



IN THE
Supreme Court of the State of Delaware

AMERICAN CIVIL LIBERTIES UNION OF DELAWARE

Plaintiff-Appellant

v.

THE TOWN OF FENWICK ISLAND

Defendant-Appellee

No. 229, 2026

On Appeal from the Superior Court of the State of Delaware

C.A. No. S25C-12-003

APPELLANT'S REPLY BRIEF

Dated: September 1, 2026

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INTRODUCTION

Delaware is unique. Its constitution has protected its people's right to free and equal elections for hundreds of years. In spite of this explicit protection, Appellee asks this Court to find no meaningful difference between this right and an implied federal right.

Delaware is also uniquely vulnerable. Here, artificial entities wield power through their numerosity beyond what exists in other states. Fenwick's grant of the ballot to these entities and the resulting dilution of natural persons' votes is a live issue this Court can and should remedy.

Because natural people's right to a free and equal election is threatened when artificial entities dilute their vote, ACLU asks this court to reverse the judgment of the Superior Court.

ARGUMENT

I. Fenwick Does Not Meaningfully Analyze the Elections Clause.

A. Fenwick Eschews a *Hunt* Factors Analysis in Favor of an Argument Lacking the Fundamentals of Constitutional Analysis.

This Court has consistently recognized that the factors identified by the New Jersey Supreme Court in *State v. Hunt* are used to determine 1) when our constitution may be a source of individual rights, and 2) the scope of those rights as compared to an analogous federal constitutional right.¹ Fenwick wrongly claims that ACLU never presented a *Hunt* factors analysis to the Superior Court, and simultaneously decides to ignore this framework in spite of precedent.² Instead of using the factors to engage with ACLU in a meaningful debate regarding the application of the Elections Clause in a novel yet appropriate context, Fenwick suggests this Court is bound by lower court precedents addressing entirely different issues.³ Not so. Delaware's enduring constitutional promise of Free and Equal

¹ *Jones v. State*, 745 A.2d 856 (Del. 1999); *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654 (Del. 2014); *Juliano v. State*, 254 A.3d 369 (Del. 2020); *Dorsey v. State*, 761 A.2d 807 (Del. 2000); *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632 (Del. 2017).

² See Appellee's Answering Brief ("AB") at 29-31 (stating that *Hunt* does not apply to an analysis of the Elections Clause yet recognizing that the Court of Chancery in *Young v. Red Clay Consolidated School District* "**undertook a Jones/Hunt analysis when it discussed the meaning of Delaware's Elections Clause**") (emphasis added).

³ See *Id.* at 14-18.

Elections, clearly stronger than its approximate federal counterpart, recognizes vote dilution claims and protects the efficacy of a natural person’s ballot.⁴

“An alleged violation of the Delaware Constitution should include a discussion of one or more of the following criteria: textual language, legislature history [sic], pre-existing state law, structural differences, matters of particular state interest of local concern, state traditions, and public attitudes or other applicable criteria.”⁵ This is a *Hunt* factors analysis. ACLU analyzed these factors below in its brief in opposition to Fenwick’s Motion to Dismiss, addressing the text of the Clause, its legislative history, state law, and the heightened importance of this issue to Delawareans historically and presently.⁶ ACLU, despite Fenwick’s insistence to the contrary, was thus more than “fair” in its presentation of the *Hunt* factors, and did not hide the ball with the Superior Court by citing *Young*, a case that applied *Hunt* to the Elections Clause.⁷

Fenwick does not address the text of the Clause at all. Fenwick chastises ACLU’s careful examination of historical and present meanings of the terms within the Clause without analyzing the text itself.⁸ Fenwick does not address any

⁴ Appellant’s Opening Brief (“OB”) at 10-22.

⁵ *Lloyd v. State*, 292 A.3d 100, 110 n.48 (Del. 2023) (citing *Ortiz v. State*, 869 A.2d 285, 291 n.4 (Del. 2005)).

⁶ Appellee’s Appendix (“B”) 026-037.

⁷ AB at 29-31.

