No. 16-1161

In the Supreme Court of the United States

BEVERLY R. GILL, ET AL.,

Appellants,

v.

WILLIAM WHITFORD, ET AL.,

Appellees.

On Appeal from the United States District Court for the Western District of Wisconsin

BRIEF OF THE PLAINTIFFS IN THE MARYLAND REDISTRICTING LITIGATION, *BENISEK* v. *LAMONE* (FORMERLY *SHAPIRO* v. *McMANUS*), AS *AMICI CURIAE* SUPPORTING NEITHER PARTY

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INTEREST OF THE *AMICI* AND SUMMARY OF THE ARGUMENT

Amici are seven individual plaintiffs litigating a First Amendment retaliation challenge to the partisan gerrymander of a single federal congressional district in Maryland in 2011. *Amici*'s case was considered by this Court two Terms ago, when the Court held that their First Amendment retaliation claim is a colorable one that should have been referred to a three-judge district court. *Shapiro* v. *McManus*, 136 S. Ct. 450 (2015) (*Shapiro I*).[1]

The three-judge panel convened pursuant to this Court's remand instructions subsequently held that *amici* had stated a justiciable partisan gerrymandering claim under the First Amendment. *Shapiro* v. *McManus*, 203 F. Supp. 3d 579 (D. Md. 2016) (*Shapiro II*). The court held, more specifically, that the First Amendment forbids a State from purposefully diluting the weight of particular citizens' votes

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[1] The authors of this brief are partners in the Washington, D.C. office of Mayer Brown LLP and serve as pro bono counsel to *amici* in their challenge to the 2011 Maryland congressional redistricting in *Benisek* v. *Lamone*, No. 13-cv-3233 (D. Md.), formerly captioned *Shapiro* v. *McManus*. Michele Odorizzi, a partner in the Chicago office of Mayer Brown LLP, is among the counsel representing Plaintiffs in this case. Ms. Odorizzi has had no personal involvement in *amici*'s lawsuit in Maryland or the drafting or filing of this brief. Conversely, the authors of this brief have had no prior involvement in Plaintiffs' lawsuit in Wisconsin. No person or entity other than *amici* and their counsel made a monetary contribution to this brief's preparation or submission. Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk. *Amici,* by name, are O. John Benisek, Edmund Cueman, Jeremiah DeWolf, Charles W. Eyler Jr., Kat O'Connor, Alonnie L. Ropp, and Sharon Strine.

because of those citizens' voting histories and party affiliations. *Id*. at 595-598. On the question of injury, the court concluded that a plaintiff must show that the challenged redistricting plan diluted the votes of the targeted citizens to such a degree that it resulted in a *concrete* burden—just as is required in any other First Amendment retaliation case. It is not enough, in other words, to prove vote dilution in the abstract, using statistical measures; rather, the deliberate dilution of voter strength must make a practical difference, such as when it changes the outcome of an election. *Id*. at 596-597. Cf. *Ala. Legislative Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1265 (2015) ("the harms that underlie a racial gerrymandering claim" include "being represented by a legislator" who does not represent the targeted voters' interests).

In the time since, the case has been re-captioned *Benisek* v. *Lamone*, and *amici* have been engaged in discovery concerning their First Amendment retaliation claim. The evidence shows overwhelmingly that those responsible for Maryland 2011 redistricting singled out Republicans in Maryland's former Sixth District for disfavored treatment because of their past voting histories and affiliation with the Republican Party. It also shows that the gerrymander *worked*, changing the outcomes of the elections in 2012 onward, precisely as intended.

Unlike *amici*'s case in Maryland, Plaintiffs' claim in this case challenges Wisconsin's state legislative map on a statewide basis under the Equal Protection Clause. And Defendants' principal argument on appeal is that "plaintiffs in a political-gerrymandering case lack standing to bring a statewide challenge." Appellants' Br. 28. Analogizing to this Court's racial

gerrymandering cases, they argue that plaintiffs in partisan gerrymandering cases "could only possibly have standing to challenge their own districts, based upon an allegation that their legislature's treatment of that district's lines caused them individualized harm." *Ibid.*

Amici take no position on the merits of that argument, except to say that if the Court agrees with Defendants, it would not bar *amici*'s case in Maryland, which is a single-district challenge involving a claim of individualized harm.

