No. 20A55

In the Supreme Court of the United States

MARCI ANDINO, *et al.*,
APPLICANTS,

V.

KYLON MIDDLETON, *et al.*,
RESPONDENTS.

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE DISTRICT OF COLUMBIA AND THE STATES OF CALIFORNIA, CONNECTICUT, DELAWARE, HAWAII, ILLINOIS, MARYLAND, MASSACHUSETTS, MICHIGAN, MINNESOTA, NEVADA, NEW MEXICO, NEW YORK, OREGON, RHODE ISLAND, VERMONT, VIRGINIA, AND WASHINGTON AS *AMICI CURIAE* IN OPPOSITION TO THE EMERGENCY APPLICATION FOR A STAY

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The District of Columbia and the States of California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington (collectively, the "*Amici* States") move for leave to file the enclosed brief as *amici curiae* in support of respondents and in opposition to the application for a stay (i) without 10 days' advance notice to the parties of *amici*'s intent to file as ordinarily required by Sup. Ct. R. 37.2(a), and (ii) in an unbound format on 8½-by-11-inch paper rather than in booklet form.

Applicants filed their emergency application for a stay in this matter on October 1, 2020. In light of the expedited briefing schedule set by the Court, it was not feasible to provide 10 days' notice to the parties. When notified, applicants took no position on the brief and respondents consented to its filing. In addition, the compressed time frame prevented the *Amici* States from having the brief finalized in sufficient time to allow it to be printed and filed in booklet form.

As set forth in the enclosed brief, the undersigned *Amici* States have a strong interest in the outcome of this application to stay the preliminary injunction. Specifically, the *Amici* States have a critical interest in ensuring that states safeguard the integrity of the election process without forcing residents to choose between their franchise and their health.

The *Amici* States thus have a distinct perspective on the harms asserted by the applicants, and the *amicus* brief includes relevant material not brought to the attention of the Court by the parties that may be of considerable assistance to the

Court. *See* Sup. Ct. R. 37.1. The brief describes how the *Amici* States have taken reasonable, common-sense steps to ensure that the COVID-19 pandemic will not disrupt their citizens' ability to safely exercise their fundamental right to vote, while also ensuring the safety and security of the election. The *Amici* States' experiences with safe and secure methods of voting by mail—without instances of significant fraud—help illuminate why the preliminary injunction will not result in irreparable harm to the applicants and why the injunction is in the public interest.

The undersigned *Amici* States therefore seek leave to file this brief in order to support respondents' showing that denying the applicants' requested stay will not result in irreparable harm or contravene the public interest, but granting a stay will harm voters and public health.

CONCLUSION

This Court should grant *amici curiae* leave to file the enclosed brief.

Respectfully submitted,

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The District of Columbia and the States of California, Connecticut, Delaware, Hawaii, Illinois, Maryland, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New York, Oregon, Rhode Island, Vermont, Virginia, and Washington (collectively, the "*Amici* States") submit this brief as *amici curiae* in support of respondents and in opposition to applicants' emergency application for a stay.

In our federalist system, states play "a major role . . . in structuring and monitoring the election process." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572 (2000); *see* U.S. Const. art. I, § 4, cl. 1. "A State," accordingly, "has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (quoting *Eu v. San Francisco Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 231 (1989)). But states cannot pursue that interest to the exclusion of all others, and must instead balance it against their serious and ongoing "responsibility of protecting the health, safety, and welfare of [their] citizens." *United Haulers Ass'n, Inc. v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, 550 U.S. 330, 342 (2007). As the primary managers of the election process, states have an obligation to safeguard their citizens' constitutional right to vote while ensuring that this right can be exercised safely. *See Burdick v. Takushi*, 504 U.S. 428, 433 (1992).

To that end, states have a critical interest in making it possible for their citizens to cast their votes in the upcoming election in ways that safeguard both public health and the sanctity of the electoral process. And the *Amici* States have experience doing just that. Most states, including several *Amici* States, have abolished absentee-excuse requirements, permitting all voters to vote by mail. Many have sent vote-by-

mail applications to all registered voters, while others have sent ballots to voters to ensure their ability to vote safely despite the COVID-19 pandemic. Some others have—either temporarily or permanently—abolished notarization and witness requirements for absentee ballots. Although the *Amici* States have developed different approaches on how to best protect the franchise during the ongoing public health crisis, they share a common interest in promoting civic participation while protecting public health by reducing the need for in-person interactions.