⁸ AB at 31.

aspect of the legislative history of the Clause, thereby ignoring hundreds of years of context. Fenwick does not even entertain the idea that the mere existence of the Clause, protecting the right to vote explicitly in contrast to the implicit protection of that right at the federal level, is worthy of consideration. Instead, Fenwick is content to provide a few sentences on Elections Clause precedents pertaining to different issues; to gesture at a few current laws, which are of course subject to constitutional limitations; and to make the unremarkable observation that ACLU's claim is not one explicitly mentioned in this Court's prior survey of the historical applications of vote dilution.⁹ Even if this Court does not apply a full or partial *Hunt* factors analysis, Fenwick's analysis falls far short of that required by this Court.

Fenwick contends that a *Hunt* factors analysis is not required because "Delaware's Elections Clause and the federal Equal Protection Clause are neither identical nor similar."¹⁰ This is wrongly stated and contrary to precedent.¹¹ The

⁹ *Id.* at 13-19; 29-34. One of the current laws Fenwick cites actually undermines its own argument. Fenwick cited a law that prevents municipal charter amendments which "limit[s] the right of nonresident persons to vote," where such voting is permitted. *Id.* at 34 n. 97 (citing 22 *Del. C.* § 835(b)). This law supports ACLU's argument, as allowing artificial entity nonresident voters to participate impacts the political efficacy of nonresident persons ballots. Further, it is another example of the legislature's general understanding that voting rights are reserved for persons.

¹⁰ AB at 30.

¹¹ *Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 811-827 (Del. Ch. 2015) (requiring a *Hunt* factors analysis for the Elections Clause).

federal comparator here is not the federal Equal Protection Clause but rather the implied right to vote under the Fourteenth Amendment.¹² As the Court of Chancery has recognized, “[a]n implied right is not the same thing as an express right,” and the mere “presence of the Elections Clause in the Delaware Constitution provides powerful support under *Jones* for giving it meaning independent of federal law.”¹³ Similarly, in *Hunt*, the Supreme Court of New Jersey noted that analysis of whether state constitutions “extend a greater measure of protection for fundamental constitutional rights than the United States Constitution,” is appropriate “on the basis of provisions in [state constitutions] not found in the federal constitution.”¹⁴ Stated simply, these courts found that it makes sense to consider whether the affirmative grant of a right is broader than the implied grant of the same. This logic should apply with even greater force to the right to vote considering voting is a fundamental right administered principally by the states under our system of federalism.¹⁵

Subsequent developments following the filing of ACLU’s Opening Brief shed further light on the “public attitudes” and “matters of particular state concern”

¹² *Id.* at 814.

¹³ *Id.* at 819.

¹⁴ *State v. Hunt*, 450 A.2d 952, 959 (N.J. 1982) (Pashman, J. concurring) (citing cases analyzing New Jersey’s “thorough and efficient” education clause).

¹⁵ *Oregon v. Mitchell*, 400 U.S. 112, 124-125 (1970) (“[T]he Framers of the Constitution intended the States to keep for themselves, as provided in the Tenth Amendment, the power to regulate elections”).

factors, further tilting the *Hunt* analysis in ACLU’s favor. On August 6, 2026, the governor signed the Delaware John Lewis Voting Rights Act (“DEVRA”) into law.¹⁶ DEVRA added a “democracy canon” to Delaware’s elections laws to specifically recognize that, in furtherance of the Elections Clause and Delaware’s Equal Protection Clause, it is the intent of the political branches that laws, including municipal charter provisions, be interpreted to “protect[] ... the right of *people* to register to vote and have their ballot cast and counted.”¹⁷ Importantly, DEVRA also created racial vote dilution causes of action in Delaware in response to the erosion of these causes of action under the Voting Rights Act of 1965.¹⁸ The bill passed unanimously in the Senate, demonstrating overwhelming local support for protecting all *people*’s right to a politically effective ballot, and a commitment to that protection far broader than most other states.¹⁹ Although ACLU is not making a DEVRA claim, ACLU contends that DEVRA is strong additional evidence of the distinctive attitudes of Delawareans relevant to this Court’s analysis of the Elections Clause.²⁰

¹⁶ H.B. 444, 153d Gen. Assemb. Reg. Sess. (Del. 2026).

¹⁷ *Id.* (emphasis added).

¹⁸ *Id.*

¹⁹ *Id.* See also, *State Voting Rights Rights Acts Toolkit*, Legal Defense Fund, <https://www.naacpldf.org/state-voting-rights-acts/toolkit/> (last visited Sep. 1, 2026) (showing only ten other states have passed state voting rights acts as of this writing).