Defendants initially took their argument a step further, however, posing the question whether partisan gerrymandering claims are justiciable as a categorical matter (J.S. i) and asserting that "this Court should hold that partisan-gerrymandering claims are nonjusticiable" altogether, presumably including *amici*'s single-district First Amendment claim in Maryland (J.S. 40). In their principal merits brief (at 36), Defendants have hedged, inviting the Court to "hold that political-gerrymandering claims are nonjusticiable," but only "for statewide claims." Defendants insist that, in the years since *Bandemer*, "no litigant has identified" any "comprehensive and neutral principles" for adjudicating partisan gerrymandering claims. *Ibid.* Defendants thus describe "continued litigation on this question" to be "futil[e]" (*id.* at 37) and "fruitless" (*id.* at 23).

In making such broad pronouncements on the justiciability of partisan gerrymandering claims, Defendants do not address the district court's thorough and thoughtful opinion on justiciability in *amici*'s case in Maryland. Because *amici* are pressing a single-district, individualized-injury gerrymandering claim—one that suffers from none of the

purported infirmities of the statewide claim at issue here—they have an interest in ensuring that the Court's consideration of the questions presented is fully informed. *Amici* take no position on the justiciability or merits of Plaintiffs' very different "partisan asymmetry" theory. They write only to stress that the Court, in addressing those issues, should be aware of (and endeavor not to prejudge) *amici*'s very different First Amendment retaliation claim.

ARGUMENT

In their last two cases addressing partisan gerrymandering, the Justices of this Court identified two conceptually distinct possibilities for solving gerrymandering's justiciability problem.

First, in *Vieth* v. *Jubelirer*, 541 U.S. 267 (2004), Justice Kennedy expressed interest in the First Amendment retaliation doctrine, according to which citizens' "First Amendment interest [in] not [being] burden[ed] * * * because of their participation in the electoral process" is violated when a redistricting map "has the purpose and effect of burdening a group of voters' representational rights" by reason of their voting histories and political-party affiliations. *Id.* at 314. This approach to partisan gerrymandering turns on citizens' past conduct alone and is most naturally litigated on a single-district basis. It is the theory presented in *amici*'s lawsuit in Maryland and remains "uncontradicted" by any of this Court's cases. *Shapiro II*, 203 F. Supp. 3d at 586 (quoting *Shapiro I*, 136 S. Ct. at 456).

Second, in *LULAC* v. *Perry*, 548 U.S. 399 (2006), some Justices expressed interest in the concept of partisan asymmetry (see, *e.g.*, *id.* at 466 (Stevens, J., concurring in part and dissenting in part)), which is "the concept at the heart of [the Wisconsin] litiga-

tion" (Mot. to Affirm 5). As the Court knows from the parties' briefing in this case, partisan symmetry is rooted in the Equal Protection Clause and reflects the view that a redistricting plan should treat the major political parties symmetrically with respect to the conversion of votes to seats. There are numerous statistical methods for measuring partisan asymmetry, including "partisan bias" and the "efficiency gap." But no matter its measure, partisan asymmetry depends on the idea that gerrymandering "is *inherently* a statewide activity" and is best adjudicated "on a statewide basis." Mot. to Affirm 4.

Defendants, for their part, have asked this Court to address the justiciability of partisan gerrymandering claims writ large (J.S. 40), or perhaps only with respect to statewide claims (Appellants' Br. 36). Either way, this case presents no occasion to pass upon the justiciability of the single-district, First Amendment retaliation claim at issue in *amici*'s lawsuit. Defendants' brief cites the Maryland court's ruling on justiciability just once, and then only in passing. See Appellants' Br. 34 (citing *Shapiro II*). And it would not be reasonable to expect Plaintiffs to defend a legal theory that is not presented in their complaint. Because the Court should not address the justiciability of claims not before it, the Court should not reach the fifth question presented in Defendants' jurisdictional statement.

A. Single-district partisan gerrymandering claims are justiciable under the First Amendment retaliation doctrine

1. The starting point for all federal lawsuits is "the concept of justiciability, which expresses the jurisdictional limitations imposed upon federal courts by the 'case or controversy' requirement of

[Article] III." *Schlesinger* v. *Reservists Comm. to Stop the War*, 418 U.S. 208, 215 (1974). Relevant here is the arm of the justiciability inquiry known as the political question doctrine.