South Carolina, which requires that voters have a witness sign their absentee ballot return envelope, is out of step with these important interests. Indeed, the data show that South Carolina is an outlier in maintaining this requirement, particularly amid the COVID-19 pandemic. In the *Amici* States' experience, it is possible to implement practices that protect the integrity of the electoral process without resorting to techniques that force voters into the impossible choice between exercising their fundamental right to vote while potentially exposing themselves to COVID-19, or simply staying home. The *Amici* States thus urge this Court to reject applicants' emergency application.

ARGUMENT

I. States Have Adopted Reasonable Measures To Protect Voter Participation And Overall Health During The COVID-19 Pandemic.

This Court has recognized that "States retain the power to regulate their own elections." *Burdick*, 504 U.S. at 433. That role, however, comes with the attendant responsibility to administer elections in ways that are safe for residents and that preserve the right to vote. Despite the ongoing COVID-19 pandemic, election experts

"predict a high turnout in November," when "[a]s much as 70% of the 240 [million]-strong electorate is expected to vote." *Covid-19 and An Atmosphere of Distrust Pose Grave Risks to America's Election,* The Economist (Sept. 3, 2020).[1] Election officials thus face the unique challenge of overseeing the democratic process while preventing transmission of the novel coronavirus. Given the disruption caused by COVID-19, 49% of registered voters expect to face difficulties casting a ballot this fall. Pew Rsch. Ctr., *Election 2020: Voters Are Highly Engaged, but Nearly Half Expect to Have Difficulties Voting* (Aug. 13, 2020).[2]

Confronted with this unprecedented challenge, states and localities have taken reasonable, common-sense steps to ensure that the pandemic will not disrupt their citizens' ability to safely exercise their fundamental right to vote. Many of these measures have been geared toward minimizing in-person interactions to preserve residents' health and prevent the spread of COVID-19, which is highly contagious. Some states, including Connecticut, Delaware, Illinois, Iowa, Maryland, Massachusetts, Minnesota, Nebraska, Rhode Island, Wisconsin, and some counties in New Mexico, are mailing applications for absentee ballots for the November election to all registered voters. *See* Conn. Off. of the Sec'y of the State, *Connecticut's Absentee Ballot Process*;[3] H.B. 346, 150th Gen. Assemb. § 3 (Del. 2020); S.B. 1863,

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1 *Available at* https://www.economist.com/briefing/2020/09/03/covid-19-and-an-atmosphere-of-distrust-pose-grave-risks-to-americas-election.

2 *Available at* https://www.pewresearch.org/politics/2020/08/13/election-2020-voters-are-highly-engaged-but-nearly-half-expect-to-have-difficulties-voting.

3 *Available at* https://portal.ct.gov/SOTS/Election-Services/Voter-Information/Absentee-Ballot-Process (last visited Sept. 23, 2020).

101st Gen. Assemb. § 10 (Ill. 2020); Stephen Gruber-Miller, *Iowa Secretary of State Will Mail Ballot Request Forms to All Voters Before Fall Election*, Des Moines Reg. (July 17, 2020);[4] Letter from Larry Hogan, Governor of Md., to Michael R. Cogan, Chairman, State Bd. of Elections (July 8, 2020);[5] 2020 Mass. Stat. ch. 115, § 6(d)(1)-(2); Press Release, Off. of the Minn. Sec'y of State, *Secretary Simon Announces Statewide Mailing to Encourage Vote from Home* (Sept. 16, 2020);[6] *All Nebraska Voters to Receive Early Ballot Request Application*, 1011 NOW (Aug. 19, 2020);[7] Morgan Lee, *New Mexico Pushes Forward with Emergency Voting Reforms*, ABC News (Aug. 18, 2020);[8] Edward Fitzpatrick, *Rhode Island Will Send Mail Ballot Applications to All Voters for the Nov. 3 Election*, Boston Globe (Sept. 11, 2020);[9] Press Release, Wis. Elections Comm'n, *Wisconsin Voting Deadlines and Facts for November 2020*, at 2 (Aug. 20, 2020).[10] Other jurisdictions, such as California, the District of

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[4] *Available at* https://www.desmoinesregister.com/story/news/politics/2020/07/17/iowa-secretary-state-paul-pate-mail-absentee-ballot-request-form-registered-voters-covid-19-pandemic/5458727002.

