No. _____

UNITED STATES COURT OF APPEALS
FOR THE
SIXTH CIRCUIT

IN RE AMERICAN FREEDOM DEFENSE INITIATIVE; PAMELA GELLER; ROBERT SPENCER,
PLAINTIFFS-PETITIONERS,

THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
HONORABLE DENISE PAGE HOOD
Civil Case No. 10-12134

PETITION FOR WRIT OF MANDAMUS

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DISCLOSURE OF CORPORATE AFFILIATIONS AND FINANCIAL INTERESTS

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure and 6th Cir. R. 26.1, Plaintiffs-Petitioners state the following:

Plaintiff-Petitioner American Freedom Defense Initiative is a nonprofit corporation. It does not have a parent corporation and no publicly held company owns 10% of its stock. Additionally, there are no publicly owned corporations, not a party to the petition, that have a financial interest in the outcome.

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RELIEF SOUGHT

Pursuant to Rule 21 of the Federal Rules of Appellate Procedure, Plaintiffs-Petitioners American Freedom Defense Initiative ("AFDI"), Pamela Geller, and Robert Spencer (collectively referred to as "Plaintiffs" or "Petitioners") hereby request an order from this Court directing the District Court to exercise its authority and rule on the parties' cross-motions for summary judgment, which have been pending in the court since *November 13, 2013*.

It has now been *more than five years* since the District Court heard oral argument on the motions. Yet, the District Court has not ruled, and this case remains in abeyance until the court takes action on the motions.

Because this case implicates important First Amendment rights, Petitioners remain irreparably harmed by the District Court's inaction. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

The writ should issue.

ISSUE PRESENTED

Whether mandamus is an appropriate remedy where the District Court has delayed for more than five years its ruling on the parties' cross-motions for summary judgment, thereby causing unreasonable delay and irreparable harm to Petitioners.

FACTS NECESSARY TO UNDERSTAND ISSUE PRESENTED

I. Nature of the Case.

In May 2010, Plaintiffs submitted a request to run their "Leaving Islam" advertisement on the buses operated by Defendant Suburban Mobility Authority for Regional Transportation ("SMART") in the Detroit, Michigan area. Defendants[1] refused to run the ad, forcing Plaintiffs to file a civil rights action. (R-1: Compl.). Plaintiffs also filed a motion for a temporary restraining order (TRO) / preliminary injunction because the speech restriction was causing irreparable harm as a matter of law. (R-8: Pls.' Mot. for Prelim. Inj. & TRO).

The District Court denied the TRO, but set a hearing date on Plaintiffs' motion for a preliminary injunction for July 13, 2010. (R-9: Order denying TRO & Notice of Hr'g).

During the hearing, the parties presented evidence to support their respective positions. Plaintiff Geller testified for Plaintiffs, and Defendant Gibbons testified on behalf of SMART pursuant to Rule 30(b)(6) of the Federal Rules of Civil Procedure and the stipulation of the parties (R-18: Tr. of Mot. Hr'g; R-17: Stipulation). At the conclusion of the hearing, the District Court indicated that it would issue its ruling that

[1] The named defendants below are SMART, Gary L. Hendrickson, individually and in his official capacity as Chief Executive of SMART; John Hertel, individually and in his official capacity as General Manager of SMART; and Beth Gibbons, individually and in her official capacity as Marketing Program Manager of SMART. (R-1: Compl.).

Friday, July 16, 2010. The court finally ruled on March 31, 2011, granting the preliminary injunction. (R-24: Order).

On April 21, 2011, Defendants filed an emergency motion to stay the District Court's ruling pending appeal. (R-27: Defs.' Emergency Mot. to Stay). Defendants subsequently filed their notice of appeal on April 25, 2011. (R-29: Notice of Appeal). On May 3, 2011, Plaintiffs opposed the motion to stay. (R-32: Pls.' Resp. to Defs.' Emergency Mot. to Stay).

The District Court heard arguments on the motion to stay on May 12, 2011. (R-28: Notice of Hr'g on Defs.' Emergency Mot. to Stay). At the conclusion of the hearing, the court indicated that it would rule on the motion by that Friday, May 13, 2011, but, nonetheless, no later than the following Monday, May 16, 2011. The court did not rule on the motion until after the appeal, deeming it moot. (R-41: Order).