²⁰ *Jones*, 745 A.2d at 865. See also *Calm v. Taylor*, 2026 WL 2322604 at *42 (Del. Ch. Aug. 11, 2026) (citing Delaware’s recently passed law forbidding privately

B. Fenwick Ignores Precedent Demonstrating ACLU's Theory of Vote Dilution and Conflates it With an Entirely Different Theory

In this Court's most recent examination of vote dilution claims, it looked to the following definition of the concept: "reducing the effectiveness of certain people's votes without actually preventing them from casting ballots."²¹ This Court went on to list the most common applications of vote dilution, but in no way indicated its listing was exhaustive or exclusive.²² In fact, as ACLU's Opening Brief proves, any such statement would be factually incorrect, as nonresident landowner voting has been broadly recognized as a cognizable theory of vote dilution in other jurisdictions.²³ As this theory of vote dilution closely tracks with ACLU's theory, it is powerful evidence that ACLU's theory is cognizable.

This theory of vote dilution stems from the reality that nonresident landowner voting schemes often result in an electorate that includes people with non-substantial interest in the governance of a public body.²⁴ It stands to reason that non-living legal fictions have an even lesser interest in the multitude of

owned detention facilities as instructive in determining Delaware's unique interest in giving Delaware's Cruel Punishment Clause independent meaning).

²¹ *Albence v. Mennella*, 320 A.3d 212, 224 (Del. 2024) (citing Nicholas O. Stephanopoulos, *The New Vote Dilution*, 96 N.Y.U. L. Rev. 1179 (2021)) (internal citations omitted).

²² *Id.* at 224-225.

²³ *See* OB at 23-26.

²⁴ *See Brown v. Bd. of Comm'rs of City of Chattanooga*, Tenn., 722 F. Supp. 380, 399 (E.D. Tenn. 1989); *Locklear v. N. Carolina State Bd. of Elections*, 514 F.2d 1152, 1155 (4th Cir. 1975).

governance functions of a Town Council such as Fenwick's, as ACLU has alleged.²⁵ A reasonable inference can be made that these differential interests can impact electoral results, thus resulting in a change to the political efficacy of natural persons' ballots. Fenwick states that ACLU "distort[ed] the standard of review on a motion to dismiss."²⁶ Yet, on such a motion, ACLU is "entitled to all reasonable inferences that logically flow from the face of the complaint," and dismissal is only warranted where "under no reasonable interpretation of the facts alleged could the complaint state a claim for which relief might be granted."²⁷ The reasonable inferences referred to above flow from ACLU's factual allegations.²⁸

And, despite Fenwick's contention to the contrary, this theory is an ocean apart from the "vote dilution through fraud facilitation" theory of vote dilution, as ACLU has not alleged nor alluded to fraud in Fenwick's elections, nor is ACLU challenging a method of voting.²⁹ Instead, ACLU's theory centers on the composition of an electorate, a standard focus of a vote dilution claim.³⁰

ACLU of course understands that a legal fiction cannot physically cast a ballot. ACLU's distinction between artificial entity voters and natural person

²⁵ Appellant's Appendix ("A") 10-13.

²⁶ AB at 3.

²⁷ *Hedenberg v. Raber*, 2004 WL 2191164, at *1 (Del. Super. Ct. Aug. 20, 2004).

²⁸ *See also infra* at II.B.

²⁹ B 017.

³⁰ OB at 33-34 n. 84; *see also infra* at II.B.

voters delineates the different actors on whose behalf a ballot is cast: a natural person who must physically live in the real world and be impacted by decisions of elected officials, or a legal fiction that exists in stacks of paper. Suggesting ACLU means otherwise is nonsensical.³¹ The natural person who enters the booth is bound by its fiduciary duties to the artificial entity. Therefore, the vote belongs to the artificial entity, and any allegation to the contrary is not based in fact.