The Court has emphasized two circumstances implicating the "narrow" political-question exception: those in which there is "a textually demonstrable constitutional commitment of the issue to a coordinate political department" and those in which there is "a lack of judicially discoverable and manageable standards for resolving [the controversy]." *Zivotofsky ex rel. Zivotofsky* v. *Clinton*, 566 U.S. 189, 195 (2012) (quoting *Nixon* v. *United States*, 506 U.S. 224, 228 (1993)).

The second circumstance is the one at issue in partisan gerrymandering cases like this one. It turns on the notion that "law pronounced by the courts must be principled, rational, and based upon reasoned distinctions." *Vieth*, 541 U.S. at 278 (plurality opinion). In the judicial sphere, unlike in the political sphere, ad hoc decision-making will not do; "judicial action must be governed by *standard*, by *rule*." *Ibid.* The absence of an objective standard suggests "'abstract questions of wide public significance' which amount to 'generalized grievances,' pervasively shared and most appropriately addressed in the representative branches." *Valley Forge Christian Coll.* v. *Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (quoting *Warth* v. *Seldin*, 422 U.S. 490, 499, 500 (1975)). Put another way, the "lack of judicially discoverable standards" indicates the commitment of the question to the "political departments," requiring dismissal. *Baker* v. *Carr*, 369 U.S. 186, 214 (1962).

That is not to say, however, that all cases with political consequences necessarily involve nonjusticiable political questions. See *Davis* v. *Bandemer*, 478 U.S. 109, 122 (1986) (The doctrine "is one of political *questions*, not one of political *cases*.") (emphases added) (quoting *Baker*, 369 U.S. at 217) (internal quotation marks omitted). On the contrary, "courts cannot reject as 'no law suit' a bona fide controversy as to whether some action * * * exceeds constitutional authority" simply because the action is "denominated 'political.'" *Ibid*. When "well developed and familiar" judicial standards for decision are available (*Baker*, 369 U.S. at 226), courts have a responsibility to render judgment—they "cannot avoid their responsibility merely 'because the issues have political implications.'" *Zivotofsky*, 566 U.S. at 196 (quoting *INS* v. *Chadha*, 462 U.S. 919, 943 (1983)).

2. The First Amendment retaliation doctrine furnishes a clear and objective standard for identifying unlawful partisan gerrymanders. It brings with it a well-settled framework for decision, including the requirement that plaintiffs establish a concrete adverse impact (*e.g.*, *Zherka* v. *Amicone*, 634 F.3d 642, 646 (2d Cir. 2011)), just as in single-district racial gerrymandering cases (*e.g.*, *Ala. Legislative Black Caucus*, 135 S. Ct. at 1265).

Amici's concrete-impact approach is grounded not only in settled First Amendment doctrine, but in the law of partisan gerrymandering itself. "The term 'political gerrymander' has been defined as '[t]he practice of dividing a geographical area into electoral districts, often of highly irregular shape, to give one political party an unfair advantage by diluting the opposition's voting strength.'" *Vieth*, 541 U.S. at 271

n.1 (plurality opinion) (quoting *Black's Law Dictionary* 696 (7th ed. 1999)). The purpose of such "vote dilution" is to ensure that the disfavored voters have "less opportunity * * * to elect candidates of their choice." *Bandemer*, 478 U.S. at 131 (plurality opinion). The proposition that vote dilution ought to be actionable when it actually produces a demonstrable adverse impact (in *amici*'s case, preventing them from re-electing the Republican candidate as their representative in Congress, as they otherwise would have been able to do) is thus sensible.[2]

The concrete burden requirement also recognizes that partisan vote dilution is not unlawful in its own right. Cf. *LULAC*, 548 U.S. at 419-420 (Kennedy, J.). Indeed, some degree of vote dilution is inevitable in every redistricting, as map-drawers and legislatures weigh and balance legitimate and competing redistricting policies. The question that has stymied courts since *Bandemer* is how to determine when a map's imposition of partisan vote dilution crosses the constitutional line—when partisan vote dilution "require[s] intervention by the federal courts." *Bandemer*, 478 U.S. at 134 (plurality opinion).