On October 25, 2012, this Court reversed the District Court's order granting the preliminary injunction. *Am. Freedom Def. Initiative v. Suburban Mobility Auth. for Reg'l Transp.*, 698 F.3d 885 (6th Cir. 2012).

Following this Court's ruling, the parties engaged in discovery to develop the factual record. At the close of discovery, the parties filed their respective motions for summary judgment.

On November 13, 2013, the District Court heard oral argument on the parties' cross-motions. Following the argument, the matter was "taken under advisement."

(Minute Entry of 11/13/2013).

On April 20, 2018, Plaintiffs filed a Request for a Status Conference / Case Update, "request[ing] a status conference and/or case update from the Court regarding when the parties might expect a decision on [their] pending dispositive motions." (R-74: Pls. Req. at 1, Pg. ID 1747). The District Court held the conference via telephone on May 17, 2018. (Minute Entry of 5/17/18). During the conference, the District Court stated that a decision would be rendered "next week."

The parties are still awaiting the District Court's ruling.

II. Factual Record.

A. The Parties to the Litigation.

Plaintiff American Freedom Defense Initiative ("AFDI") is a nonprofit organization. (R-58-2: Spencer Decl. at ¶ 3, Pg. ID 1294). It is "dedicated to freedom of speech, freedom of conscience, freedom of religion, freedom from religion, and individual rights." (R-58-8: Geller Dep. at 15-16, Pg. ID 1455).

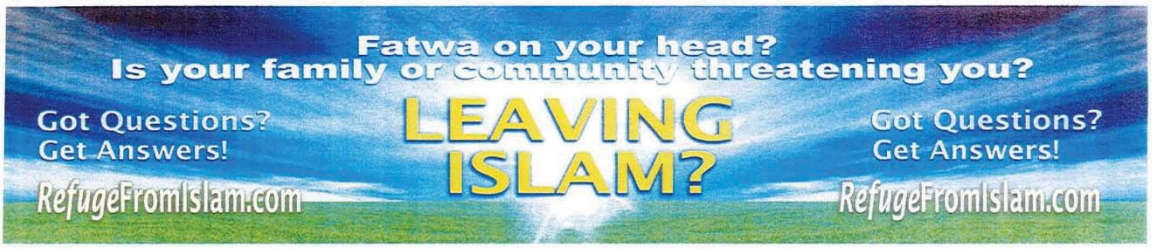
Plaintiffs Pamela Geller and Robert Spencer co-founded AFDI. Plaintiff Geller is the Executive Director, and Plaintiff Spencer is the Associate Director. Plaintiffs Geller and Spencer engage in free speech activity through various projects of AFDI. One such project is the posting of ads on the advertising space of various government transportation agencies throughout the United States, including SMART, which operates buses in the Detroit, Michigan area. (R-58-2: Spencer Decl. at ¶¶ 2-4, Pg. ID

1294).

Defendant SMART is a governmental agency. As SMART admits, "First Amendment free speech rights require that SMART not censor free speech and because of that, SMART is required to provide equal access to advertising on our vehicles."[2] (R-58-5: SMART Dep. at 105-06, Pg. ID 1353; R-58-6: Dep. Ex. 6, Pg. ID 1390).

B. Plaintiffs' "*Leaving Islam*" Advertisement.

On May 12, 2010, Plaintiffs submitted the below advertisement to SMART:



(R-58-3: Geller Decl. at ¶ 7, Pg. ID 1314; R-58-6: Dep. Ex. 2, Pg. ID 1379-80). Plaintiffs subsequently entered into a contract through SMART's advertising agent to run the ad. (R-58-3: Geller Decl. at ¶ 7, Pg. ID 1314).