Lastly, Fenwick is wrong that ACLU is “asserting a new theory of the case” and improperly advancing arguments under federal law.³² Fenwick even baselessly claims that ACLU is now challenging “nonresident landowner voting even by individuals.”³³ This is entirely false. ACLU was abundantly clear that it cited federal law on nonresident landowner voting as persuasive authority to determine the bounds of the Elections Clause if this Court finds that the Elections Clause should be interpreted in lockstep with federal law in this context.³⁴ Consideration of federal precedents is commonplace in this Court’s *Hunt* analyses.³⁵

C. Fenwick Confuses a Proposed Burden to Overcome a Presumption of Constitutionality with Requirements to Survive a Motion to Dismiss.

³¹ See AB at 25-26.

³² AB at 32-33.

³³ AB at 37 n. 105.

³⁴ OB at 10-11, 22-27.

³⁵ See *Juliano*, 254 A.3d at 381-382.

Fenwick argues that ACLU must overcome the presumption of constitutionality which attaches to laws passed by the General Assembly.³⁶ ACLU addressed the faults of this argument in its Opening Brief to this Court, arguing that actually overcoming that presumption is not currently before this Court, as what is on appeal now is a motion to dismiss which only contemplates whether there is any set of circumstances under which ACLU could prevail.³⁷ Fenwick renews its argument without addressing ACLU's demonstrations of its faults.

Further, if this Court finds that the harm actually traces from Fenwick's ordinances and not charter provisions approved by the General Assembly,³⁸ it is unclear whether this burden would even apply, as Fenwick acknowledges it applies to "state-enacted laws."³⁹

D. The General Assembly's June 2026 Passage of HB 430 Does Not "Conclusively" Prove Anything.

Fenwick asserts that it is illogical that the Delaware constitution "has to be amended to prohibit what ACLU contends . . . is already prohibited."⁴⁰ But the

³⁶ AB at 12.

³⁷ OB at 8 n. 13.

³⁸ *See infra* at II.C.

³⁹ AB at 12.

⁴⁰ AB at 28 (referring to a constitutional amendment which would limit all Delaware Elections to natural persons) (H.B. 430 syn., 153d Gen. Assemb. Reg. Sess. (Del. 2026)).

General Assembly is not the arbiter of the meaning of the state constitution. That role belongs to the Courts.⁴¹

Still, if the General Assembly’s constitutional analysis is relevant, it perhaps makes more sense to look at its actual words instead of assuming its intent. Senator Kyra Hoffner, the primary sponsor of HB 430 in the Senate, stated in a committee hearing that the purpose of the legislation is to “make one simple principle explicit in our Delaware Constitution: only natural persons may vote in our elections occurring in or for this state, at any level or political subdivision.”⁴² Senator Hoffner added, “we have long understood in Delaware that the right to vote is a fundamental, democratic right that belongs to the people, not property records or corporations that register here.”⁴³ Therefore, Senator Hoffner clearly believed that the practice was already unconstitutional when she proposed the constitutional amendment.

The passage of HB 430 is part and parcel of the General Assembly’s increasingly common “belt and suspenders” approach to protecting the rights of

⁴¹ Fenwick Island was forced to concede this point in front of this Court a few months ago. *Town of Fenwick Island v. State*, 2026 WL 1468816 at *3 (Del. May 26, 2026) (“The plaintiffs concede that, unless the separate branches of government share powers, the separation of powers doctrine requires the three branches of Delaware government – executive, legislative, and judicial – to stay in their own constitutional lanes.”)

⁴² *Meeting of the S. Elections & Gov’t Affs. Comm.*, 153d Gen. Assemb. (Del. June 25, 2026) (statement of Sen. Kyra Hoffner) at 11:31.

⁴³ *Id.* at 11:32.

Delawareans. Just this session, it passed bills to take similar first steps to enshrine pre-existing rights into the constitution, such as marriage equality, further protecting rights which Delawareans already possess.⁴⁴ Therefore, the amendment does not “conclusively” prove anything, and to the extent that it is relevant, it is to factor into the *Hunt* analysis to support ACLU’s argument that Delawareans are against Fenwick’s unconstitutional practice.⁴⁵

⁴⁴ SS 2 for S.B. 100, 153d Gen. Assemb. Reg. Sess. (Del. 2026). *See also Governor Signs Marriage Equality Bill Into Law*, Delaware News, <https://news.delaware.gov/2013/05/07/governor-signs-marriage-equality-bill-into-law/> (May 7, 2013) (demonstrating that Delawareans already enjoy this right without a constitutional amendment).

