



IN THE SUPREME COURT OF THE STATE OF DELAWARE

AMERICAN CIVIL LIBERTIES :
UNION OF DELAWARE :
 :
Plaintiff-Appellant, : Case No. 229, 2026
 :
v. : Court Below:
 : Superior Court of the State of
THE TOWN OF FENWICK ISLAND : Delaware in and for Sussex County
 :
Defendant-Appellee. : C.A. No. S25C-12-003 CAK
 :

APPELLEE'S ANSWERING BRIEF

**BROCKSTEDT MANDALAS
FEDERICO LLC**

/s/ Luke W. Mette

Luke W. Mette, Esq. (Bar ID 2540)

Joseph Grubb, Esq. (Bar ID 4712)

Mark A. Denney, Esq. (Bar ID 5156)

1413 Savannah Road, Suite 1

Lewes, DE 19958

(302) 645-2262

Lmette@lawbmf.com

Attorneys for Defendant- Appellee

Dated: August 17, 2026

TABLE OF CONTENTS

TABLE OF CONTENTS	i
TABLE OF CITATIONS.....	iv
INTRODUCTION	1
NATURE OF PROCEEDINGS	5
SUMMARY OF ARGUMENT.....	7
STATEMENT OF FACTS	8
ARGUMENT	11
I. THE SUPERIOR COURT CORRECTLY HELD THAT ACLU FAILED TO STATE A CLAIM THAT FENWICK’S CHARTER VIOLATES THE ELECTIONS CLAUSE OF THE DELAWARE CONSTITUTION BY WAY OF “VOTE DILUTION”	11
A. Question Presented	11
B. Scope of Review.....	11
C. Merits of the Argument	13
1. Fenwick’s Elections Are “Free and Equal” Within the Meaning of the Elections Clause	13
a. ACLU Makes No Allegation That Fenwick’s Elections Are Not “Free” Within the Meaning of the Elections Clause	14
b. ACLU Makes No Cognizable Allegation that Fenwick’s Elections Are Not “Equal” Within the Meaning of the Elections Clause.....	16
c. Fenwick’s Charter is Consistent with Other Delaware Law That Might Imbue the Elections Clause With Meaning	18
2. ACLU’s Complaint Fails to Allege Any Cognizable Theory of Vote Dilution.....	20
a. The Apparent Source of ACLU’s Phrase “Political Efficacy of Peoples’ Votes”	20

b. ACLU’s Complaint Fails to Allege Any Cognizable Theory of Vote Dilution.....	21
c. ACLU’s “Novel” and “Broad” Application of Vote Dilution Has No Basis.....	25
3. The Delaware General Assembly’s June 2026 Step to Amend Delaware’s Constitution Confirms, Conclusively, That Fenwick’s Charter is Constitutional.	28
4. ACLU’s Remaining Arguments on the Merits Are Impermissible, Incorrect, And Fall Well Short of Its Burden to Overcome the Presumption that Fenwick’s Charter Is Constitutional	29
d. a.ACLU Unfairly and Incorrectly Takes the Superior Court to Task for Allegedly Not Conducting a Type of Analysis ACLU Never Asked the Superior Court to Undertake Below	29
e. b.In Any Event, the Decision Below Is Far More Logical, Deductive and Analytical Than Anything ACLU Argues on Appeal.....	31
f. c.ACLU Improperly Advances Arguments Under Federal Law that ACLU Did Not Plead Below	32
II. THE SUPERIOR COURT’S DECISION SHOULD BE AFFIRMED ON THE INDEPENDENT GROUND THAT ACLU LACKS STANDING TO BRING THIS ACTION	35
A. Question Presented.....	35
B. Scope of Review.....	35
C. Merits of Argument	37
1. ACLU’s Alleged Harm Is Not Imminent.....	37
2. ACLU’s Alleged Harm Is Speculative.....	38
3. ACLU’s Alleged Harm Is A Generalized Grievance	40
4. ACLU’s Alleged Harm Arises From a Law Enacted by the State of Delaware.....	42

III. THIS ACTION MAY BECOME MOOT BY THE TIME FENWICK CONDUCTS ITS NEXT CONTESTED MUNICIPAL ELECTION IF DELAWARE’S CONSTITUTION IS AMENDED AS ACLU SEEKS HERE	44
A. Question Presented	44
B. Scope of Review.....	44
C. Merits of Argument	44
CONCLUSION	46

