



IN THE  
**Supreme Court of the State of Delaware**

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AMERICAN CIVIL LIBERTIES UNION OF DELAWARE

Plaintiff-Appellant

v.

THE TOWN OF FENWICK ISLAND

Defendant-Appellee

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No. 229, 2026

On Appeal from the Superior Court of the State of Delaware

C.A. No. S25C-12-003

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**APPELLANT'S OPENING BRIEF**

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Dated: July 16, 2026

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**MUNICIPAL CHARTER AND CODE PROVISIONS**

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## **NATURE OF THE PROCEEDINGS**

This case is about the “fundamental right on which our democracy rests.”<sup>1</sup> Specifically, this case is about whether the right to vote in municipal elections belongs to human beings, or whether artificial entities share the most important right in Delaware’s constitutional democracy. Because the right to vote belongs to people, the ACLU of Delaware (“ACLU”) asks this Court to reverse the judgment of the Superior Court.

The Town of Fenwick Island, Delaware (“Fenwick” or “the Town”) allows artificial entities to vote in municipal elections. On behalf of its members residing in Fenwick, the American Civil Liberties Union of Delaware filed this lawsuit, alleging that Fenwick’s scheme violates the Elections Clause of the Delaware constitution.

On February 16, 2026, Fenwick filed a Motion to Dismiss. The Superior Court heard oral argument on May 4, 2026, and on May 26, 2026, it granted Fenwick’s motion, dismissing the case.

On June 4, 2026, ACLU filed a Notice of Appeal to this Court.<sup>2</sup>

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<sup>1</sup> *League of Women Voters of Del., Inc. v. Dep’t of Elections*, 250 A.3d 922, 925 (Del. Ch. 2020) (hereinafter “*LWVDE*”).

<sup>2</sup> Although this Court granted expedited review to resolve this case before Fenwick’s August 1, 2026 election, the parties later stipulated that expedition was not necessary after Fenwick canceled that election. *See* Sophia Peters, *Fenwick Island Cancels Election Due to Lack of Candidates*, 47 ABC WMDT (June 22,

## **SUMMARY OF THE ARGUMENT**

1. The Superior Court improperly granted Fenwick's motion to dismiss.

Fenwick did not show that ACLU would not be entitled to relief under any set of circumstances because the Elections Clause has broad independent meaning. The Clause protects the political efficacy of peoples' ballots, and cases applying the federal analog to the Elections Clause demonstrate that even a cabined understanding of the Elections Clause would recognize ACLU's claim.

2. ACLU has sufficiently alleged standing because its Fenwick members are at imminent risk of the particularized harm of the dilution of their votes, and ACLU meets all other requirements for associational standing.

3. ACLU's claim is not moot because it retains standing despite the cancellation of Fenwick's 2026 election, and the matter remains judicially resolvable. Even if Fenwick could meet its burden and demonstrate mootness, both exceptions to mootness apply as the harm alleged is capable of repetition yet evading review and pertains to a matter of public importance.

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2026) <https://www.wmdt.com/2026/06/fenwick-island-cancels-election-due-to-lack-of-candidates/>.

## **STATEMENT OF THE FACTS**

ACLU is a non-profit organization with the mission of preserving and advancing civil liberties and civil rights enshrined in the United States and Delaware Constitutions.<sup>3</sup> Direct participation in elections by artificial entities undermines core principles of democracy and frustrates ACLU members' right to a fully effective ballot.

Fenwick's charter provides that any artificial entity—"including but not limited to corporations, partnerships, trusts, and limited liability companies"—that owns property in Fenwick as of the registration deadline "shall have one vote" if provided by ordinance.<sup>4</sup> Fenwick's charter does not impose a limit upon the number of artificial entities that can vote through ownership of a piece of property and does not set a minimum share or value of property ownership by an artificial entity before it can cast a ballot.<sup>5</sup>

As of October 2025, 214 entities were registered to vote in Fenwick, which represents approximately 12% of the Town's voters. A86–A119. In Fenwick's 2024 election, 109 of those entities cast votes, which comprised approximately 23% of the ballots in the election. *See* A86–A179. Recently, at-large elections in

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<sup>3</sup> *About Us*, ACLU Delaware, <https://www.aclu-de.org/about-us/> (last visited July 16, 2026).

<sup>4</sup> Town of Fenwick, Del., Charter, § 9A(2).

<sup>5</sup> *Id.* at § 9A.

Fenwick have been decided by close margins, such that the number of artificial entity votes exceeded the margin of victory between winning and losing candidates.<sup>6</sup>

On December 4, 2025, ACLU sued Fenwick on behalf of its members and supporters residing in Fenwick, alleging that Fenwick’s scheme of artificial entity voting violates the Elections Clause of the Delaware Constitution. A7–A16. ACLU’s complaint sought a declaration that artificial entity voting violates the Elections Clause and an injunction to prevent the Defendant from counting ballots cast by artificial entities in the upcoming and any future Fenwick Island municipal elections. A16.

On February 16, 2026, Fenwick filed a motion to dismiss pursuant to Superior Court Civil Rules 12(b)(1) and 12(b)(6). A17. The Town argued, *inter alia*, that ACLU lacked standing and that ACLU’s complaint failed to state a claim upon which relief could be granted. A18–A60. While briefing on the motion was pending, Fenwick responded to interrogatories from ACLU. A63–A76.

On May 4, 2026, the Superior Court heard oral argument on Fenwick’s motion. A3. On May 26, 2026, while the parties were contemplating additional discovery, the Court granted Fenwick’s motion to dismiss, holding that ACLU

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<sup>6</sup>See Mari Lou, *UPDATED: Fenwick Island Voters Return Incumbents and Elect Brennan to Town Council*, WGMD 92.7/98.5 (Aug. 3, 2024), <https://www.wgmd.com/municipal-election-saturday-in-fenwick-island/>.

failed to state a claim upon which relief could be granted. Attch. 1. ACLU now appeals that decision.

## **ARGUMENT**

### **I. Questions Presented**

1. Did the Superior Court err in dismissing ACLU's claim under Superior Court Civil Rule 12(b)(6) for failure to state a claim?
2. Does ACLU have standing to sue through its members residing in Fenwick?
3. Has the cancellation of Fenwick's 2026 election mooted this case?

## **II. Scope of Review**

This Court reviews questions of law, such as constitutional issues, subject matter jurisdiction, and standing under a *de novo* standard.<sup>7</sup> This Court also reviews decisions granting Rule 12(b)(6) motions to dismiss *de novo*,<sup>8</sup> analyzing whether “the judge erred as a matter of law in formulating or applying legal precepts.”<sup>9</sup> This Court “view[s] the complaint in the light most favorable to the nonmoving party, accepting as true its well-pled allegations and drawing all reasonable inferences that logically flow from those allegations.”<sup>10</sup> Further, “[d]ismissal is appropriate only if it appears ‘with reasonable certainty that, under any set of facts that could be proven to support the claims asserted, the plaintiff would not be entitled to relief.’”<sup>11</sup>

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<sup>7</sup> *Delmarsh, LLC v. Env’t. Appeals Bd.*, 277 A.3d 281, 289 (Del. 2022) (constitutional claims); *Albence v. Higgin*, 295 A.3d 1065, 1085 (Del. 2022) (standing and constitutional claims); *In re COVID-Related Restrictions on Religious Servs.*, 326 A.3d 626, 638–39 (Del. 2024) (subject matter jurisdiction).

<sup>8</sup> *Windsor I, LLC v. CWCapital Asset Mgmt. LLC*, 238 A.3d 863, 871 (Del. 2020).

<sup>9</sup> *Deuley v. DynCorp Int’l, Inc.*, 8 A.3d 1156, 1160 (Del. 2010).

<sup>10</sup> *Clinton v. Enter. Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009).