A fatwa, as referenced in the ad, is a religious edict issued by a Muslim cleric addressing a point of Islamic religious law, and the penalty for leaving Islam under extant Islamic law is severe. (R-58-2: Spencer Decl. at ¶¶ 9-13, Pg. ID 1296-98). This Court acknowledged this reality in a case involving a constitutional challenge by

[2] This statement was added to SMART's website after the atheist ad controversy, (R-58-7: Gibbons Dep. at 29-32, Pg. ID 1445), which is discussed further in the text above.

a Christian pastor to a restriction on his right to distribute religious literature to Muslims at an Arab festival. *Saieg v. City of Dearborn*, 641 F.3d 727, 732 (6th Cir. 2011) ("Saieg also faces a more basic problem with booth-based evangelism: '[t]he penalty of leaving Islam according to Islamic books is death,' which makes Muslims reluctant to approach a booth that is publicly 'labeled as . . . Christian.'"). Consequently, Plaintiffs' "*Leaving Islam*" ad is "a call to girls who need help," much like an ad for a battered women's shelter for victims of domestic violence. (R-58-8: Geller Dep. at 177, Pg. ID 1457; R-58-3: Geller Decl. at ¶ 5, Pg. ID 1313-14).

On or about May 24, 2010, Defendants denied Plaintiffs' request to display the ad. Plaintiff Geller immediately contacted Defendant Gibbons, the point of contact for SMART, and asked: "What was it about the ad that was 'not approved' and what would have to be changed? Please let me know so we can get this campaign on the road." No one from SMART, including Defendant Gibbons, responded to Plaintiffs' questions, nor has anyone approved the display of Plaintiffs' ad, (R-58-3: Geller Decl. at ¶¶ 8, 9, Pg. ID 1314-15), prompting the filing of this lawsuit.

C. SMART's Advertising Guidelines.

SMART enforces advertising guidelines that prohibit certain advertisements on its buses and bus shelters. These advertising guidelines were employed by Defendants to reject Plaintiffs' "*Leaving Islam*" ad. (R-58-5: SMART Dep. at 37, Pg. ID 1339).

SMART's advertising guidelines state, in relevant part, as follows:

5.07 Advertising Guidelines

* * * *

B. Restriction on Content

In order to minimize chances of abuse, the appearance of favoritism, and the risk of imposing upon, a captive audience, Offeror shall not allow the following content:

1. *Political or political campaign advertising*.
2. Advertising promoting the sale of alcohol or tobacco.
3. Advertising that is false, misleading, or deceptive.
4. *Advertising that is clearly defamatory or likely to hold up to scorn or ridicule any person or group of persons*.[3]
5. Advertising that is obscene or pornographic; or in advocacy of imminent lawlessness or unlawful violent action.

(R-58-5: SMART Dep. at 19-24, Pg. ID 1335-36; R-58-6: Dep. Ex. 3, Pg. ID 1383) (emphasis added). Defendants rejected Plaintiffs' ad based on sections B.1. and B.4. (R-58-5: SMART Dep. at 37, Pg. ID 1339).

Aside from what is stated in the guidelines above, there are no additional manuals, guides, or other documents or references, including a definitional section within the guidelines, to assist a SMART official to determine whether the content of an advertisement is permissible. (R-58-5: SMART Dep. at 21-24, 38-40, Pg. ID 1336,

[3] This guideline (B.4.), as applied here, is unlawful following the U.S. Supreme Court's ruling in *Matal v. Tam*, 137 S. Ct. 1744, 1751 (2017) (holding that the Lanham Act provision that prohibited trademarks that may "disparage . . . or bring . . . into contemp[t] or disrepute" any "person, living or dead" was an unlawful viewpoint-based restriction on speech). *See also Am. Freedom Def. Initiative v. King Cnty.*, 904 F.3d 1126 (9th Cir. 2018) (holding that the transit authority's restriction on demeaning or disparaging ads was an unlawful viewpoint-based speech restriction in light of *Matal*).

1339; R-58-7: Gibbons Dep. at 92, Pg. ID 1450).

According to SMART's designated witness under Rule 30(b)(6), the term "political" for purposes of its advertising guidelines means "*any advocacy of a position of any politicized issue*." (R-58-5: SMART Dep. at 41, Pg. ID 1340) (emphasis added). In an effort to explain this tautology (*i.e.*, "political" = politicized issue), SMART defined "politicized" as follows: "*if society is fractured on an issue and factions of society have taken up positions on it that are not in agreement, it's politicized*." (*Id.*) (emphasis added).