TABLE OF CITATIONS

Cases

<i>Abbott v. Gordon</i> , 2008 WL 821522 at * 19 (Del. Super. Mar. 27, 2008)	14
<i>Albence v. Higgin</i> , 295 A.3d 1065, 1088 (Del. 2022)	12
<i>Albence v. Mennella</i> , 320 A.3d 212, 220 (Del. 2024)	passim
<i>Am. Civil Liberties Union of Delaware v. Town of Fenwick Island</i> , No. 229, 2026 (Del. Jun. 22, 2026)	44
<i>Am. Littoral Soc., Inc. v. Bernie's Conchs, LLC</i> , 954 A.2d 909 (Del. 2008)	44
<i>Anglo Am. Sec. Fund, L.P. v. S.R. Glob. Int'l Fund, L.P.</i> , 829 A.2d 143, 155 (Del. Ch. 2003)	12
<i>Avery v. Midland County, Texas</i> , 390 U.S. 474 (1968)	25
<i>Baker v. Carr</i> , 369 U.S. 186 (1962)	22, 25
<i>Bjornestad v. Hulse</i> , 229 Cal. App. 3d 1568 (Cal. Ct. App. 1991)	24
<i>Brookfield Asset Mgmt., Inc. v. Rosson</i> , 261 A.3d 1251, 1262 (Del. 2021)	37
<i>Clinton v. Enterprise Rent-A-Car Co.</i> , 977 A.2d 892, 895 (Del. 2009)	11, 12

<i>Crescent/Mach I Partners, L.P. v. Dr Pepper Bottling Co. of Texas</i> , 962 A.2d 205, 208 (Del. 2008)	45
<i>Del. Op. Att’y. Gen 09-IB05</i> , 2 009 WL 1805910 (2009)	33
<i>Dover Hist. Soc. v. City of Dover Plan. Comm’n</i> , 838 A.2d 1103, 1109 (Del. 2003)	35
<i>Dupont v. Mills</i> , 39 Del. 42 (Del. 1937)	33
<i>Feldman v. Cutaia</i> , 951 A.2d 727, 730-31 (Del. 2008))	11
<i>Gen. Motors Corp. v. New Castle Cnty.</i> , 701 A.2d 819, 824 (Del. 1997)	38
<i>Gray v. Sanders</i> , 372 U.S. 368 (1963)	22
<i>Hedenberg v. Raber</i> , 2004 WL 2191164, at *1 (Del. Super. Ct. Aug. 20, 2004)	11
<i>Isaac v. Politico LLC</i> , 346 A.3d 103, 115 (Del. 2025)	11
<i>Jones v. State</i> , 745 A.2d 856, 864 (Del. 1999)	29, 30, 31
<i>Justice v. Gatchell</i> , 325 A.2d 97, 102 (Del. 1974)	12

<i>Lammot v. Walz</i> , 107 A.2d 905, 913 (Del. Super. 1954)	39
<i>League of Women Voters, Inc. v. Dep't of Elections</i> , 250 A.3d 922, (Del. Ch. 2020)	12, passim
<i>Martel v. Condos</i> , 487 F. Supp. 3d 247, 253 (D. Vt. 2020)	26
<i>May v. Town of Mountain Village</i> , 969 P.2d 790, 793 (Col. App. 1998)	33
<i>Mayor & Council of City of Dover v. Kelley</i> , 327 A.2d 748 (Del. 1974)	23
<i>McGowan v. State of Md.</i> , 366 U.S. 420, 425-26 (1961)	12
<i>Moran v. Bowley</i> , 347 Ill. 148, 179 N.E. 526, 531 (1932)	17
<i>Morris v. Spectra Energy Partners (DE) GP, LP</i> , 246 A.3d 121, 138 (Del. 2021)	37
<i>Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.</i> , 636 A.2d 892, 902 (Del. 1994)	37
<i>People v. Hoffman</i> , 116 Ill. 587, 5 N.E. 596, 601 (1886)	15
<i>Protech Mins., Inc. v. Dugout Team, LLC</i> , 284 A.3d 369, 378 (Del. 2022)	33

<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964)	22
<i>Rucho v. Common Cause</i> , 588 U.S. 684, 718 (2019)	22
<i>Schadt v. Latchford</i> , 843 A.2d 689, 691 (Del. 2004)	42
<i>Shawe v. Elting</i> , 157 A.3d 152, 168 (Del. 2017)	33
<i>Sierra v. Dep’t of Servs. for Children, Youth & Their Families</i> , 238 A.3d 142, 156 (Del. 2020)	12
<i>Spahos v. Mayor & Councilmen of Savannah Beach Tybee Island Ga.</i> , 207 F. Supp. 688 (S.D. Ga 1962)	25
<i>State v. Hunt</i> , 450 A.2d 952 (N.J. 1982).	29, 30
<i>Stewart v. Parish School Board of the Parish of St. Charles</i> , 310 F.Supp. 1172, 1173, (E.D La 1970)	24
<i>Swan Energy, Inc. v. Investor Protection Unit of Del. Dept. of Just.</i> , 341 A.3d 1036, 1046 (Del. 2025)	12
<i>United States v. Students Challenging Regul. Agency Procs. (SCRAP)</i> , 412 U.S. 669, (1973)	45
<i>Wilm. Med. Ctr., Inc. v. Bradford</i> , 382 A.2d 1338, 1342 (Del. 1978))	12