<sup>11</sup> *Id.* (quoting *Feldman v. Cutaia*, 951 A.2d 727, 731 (Del. 2008)).

### **III. Merits of the Argument**

ACLU stated a claim that Fenwick's enfranchisement of artificial entities violates the Elections Clause. The Superior Court should not have dismissed ACLU's claim for two reasons. First, the Clause should be interpreted using the factors adopted by this Court in *Jones v. State*.<sup>12</sup> Those factors demonstrate that the Elections Clause prohibits vote dilution that impacts the political efficacy of people's ballots. Second, even if this Court finds the Elections Clause does not provide heightened voting protections, it should still find these protections are coextensive with voting rights guarantees stemming from the Equal Protection Clause in the United States Constitution. Precedent applying the Equal Protection Clause in like cases demonstrates that ACLU has stated a claim. So, Fenwick cannot show that there is no set of facts which could be proven that would entitle ACLU to relief.<sup>13</sup>

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<sup>12</sup> *Jones v. State*, 745 A.2d 856, 864-65 (Del. 1999).

<sup>13</sup> The Superior Court referenced that laws enacted by the Delaware General Assembly are presumed to be constitutional. Attch. 1 at 11. ACLU does not dispute that it must rebut this presumption to prevail in this litigation. However, at this stage in the proceedings, ACLU must demonstrate only that the Superior Court wrongfully ruled on the 12(b)(6) motion and show that a reasonable set of circumstances exists to under which it can prevail. *See Mennella v. Albence*, 2024 WL 758606 at \*5 (Del. Super. Ct. Feb. 23, 2024) (separating the standards for a motion to dismiss from the standards for rebutting a statute's presumption of constitutionality), *rev'd and vacated on other grounds*, 320 A.3d 212 (Del. 2024); *see also Cent. Mortgage Co. v. Morgan Stanley Mortgage Capital Holdings LLC*, 27 A.3d 531, 536 (Del. 2011) (explaining that though it may, as a factual matter,

ACLU also has standing on behalf of its members residing in Fenwick because it meets all associational standing requirements, including sufficiently alleging imminent, concrete, and particular harm that is fairly traceable to Fenwick. Under Delaware precedent and federal precedent applying stricter standing requirements, ACLU clears the bar for standing.

Lastly, this case is not moot. Fenwick cannot meet its burden of demonstrating that ACLU has lost standing or that a court can no longer resolve this dispute. Even if this Court found otherwise, ACLU's claim is both subject to repetition yet evading review and presents an issue of public importance, so this case is not moot.

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be impossible for a plaintiff to prove their claims at later stages of litigation, this is not the test for a motion to dismiss). It is of no consequence that ACLU has sought a declaratory judgment, as factfinding is expressly contemplated in such proceedings. 10 *Del. C.* § 6509.

A. The Superior Court Erred in Holding that ACLU Failed to State a Claim Upon Which Relief Could be Granted.

The Superior Court held that ACLU had not stated a cognizable claim that the Town's enfranchisement of artificial entity voters, and the resulting debasement of the value of human voters' ballots, violates the Delaware Elections Clause. Attch. 1. In reaching its conclusion, the court found that "free elections under Delaware's Elections Clause mean elections free of fraud, physical coercion, force, improper influence, intimidation, violence, impediments to voting, or financial incentives," and that elections are equal when "the vote of each voter is equal in its influence upon the result to the vote of every other elector" and when "each ballot is as effective as every other ballot." Attch. 1 at 8-11. The Court then ruled that because ACLU did not allege that artificial entity voting involves any intimidation or improper influence, special treatment, discrimination, or unequal ballots, ACLU failed to state a claim under the Elections Clause. Attch. 1 at 11.

The Superior Court's analysis is flawed because it did not undertake the required "logical, deductive analytical process," to determine the meaning of the Elections Clause in this context.<sup>14</sup> This analysis reveals that ACLU has at least stated a claim sufficient to survive a 12(b)(6) motion to dismiss, as the Clause protects the political efficacy of peoples' votes. Further, persuasive law under the

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<sup>14</sup> See *Jones*, 745 A.2d at 864.

federal parallel to the Elections Clause demonstrates that ACLU has stated a claim upon which relief can be granted, as cases brought under the Equal Protection Clause have struck down non-resident landowner voting schemes, and Fenwick’s artificial entity voting scheme is derivative of non-resident landowner voting.

*i. An Analysis of the Hunt Factors Demonstrates that the Elections Clause Recognizes Vote Dilution Claims.*

Where language in the Delaware Constitution is similar to language in the United States Constitution, this Court has used factors identified by Justice Handler of the New Jersey Supreme Court in *State v. Hunt* to determine whether, the “distinctive and identifiable attributes of a state government, its laws and its people” justifies using the “state constitution as an independent source for recognizing and protecting individual rights.”<sup>15</sup> Here, as the Court of Chancery recognized when evaluating the Elections Clause in *Young v. Red Clay Consolidated School District*, “the ostensible federal parallel for the Elections Clause is ... the federal regime of implied constitutional protection for voting rights that has developed under the Due Process and Equal Protection Clauses,” and the “presence of the Elections Clause in the Delaware Constitution provides powerful support under *Jones* for giving it meaning independent of federal law.”<sup>16</sup>

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<sup>15</sup> *Id.* at 864-865 (citing *State v. Hunt*, 450 A.2d 952, 962, 967 (N.J. 1982)).

<sup>16</sup> *Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 810, 819 (Del. Ch. 2015).

The extent of this independent meaning is determined by weighing the *Hunt* factors, which include textual language, legislative history, preexisting state law, structural differences between the state and federal constitutions, matters of particular state interest or local concern, state traditions, and public attitudes.<sup>17</sup> Analysis of relevant *Hunt* factors demonstrates that the Elections Clause prohibits the vote dilution occurring in Fenwick.

a. The Text of the Elections Clause Demonstrates that it Protects the Political Efficacy of Natural Persons' Ballots.

Under a *Hunt* analysis, the Court looks first to the meaning of the words used in the Clause.<sup>18</sup> The Elections Clause guarantees that “[a]ll elections shall be free and equal.”<sup>19</sup> This Clause was introduced into the Constitution in 1792 and reaffirmed in the Constitutions of 1831 and 1897.<sup>20</sup>

At the time of the Clause’s introduction, the definition of “equal” included “[i]n just proportion,” and “[e]quitable.”<sup>21</sup> At the time of the Clause’s 1897 reaffirmance, “free” had public meanings including equality components pertaining to the individual rights of people. For example, Black’s Law Dictionary defined “free” as “[n]ot subject to the dominion of another,” “[e]njoying full civic

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<sup>17</sup> *Hunt*, 450 A.2d at 864–65.

<sup>18</sup> *Jones*, 745 A.2d at 864.

<sup>19</sup> Del. Const. art. I, § 3.

<sup>20</sup> *Young*, 122 A.3d at 820–24.

<sup>21</sup> See *EQUAL*, Samuel Johnson, *A Dictionary of the English Language* (8th ed. 1792)

rights,” “[n]ot despotic, assuring liberty; defending individual rights against encroachment by any person or class; instituted by a free people; said of governments.”<sup>22</sup> Similarly, Anderson’s Law Dictionary stated that “free” meant “open to all citizens alike,”<sup>23</sup> and defined “free” to include “defending individual rights against encroachment by any person or class; as, a free government, free institutions.”<sup>24</sup>

Today, Black’s Law Dictionary defines the phrase “free and equal” in the electoral context as pertaining to both the “opportunity to vote” and “effect” of each vote.<sup>25</sup> Therefore, from its origin through its reauthorizations to today, the Elections Clause’s public meaning has included protecting the political efficacy of a vote and its basic function of ensuring that people can elect a government responsive to them and protective of their rights.