During her deposition, Defendant Gibbons testified that she understood the term "political" for purposes of applying SMART's advertising guidelines as "*when somebody advocates for a particular side*." (R-58-7: Gibbons Dep. at 24, Pg. ID 1443). She also testified that she was now able to "qualify" the definition of "political" with words *after* having read the transcript of the deposition testimony of SMART's Rule 30(b)(6) witness, (R-58-7: Gibbons Dep. at 24-25, Pg. ID 1443-44)—testimony she reviewed to prepare for her deposition, (R-58-7: Gibbons Dep. at 9-11, Pg. ID 1440).

During her prior sworn testimony at the hearing on Plaintiffs' motion for a preliminary injunction,[4] Defendant Gibbons testified as follows with regard to the

[4] As we learned through discovery, Defendant Gibbons is in fact a decisionmaker for SMART with regard to the application of the advertising guidelines. Consequently, her testimony regarding their application is binding on SMART as an admission by a

application of SMART's advertising guidelines to Plaintiffs' ad:

> Q: So in fact, there is no policy or guideline or training manual or anything else that would set out why [Plaintiffs' advertisement] is political [and thus impermissible] and the Atheist Ad is not political [and thus permitted]?[5]
> A. Right.

(R-18: Tr. of Hr'g on Mot. for Prelim. Inj. at 15) (hereinafter "Tr.").[6]

Defendant Gibbons also stated during the hearing that when she examined the "*Leaving Islam*" advertisement (*i.e.*, its "four corners"), she found nothing about the ad itself that was political. She testified as follows:

> Q: So when you examined [Plaintiffs'] ad, there was nothing about the ad itself that was political?
> A: Correct.

(R-18: Tr. at 10).

Defendant Gibbons testified on redirect examination as follows:

> Q: I would like to change topics now, Ms. Gibbons, and ask you one or two questions following up on a question that Mr. Yerushalmi asked you regarding the political content of the FDI [advertisement]. In both reading the controversy surrounding the Miami Dade Transit issue, can you tell us whether you were able to determine that the FDI ad was political?
> A: I knew that it was of concern *in that there is controversy on both sides of the issue on whether they should be posted or shouldn't be posted*.

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party-opponent. *See* Fed. R. Evid. 801(d)(2).

[5] The "Atheist Ad" is the Detroit Area Coalition of Reason's advertisement that ran on SMART's buses. (R-58-5: SMART Dep. at 81-82, Pg. ID 1347; R-58-6: Dep. Ex. 4, Pg. ID 1388).

[6] There are no "Pg ID" references on the filed transcript.

(R-18: Tr. at 19) (emphasis added). In other words, Defendant Gibbons reacted to a newspaper article's rendering of a question raised about whether the Miami transit authority would run the ad—not whether the ad itself represented a "political" advertisement.

Ms. Elizabeth Dryden, who was at all relevant times the Director of External Affairs, Marketing and Communications for SMART and a person authorized to enforce the advertising guidelines (R-58-10: Dryden Dep. at 12, Pg. ID 1466), understood "political" for purposes of the advertising guidelines to mean advertisements whose subject matter was "ballot proposals, . . . campaign initiatives, or individuals . . . if they're running for office."[7] (R-58-10: Dryden Dep. at 13, Pg. ID 1467). However, Ms. Dryden further explained that matters "hotly contended, in the media" may also be considered "political" for purposes of SMART's advertising guidelines. (R-58-10: Dryden Dep. at 14-15, Pg. ID 1467).

In summary, if an advertisement addresses a contentious issue—at least one that Defendants believe is contentious based upon a sliding spectrum of contentiousness—then it is rejected. (*See* R-58-5: SMART Dep. at 66-67, Pg. ID 1346 [acknowledging that there is a hypothetical "spectrum" of whether something is sufficiently

[7] Despite this commonsense understanding of "political," we learned during the course of discovery that a "get-out-the-vote" message (*i.e.*, an advertisement urging citizens to exercise their political franchise—a subject that is quintessentially political) is, indeed, *not* "political" according to SMART. (R-58-5: SMART Dep. at 177, Pg. ID 1370; R-58-6: Dep. Ex. 36, Pg. ID 1428-29).