The answer to that question, under the First Amendment retaliation framework, is two-pronged: Partisan vote dilution is unlawful—first—when it has been brought about *deliberately*, reflecting a

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[2] To be clear, "'[c]oncrete' is not * * * necessarily synonymous with 'tangible.'" *Spokeo, Inc.* v. *Robins*, 136 S. Ct. 1540, 1549 (2016). "Although tangible injuries are perhaps easier to recognize, [the Supreme Court has] confirmed in many of [its] previous cases that intangible injuries can nevertheless be concrete." *Ibid.* (citing *Pleasant Grove City* v. *Summum*, 555 U.S. 460 (2009) (free speech); *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, 508 U.S. 520 (1993) (free exercise)).

specific intent to burden particular citizens because of the way they have voted in prior elections and the party with which they affiliate; and—second—when it manifests in a concrete and practical way, such as when it changes the outcome of an election.

This concrete-burden standard turns on the same reasoned, manageable distinctions that govern every lawsuit in federal court. Every plaintiff must always "allege a distinct and palpable injury to himself, even if it is an injury shared by a large class of other possible litigants." *Warth* v. *Seldin*, 422 U.S. 490, 501 (1975). And measuring the significance of vote dilution by evaluating whether it produces a concrete burden is a natural reflection of the longstanding rule that the Elections Clause is not "a source of power to dictate electoral outcomes" by enacting laws that "favor or disfavor a class of candidates." *U.S. Term Limits, Inc.* v. *Thornton*, 514 U.S. 779, 833-834 (1995).

3. The three-judge district court in *Shapiro II* agreed with all of this, holding that *amici* had stated a justiciable single-district claim under the First Amendment retaliation doctrine.

The district court started from settled principles. To begin, "[p]olitical belief and association constitute the core of those activities protected by the First Amendment" and "[t]he right to vote freely for the candidate of one's choice is of the essence of a democratic society." *Shapiro II*, 203 F. Supp. 3d at 594 (quoting *Elrod* v. *Burns*, 427 U.S. 347, 356 (1976) (plurality opinion); *Reynolds* v. *Sims*, 377 U.S. 533, 555 (1964)). "[T]he First Amendment also works in tandem with other constitutional guarantees to protect representational rights," including "'[t]he right of qualified voters, regardless of their political

persuasion, to cast their votes effectively.'" *Ibid.* (emphasis omitted) (quoting *Anderson* v. *Celebrezze*, 460 U.S. 780, 787 (1983)). "Thus, at the most basic level," the court reasoned, "when a State draws the boundaries of its electoral districts so as to dilute the votes of certain of its citizens, the practice imposes a burden on those citizens' right to 'have an equally effective voice in the election' of a legislator to represent them." *Shapiro II*, 203 F. Supp. 3d at 595 (quoting *Reynolds*, 377 U.S. at 565).

In this way, "[t]he practice of *purposefully* diluting the weight of certain citizens' votes to make it more difficult for them to achieve electoral success *because of* the political views they have expressed through their voting histories and party affiliations" violates "the First Amendment's well-established prohibition against retaliation, which prevents the State from indirectly impinging on the direct rights of speech and association by retaliating against citizens for their exercise." *Shapiro II*, 203 F. Supp. 3d at 595 (citing *Vieth*, 541 U.S. at 314-315 (Kennedy, J., concurring in the judgment); *Hartman* v. *Moore*, 547 U.S. 250, 256 (2006)). "Because there is no redistricting exception to this well-established First Amendment jurisprudence, the fundamental principle that the government may not penalize citizens because of how they have exercised their First Amendment rights [in the past] thus provides a well-understood structure for claims challenging the constitutionality of a State's redistricting legislation." *Id.* at 596.