This understanding of the text of the Elections Clause is consistent with the few Delaware precedents that have considered this text. *State v. McCoy*, which was decided the same year the Clause was reaffirmed, described the Elections Clause as

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<sup>22</sup> *FREE*, Black’s Law Dictionary (1st ed. 1891). This definition was used by the District Court of Utah to interpret their equivalent clause, which provides that, “[a]ll elections shall be free.” *League of Women Voters of Utah v. Utah State Leg.*, 2022 WL 21745734, \*13 (Utah Dist.Ct.).

<sup>23</sup> *FREE*, William C. Anderson, Dictionary of Law, (1889). This definition was also used by the District Court of Utah. *League of Women Voters of Utah*, 2022 WL 21745734, at \*13.

<sup>24</sup> *Anderson, supra*, at 478.

<sup>25</sup> *FREE AND EQUAL*, Black’s Law Dictionary (12th ed. 2024)

part of a guarantee that “an election is the constitutional expression of the sovereign will of the people.”<sup>26</sup> Further, in *Abbott v. Gordon*, the Superior Court recognized that the Clause’s “purpose is to ensure that the right of citizens to vote in an election is unfettered,” and that it “safeguards the people’s right to elect officials of their choosing.”<sup>27</sup> *Young* largely looked to *Abbott* and other state courts’ jurisprudence regarding similar clauses in their state constitutions. *Young* noted that Kentucky’s clause guarantees that the “purpose of elections . . . to obtain a full, fair, and free expression of the popular will,” is met.<sup>28</sup> The court also endorsed the Illinois Supreme Court’s explanation that a “free and equal” election means that “each ballot is as effective as every other ballot.”<sup>29</sup>

Beyond Delaware precedents, other states’ applications of similar clauses in their constitutions bolsters the understanding that Delaware’s Clause protects the efficacy of a ballot. Of utmost significance is Pennsylvania’s Elections Clause,

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<sup>26</sup> *State v. McCoy*, 43 A. 270, 273 (Del. Super. Ct. 1897)

<sup>27</sup> *Abbott v. Gordon*, 2008 WL 821522 at \*19 (Del. Super. Ct. Mar. 27, 2008), *aff’d*, 2008 WL 3919846 (Del. 2008) (citing *State ex rel. James v. Battersby*, 56 A.2d 527, 532 (Del. Super. Ct. 1947)). The Superior Court in the present matter correctly pointed out that *Abbott* was not a vote dilution case but failed to consider the implication of this broad language, namely, that the Elections Clause has broad substantive content which readily lends itself to a vote dilution claim.

<sup>28</sup> *Young*, 122 A.3d at 838 (quoting *Wallbrecht v. Ingram*, 175 S.W. 1022, 1026 (Ky. 1915)).

<sup>29</sup> *Id.* at 840 (citing *People v. Hoffman*, 5 N.E. 596, 599-560 (Ill. 1886)).

which served as a model for Delaware’s “‘nearly identical’” Clause.<sup>30</sup> So, interpretation of Pennsylvania’s Clause carries special weight. The Clause is as follows: “Elections shall be free and equal; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”<sup>31</sup>

Pennsylvania Courts have interpreted their Elections Clause as providing Pennsylvanians with a right to a politically effective vote. In *League of Women Voters of Pa. v. Commonwealth*, the Supreme Court of Pennsylvania found that its Elections Clause protects against partisan gerrymandering, holding that it “should be given the broadest possible interpretation, one which . . . provides the people of this Commonwealth an equally effective power to select the representative of his or her choice, and bars the dilution of the people's power to do so.”<sup>32</sup> This reasoning has subsequently been reinforced: “‘the overarching objective of [the Clause] is to prevent dilution of an individual’s vote by mandating that the power of his or her vote in the selection of representatives be equalized to the greatest

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<sup>30</sup>*Id.* at 821 (citing Rodman Ward Jr. & Paul J. Lockwood, *Bill of Rights Article I, in The Delaware Constitution of 1897: The First 100 One Hundred Years* (Randy J. Holland & Harvey Bernard Rubenstein eds., 1997)); Brett Graham, “Free and Equal”: James Wilson’s Elections Clause and Its Implications for Fighting Partisan Gerrymandering in State Courts, 85 Alb. L. Rev. 799, 814 (2022) (quoting Randy J. Holland, *The Delaware State Constitution: A Reference Guide* 7 (G. Alan Tarr ed., 2002)).

<sup>31</sup> Pa. Const. art. I, § 5

<sup>32</sup> *League of Women Voters of Pa. v. Commonwealth*, 178 A.3d 737, 814 (Pa. 2018) (hereinafter “*LWVPA*”).

degree possible with all other Pennsylvania citizens,” and “the ‘Free and Equal Elections Clause was specifically intended to equalize the power of voters in our Commonwealth’s election process.’”<sup>33</sup> Therefore the model for Delaware’s Elections Clause guarantees Pennsylvanians a right to a politically effective ballot free from vote dilution.

Courts in states with either a facsimile or substantially similar clause to Delaware’s have similarly held that these clauses concern the political efficacy of a ballot or the protection of the ability of the people to choose their representatives. Examples include New Mexico, Kentucky, Maryland, and Utah.<sup>34</sup>

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<sup>33</sup> *Working Families Party v. Commonwealth*, 209 A.3d 270, 281–82 (Pa. 2019) (quoting *LWVPA* 178 A.3d at 817); *Carter v. Chapman*, 270 A.3d 444, 456 (Pa. 2022) (quoting *LWVPA*, 178 A.3d at 812).

<sup>34</sup> *Grisham v. Van Soelen*, 539 P.3d 272, 284 (N.M. 2023) (explaining in a partisan gerrymandering dispute that where the will of the people is succumbs to the will of an entrenched party “the fundamental right to vote in a free and open election ... [is] transformed into a meaningless exercise”); *Wallbrecht*, 175 S.W. at 1026 (indicating that “[t]he very purpose of elections is to obtain a full, fair, and free expression of the popular will upon the matter” when describing a “free and equal election”); *Szeliga v. Lamone*, 2022 WL 2132194, at \*13 (Md.Cir.Ct., Mar. 25, 2022) (citing a delegate to Maryland’s Constitutional Convention of 1864 as speaking to the “right to participate in free elections” under Maryland’s free elections clause when he declared that “[t]he people of Maryland have always in times past, guarded with more than vestal care this fundamental principle of self-government, [b]y constitutional provisions and legislative enactments, they have sought to provide against, every conceivable effort that might be made to suppress the voice of the people”) (internal citation removed); *League of Women Voters of Utah*, 2022 WL 21745734 at \*14-15 (finding that Utah’s clause, guaranteeing among other things that “[a]ll elections shall be free,” “guarantees more than merely the right to vote” including “an unconstrained process, that does not ‘produce’ results “in an unnatural or strained manner”). New Mexico and

These sources demonstrate the Elections Clause’s text is best understood as a broad guarantee against vote dilution.

b. The Structure and Legislative History of the Elections Clause Demonstrate that it Concerns the Fundamental Requirement that Government is Responsive to the People.

The next step in determining the scope of the Elections Clause’s protections is examining the general structure of state constitutions and the legislative history of the Elections Clause. State constitutions “serve[] only to limit the sovereign power which inheres directly in the people . . . [h]ence the explicit affirmation of fundamental rights in our Constitution can be seen as a guarantee of those rights.”<sup>35</sup> Therefore, the Elections Clause structurally serves as a guarantee of the political freedom and equality naturally prescribed in our system of government to its people.