"politicized" to be rejected]). As demonstrated further below, whether an ad addresses an issue that is sufficiently "politicized" or "scornful" and thus rejected by Defendants is wholly arbitrary and subjective.[8]

D. Application of SMART's Advertising Guidelines.

As discovery demonstrated, SMART permits a *wide variety* of commercial, noncommercial, public-service, public-issue, and religious advertisements on its property, including ads promoting controversial and contentious issues.

For example, SMART permitted the Detroit Area Coalition of Reason to place an ad on its vehicles that stated the following: "*Don't believe in God? You are not alone*." The ad also listed the website of the organization (DetroitCoR.org). (R-58-5: SMART Dep. at 81-82, 84, Pg. ID 1347; R-58-6: Dep. Ex. 4, Pg. ID 1388). The Detroit Area Coalition of Reason's webpage (and its affiliated United Coalition of Reason) as identified on the advertisement reveals that this organization supports the views of secular humanists, atheists, "freethinkers," etc. *See* http://unitedcor.org/detroit/page/home. It describes its mission as follows: "From civil rights and separation of state and church activism, to scientific, rational and freethought presentations and discussions, to networking and camaraderie, Detroit

[8] In *Minnesota Voters Alliance v. Mansky*, 138 S. Ct. 1876 (2018), the Court held that because the unqualified ban on "political" apparel did not provide objective, workable standards, it was unreasonable in violation of the First Amendment. Under *Mansky*, SMART's "political" restriction cannot withstand constitutional scrutiny. (*See* R-77, Pls. Notice of Supplemental Auth., Pg. ID 1756-57 [bringing to the court's attention the *Mansky* decision]).

CoR Member Groups have so much to offer." *See* http://unitedcor.org/detroit/page/about-us. (R-58-4: Muise Decl. at ¶¶ 9-11, Exs. A-C, Pg. ID 1319-20, 1321-29; R-58-5: SMART Dep. at 84, 87, Pg. ID 1347-48). The Detroit Area Coalition of Reasoning's advertisement advocates a position on perhaps the most contentious (*i.e.*, *"politicized" per SMART's rendering*) of all issues—the existence of God. As Defendant Gibbons noted in her deposition, the issue presented by this ad is so *politicized* that bus drivers for SMART refused to drive the buses displaying the ad because the message "went against their belief." (R-58-7: Gibbons Dep. at 29, Pg. ID 1445).

SMART has also accepted ads that promote sexual relations between men. (R-58-5: SMART Dep. at 135, Pg. ID 1359; R-58-6: Dep. Ex. 16, Pg. Id 1398; *see also* R-58-6: Dep. Exs. 13-19, Pg. ID 1394-1401). According to an article linked on the statussexy.com website—which is listed on the ad accepted by SMART—"The 'Status Sexy' campaign uses images of attractive, shirtless men to convey its message encouraging men who have sex with men to be tested for HIV.'" (R-58-5: SMART Dep. at 138-43, Pg. ID 1360-61; R-58-6: Dep. Exs. 19, 20, Pg. ID 1401-02). Moreover, the ads use crude language suggestive of sexual acts (*i.e.*, "before you get down") that is, at the very least, factious. Consequently, Defendants have no problem with a "captive" audience,[9] including children, seeing this controversial (and arguably

[9] This ad campaign ran on advertising space within SMART buses as well as on the

lewd) advertisement campaign.

Defendants have also accepted an ad that encourages the use of "*Birth control, including: Pills, IUD's, Condoms and Diaphragms*." The advertisement promotes "Free Birth Control," and *takes a position in favor of the use of birth control* (a highly *politicized* issue), arguing that a woman should "*Put Yourself First . . . PLAN FIRST*," and "*Have a baby when the time is right for you*." (R-58-5: SMART Dep. at 146-47, 150, Pg. ID 1362-63; R-58-6: Dep. Ex. 22, Pg. ID 1406).