<i>Wood v. Raffensperger</i> , 981 F.3d 1307, 1314-15 (11 th Cir. 2020)	26
<i>XL Specialty v. WMI Liquidating Trust</i> , 93 A.3d 1208, 1217–18 (Del. 2014)	45
<i>Young v. Red Clay Consol. Sch. Dist.</i> , 122 A.3d 784, 790 (Del. Ch. 2015)	passim

Statutes

15 <i>Del. C.</i> § 101A	19
15 <i>Del. C.</i> § 5943	39
15 <i>Del. C.</i> § 7543(a)(2)	19
15 <i>Del. C.</i> § 7554	9
15 <i>Del. C.</i> §§ 7550-7585	42
22 <i>Del. C.</i> § 801(4)	9
22 <i>Del. C.</i> § 802	10
22 <i>Del. C.</i> § 835(b)	34
49 Del. Laws ch. 302 (1953)	9
49 Del. Laws ch. 302 (1953), § 9	10
76 Del. Laws ch. 363 (2008)	10, 37, 42

Other Authorities

Ariz. Rev. Stat. § 48-6818 (2025)	19
City of Rehoboth Beach, Del., Charter, § 7(d) (2019)	18
Fenwick Charter § 9(A)(3).....	17
Fenwick Charter, §§ 9A(3)-(4)	26
H.B. 402, 144th Gen. Assemb.....	37
H.B. 430 syn., 153d Gen. Assemb. Reg. Sess. (Del. 2026).....	28, 43, 45
Town of Dewey Beach, Del., Charter, § 10(b)(4) (2021)	18
Town of Fenwick Island Charter § 9A(1), (2)	1
Town of Henlopen Acres, Del., Charter, § C-5B(2) (2014).....	18
Utah Code Ann. § 17B-1-306 (2025).....	19
W. Va. Code § §8-6-2 (2003) 7-25-10 (2022).....	19
Wyo. Stat. Ann. §§ 18-16-102, 18-16-119, 18-12-102, 22-29-104 (2025).....	19

Rules

Del. Supr. Ct. R. 8	33
Del. Supr. Ct. R. 25(e)	6
Super Ct. Civ. R. 12(b)(6)	11, 35

Constitutional Provisions

Del. Const. art. I, § 3	9, 13
Del. Const. art. V, § 2	19
Del. Const. art. V, § 7	19

INTRODUCTION

By an act of the Delaware General Assembly nearly 20 years ago, the State of Delaware expressly authorized the small Town of Fenwick Island (“Fenwick”) to expand its voter registration rolls to allow individuals (human beings) to cast votes in Fenwick’s municipal elections on behalf of trusts, limited liability companies, partnerships and corporations that own property in Fenwick. Today, the overwhelming majority of legal entity property owners in Fenwick registered to vote, and on whose behalf votes are cast, in Fenwick’s municipal elections are trusts.

Entities in Fenwick are not registered to vote, and do not vote,¹ in municipal elections based on their *status as entities*. Rather, the distinction in Fenwick’s Charter regarding voter qualifications is between (1) residents (who must be natural persons, citizens, adults, bona fide residents and registered to vote) and (2) nonresidents (property owners, whether they be natural persons or Delaware domestic entities).² It is property ownership, not entity status, that provides a vehicle for nonresidents to also participate in Fenwick’s elections.³ Entities that do not own

¹ Votes on behalf of entity property owners must be cast by persons at least 18 years old who are also citizens.

² Town of Fenwick Island Charter § 9A(1), (2).

³ Property ownership is not a requirement for voting in Fenwick if a person is otherwise a resident of the Town.

property in Fenwick are not permitted to have votes cast on their behalf in Fenwick's municipal elections.

Fenwick's Charter expressly adopts the principle of "one person/entity, one vote." It provides that where a voter is "entitled to vote by virtue of being both a resident and as an owner of real property, that voter shall be entitled to one vote."⁴ Similarly, it provides, "where a voter is entitled to vote by ownership of two or more parcels of real property, that voter shall be entitled to one vote."⁵

Through this litigation, American Civil Liberties Union of Delaware ("ACLU") seeks to disenfranchise existing property owners from having votes cast on their behalf in Fenwick's municipal elections. ACLU's complaint alleges that provisions in Fenwick's Charter authorizing humans to vote on behalf nonresident entity property owners violates the Elections Clause of the Delaware Constitution by way of "vote dilution."