[5] *Available at* https://governor.maryland.gov/wp-content/uploads/2020/07/Letter-to-SBE_November-Election.pdf.

[6] *Available at* https://www.sos.state.mn.us/about-the-office/newsroom/secretary-simon-announces-statewide-mailing-to-encourage-vote-from-home.

[7] *Available at* https://www.1011now.com/2020/08/19/nebraska-voters-to-receive-early-ballot-request-application.

[8] *Available at* https://abcnews.go.com/Health/wireStory/mexico-pushes-forward-emergency-voting-reforms-72455283.

[9] *Available at* https://www.bostonglobe.com/2020/09/11/metro/rhode-island-will-send-mail-ballot-applications-all-voters-nov-3-election.

[10] *Available at* https://elections.wi.gov/sites/elections.wi.gov/files/2020-08/NR%20Elections%20-%20Absentee%20Voting%20Facts%20for%20November%202020%2008-20-20.pdf.

Columbia, Nevada, New Jersey, and Vermont, plan to mail ballots for the 2020 general election to all active registered voters. *See* A.B. 860, 2019-2020 Reg. Sess. § 2 (Cal. 2020); D.C. Bd. of Elections, *Vote Safe DC*;[11] A.B. 4, 80th Leg., 32nd Special Sess. §§ 15-16 (Nev. 2020); A.B. 4475, 2020-2021 Reg. Sess. § 2 (N.J. 2020); Vt. Off. of the Sec'y of State, First Statewide Elections Directive (July 20, 2020).[12] Yet others have commonly mailed ballots to all eligible voters. Nat'l Conf. of State Legis., *Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options* (Sept. 21, 2020)[13] (observing that Colorado, Hawaii, Oregon, Utah, and Washington have mailed ballots to voters in prior elections and will do so for the November election).

By contrast, and despite the pandemic, South Carolina has maintained a witness requirement so extraordinary that even an individual who is COVID-positive, and likely contagious, must seek a witness in order to vote. This makes it an outlier, especially in light of COVID-19. Even prior to the pandemic, only around a dozen states enforced notary or witness requirements for absentee voters. *See* Nat'l Conf. of State Legis., *Voting Outside the Polling Place: Table 14: How States Verify Voted Absentee Ballots* (Apr. 7, 2020).[14] And, in light of the health risks posed by person-

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11 *Available at* https://www.dcboe.org (last visited Oct. 2, 2020).

12 *Available at* https://sos.vermont.gov/media/hxgjjdkb/secretary-of-state-s-first-2020-statewide-election-procedures-directive.pdf.

13 *Available at* https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx.

14 *Available at* https://www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.

to-person contact, that number has further dwindled. Rhode Island and Virginia, for example, have agreed to modify their witness requirements for the November election, given the difficulty voters might have in finding a witness if they are quarantining or self-isolating. *Common Cause R.I. v. Gorbea*, No. 20-CV-318, 2020 WL 4460914, at *3 (D.R.I. July 30, 2020) (entering a consent decree suspending Rhode Island's enforcement of its witness requirement for the 2020 elections), *stay denied*, 970 F.3d 11 (1st Cir. 2020), *stay denied sub nom. Republican Nat'l Comm. v. Common Cause R.I.*, No. 20A28, 2020 WL 4680151 (U.S. Aug. 13, 2020); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-24, 2020 WL 2158249, at *14 (W.D. Va. May 5, 2020) (entering a consent decree suspending Virginia's enforcement of witness requirement for voters who believe that they cannot safely have a witness present while completing absentee ballot). Other states have modified nonessential obstacles or bolstered affirmative engagement efforts to ensure and encourage safe voting despite the pandemic. *See* Quinn Scanlan, *Here's How States Have Changed the Rules Around Voting Amid The Coronavirus Pandemic*, ABC News (Sept. 22, 2020).[15]