Defendants approved the display of a stop smoking campaign that employs graphic and controversial images to advocate for a position against smoking. (R-58-5: SMART Dep. at 164-65, Pg. ID 1366-67; R-58-6: Dep. Exs. 30-31, Pg. ID 1420-21). Defendants approved an ad for a Christian organization, which asks, "*Feeling lost? Find your path*," with an image of the Latin cross. (R-58-5: SMART Dep. at 157, Pg. ID 1365; R-58-6: Dep. Ex. 26, Pg. ID 1415). Defendants approved stop drunk driving campaigns, AIDS/HIV awareness campaigns, and stop hunger campaigns, among others, (*see* R-58-6: Dep. Exs. 23-25, 27-28, Pg. ID 1407-13, 1416-19), all of which advocate for a particular position on a public issue. Indeed, out of the "hundreds" of advertisements submitted for approval under the guidelines at issue (R-58-5: SMART Dep. at 126, Pg. ID 1357)—*ads covering a wide array of public issues*—Defendants only ever rejected three because they were allegedly "political": (1) Plaintiffs'

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outside of the buses and at bus shelters. (R-58-6: Dep. Exs. 13-18, Pg. ID 1395-1400).

"*Leaving Islam*" ad, (2) an ad for Rachel's Vineyard, which provides assistance for post-abortive women, and (3) an ad similar to the atheist ad that said, "*Don't believe in Muhammad? You are not alone*." (R-58-5: SMART Dep. at 124-26, *see also* 116-17, Pg. Id 1356-57, 1354-55; R-58-9: Dep. Ex. TT, Pg. ID 1462).

In sum, the factual record developed in this case clearly shows that a significant First Amendment issue has been squarely presented to the District Court, and the court's delay in resolving this dispute is harmful to Plaintiffs' interests and the interests of the public as well. *See Dayton Area Visually Impaired Persons, Inc. v. Fisher*, 70 F.3d 1474, 1490 (6th Cir. 1995) (stating that "the public as a whole has a significant interest in ensuring equal protection of the laws and protection of First Amendment liberties").

ARGUMENT

I. Introduction.

"The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or *to compel it to exercise its authority when it is its duty to do so*." *Roche v. Evaporated Milk Ass'n*, 319 U.S. 21, 26 (1943) (emphasis added).

As recently stated by this Court:

> "Mandamus is a drastic remedy that should be invoked only in extraordinary cases where there is a clear and indisputable right to the relief sought." *United States v. Young*, 424 F.3d 499, 504 (6th Cir. 2005). "Although a writ of mandamus should not generally be used to

> review the discretionary decisions of trial courts, the writ may be issued where the trial court's actions amount to a clear abuse of discretion." *United States v. Ford*, 987 F.2d 334, 341 (6th Cir. 1992) (internal citation omitted). To warrant relief in mandamus, [petitioner] must show his right to the writ is "clear and indisputable." *Cheney v. United States Dist. Court*, 542 U.S. 367, 381 (2004) (quoting *Kerr v. United States Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)).

In re Dixon, No. 18-3550, 2018 U.S. App. LEXIS 22507, at *1 (6th Cir. Aug. 13, 2018); *see also Kerr*, 426 U.S. at 402 (observing that while the Court has "not limited the use of mandamus by an unduly narrow and technical understanding of what constitutes a matter of 'jurisdiction,' . . . the fact still remains that only exceptional circumstances amounting to a judicial 'usurpation of power' will justify the invocation of this extraordinary remedy") (internal quotations and citation omitted).

Here, Petitioners are seeking an order to compel the District Court to rule on the parties' cross-motions for summary judgment, *which have been pending for more than five years*, so that this First Amendment case may proceed. Consequently, exceptional and extraordinary circumstances exist in this case.

II. Standard of Review.

The All Writs Act provides that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a). For a writ of mandamus to issue, three conditions must be satisfied: (1) "the party seeking issuance of the writ must have no other adequate means to attain

the relief he desires"; (2) the petitioner must demonstrate that the "right to issuance of the writ is clear and indisputable"; and (3) "the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004) (brackets, citations, and internal quotation marks omitted); *In re City of N.Y.*, 607 F.3d at 932-33 (same).

Petitioners satisfy these conditions.