Furthermore, the legislative history of the Elections Clause supports ACLU’s claim that it protects the right of people to cast politically effective ballots free from vote dilution. “[A]ntecedents of the Elections Clause,” are of use because

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Maryland’s have language similar to but not exactly the same as Delaware’s. New Mexico’s Clause requires “free and open” elections, and its Supreme Court has stated that this language “is similar enough” to the more common free and equal elections clauses to direct interpretation. *Gunaji v. Macias*, 31 P.3d 1008, 1016 (N.M. 2001). Maryland’s Clause states that “[t]he right of the People to participate in the Legislature is the best security of liberty and the foundation of all free Government; for this purpose, elections ought to be free and frequent.” Md. Const. Declaration. of Rts. art. 7.

<sup>35</sup> *Jones*, 745 A.2d at 864.

the history of the Clause “is largely coterminous with the development of the Delaware Constitution.”<sup>36</sup> *Young* noted that Delaware’s first constitution, drafted during “widespread . . . desire for popular control over the process of governing . . . emphasized the role of the people and the importance of elections.”<sup>37</sup> The Constitution of 1776 incorporated a Declaration of Rights and Fundamental Rules of the Delaware State, rife with guarantees that the people of Delaware are ultimately sovereign. Section 1 stated “all government of right originates from the *people*, is founded in compact only, and instituted solely for the good of the whole.”<sup>38</sup> Section 4 guaranteed that “*people* of this state have the sole exclusive and inherent right of governing and regulating the internal police of the same.”<sup>39</sup> Section 5 warned that “*persons* intrusted with the Legislative and Executive Powers are the Trustees and Servants of the public . . . whenever the ends of government are perverted, and public liberty manifestly endangered by the [the legislature or executive], the people may . . . establish a new, or reform the old government.”<sup>40</sup> Section 6, the most direct antecedent of the Elections Clause, proclaimed:

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<sup>36</sup> *Young*, 122 A.3d at 819–24.

<sup>37</sup> *Id.* at 820 (citing Randy J. Holland, *State Constitutions: Purpose and Function*, in *The Delaware Constitution of 1897: The First One Hundred Years*, 5, 18 (Randy J. Holland & Harvey Bernard Rubenstein eds., 1997 ) (emphasis added)).

<sup>38</sup> Del. Declaration of Rts. § 1 (1776) (emphasis added).

<sup>39</sup> *Id.* at § 4 (emphasis added).

<sup>40</sup> *Id.* at § 5 (emphasis added).

That the right in the *people* to participate in the Legislature, is the foundation of liberty and of all free government, and for this end all elections ought to be free and frequent, and every freeman, having sufficient evidence of a permanent common interest with, and attachment to the community, hath a right of suffrage.<sup>41</sup>

Therefore, relevant antecedents of the Elections Clause demonstrate the Clause's guarantee of a politically effective vote.<sup>42</sup>

The Elections Clause first appeared in the Constitution of 1792.<sup>43</sup> The drafters of this Constitution “reaffirmed [Delaware’s] commitment to its own declaration of rights and common law traditions.”<sup>44</sup> The Constitution of 1792 also added a preamble stating that “the *people*” established and ordained the Constitution, and that “all just authority in the institutions of political society is derived from the *people*, and established with their consent.”<sup>45</sup> The addition of this preamble coinciding with the addition of the Elections Clause is additional evidence that the framers were concerned with protecting the political efficacy of Delaware voters’ ballots.

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<sup>41</sup> *Id* at § 6 (emphasis added).

<sup>42</sup> Additionally, this Court has noted that “it is logical to infer” that there would be remedies for violations of Delaware’s First Constitution or the Declaration of Rights. *Dorsey v. State*, 761 A.2d 807, 816-817 (Del. 2000).

<sup>43</sup> Del. Const. of 1792, art. I, § 3

<sup>44</sup> *Young*, 122 A.3d at 821 (citing Holland, *State Constitutions: Purpose and Function*, *supra* note 37, at 14).

<sup>45</sup> Del. Const. of 1792, pmbl. (emphasis added).

The Elections Clause and the portions of the 1792 Preamble cited above went unchanged in Delaware’s 1831 constitution.<sup>46</sup> The final iteration of the Delaware Constitution was enacted in 1897. It reaffirmed the “revered” Elections Clause and the Preamble language.<sup>47</sup> As stated in *Young*, “the evolution of the Delaware Constitution from 1776 until 1897 evidences consistent concern for the integrity of the electoral process,” with framers of the 1897 Constitution seeking “to re-establish free and open elections,” considering their “heightened sensitivity to outside influences on voters.”<sup>48</sup> The legislative history therefore demonstrates the framers’ desire to protect the efficacy of people’s ballots and the foundational principle that the state derives power from the people.

c. Delaware’s Particular Susceptibility to Artificial Entity Vote Dilution and Local Attitudes and History Suggest the Elections Clause Protects Against Artificial Entity Vote Dilution.

Matters of particular state interest or local concern, state traditions, and public attitudes are also important factors for determining the reach of state constitutional provisions with federal analogs.<sup>49</sup> It is no coincidence that the issue of artificial entity participation in the franchise would come to a head in this state.

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<sup>46</sup> Randy J. Holland, *The Delaware State Constitution* 17–18 (2d ed. 2017).

<sup>47</sup> Del. Const. art. I, § 3; Del. Const. pmbl.; *Young*, 122 A.3d at 822.

<sup>48</sup> *Young*, 122 A.3d at 824.

<sup>49</sup> *Jones*, 745 A.2d at 865.

As of 2024, “Delaware remain[ed] the undisputed leader in . . . business formation, both nationally and globally,” and was home to over 2.1 million active business entities.<sup>50</sup> Comparatively, in 2024, only 518,330 Delawareans voted in statewide elections.<sup>51</sup> Delaware, to a greater extent than anywhere else in the country, has a particular interest in keeping its democratic process responsive to its people and not artificial entities.

Further, historical and present attitudes demonstrate that artificial entity voting is offensive to the Elections Clause. Concern over the influence of business entities is evergreen in Delaware. It was a concern around the time of Delaware’s 1896 Constitutional Convention.<sup>52</sup> In the present day, public sentiment appears to largely be against artificial entities voting in elections, as a new effort to ban the practice statewide through a constitutional amendment, spurred in no small part by the ruling by the Superior Court in this very dispute, has passed its first leg.<sup>53</sup>

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<sup>50</sup> 2024 Del. Div. of Corps. Ann. Rep. 1.

<sup>51</sup> 2024 Del. Dep’t of Elections Gen. Election Rep.

<sup>52</sup> “Complaints were expressed that . . . Delawareans were becoming ‘absentee landlords of distant corporations,’” further the lack of a general corporation law “k[ep]t open[] the door to possible corrupt dealings between companies and legislators.” “The assumption was that a convention would . . . place more power in the hands of the people.” Richard Lynch Mumford, *Constitutional Development in the State of Delaware, 1776–1897*, 292, 301–02 (1969) (quoting Henry Seidel Canby, *The Age of Confidence* 239 (1934)).

<sup>53</sup> Brandon Ferguson, *Delaware lawmakers pass flurry of bills in final session push*, WDEL (July 1, 2026, 2:00 ET) [https://www.wdel.com/news/delaware-lawmakers-pass-flurry-of-bills-in-final-session-push/article\\_96dd3679-db3e-56e6-a645-f1458513e171.html#/questions](https://www.wdel.com/news/delaware-lawmakers-pass-flurry-of-bills-in-final-session-push/article_96dd3679-db3e-56e6-a645-f1458513e171.html#/questions).

These factors therefore provide strong evidence that Delaware's Elections Clause should provide protection against debasement of the franchise by artificial entity voting.

In conclusion, the relevant *Hunt* factors demonstrate that the Elections Clause goes beyond its federal analog, broadly protecting against vote dilution and guaranteeing the core democratic principle that governments are ultimately responsive to the *people* they govern. Therefore, the Superior Court improperly held that ACLU did not state a claim upon which relief could be granted.