⁴⁵ *Jones*, 745 A.2d at 865 (“Distinctive attitudes of a state’s citizenry may also furnish grounds to expand constitutional rights under state charters.”)

II. Fenwick Conflates or Misunderstands Fundamental Justiciability Concepts and Otherwise Fails to Rebut ACLU's Standing Arguments.

A. Fenwick's Imminence Arguments Confuse Standing and Mootness and are Otherwise Irrelevant.

Fenwick's imminence analysis conflates standing and mootness. Fenwick states that "standing is not static."⁴⁶ Not true. The principal authority Fenwick relies upon to argue ACLU does not have standing definitively states the following: "[s]tanding is assessed when the complaint is filed."⁴⁷

Fenwick's only argument to the contrary relies on an out of context quote saying that a party's standing can change while litigation is in progress.⁴⁸ While the quote from the case is accurately transcribed, it leaves out the very next line, which speaks to subsequent developments *mooting* an issue.⁴⁹ Additionally, Fenwick fails to realize that every case that *Gen. Motors* cites speaks to mootness, not standing.⁵⁰

⁴⁶ AB at 38.

⁴⁷ *Mennella*, 320 A.3d at 220 (emphasis added) (citations omitted). **Fenwick cites this exact quote in its brief.** See AB at 35.

⁴⁸ AB at 38 (citing *Gen. Motors Corp. v. New Castle Cnty.*, 701 A.2d 819, 824 (Del. 1997)).

⁴⁹ The full paragraph in context reads as follows: "Unlike the federal courts, where standing may be subject to stated constitutional limits, state courts apply the concept of standing as a matter of self-restraint to avoid the rendering of advisory opinions A change in the parties' standing may result from a myriad of subsequent legal or factual causes that occur while the litigation is in progress. For example, when two proceedings are pending simultaneously and each involves the same issue, a binding decision in one court will **moot that issue** in the second court." (emphasis added) (internal citations and quotations omitted but discussed in the following footnote). *Gen. Motors Corp.* 701 A.2d at 824.

⁵⁰ *Gen. Motors Corp.* 701 A.2d at 824 n. 6 (citing *Stearn v. Koch*, 628 A.2d 44, 46 (Del. 1993) (finding a cross-appeal to this Court moot due to subsequent legal and

While this may appear academic, it is of critical importance in establishing the burden of persuasion. Although ACLU has this burden on standing, Fenwick has the “heavy burden” of establishing mootness.⁵¹ Regardless, Fenwick has not met its burden of determining that any subsequent developments following the filing of this action and then appeal have mooted this case.⁵²

The remainder of Fenwick’s imminence argument raises the irrelevant point that the charter provision at issue was adopted 18 years ago.⁵³ Imminence in a standing analysis, however, refers to the imminent nature of the *injury*, not the age of the instrument delivering the injury.⁵⁴ As ACLU explained in its Opening Brief to this Court, at the time the complaint in this action was filed, the alleged harm

factual developments following the filing of the cross-appeal); *Perry v. State*, 575 A.2d 1154, 1156 (Del. 1990) (finding an appeal moot due to a subsequent factual development following an appeal to this Court); *Stotland v. GAF Corp.*, 469 A.2d 421, 422, 423 (Del. 1983) (finding an appeal moot due to a subsequent factual development which occurred following dismissal of action); *Brown v. State*, 453 A.2d 101, 101 (Del. 1982) (finding an appeal moot due to a subsequent legal development); *Sannini v. Casscells*, 401 A.2d 927, 930 (Del. 1979) (finding an appeal moot due to a subsequent factual development following an appeal to this Court)).

⁵¹ *Emps. Ins. Co. of Wausau v. First State Orthopaedics, P.A.*, 312 A.3d 597, 607–609 (Del. 2024).

⁵² *See supra* at I.D.

⁵³ AB at 37.

⁵⁴ *Mennella*, 320 A.3d at 216 (“To achieve standing, a plaintiff must allege an injury in fact that is ... actual or imminent.”).

was imminent due to the looming election at which artificial entity voting was to be allowed.⁵⁵

B. Fenwick Fails to Rebut ACLU's Allegations of a Dilutive Voting Harm to its Members Residing in Fenwick Sufficient to Survive a Motion to Dismiss.

