections to the magistrate judge's order could be addressed in a more orderly fashion. See Roofing and Sheet Metal Servs, Inc. v. LaQuinta Motor Inns, Inc., 689 F.2d 982, 988 n.10 (11th Cir. 1982). Accordingly, the Court's decision to deny the mandamus petition says nothing about the merits of the magistrate judge's transfer order or the petitioner's objections to the subpoena. Speaking only for myself, I believe the order to transfer was erroneous and that the subpoena should be quashed. But, assuming the petitioner raises these arguments again in the transferee court, that court must be the one to rule on those issues.