*ii. Even Applying Federal Equal Protection Standards, Fenwick's Scheme Cannot Survive Scrutiny.*

Even if this Court were to find that the Elections Clause should be interpreted in lockstep with protections against vote dilution articulated under the Equal Protection Clause, it should find that the Superior Court erred in concluding that ACLU failed to state a claim. In the similar context of nonresident landowner voting, courts have found that either strict scrutiny is invoked for elections of government entities of general purpose or powers, or else that a rational basis test is required and that overly inclusive nonresident landowner voting schemes do not

survive rational basis review.<sup>54</sup> Regardless of the analysis this Court may employ under a lockstep approach, ACLU has stated a claim.

First, a neighboring federal circuit has found that enfranchising nonresidents triggers strict scrutiny in all instances. In *Locklear v. North Carolina State Board of Elections*, the Fourth Circuit Court of Appeals held that considered a state statute pertaining to the elections of the six boards of education in Robeson County.<sup>55</sup> The statute allowed “city voters [to] vote for members of both their own board and some members of the county board,” while “county voters may vote only for members of the county board.”<sup>56</sup> The court required a “compelling justification” for the dilution of county-resident votes, and the proffered explanation of providing city voters a voice in the limited functions of common interest performed by the county school board was insufficient because city voters were given “a voice in the operation of the county schools in those noncooperative aspects of their operation in which there is no showing that they have any interest.”<sup>57</sup>

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<sup>54</sup> In the words of Fenwick: “[i]t is property ownership, not entity status, that provides a vehicle for nonresidents to also participate in Fenwick’s elections.” A33.

<sup>55</sup> Each school board was “an independent body” within an “exclusive geographical jurisdiction” despite five of them being termed “city administrative units” and one of them being termed the “Robeson County Board of Education.” *Locklear v. N.C. State Bd. of Elections*, 514 F.2d 1152, 1153 (4th Cir. 1975).

<sup>56</sup> *Id.* at 1153, 1154.

<sup>57</sup> *Id.* at 1154-1156.

Applying this rationale to a situation more similar to this case, the United States District Court for the District of Maryland found that the town of North Beach could not extend the right to vote to nonresidents who owned property in the town absent a compelling interest.<sup>58</sup> The Court found that even property owners’ “substantial interest” in how North Beach was governed did not rise to a compelling interest for enfranchising them, and the inclusion of the 11% of North Beach’s voters who were nonresident property owners was therefore a violation of the Equal Protection Clause.<sup>59</sup>

Other courts have suggested that the compelling interest test applies where the election at issue pertained to governmental bodies of general purpose and powers. In *Bjornestad v. Hulse*, California’s Court of Appeal for its Third Appellate District considered the constitutionality of a provision allowing “every owner of real property within [a water district], who is not a resident of the district” to vote, including “a corporation” through a legal representative.<sup>60</sup> The Court upheld the provision under a rational basis analysis, emphasizing that rational basis applied because the water district was “not a governmental entity of general purpose and powers,” and instead was “limited essentially to providing

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<sup>58</sup> *Tobin v. Town of North Beach*, No. R-86-1517, slip op. at 5 (D. Md. Sep. 25, 1986), aff’d 1989 WL 21357 (4th Cir. 1989). Attch. 2.

<sup>59</sup> *Id.* at 4-5.

<sup>60</sup> *Bjornestad v. Hulse*, 281 Cal. Rptr. 548, 550 (Ct. App. 1991) (quoting Cal. Water Code § 30700.6 (West)).

water and sewer services and structuring the arrangements to finance those services.”<sup>61</sup> *Bjornestad* aligned with other California decisions differentiating the voting rights of natural person residents and those able to vote through property ownership.<sup>62</sup>

Because artificial entity voting is derived from landownership and presents a graver example of parties receiving a voice in affairs that most directly impact residents, it follows that the compelling interest test would be appropriate. Here, Fenwick has no compelling interest, because it has never provided any justification for its scheme.

But even if this Court were to apply a rational basis test, Fenwick’s scheme would not withstand scrutiny. In *Brown v. Board of Commissioners of the City of Chattanooga*, the United States District Court for the District of Tennessee evaluated Chattanooga’s city charter, which allowed “[n]onresident freeholders [to] vote in the wards in which their freehold is situated.”<sup>63</sup> The Court found Chattanooga’s voting scheme did not survive a rational basis review, because it

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<sup>61</sup> *Id.* at 560, 563.

<sup>62</sup> See *Curtis v. Bd. of Supervisors*, 501 P.2d 537, 552 (Cal. 1972) (“[W]e entertain no doubt that the state cannot enact a provision which gives absentee and corporate landowners the power to Override [sic] the needs and interests of the residents”); *Erven v. Bd. of Supervisors*, 126 Cal. Rptr. 285, 294 (Ct. App. 1975) (“It is doubtful that [the voting scheme described in *Curtis*] can ever meet the strict scrutiny [sic] test with respect to elections held by governmental entities exercising general governmental powers.”).

<sup>63</sup> *Brown v. Bd. Of Comm’rs*, 722 F. Supp. 380, 397 (D. Tenn. 1989).

allowed “nonresident property owners to vote in city elections who do not have a substantial interest in the operation of the city,” where the “charter permit[ed] a nonresident who owns a trivial amount of property to vote in municipal elections.”<sup>64</sup> Further, in the case of *May v. Town of Mountain Village*, the Tenth Circuit Court of Appeals held that a nonresident property-owner voting scheme that specifically excluded artificial entities and required property owners to own a minimum of 50% of the fee title interest of the property withstood constitutional scrutiny in part because there was no possibility of “excessive partitions of a piece of property” that would allow nonresidents to artificially inflate their voting power.<sup>65</sup>

Here, ACLU alleged that only a trivial amount of property ownership is required to vote as an artificial entity in Fenwick and that Fenwick’s Charter does not limit the number of artificial entities eligible to vote based on their ownership interest in any single property. A11. This is sufficient to state a claim under *Brown* and *May*.<sup>66</sup>

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<sup>64</sup> *Id.* at 399.

<sup>65</sup> *May v. Town of Mountain Village*, 132 F.3d 576, 578, 582 (10th Cir. 1997).

<sup>66</sup> Further, this Court has recently explained that rational basis review “is still substantive review,” that is “by no means ‘toothless.’” *State v. Topolski*, 303 A.3d 338, 365 (Del. Super. Ct. 2023) (quoting *Heffner v. Murphy*, 745 F.3d 56, 79 (3d Cir. 2014)).

Therefore, even if this Court does not find that the Elections Clause provides broader voting rights protections than the Equal Protection Clause does, ACLU has stated a claim under the federal election law approach because similar schemes have been struck down under either strict scrutiny or rational basis tests.

B. ACLU has Standing to Bring this Lawsuit.

Standing is broadly conferred by Delaware courts, which utilize a “flexible” approach to standing doctrine.<sup>67</sup> The Delaware Constitution contains a clear mandate that “[a]ll courts shall be open; and every person for any injury done . . . shall have remedy by the due course of law,” requiring Delaware courts to “afford a remedy for every substantial wrong.”<sup>68</sup> Delaware courts analyze standing “as a matter of self-restraint to avoid the rendering of advisory opinions at the behest of parties who are ‘mere intermeddlers.’”<sup>69</sup> “[T]he degree and manner of evidence that is required to establish standing varies as the successive stages of any litigation proceeds,” such that “[a]t the pleading stage, general allegations of injury are sufficient to withstand a motion to dismiss because it is ‘presume[d] that general allegations embrace those specific facts that are necessary to support the claim.’”<sup>70</sup>

Voting rights cases exemplify this principle. In disputes ranging from the constitutionality of statutory deadlines for mailed ballots to the constitutionality of emergency statutes expanding vote by mail, Delaware courts take seriously their

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<sup>67</sup> *In re Delaware Pub. Sch. Litig.*, 239 A.3d 451, 510-11 (Del. Ch. 2020).