ACLU has alleged a sufficiently concrete and particularized injury. ACLU's allegations were more than sufficient to survive a motion to dismiss, as this Court has recognized parties are only required to provide "general allegations of injury" to "withstand a motion to dismiss," and ACLU's allegations give rise to a reasonable inference of vote dilution impacting its members and not Fenwick voters writ large.⁵⁶

Fenwick argues ACLU's use of phrases in its complaint conveying the probability of a harm instead of the certainty of a harm is "fatal to standing."⁵⁷ This argument falls on its face. All that this Court has required, even in cases involving arguably speculative harm, is that the plaintiff's claim "not be so conjectural as to be more creative imagination than fact."⁵⁸ Clearly it is not "fatal" to ACLU's claim that its complaint employs phrases expressing contingent harms.

⁵⁵ OB at 30-31.

⁵⁶ *Dover Historical Soc'y v. City of Dover Planning Comm'n*, 838 A.2d 1103, 1110 (Del. 2003).

⁵⁷ AB at 38.

⁵⁸ *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 906 (Del. 1994).

ACLU's claim does not resemble the "vote dilution through fraud facilitation claim" advanced in *Mennella*. In the scholarly article this Court considered in *Mennella*, the author looked to the "theories of vote dilution that the [United States] Supreme Court has unequivocally acknowledged: malapportionment, racial vote dilution, and partisan gerrymandering."⁵⁹ In distinguishing the concept of vote dilution through fraud facilitation, the author wrote that the traditional claims pertain to vote aggregation, whereas this new theory pertains to "the offset, or negation, or cancellation, of lawfully cast votes by fraudulent ballots."⁶⁰ The traditional claims consider "how many or **which people**" are included in a jurisdiction.⁶¹ ACLU's claim more accurately resembles these traditional claims, as it is fundamentally about which voters are included and able to translate their interests into representation and is not about "fraudulent" ballots cancelling out legal ballots.

Fenwick attempts to confuse this issue by pointing to ACLU's reference to Delaware's fraudulent voting statute in its briefing to the Superior Court.⁶² However, ACLU's reference to that statute was part of its *Hunt* factors analysis to demonstrate that the human-centric focus of Delaware election laws supported the

⁵⁹ Stephanopoulos, *supra*, at 1190. Again, it is of note that the author does not claim that these are the only recognized theories of vote dilution.

⁶⁰ *Id.*

⁶¹ *Id.* (emphasis added).

⁶² AB at 41.

conclusion that the Elections Clause should be construed to protect the efficacy of the ballots of human voters.⁶³

What ACLU's claim *does* resemble is both 1) claims that have been recognized and resolved on the merits in federal court, where standing requirements are higher, and 2) the description in *Mennella* of sufficient pleading for a vote dilution claim.⁶⁴ In the latter, this Court advised that both a description of how the challenged voting practice "compromises the political efficacy" of a plaintiff's vote and an explanation of how the absence of the challenged practice would alleviate that harm were needed to establish standing at the pleading stage.⁶⁵ ACLU's pleadings suffice under this formulation.

ACLU alleged that Fenwick's municipal government has powers "wholly unrelated to any special interest of artificial entities," and that artificial entities can vote based solely upon a "minor ownership interest in [Fenwick]," because Fenwick's Charter "contains no limitation on the number of artificial non-human entities eligible to vote based on their ownership interest in any single property parcel," nor a "minimum share of property ownership nor value of property owned required to register to vote as an artificial entity."⁶⁶ These allegations support an

⁶³ B 033-034.

⁶⁴ See OB at 31-33.

⁶⁵ *Mennella*, 320 A.3d at 224.

⁶⁶ A 10-11.

inference sufficient to survive a motion to dismiss, as they describe a plausible scenario where the interests of artificial entity voters and natural person voters would diverge, impacting the political efficacy of natural persons' ballots. And, because granting the relief ACLU has requested would prevent artificial entity voting, ACLU's claim does not share the obvious flaw nestled in the *Mennella* plaintiffs' argument, that voters using the voting *methods* challenged in that case "would not, in the absence of [those methods], vote in person on election day."⁶⁷

Lastly, Fenwick continues to take issue with ACLU not specifically identifying its members whose votes are at risk of being diluted. But Fenwick has offered no legal argument that such identification is required.⁶⁸ Such outing of organization membership is not required, and ACLU has made sufficient allegations to demonstrate a harm to its members that is not shared by all voters in Fenwick.⁶⁹ Therefore, ACLU has met the requirements to plead a concrete and particularized harm.