These measures reflect a range of permissible approaches to preserving citizens' access to the franchise while protecting public health and safety in the face of the novel coronavirus. But the critical thing they have in common is preventing voters from the crippling dilemma of choosing between their right to self-governance

[15] *Available at* https://abcnews.go.com/Politics/states-changed-rules-voting-amid-coronavirus-pandemic/story?id=72309089.

and their health. Indeed, jurisdictions across the political spectrum have adopted such policies, underscoring the reasonableness of facilitating distanced voting during this public health crisis. *See* May Wong, *New Research on Voting by Mail Shows Neutral Partisan Effects*, Stan. Inst. for Econ. Pol'y Res. (Apr. 16, 2020).[16] Put simply, a majority of States have found ways to further their twin interests in public health and election integrity without employing a witness requirement—and so too can South Carolina.

II. There Is No Evidence That South Carolina's Witness Requirement Is Necessary To Prevent Voter Fraud.

The applicants assert that South Carolina's witness requirement "continue[s] to serve the State's interests in deterring voter fraud and increasing confidence in the integrity of [its] electoral processes." *See* Application for Stay 18 (alteration omitted) (internal quotation marks omitted). Although a state has a "compelling interest in preserving the integrity of its election process," *Eu*, 489 U.S. at 231, there is no evidence—in the record or elsewhere—that South Carolina's witness requirement is necessary to, or even helpful in, preventing voter fraud.

As a general matter, fraudulent voting by mail is exceptionally rare. The commissioner of the Federal Election Commission has said that there is "simply no basis" for the "theory that voting by mail causes fraud." *US Election: Do Postal Ballots Lead to Voting Fraud?*, BBC News (Sept. 25, 2020) (internal quotation marks

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[16] *Available at* https://siepr.stanford.edu/news/new-research-voting-mail-shows-neutral-partisan-effects.

omitted).[17] Senior officials at the Federal Bureau of Investigation, "who have been consulting with election workers across all 50 states," similarly said that they found no "evidence of a coordinated effort to commit mail-in voting fraud." Alfred Ng, *Election Security Officials Find No Evidence of Coordinated Fraud With Mail-In Ballots*, CNET (Aug. 26, 2020).[18] More generally, the Presidential Advisory Commission on Election Integrity, established by President Trump following the 2016 election, "uncovered no evidence to support claims of widespread voter fraud." Marina Villeneuve, *Report: Trump Commission Did Not Find Widespread Voter Fraud*, Associated Press (Aug. 3, 2018).[19]

States' experiences have borne this out. Five states—Colorado, Hawaii, Oregon, Utah, and Washington—already had all-mail voting systems prior to the COVID-19 pandemic, in which "every registered voter receives a ballot in the mail." Nat'l Conf. of State Legis., *Elections Go to Court*, The Canvass (Sept. 2020).[20] None of these states requires a witness signature, *see Voting Outside the Polling Place: Absentee, All-Mail and Other Voting at Home Options*, *supra*, and none has encountered widespread voter fraud since shifting to mail-in ballots, Wendy R. Weiser & Harold Ekeh, *The False Narrative of Vote-by-Mail Fraud*, Brennan Ctr. for

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17 *Available at* https://www.bbc.com/news/world-us-canada-53353404.

18 *Available at* https://www.cnet.com/news/election-security-officials-find-no-evidence-of-coordinated-fraud-with-mail-in-ballots.

19 *Available at* https://apnews.com/f5f6a73b2af546ee97816bb35e82c18d/Report:-Trump-commission-did-not-find-widespread-voter-fraud.

20 *Available at* https://www.ncsl.org/research/elections-and-campaigns/the-canvass-september-2020.aspx.