<sup>68</sup> Del. Const. Art. I § 9; Randy J. Holland, *The Delaware State Constitution* 64–65 (2011).

<sup>69</sup> *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1382 (Del. 1991) (quoting *Crescent Park Tenants Assoc. v. Realty Equities Corp. of New York*, 58 N.J. 98, 107 (1971)).

<sup>70</sup> *Dover Historical Soc. v. City of Dover Planning Comm’n*, 838 A.2d 1103, 1110 (Del. 2003) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)).

duty to confer standing broadly and have applied the proper standard for each stage of a given dispute, embracing an expansive view of standing even at the summary judgment stage.<sup>71</sup>

ACLU has standing if “1) the interests to be protected by the suit are germane to [ACLU’s] purpose; 2) neither the claim asserted nor the relief requested requires the participation of individual members; and 3) [ACLU’s] members would otherwise have standing.”<sup>72</sup> ACLU meets all three criteria.<sup>73</sup>

*i. ACLU Members Otherwise have Standing.*

ACLU members would otherwise have individual standing to bring suit because the imminent harm they faced is a quintessential injury to a fundamental right traceable to Fenwick.<sup>74</sup>

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<sup>71</sup> See *LWVDE* 250 A.3d at 926, 934 (assuming standing at the motion for summary judgment stage where plaintiff organization alleged that a deadline for receipt of mailed ballots constituted a “burden . . . more likely to disenfranchise some groups of voters than others”); *Republican State Comm. of Delaware v. Dep’t of Elections*, 250 A.3d 911, 917 (Del. Ch. 2020) (assuming standing at the motion for summary judgment stage despite unresolved questions pertaining to injury-in-fact and laches).

<sup>72</sup> *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 902 (Del. 1994).

<sup>73</sup> ACLU easily meets the first two prongs because there is at least “mere pertinence” between its organizational purpose of preserving civil liberties and combatting vote dilution, and because ACLU is neither seeking money damages nor is ACLU-member testimony required. *Id.* at 902 (internal quotations and citations removed).

<sup>74</sup> *Albence v. Mennella*, 320 A.3d 212, 220 (Del. 2024).

- a. Injury to ACLU Members was Certainly Impending When this Suit was Filed Because the Harm Pertained to an Upcoming Election.

In *Albence v. Mennella* (hereinafter “*Mennella*”), this Court provided guidance on alleging an imminent and particularized voting-related harm sufficient to meet the 12(b)(6) standard.<sup>75</sup> This Court held that a candidate who was not slated to run for re-election until 2026 did not face an imminent harm from then-existing election laws because he “signed onto the amended complaint more than three years before the next election in which he [would] be a candidate.”<sup>76</sup>

This Court contrasted the situation in *Mennella* with a prior holding that a candidate had standing where the “looming election” was set to occur the same year his complaint was filed and where he had filed an affidavit mere months before the election confirming he filed as a candidate and was actively campaigning for office.<sup>77</sup> Therefore, the focus of this Court’s imminence analysis in both cases was the proximity of an election.

Here, ACLU’s members stood to be injured in the next election, set to occur approximately nine months after the complaint in this matter was filed. Standing and the narrower issue of imminence are assessed at the time a complaint is filed; it

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 222.

<sup>77</sup> *Id.* at 222 n. 51(citing *App. to Opening Br.* at A146–47, *Albence v. Higgin*, 295 A.3d 1065 (Del. 2022)) (indicating that the candidate in *Higgin* filed his complaint on July 22, 2022).

does not matter for the standing analysis that Fenwick’s next election is now approximately one year away.<sup>78</sup>

b. Injury to ACLU Members is Sufficiently Concrete Because it Presents an Analog to Vote Dilution Claims Decided on the Merits in Federal Courts and ACLU Allegations Meet what is Required under *Mennella*.

ACLU has also alleged a sufficiently concrete harm. *Mennella* recognized that vote dilution is “defined as ‘reducing the effectiveness of certain people’s votes without actually preventing them from casting ballots,’” and “standing is grounded in the discrimination of the influence of the plaintiff’s votes in relation to that of other voters.”<sup>79</sup> While *Mennella* focused on the most common applications of this theory, malapportionment and gerrymandering, courts across the country have recognized other forms of vote dilution.

The most direct comparators to the case at-hand are non-resident landowner voting schemes. In fact, numerous cases brought in federal circuits challenging non-resident property owner voting schemes have been resolved on the merits.<sup>80</sup>

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<sup>78</sup> *Id.* at 220; *see also Emps Ins. Co. of Wausau v. First State Orthopaedics, P.A.*, 312 A.3d 597, 607–609 (Del. 2024) (distinguishing standing from mootness and finding that only the latter “addresses cases where a controversy existed at the time the plaintiff commenced litigation but the controversy later dissolves”).

<sup>79</sup> *Id.* at 224–225 (citing Nicholas O. Stephanopoulos, *The New Vote Dilution*, 96 N.Y.U. L. Rev. 1179 (2021)).

<sup>80</sup> *See e.g. May*, 132 F.3d; *Brown*, 722 F. Supp; *Spahos v. Mayor & Councilmen of Town of Savannah Beach, Tybee Island, Ga.*, 207 F. Supp. 688, 689 (S.D. Ga. 1962), *aff’d sub nom. Spahos v. Mayor & Councilmen of Town of Savannah Beach*,

As “a showing that satisfies the Article III requirements will establish standing under Delaware law,” and because “without proper jurisdiction, a court cannot proceed at all, but can only note the jurisdictional defect and dismiss the suit,” these manifold cases demonstrate that non-resident landowner voting schemes provide a justiciable theory of vote dilution.<sup>81</sup> Because artificial entity voting is tied to property ownership, ACLU has standing and the case can be resolved on the merits.

Even if this Court is unpersuaded that the federal cases prove the concreteness of the harm alleged, the instant case is distinguishable from *Mennella* because ACLU has provided more specific allegations and evidence and done so at an even earlier stage of the litigation than the plaintiffs in *Mennella*.

The holding on voter standing in *Mennella* pertained to deficiencies in pleading.<sup>82</sup> As stated by this Court:

Our review of the plaintiffs’ vote-dilution claim is constrained by their minimalist description of how the Challenged Statutes dilute their vote. They do not allege that their votes would count less than the votes of other electors. Neither do they allege that the electors who

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*Tybee Island, Georgia*, 371 U.S. 206 (1962); *Clark v. Town of Greenburgh*, 436 F.2d 770 (2d Cir. 1971); *Creel v. Freeman*, 531 F.2d 286 (5th Cir. 1976); *Duncan v. Coffee Cnty., Tenn.*, 69 F.3d 88 (6th Cir. 1995); *Cantwell v. Hudnut*, 566 F.2d 30 (7th Cir. 1977).

<sup>81</sup> *Cont’l Auto. Sys., Inc. v. Nokia Corp.*, 2023 WL 1370523, \*6 (Del. Ch. Jan. 31, 2023); *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 84 (1998).