III. Petitioners Satisfy the Conditions for a Writ of Mandamus to Issue.

A. Petitioners Have No Other Adequate Means to Obtain Relief.

Petitioners have no other adequate means to obtain the relief they seek. There is no final judgment. *See* 28 U.S.C. § 1291. There is no ruling that would permit an interlocutory appeal. *See* 28 U.S.C. § 1292(a). And there is no ruling that would permit certification. *See* 28 U.S.C. § 1292(b). In short, there is no ruling. Consequently, Petitioners remain at the mercy of the District Court.[10]

[10] Nor is there any administrative remedy available to Petitioners, as might be the case when dealing with a situation involving the unreasonable delay of a federal agency. *See generally* Carol R. Miaskoff, Note, *Judicial Review of Agency Delay and Inaction Under Section 706(1) of The Administrative Procedure Act,* 55 Geo. Wash. L. Rev. 635, 656 (1987) ("Although section 706(1) and All Writs mandamus are virtually coextensive for purposes of defining unreasonable delay, the APA provides the more flexible remedy. Mandamus provides appropriate relief under the All Writs Act, but courts have generally been unwilling to use the writ in this context. Instead, courts have fashioned equitable remedies under section 706(1)."") (citing *In re Ctr. for Auto Safety,* 793 F.2d 1346 (D.C. Cir. 1986); *United Steelworkers of Am. v. Rubber Mfrs. Ass'n,* 783 F.2d 1117 (D.C. Cir. 1986); *Telecomm. Research & Action Ctr. v. FCC*, 750 F.2d 70 (D.C. Cir. 1984)).

Indeed, in addition to filing the request for a status conference (R-74: Pls. Req. at 1, Pg. ID 1747) and requesting during this conference held on May 17, 2018, that the District Court rule on the pending motions so that the case could proceed, previously on September 11, 2017, Petitioners' counsel emailed the case manager, Ms. La Shawn Saulsberry, copying all counsel, and stated the following:

> Dear Ms. Saulsberry,
> The parties' cross-motions for summary judgment have been pending for more than several years now awaiting a final ruling from the court. Might we get an update of the status of this case? Thank you.

(Email of 9/11/17, APX-1). Ms. Saulsberry never responded.

Following the May 17, 2018, conference, Petitioners' counsel, on July 23, 2018, once again emailed Ms. Saulsberry, copying all counsel, and stated the following:

> Ms. Saulsberry,
> During our conference held this past May, Judge Hood told that parties that she would be issuing her opinion on the cross-motions for summary judgment the next week. Can you provide us with an update on the status? Thank you.

(Email of 7/23/18, APX-2). Ms. Saulsberry never responded.

B. The Right to Issuance of the Writ Is Clear and Indisputable.

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803). By refusing to exercise its judicial power (*i.e.*, failing to fulfill its duty), the District Court is, in effect, usurping this very same power. *See also* Fed. R. Civ. P. 1 (requiring courts to administer the

Federal Rules "to secure the just, speedy, and inexpensive determination of every action and proceeding").

A writ of mandamus is properly granted to correct the "usurpation of judicial power." *In re Link_A_Media Devices Corp.*, 662 F.3d 1221, 1222 (Fed. Cir. 2011). Specific to this case, "a lengthy delay in ruling on a request for relief can amount to a denial of the right to have that request meaningfully considered." *In re Google*, No. 15-138, 2015 U.S. App. LEXIS 16544, at *2 (Fed. Cir. July 16, 2015); *see also Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990) (granting a petition for a writ of mandamus because the "delay in this [habeas corpus] case for no reason other than docket congestion [wa]s impermissible").

Thus, the District Court's unreasonable delay in ruling is effectively an impermissible refusal to act. *See Pub. Citizen Health Research Grp. v. Comm'r, Food & Drug Admin.*, 740 F.2d 21, 32 (D.C. Cir. 1984) ("At some point administrative delay amounts to a refusal to act . . . .") (internal quotation marks and citation omitted).

Consequently, Petitioners' right to "secure the just, speedy, and inexpensive determination" of this First Amendment action has been denied by the District Court's failure to resolve the pending dispositive motions. *See* Fed. R. Civ. P. 1. Thus, it would be a "traditional use of the writ . . . to compel [the District Court] to exercise its authority" since "it is its duty to do so." *Roche*, 319 U.S. at 26.

C. The Writ Is Appropriate under the Circumstances.

It has been more than five years since the District Court heard oral argument on the parties' cross motions. There is no excuse for the District Court's delay in ruling. And without the District Court's ruling, the case remains in limbo.