Just. (Apr. 10, 2020).[21] For example, Oregon, the first state to adopt all-mail voting, "has sent out more than 100 million mail-in ballots since 2000, and has documented only about a dozen cases of proven fraud." Ed. Bd., *The 2020 Election Won't Look Like Any We've Seen Before*, N.Y. Times (Mar. 21, 2020).[22] Similarly, Washington State announced that, out of 3.1 million votes cast in 2018, it had referred 142 cases, or 0.004 percent, to local election officials on suspicion of improper voting. Elise Viebeck, *Miniscule Number of Potentially Fraudulent Ballots in States with Universal Mail Voting Undercuts Trump Claims About Election Risks*, Wash. Post (June 8, 2020).[23] A Washington Post analysis of data collected by Colorado, Oregon, and Washington identified only 372 "possible cases of double voting or voting on behalf of deceased people out of about 14.6 million votes cast by mail in the 2016 and 2018 general elections." *Id.* That amounts to a rate of just 0.0025 percent. *Id.* Similarly, data collected by the Heritage Foundation from the five states with universal voting by mail found only 29 cases of fraudulent votes attempted by mail and 24 cases of duplicative voting or absentee ballot fraud out of nearly *50 million* general election votes cast between 1982 and 2019. Elaine Kamarck & Christine Stenglein, *Low Rates*

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[21] *Available at* https://www.brennancenter.org/our-work/analysis-opinion/false-narrative-vote-mail-fraud.

[22] *Available at* https://www.nytimes.com/2020/03/21/opinion/sunday/coronavirus-vote-mail.html.

[23] *Available at* https://www.washingtonpost.com/politics/minuscule-number-of-potentially-fraudulent-ballots-in-states-with-universal-mail-voting-undercuts-trump-claims-about-election-risks/2020/06/08/1e78aa26-a5c5-11ea-bb20-ebf0921f3bbd_story.html.

of Fraud in Vote-by-Mail States Show the Benefits Outweigh the Risks, Brookings (June 2, 2020) (reproducing data from the Heritage Foundation's database).[24]

Given the dearth of evidence that states which send mail-in ballots to all registered voters experience significant voter fraud, applicants' assertion that a witness signature is necessary to safeguard its election procedures is particularly unpersuasive. Indeed, as the district court thoroughly explained, it is hard to see how the witness requirement accomplishes *any* fraud-prevention purpose when viewed in combination with South Carolina's other absentee voting requirements. *Middleton v. Andino*, No. 3:20-CV-1730, 2020 WL 5591590, at *33 (D.S.C. Sept. 18, 2020). In order to even receive an absentee ballot in South Carolina, an individual must submit an application containing personal information, swearing and affirming they have provided accurate information under criminal penalty. S.C. Code § 7-15-340. Before sending a ballot, a state election official must confirm that the putative voter "validly completed" the application by including the required information. *Id.* § 7-15-370. Given that election officials have no way to verify a witness's signature and do not even require that the witness know the identity of the voter, it is little wonder that the lead applicant herself— Marci Andino, Executive Director of South Carolina's Election Commission—stated that the requirement offered "no benefit" and recommended that the state suspend it. App. 60 & n.36.

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[24] *Available at* https://www.brookings.edu/blog/fixgov/2020/06/02/low-rates-of-fraud-in-vote-by-mail-states-show-the-benefits-outweigh-the-risk. The Heritage Foundation notes that its database is not "exhaustive or comprehensive." Heritage Found., *A Sampling of Recent Election Fraud Cases from Across the United States*, https://www.heritage.org/voterfraud/#choose-a-state (last visited Oct. 2, 2020).

Nor is there any reason to believe that South Carolina residents are more likely to engage in voter fraud than residents of other states. Data collected by the Heritage Foundation indicate that South Carolina has documented only a single case of voter fraud involving the fraudulent use of absentee ballots. Heritage Found., *supra*.[25]

To the extent that South Carolina remains concerned about potential fraud, there are myriad alternatives to the witness requirement—alternatives that safeguard electoral integrity without forcing individuals to risk exposure to the novel coronavirus. To begin, some states generally require that ballots be "printed on the proper type of paper" and "include specific technical markings" in order to be counted. Andy Sullivan, *Explainer: Fraud Is Rare in U.S. Mail-In Voting. Here Are the Methods That Prevent It*, Reuters (July 7, 2020).[26] In more states, the mail-in ballot envelope includes a unique bar code, which enables election officials to track ballot processing and to "identify and eliminate duplicate ballots." Weiser & Ekeh, *supra*. Once a voter returns his ballot and the bar code is scanned, "no other ballot can be cast by that voter for that election." Viebeck, *supra*. And in most states, the ballot envelope also requires each voter to include certain personal identifying information and a signature. Weiser & Ekeh, *supra*.