As a general matter, a plaintiff bringing a First Amendment retaliation lawsuit must show that the State harbored a specific intent to penalize him as reprisal for conduct protected by the First Amend-

ment; that the State's conduct resulted in injury; and that the injury is a but-for result of the improper intent to retaliate. *Shapiro II*, 203 F. Supp. 3d at 596. On the issue of injury, in particular—the issue that has eluded manageable measurement in equal-protection gerrymandering cases—the plaintiff must show a harm that is more than "de minimis or trivial," and "[h]urt feelings or a bruised ego" are not enough. *Shapiro II*, 203 F.3d at 596 (quoting *Suarez Corp. Indus.* v. *McGraw*, 202 F.3d 676, 686 (4th Cir. 2000); *Zherka* v. *Amicone*, 634 F.3d 642, 645-646 (2d Cir. 2011)). The harm must, in other words, be "concrete." *Ibid.*

Accordingly,

> [w]hen applying First Amendment jurisprudence to redistricting, * * * [a] plaintiff must [show] that those responsible for the map redrew the lines of his district with the *specific intent* to impose a burden on him and similarly situated citizens because of how they voted or the political party with which they were affiliated. In the context of redistricting, this burden is the *injury* that usually takes the form of *vote dilution*. But vote dilution is a matter of degree, and a *de minimis* amount of vote dilution, even if intentionally imposed, may not result in a sufficiently adverse effect on the exercise of First Amendment rights to constitute a cognizable injury. Instead, to establish the injury element of a retaliation claim, the plaintiff must show that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a tangible and concrete adverse effect. In other words,

> the vote dilution must make some practical difference. Finally, the plaintiff must allege *causation*—that, absent the mapmakers' intent to burden a particular group of voters by reason of their views, the concrete adverse impact would not have occurred.

Shapiro II, 203 F. Supp. 3d at 596-597.

Crucially, "[t]his standard contains several important limitations that help ensure that courts will not needlessly intervene in what is quintessentially a political process." *Shapiro II*, 203 F. Supp. 3d at 597. *First*, "it does not prohibit a legislature from taking *any* political consideration into account in reshaping its electoral districts." *Ibid*. "Rather, what implicates the First Amendment's prohibition on retaliation is not the use of data reflecting citizens' voting history and party affiliation, but the use of such data for the purpose of making it harder for a particular group of voters to achieve electoral success because of the views they had previously expressed." *Ibid*.

Second, "merely proving that the legislature was aware of the likely political impact of its plan and nonetheless adopted it is not sufficient to prove that the legislature was motivated by the type of intent necessary to sustain a First Amendment retaliation claim." *Ibid*.

Finally:

> the standard requires proof that the vote dilution brought about by the redistricting legislation was sufficiently serious to produce a demonstrable and concrete adverse effect on a group of voters' right to have "an equally effective voice in the election" of a representative. Not only is this requirement of a

> palpable and concrete harm indicated by First Amendment retaliation jurisprudence, but it also makes common sense. Legislators draw political gerrymanders for practical reasons, and it is fitting to measure the effect of the apportionment not by whether it crosses some arbitrary statistical threshold or offends some vague notion of fairness, but by its real-world consequences—including, most notably, whether the State's intentional dilution of the weight of certain citizens' vote by reason of their views has actually altered the outcome of an election.

Shapiro II, 203 F. Supp. 3d at 597-598 (citation omitted). The district court thus "recognize[d] the justiciability of a claim challenging redistricting under the First Amendment and Article I, § 2, when it alleges intent, injury, and causation, as described herein." *Id*. at 598.

B. *Amici*'s evidence of unlawful First Amendment retaliation in Maryland's 2011 redistricting is compelling

As *amici* have demonstrated in their motion for a preliminary injunction before the district court, they have proved each of the elements of their claim.

First, those responsible for Maryland's 2011 redistricting plan had the specific intent to dilute the votes of Republican citizens because of their voting histories and party affiliation, including their past success electing Republican Roscoe Bartlett to Congress. In his deposition testimony on this point, Governor Martin O'Malley—the man with principal responsibility for the map—could not have been more forthcoming: It was "clearly [his] intent" and the

"intent" of "those of us in leadership positions in our party * * * to create a map that would" result in a "district where the people would be more likely to elect a Democrat than a Republican." See Mot. for P.I. 1-2, 11-12, Dkt. 177-1, *Benisek* v. *Lamone*, No. 13-cv-3233 (D. Md. May 31, 2017). May others involved in the redistricting confirmed this express purpose, as did *amici*'s experts in demography and redistricting. *Id*. at 12-16. There is simply no other explanation for the massive reshuffling of the Sixth District's population in 2011, apart from an intent to dilute Republican votes there.