C. Fenwick's Traceability Argument is Factually Incorrect and Littered with Non Sequiturs.

Fenwick's argument pertaining to the traceability prong of standing, that the unconstitutional vote dilution is the result of the General Assembly's approval of

⁶⁷ *Mennella*, 320 A.3d at 224.

⁶⁸ See AB at 37 n. 105, 40.

⁶⁹ See OB at 34-35.

language in Fenwick’s charter, and that therefore ACLU’s qualms should be taken up with that body, is detached from indisputable facts.⁷⁰ Fenwick frames ACLU’s challenge as a facial challenge to the charter provision it cites.⁷¹ However, that charter provision allows for artificial entity voting only “if provided by ordinance.”⁷² It is Fenwick’s ordinances that actually authorize artificial entity voting.⁷³ Recognizing this, ACLU’s complaint asked the Superior Court to declare artificial entity voting unconstitutional and “enjoin[] the Defendant from counting ballots cast by ... artificial entities.”⁷⁴

And even if it were true that ACLU was directing a facial challenge at a municipal charter provision approved by the General Assembly, traceability to Fenwick would be met.⁷⁵ To establish traceability, plaintiffs need only show an “indirect causal relationship.”⁷⁶ This is clearly met here where Fenwick has adopted ordinances to provide for artificial entity voting. And it is met in Fenwick’s alternate reality (where Fenwick’s charter obligates Fenwick to

⁷⁰ See AB at 42-43.

⁷¹ *Id.* at 42.

⁷² Town of Fenwick, Del., Charter, §9A(2).

⁷³ Town of Fenwick, Del. Code § 13-21, 13-22, 13-28.

⁷⁴ A 16.

⁷⁵ OB at 36 (citing *Deibler v. City of Rehoboth Beach*, 790 F.2d 328 (3d Cir. 1986)).

⁷⁶ *Freeman v. Corzine*, 629 F.3d 146, 153 (3d Cir. 2010) (quoting *Toll Bros., Inc. v. Twp. of Readington*, 555 F.3d 131, 138 (3d Cir. 2009)).

implement artificial entity voting) as Fenwick’s implementation of such an imagined provision would suffice as an indirect causal connection.

Fenwick makes other arguments that have nothing to do with the traceability requirement for standing. Fenwick argues ACLU should have sued other municipalities with similar provisions.⁷⁷ This in no way relates to whether ACLU’s members residing in Fenwick are injured by Fenwick’s complained-of-conduct.⁷⁸

Fenwick also states that ACLU “argues that the State of Delaware somehow invited this litigation due to the state’s preeminence in the area of corporate law,” but this is a confusing misreading of ACLU’s argument. Fenwick made this claim in response to parts of ACLU’s *Hunt* factors analysis in its Opening Brief to this Court. But ACLU did not suggest the State of Delaware invited this lawsuit. ACLU’s point was that artificial entity vote dilution is of particular concern to Delawareans vis-à-vis residents of other states, considering both the number of artificial entities in Delaware versus the number of people in the state, and the sentiment of Delawareans concerning this and similar issues.⁷⁹

Lastly, Fenwick argues that the “General Assembly’s efforts to amend Delaware’s Constitution ‘to forbid corporations and other artificial entities from voting’ ... reinforces that ACLU’s alleged injury is traceable to the conduct of the

⁷⁷ AB at 43.

⁷⁸ *Mennella* 320 A.3d at 220 (citing *Emps. Ins. Co.*, 312 A.3d at 608).

⁷⁹ AB at 43 (citing OB at 20-21).

State.”⁸⁰ This is baffling and seems to suggest that an entity with the power to solve a problem is somehow the cause of the problem – it is blaming the fire extinguisher for the fire.

⁸⁰ AB at 43 (citing H.B. 430 syn., 153d Gen. Assemb. Reg. Sess. (Del. 2026)).