<sup>82</sup> *Mennella*, 320 A.3d at 224; *Id.* at 232 (Valihura, J., concurring) (expressing that the *Mennella* Court’s discussion of voter standing beyond the discussion of plaintiffs’ pleading deficiency was *dicta*).

choose early voting or request permanent-absentee status under the Challenged Statutes would not, in the absence of those statutes, vote in person on election day. Nor do the plaintiffs explain how voting under the Challenged Statutes compromises the political efficacy of their votes. The plaintiffs allege ...that early voting or voting by an elector with “permanent absentee” status will lead to an unfair election if voting under the Challenged Statutes is allowed. These pleading deficiencies, standing alone, would be sufficient to warrant dismissal of the plaintiffs’ complaint for lack of standing.<sup>83</sup>

ACLU’s allegations do not share these deficiencies. If ACLU’s requested relief were granted, artificial entity voters would not be able to participate in Fenwick elections. Further, ACLU has endeavored to explain, with ample evidence at the complaint stage, that artificial entity voting compromises the political efficacy of their members’ votes. ACLU has alleged that Fenwick’s municipal government has both “general governmental powers” and specifically enumerated powers “wholly unrelated to any special interest” of artificial entities. A10. Additionally, ACLU has alleged that artificial entities can wield the franchise based solely on a “minor ownership interest in [Fenwick].” A11. And, ACLU has provided evidence that artificial entities are registered to vote and vote in sufficient numbers to support the allegation that they influence the outcome of elections. A86-A179. Therefore, ACLU has alleged a concrete harm.<sup>84</sup>

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<sup>83</sup> *Id.* at 224.

<sup>84</sup> Additionally, the *Mennella* Court, in dicta, expressed disapproval for a theory of vote dilution termed “vote dilution through fraud facilitation.” But ACLU did not

- c. The Harm to ACLU Members in Fenwick is Particularized,  
Because these Members Suffer a Distinct Injury that is not Shared  
by the Artificial Entity Voters in Fenwick.

In *Mennella* this Court made clear that plaintiffs alleging a harm to the right to vote must indicate how the injury “will harm plaintiffs differently than it will affect other voters.”<sup>85</sup> The allegation in *Mennella* failed in this regard because it was not clear how early votes or absentee votes cast by permanent-absentee status voters impacted the plaintiffs in a way that was distinct from every other voter.<sup>86</sup> Here, however, the injury to ACLU members is felt in a personal way because it is not shared with every voter in Delaware nor even every voter in Fenwick. It is shared only by the human voters residing in Fenwick.<sup>87</sup> And, as referenced *supra*

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allege or allude to fraud in Fenwick elections, so the Court's analysis on that point is inapplicable here. *Id.* at 224–228.

<sup>85</sup> *Id.* at 228.

<sup>86</sup> *Id.*

<sup>87</sup> It is not of consequence that the harm alleged here is shared by a large number of human voters in Fenwick. An almost universally widespread injury can still confer standing so long as the shared harm is not shared with the entire voting population. *Compare Michel v. Anderson*, 14 F.3d 623, 624–626 (D.C. Cir. 1994) (recognizing that individual voters residing in states shared a harm “suffered by every American voter who resides in any state,” but that this harm was still particularized because each voter could be said to have “suffered [the] distinct and concrete harm” of the diminishment of the voting power of their congressperson where territorial delegates were allowed to vote in the Committee of the Whole), *with Mennella*, 320 A.3d at 225-226, (citing cases in which the challenged election practices applied to all voters, including a challenge to a Vermont law which authorized the Secretary of State to require local election officials to send ballots by mail to all registered voters, a challenge to a Nevada law directing city and county election officials to mail paper ballots to all active registered voters in Nevada, and a

section B.i.b., many federal courts have resolved closely related cases concerning nonresident landowner vote dilution, meaning that these courts did not find in any of these cases that the plaintiffs' injuries lacked particularity.

Further, federal cases considering vote dilution claims indicate that ACLU provided enough information in the Complaint to allege this harm. In *Alabama Legislative Black Caucus v. Alabama*, the Supreme Court held that a district court improperly found that the Alabama Democratic Conference did not have standing to challenge a redistricting plan under the Fourteenth Amendment.<sup>88</sup> In analyzing the same prong for associational standing now analyzed here, the Court wrote that “a ‘member’ of an association ‘would have standing to sue’ in his or her ‘own right’ when that member ‘resides in the district.’”<sup>89</sup> The Court chastised the district court for rejecting standing even where a representative of the Alabama Democratic Conference testified that “the Conference ‘has members in almost every county in Alabama,’” and ordered the district court to consider on remand additional evidence pertaining to the Conference’s members.<sup>90</sup> Here, where ACLU has alleged an injury that is not shared by all voters in Fenwick and provided

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challenge to a Georgia law pertaining to state absentee-ballot and recount procedures).

<sup>88</sup> *Alabama Legis. Black Caucus v. Alabama*, 575 U.S. 254, 258, 268–269 (2015).

<sup>89</sup> *Id.* at 269.

<sup>90</sup> *Id.* at 269-271.

sufficient information to demonstrate that its members are impacted, it has met the particularity requirement.

d. The Harm to ACLU Members in Fenwick is Traceable to the Town because it Stems from Fenwick's Laws.

The harm ACLU alleged is traceable to Fenwick. Fenwick has argued that the harm alleged is caused by the General Assembly because the provision in question is derived from an act of the General Assembly (approving Fenwick's charter). A43. But municipal charter provisions approved by the General Assembly have been the subject of lawsuits without joining the General Assembly to the suit.<sup>91</sup> Further, it is highly relevant that the provision in the Town's charter at issue here specifies that artificial entities may cast ballots only "if provided by ordinance."<sup>92</sup> Therefore, the enfranchisement of artificial entities required additional action by Fenwick beyond any action the General Assembly took to amend the Town's charter. Consequently, ACLU's injury is clearly traceable to the Town.

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<sup>91</sup> See, e.g., *Deibler v. City of Rehoboth Beach*, 790 F.2d 328 (3d Cir. 1986) (challenge to Rehoboth Beach charter provision requiring a candidate for the elected position of commissioner be a nondelinquent taxpayer and freeholder).

<sup>92</sup> Town of Fenwick, Del., Charter, §9A(2).

C. This Court Should not Dismiss this Lawsuit on Mootness Grounds.

This appeal has not become moot because the cancellation of Fenwick’s 2026 election. Also, the dispute is still amenable to judicial resolution because the grant of relief would have a practical effect on the controversy. And even if this dispute were moot, it meets both exceptions to the doctrine, as elections fall into the capable of repetition yet evading review exception, and voting and the narrower issue of vote dilution are clearly matters of public importance.

An appeal is moot “where a controversy existed at the time the plaintiff commenced litigation but the controversy later dissolves.”<sup>93</sup> “[T]he *defendant* bears the heavy burden of proving the controversy has become moot.”<sup>94</sup> An appeal may become moot either “[1] because a party has lost standing to assert its merits or [2] because the dispute is no longer amenable to judicial resolution.”<sup>95</sup> Even where an appeal has become moot, “[t]here are two generally recognized exceptions ... situations that are capable of repetition but evade review or matters of public importance.”<sup>96</sup>

i. *This Matter has not Become Moot Because ACLU Retains Associational Standing and the Matter is Still Amenable to Judicial Resolution.*

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<sup>93</sup> *Emps Ins. Co. of Wausau*, 312 A.3d at 608–609 (internal citations and quotations removed).

<sup>94</sup> *Id.* at 608 (emphasis in original).

<sup>95</sup> *Raiford v. Anthony*, 2026 WL 810487, \*2 (Del. Mar. 24, 2026).

<sup>96</sup> *Burroughs v. State*, 304 A.3d 530, 539 (Del. 2023).

ACLU has met its burden of establishing standing at this stage in the proceedings by demonstrating that its Fenwick members face a concrete and particularized harm that is traceable to Fenwick. *See supra* section B.i.. The only aspect of this harm arguably impacted by the cancellation of Fenwick’s 2026 election is the imminence of the harm. However, Fenwick cannot meet its burden of demonstrating that the cancellation of this election has sufficient bearing on imminence to divest ACLU of its standing to bring the present case.