Second, those responsible for the redistricting plan achieved their specifically intended goal: Experts for both the plaintiffs and the State have agreed that Republican votes in the Sixth District were substantially diluted as a consequence of moving large majority-Democrat areas into, and majority-Republican areas out of, the district. And the upshot of this deliberate vote dilution was a concrete injury: In each of the three elections since 2011, Republicans in the old Sixth District have been unable to elect a candidate of their choice, despite that they had been able to do so in each election over the prior two decades. Thus, the vote dilution visited upon Republicans in the Sixth District made a "concrete" and "practical difference." *Shapiro II*, 203 F. Supp. 3d at 597.

Finally, "absent the mapmakers' intent to burden [Republicans in the old Sixth District] by reason of their views" (*Shapiro II*, 203 F. Supp. 3d at 597), Republican voters in the Sixth District would not have been palpably diluted. There is no evidence that any of the other considerations cited by Governor O'Malley would have resulted in so fundamental a

rearrangement of the Sixth District's population. And no traditional redistricting principles can explain the district's southward contortions. Finally, without the massive vote dilution visited upon Republican voters in the former Sixth District, the outcomes of the elections in 2012 onward would have been different.

C. The Court should not pass upon the justiciability or merits of any claim not before it

The differences between Plaintiffs' claim in this case and *amici*'s claim in the Maryland litigation are manifest:

- This case involves a challenge under the Equal Protection Clause based on the statewide concept of partisan asymmetry and the efficiency gap. *Amici*'s case, in contrast, involves a challenge under the First Amendment retaliation doctrine, including its requirement of a concrete injury.
- Whereas Plaintiffs' partisan asymmetry claim necessarily entails quantitative, statistically-based line-drawing, *amici*'s First Amendment retaliation claim does not.
- The partisan asymmetry claim in this case involves a challenge to a statewide map, and the State's principal appellate arguments are directed at the statewide nature of the claim. *Amici*'s case, in contrast, involves a challenge to the deliberate cracking of a single congressional district.
- According to Plaintiffs' claim, a case of intentional and concrete vote dilution in one district may be lawful, so long as statewide partisan asymmetry is not "extreme" overall. Not so under the First Amendment retaliation doctrine. It would be no answer to the injury inflicted upon *amici* in

Maryland's Sixth Congressional District to observe that far-off voters in the First Congressional District had successfully elected a Republican, or to conclude that the 2011 congressional map is otherwise "fair" to Maryland Republicans overall, according to an abstract, statewide measure of partisan symmetry.

- *Aimic*'s case involves a challenge to the lines of a single *federal* congressional district. Plaintiffs' case, in contrast, involves a challenge to the lines of *state* legislative districts, which are subject to laxer constitutional constraints than the drawing of federal districts. See *Reynolds* v. *Sims*, 377 U.S. 533, 577-579 (1964).

Despite these differences, the fifth question presented in Defendants' jurisdictional brief (at i) is stated in categorical terms: "Are partisan-gerrymandering claims justiciable?" Simply put, that question is not presented in this appeal. To answer that question, after all, the Court would have to pass upon the justiciability of *amici*'s claim. Yet the parties here have not briefed that issue, either below or before this Court. And why would they have? Plaintiffs did not plead a First Amendment retaliation claim, and the parties' discovery was not directed to that theory.

The Court accordingly should not reach the fifth question presented in Defendants' jurisdictional brief. Cf. *Sims* v. *Apfel*, 530 U.S. 103, 108-109 (2000) ("[A]ppellate courts will not consider arguments not raised before trial courts."). And in addressing the justiciability and merits of Plaintiffs' particular statewide claim, the Court should be aware of *amici*'s single-district First Amendment retaliation claim and cautious not prejudge it.

CONCLUSION

Amici's single-district, First Amendment retaliation claim in Maryland is based on a "legal theory * * * [that is] uncontradicted by the majority in any of [the Court's] cases" (*Shapiro I*, 136 S. Ct. at 456), and its justiciability has been affirmed by the three-judge district court in *Shapiro II*. In deciding the issues presented in this appeal, the Court should not prejudge *amici*'s First Amendment retaliation claim.

Respectfully submitted

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