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[25] Select "South Carolina" from "Refine by State" dropdown, then select "Fraudulent Use of Absentee Ballots" from "Refine by Type" of fraud dropdown.

[26] *Available at* https://www.reuters.com/article/us-usa-election-vote-by-mail-explainer/explainer-fraud-is-rare-in-us-mail-in-voting-here-are-the-methods-that-prevent-it-idUSKBN2482SA.

Another "common layer of security" is "secure drop-off locations," which "help maintain a secure chain of custody as the ballot goes from the voter to the local election office." *Id.* A 2016 survey confirmed that many voters casting mail ballots take advantage of this feature: "in 2016, 73 percent of voters in Colorado, 59 percent in Oregon, and 65 percent in Washington returned their ballots to some physical location." *Id.*

Moreover, criminal and civil penalties—like those already imposed by South Carolina—"provide a strong deterrent to voter fraud." *Id*; *see* S.C. Code § 7-25-150 (providing that any individual who falsifies an oath in order to vote shall be "guilty of perjury and be punished, upon conviction, as for perjury"). An individual convicted of voter fraud in a federal election is subject to a fine of $10,000 per violation and up to five years in prison. 52 U.S.C. §§ 10307, 20511. Many states also punish voter fraud with hefty fines and potential jail time. *See, e.g.*, Colo. Rev. Stat. § 1-13-710(1) (punishing double voting with a maximum fine of $5,000 and an 18-month term of imprisonment); Haw. Rev. Stat § 19-4 (punishing election fraud with a maximum fine of $5,000 and a two-year term of imprisonment); Ore. Rev. Stat. § 260.993(2); *see id.* §§ 161.605(3), 161.625(1)(d) (classifying election fraud as a felony punishable with a maximum fine of $125,000 and a five-year term of imprisonment); Utah Code § 20A-1-603(2); *see id.* §§ 76-3-204(1), 76-3-301(1)(c) (punishing voter fraud with a maximum fine of $2,500 or a 364-day term of imprisonment); Wash. Rev. Code § 29A.84.650(1); *see id.* § 9A.20.021(c) (classifying double voting as a felony punishable by a maximum fine of $10,000 or a five-year term of imprisonment). The

risk of substantial punishment for casting a fraudulent ballot is a strong deterrent—significantly stronger than a witness-signature requirement.[27]

Taking all this together, the district court properly concluded that the "Witness Requirement[] imposed burdens on Plaintiffs [that] outweigh an investigatory law enforcement interest." *Middleton*, 2020 WL 5591590, at *33. Accordingly, the Fourth Circuit properly declined to issue a stay. *See* App. 86 (King, J., concurring in en banc court's denial of stay) (describing the district court's decision to grant injunctive relief as "soundly supported both factually and legally," and concluding that "the extraordinary relief of a stay pending appeal is in no way warranted under the controlling legal principles that are applicable here"). Similarly, because neither the balance of harms nor the public interest favors a stay, *see Nken v. Holder*, 556 U.S. 418, 435-36 (2009), this Court should deny the application.

CONCLUSION

This Court should deny the application for a stay.

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[27] Indeed, given the significant penalties for voter fraud, a witness-signature requirement is not likely to provide an additional deterrent. As one court recently observed, "[f]or the fraudster who would dare to sign the name of another qualified voter at the risk of being [criminally] charged . . . writing out an illegible scrawl on an envelope to satisfy the witness requirement would seem to present little to no additional obstacle." *League of Women Voters of Va.*, 2020 WL 2158249, at *9.

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