As previously discussed, this Court’s imminence analysis in *Mennella* turned on whether the candidate’s challenge was to an “upcoming” or next-scheduled election.<sup>97</sup> Here, Fenwick cannot show that the “elastic concept” of imminence is lacking to the extent required under *Mennella* because ACLU’s Fenwick members stand to be harmed in the next election, approximately one year from today.<sup>98</sup>

Nor can Fenwick show that this dispute is no longer amenable to judicial. Earlier this year, this Court found a matter no longer judicially resolvable where an appellant sought reversal of a three-month revocation of his driving privileges and

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<sup>97</sup> *Mennella* 320 A.3d at 221–222.

<sup>98</sup> *Id.* at 222. (internal citation omitted). Town of Fenwick Island, *Election & Voter Information*, <https://fenwickisland.delaware.gov/election/> (last visited July 16, 2026) (“The Town of Fenwick Island Municipal Election is held on the first Saturday in August every year.”).

the removal of the civil revocation notation from his driving record.<sup>99</sup> The matter was not amenable to judicial resolution “because the grant of relief [could not] have any practical effect” on the controversy, as the three-month revocation had run its course, and regardless of the Court’s ruling on the civil revocation notation, the appellant would still have a criminal notation on his driving record.<sup>100</sup>

The present matter stands in stark contrast. Although Fenwick’s 2026 election has been cancelled, Fenwick’s voting scheme is unchanged. Therefore, ACLU’s requested relief pertains to an issue that is ongoing in Fenwick, such that a ruling in this case would have a practical impact on ACLU’s Fenwick members. Further, ACLU seeks relief that implicates all future elections in Fenwick, not just Fenwick’s now-cancelled 2026 election. A16. Therefore, Fenwick cannot meet its burden of demonstrating that this Court can no longer resolve this controversy.

*ii. Even if Fenwick can Meet its Burden to Demonstrate Mootness, this Dispute Falls into both Recognized Mootness Exceptions.*

If this Court finds Fenwick to have met its burden of demonstrating that cancellation of Fenwick’s 2026 election either divests ACLU of standing or renders the matter incapable of judicial resolution, this matter falls into both recognized exceptions to the mootness doctrine.

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<sup>99</sup> *Raiford*, 2026 WL 810487 at \*1–2.

<sup>100</sup> *Id.* at \*2.

First, this Court exempts “situations that are capable of repetition but evade review.”<sup>101</sup> Using this exception, Delaware courts can decline to dismiss a case as moot where “a challenged action is likely to be repeated with respect to the plaintiff at bar and yet would continue to evade substantive judicial review by its cessation or expiration prior to litigation,” such that “a defendant will resume challenged conduct once litigation is dismissed.”<sup>102</sup>

Elections occur in condensed timeframes, and in many instances, an issue that is no longer live for an election can readily arise in the context of a future election. Therefore, federal courts have repeatedly found election disputes warrant the invocation of this exception.<sup>103</sup> Delaware caselaw is more limited, yet this Court held that a dispute about the process by which Wilmington residents may initiate a charter amendment was not moot even where the election to ratify said

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<sup>101</sup> *State Farm Mut. Auto. Ins. Co. v. Davis*, 80 A.3d 628, 633 (Del. 2013) (citing *Gen. Motors Corp. v. New Castle Cnty.*, 701 A.2d 819, 823 n.5 (Del. 1997)).

<sup>102</sup> Evan Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 Harv. L. Rev. 655 n.283 (1992); *Emps Ins. Co. of Wausau*, 312 A.3d 597 at 611.

<sup>103</sup> See, e.g., *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969) (challenge to ballot access provisions decided after affected election because “[t]he need for ... resolution ... reflects a continuing controversy in the federal state area where our ‘one man, one vote’ decisions have thrust”); *Belitskus v. Pizzigrilli*, 343 F.3d 632, 648 (3d Cir. 2003) (exception met in a challenge to filing fee requirements for an election because of the “brief duration of the election season”) (citing *Storer v. Brown*, 415 U.S. 724, 749 n.11 (1974) (holding an as-applied challenge to an election law was not mooted where “the election was long over”).

amendment had passed because the issue was “of continuing significance to the City and its citizens.”<sup>104</sup>

This case is precisely the same. ACLU’s lawsuit, filed in December 2025, is still at the motion to dismiss stage in July 2026. And Fenwick has shown every intention of continuing its practice of allowing artificial entities to vote in upcoming municipal elections. Considering the narrow timeframe, the almost certain recurrence of the challenged conduct absent a ruling from this Court, and the continued significance of the issue, this Court should apply this exception if it finds that Fenwick met its initial burden on mootness.

The second recognized exception to mootness pertains to situations, “where the question is of public importance, and its impact on the law is real.”<sup>105</sup> In *McDermott Inc. v. Lewis*, this Court held that the unresolved issue of whether a Delaware subsidiary of a Panamanian corporation could vote the shares it held in its parent company under circumstances that were prohibited by Delaware law (but not Panama law) “compelled [this Court] to decide [the] case,” invoking this mootness exception.<sup>106</sup> It thus stands to reason that an issue concerning the most

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<sup>104</sup> See *Fraternal Ord. of Police, Delaware-Wilmington Lodge No. 1 v. McLaughlin*, 428 A.2d 1158, 1159-1160 (Del. 1981).

<sup>105</sup> *McDermott Inc. v. Lewis*, 531 A.2d 206, 211 (Del. 1987).

<sup>106</sup> *Id.* at 208, 212.

fundamental constitutional right of Delaware citizens also warrants the exception.<sup>107</sup>

Additionally, this Court has previously indicated that legislative efforts concerning a legal issue are evidence of the public importance of the issue.<sup>108</sup> As previously stated, the issue of artificial entity voting has been and continues to be the subject of legislative debate, *see Supra* section A.i.c., adding another reason why the public importance exception is applicable in the present matter.

Resolving this matter will also have a real impact on the law. First, resolving this case implicates the constitutionality of Fenwick’s charter and ordinances. This alone would create a real impact on laws pertaining to Fenwick’s elections and potentially other elections in Delaware. Second, this case pertains to Delaware’s Elections Clause, which, as recognized by the Superior Court, has “rarely been invoked in litigation in Delaware,” such that its dimensions and applications have not been fully defined. Attch. 1 at 8. If the Superior Court’s ruling is allowed to stand, it would have an impact on election law, as it suggests that the Elections Clause is simply concurrent with federal law pertaining to vote dilution, even

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<sup>107</sup> *LWVDE*, 250 A.3d at 925 (“the right to vote in a free and equal election is not simply a right enshrined in Delaware's Constitution; it is the fundamental right on which our democracy rests”).

<sup>108</sup> *Burroughs* 304 A.3d at 539-40.

though the *Young* case held the Elections Clause provides voting protections beyond those provided in the federal regime.<sup>109</sup>

Finally, where the public importance exception and capable of repetition yet evading review exception are both present, this Court has considered both as supporting a decision to decide an otherwise moot case.<sup>110</sup> Here, where this issue meets both exceptions, this Court should resolve this dispute.

In sum, Fenwick cannot meet its heavy burden of showing that ACLU's claim is moot. Fenwick's cancelled election does not impact standing, and this Court can still provide a remedy. Even if Fenwick could meet its burden, the dilution of natural persons' votes by artificial entities is a voting issue that is clearly both capable of repetition yet evasive of review due to the short timeframe for Fenwick's elections and also of great public importance due to the fundamental right at stake and legislative debate surrounding the issue. Therefore, this Court should decide this case.

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<sup>109</sup> *Young*, 122 A.3d at 810, 819.

<sup>110</sup> *See Burroughs*, 304 A.3d at 539–40. (finding that the constitutionality of Delaware's cash-bail system was both “of great importance” and presented sufficient challenges to timely appellate review to warrant invocation of both exceptions).

## **CONCLUSION**

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

Dated: July 16, 2026

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