The District Court's unreasonable delay in fulfilling its duty to resolve these dispositive motions is particularly troubling under the circumstances because this case involves the fundamental right to freedom of speech. The courts, including this Court, are uniform in concluding that even the momentary loss of First Amendment freedoms constitutes irreparable injury. *Elrod*, 427 U.S. at 373; *Newsom v. Norris*, 888 F.2d 371, 378 (6th Cir. 1989) ("The Supreme Court has unequivocally admonished that even minimal infringement upon First Amendment values constitutes irreparable injury sufficient to justify injunctive relief.") (citing *Elrod*).

In the final analysis, the just and speedy resolution of this case is critically important because it involves the First Amendment. Consequently, under the circumstances, a writ is appropriate.

CONCLUSION

Petitioners hereby request that this Court grant this petition and issue a writ of mandamus directing the District Court to exercise its duty to rule on the parties' cross-motions for summary judgment so that this case may finally proceed to a prompt and just resolution.

AMERICAN FREEDOM LAW CENTER

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Attorneys for Plaintiffs-Petitioners

CERTIFICATE OF COMPLIANCE

I certify that pursuant to Rules 21(d) and 32(c)(2) of the Federal Rules of Appellate Procedure, the foregoing Petition is proportionally spaced, has a typeface of 14 points Times New Roman, and contains 4,689 words.

AMERICAN FREEDOM LAW CENTER

/s/ Robert J. Muise
Robert J. Muise, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2019, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Sixth Circuit by using the appellate CM/ECF system. Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system. I further certify that I caused to be served a copy of this petition via Federal Express upon the following respondents:

Honorable Denise Page Hood
U.S. District Court for the E.D. of Michigan
Theodore Levin U.S. Courthouse
231 W. Lafayette Blvd., Room 701
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(313) 234-5165
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AMERICAN FREEDOM LAW CENTER

/s/ *Robert J. Muise*
Robert J. Muise (P62849)

ADDENDUM: DESIGNATION OF RELEVANT DISTRICT COURT DOCUMENTS

Record No.	Description
R-1	Complaint
R-18	Transcript of Hearing on Motion for Preliminary Injunction
R-58-2	Declaration of Plaintiff Robert Spencer
R-58-3	Declaration of Plaintiff Pamela Geller
R-58-4	Declaration of Attorney Robert J. Muise
R-58-5	Deposition of Defendant SMART (excerpts)
R-58-6	SMART Deposition Exhibits
R-58-7	Deposition of Defendant Beth Gibbons (excerpts)
R-58-8	Deposition of Plaintiff Pamela Geller (excerpts)
R-58-9	Plaintiff Geller Deposition Exhibits
R-58-10	Deposition of Elizabeth Dryden (excerpts)
R-74	Plaintiffs' Request for Status Conference / Case Update

APPENDIX

Robert Muise - AFLC

From: Robert Muise - AFLC <rmuise@americanfreedomlawcenter.org>
Sent: Monday, September 11, 2017 11:07 AM
To: 'La_Shawn_Saulsberry@mied.uscourts.gov'
Cc: 'Gordon, Avery'; 'Christian E. Hildebrandt'; 'dyerushalmi@americanfreedomlawcenter.org'
Subject: RE: 10-12134 American Freedom v. Suburban

Dear Ms. Saulsberry,
The parties' cross-motions for summary judgment have been pending for more than several years now awaiting a final ruling from the court. Might we get an update on the status of this case? Thank you.

Robert J. Muise*
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Robert Muise - AFLC

From: Robert Muise - AFLC <rmuise@americanfreedomlawcenter.org>
Sent: Monday, July 23, 2018 12:20 PM
To: 'La_Shawn_Saulsberry@mied.uscourts.gov'
Cc: 'Gordon, Avery'; 'childebrandt@vgpclaw.com'; 'dyerushalmi@americanfreedomlawcenter.org'; 'erin@greatlakesjc.org'
Subject: RE: FW: Set Deadlines/Hearings in 2:10-cv-12134-DPH-MJH American Freedom Defense Initiative et al v. Suburban Mobility Authority For Regional Transportation (SMART) et al

Ms. Saulsberry,
During our status conference held this past May, Judge Hood told the parties that she would be issuing her opinion on the cross-motions for summary judgment the next week. Can you provide us with an update on the status? Thank you.

Robert J. Muise*
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