III. Fenwick’s Speculative Mootness Argument is Undermined by the Very Precedent it Relies Upon.

Fenwick’s argument that this appeal is now moot also fails. Fenwick begins its argument by quoting this Court’s statement that mootness applies where a “controversy ceases to exist.”⁸¹ Having cited this principle, however, Fenwick promptly ignores the holding of the case in which it appears.

In that case, *American Littoral Society, Inc. v. Bernie’s Conchs, LLC*, organizations (collectively the “applicant-intervenors”) sought reversal of a Superior Court decision which vacated a government agency regulation.⁸² Subsequently, the government agency adopted new regulations.⁸³ In finding the Applicant-Intervenors’ appeal moot, this Court stated that: “The subject matter of the Superior Court decision ... has been superseded by a subsequent rulemaking process and no longer has any force. Any judicial pronouncement on the merits of that regulation would be purely advisory” and that therefore the matter was no longer amenable to judicial resolution.⁸⁴

The clear holding of *American Littoral Society* is that, where this Court cannot grant relief that has any practical effect on the parties, and where no

⁸¹ AB at 44 (citing *Am. Littoral Soc., Inc. v. Bernie’s Conchs, LLC*, 954 A.2d 909 (Del. 2008)).

⁸² *Am. Littoral Soc., Inc.*, 954 A.2d at *2.

⁸³ *Id.*

⁸⁴ *Id.*

mootness exception applies, the matter is moot.⁸⁵ Here, this Court (or the Superior Court, if this case is remanded) can very clearly grant relief which has a practical effect on the parties – it can declare that Fenwick’s practice of allowing artificial entities to vote is unconstitutional.

Fenwick weakly protests that “by the time Fenwick conducts its next, contested municipal election ... **the Delaware Constitution *may* have been amended in the manner ACLU seeks to achieve in this litigation.**”⁸⁶ This is a profoundly bizarre statement. First, Fenwick seeks to satisfy its “heavy burden” on mootness by imagining a hypothetical future scenario requiring action by a third party.⁸⁷ Delaware’s constitution has not yet been amended. If history is any guide, the fate of any constitutional amendment pertaining to voting is not secured just because its “first leg” has passed.⁸⁸ Further, recent history would suggest that the General Assembly is unlikely to act on a constitutional amendment prior to the end of a two-year General Assembly session.⁸⁹ Second, Fenwick somehow reads into

⁸⁵ *Id.* ACLU articulated this in its Opening Brief. OB at 37-43.

⁸⁶ AB at 45 (emphasis added).

⁸⁷ *Emps. Ins. Co. of Wausau*, 312 A.3d at 607–609.

⁸⁸ *See e.g. Albence v. Higgin*, 295 A.3d 1065, 1082-83 (Del. 2022) (discussing the failure of an amendment to provide for “no-excuse voting by mail” to pass its “second leg” even where its first leg passed).

⁸⁹ The following non-exhaustive list of constitutional amendments all passed or failed their first legs in the last month of this past two-year legislative session. If HB 430 follows a similar path, it may not pass or fail its second leg prior to June 2028. H.B. 180 syn., 153d Gen. Assemb. Reg. Sess. (Del. 2026); S.B. 100 syn.,

ACLU's complaint a request for relief to amend Delaware's constitution. ACLU has requested nothing of the sort in this litigation, instead *invoking* the State constitution to prevent an unconstitutional practice.

Fenwick also suggests that it may not have an election in 2027. Again, this is speculative. Regardless, ACLU and Fenwick both know that an election *will* occur in Fenwick at some point or another, and so long as Fenwick maintains that it will allow artificial entities to participate in its elections, this issue will remain. Simply put, this Court can issue a ruling addressing the live issue of artificial entity voting in Fenwick.

Lastly, even if this Court is persuaded that this matter is moot, Fenwick does not address the exceptions to mootness, and ACLU has previously contended that this matter falls into both recognized exceptions.⁹⁰

153d Gen. Assemb. Reg. Sess. (Del. 2026); H.B. 88 syn., 153d Gen. Assemb. Reg. Sess. (Del. 2026).

⁹⁰ OB at 39-43.

CONCLUSION

For the foregoing reasons, this Court should reverse the Superior Court's order granting Defendant's motion to dismiss and remand for further proceedings.

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