Fenwick's Charter is presumed to be constitutional. Accordingly, ACLU carries the burden of demonstrating by clear and convincing evidence that there is no set of circumstances under which Fenwick's Charter could be constitutional. ACLU fails to overcome that presumption. Neither Delaware's Election Clause nor jurisprudentially recognized concepts of "vote dilution" provide any legal basis for

⁴ Fenwick Charter § 9A(3).

⁵ *Id.*

ACLU's asserted claim on the facts alleged here. The Superior Court below properly granted Fenwick's motion to dismiss ACLU's complaint for failure to state a claim as a matter of law.

On appeal, ACLU flees from its own complaint by distorting the standard of review on a motion to dismiss and by inappropriately attempting to assert an entirely new theory of this case (not pled below) under federal law. ACLU also unfairly attacks the Superior Court for not undertaking a type of analysis ACLU never asked that court to perform in the first place.

At root, this litigation stems from ACLU's view that artificial entities (in particular corporations) should not be entitled to vote. But this case is not "about" whether artificial entities such as corporations have a fundamental, constitutional right to vote in federal, state or even municipal elections.⁶ Fenwick has never so argued, and the court below correctly concluded that question does not need to be reached here.

After the decision below, the presumed constitutionality of Fenwick's Charter was confirmed by Delaware's General Assembly. In June 2026, that body took the first legislative step to amend Delaware's Constitution specifically to forbid what ACLU contends in this litigation is already unconstitutional. The General

⁶ See Appellant's Opening Brief ("OB") at 1.

Assembly's actions alone demonstrate, conclusively, a set of circumstances under which Fenwick's Charter could be deemed constitutional.

The General Assembly's June 2026 step to pare back the enfranchisement of certain nonresident voters it previously bestowed also cements Fenwick's arguments below that ACLU lacks standing. ACLU's alleged harm is neither imminent nor particularized and instead is speculative and traceable to the conduct of the State of Delaware. ACLU's Complaint is fundamentally an academic (and now legislative) polemic in search of a judicial solution.

Finally, by the time Fenwick conducts its next contested municipal election in August 2027 (if not later), Delaware's Constitution may have been amended in the manner ACLU seeks, thus rendering this litigation moot.

NATURE OF PROCEEDINGS

ACLU commenced this action on December 4, 2025, by filing a complaint (the “Complaint”) against Fenwick in the Superior Court of the State of Delaware. In its Complaint, ACLU sought (a) a declaratory judgment that “non-human artificial entity voting” in Fenwick’s municipal elections violated the Elections Clause of the Delaware Constitution and (b) an order “[p]ermanently enjoining” Fenwick from “counting ballots cast by non-human artificial entities” in upcoming and future Fenwick elections.⁷

On February 16, 2026, Fenwick filed a motion to dismiss the Complaint (“Motion to Dismiss”) on grounds: (a) that the Complaint failed to state a claim upon which relief could be granted; (b) that ACLU lacked standing to bring the action; (c) that the Superior Court lacked subject matter jurisdiction to issue the permanent injunction sought by ACLU; and (d) that ACLU failed to explain why it did not join other Delaware municipalities whose state-approved charters contain language similar to the provisions in Fenwick’s Charter challenged here.

Fenwick’s Motion to Dismiss below was fully briefed, and the Superior Court heard oral argument. By Memorandum Opinion and Order dated May 26, 2026, the Superior Court granted Fenwick’s Motion to Dismiss and dismissed ACLU’s Complaint (the “Decision”) on grounds that ACLU had failed to state a claim. The

⁷ Appellant’s Appendix (“A”) 16.

Superior Court did not reach, and did not need to reach, the other grounds upon which Fenwick moved to dismiss, including lack of standing.

On June 4, 2026, ACLU filed a Notice of Appeal from the Superior Court's Decision.

Also on June 4, 2026, ACLU moved to expedite this appeal pursuant to Delaware Supreme Court Rule 25(e), based on the assumption that Fenwick would conduct a municipal election for Town Council on August 1, 2026. However, Fenwick's August 1, 2026 municipal election was subsequently rendered uncontested, and this Court then ordered non-expedited briefing. On July 16, 2026, ACLU filed its Opening Brief on appeal.

This is Fenwick's Answering Brief on appeal.

SUMMARY OF ARGUMENT

I. **Appellant's Argument I is denied.** The Superior Court correctly held that ACLU failed to state a claim that Fenwick's Charter violates the Elections Clause in Delaware's Constitution by way of "vote dilution". Fenwick's municipal elections are "free and equal" within the meaning of the Elections Clause. ACLU's novel application of "vote dilution" has no jurisprudential basis. ACLU fails to meet its burden to demonstrate, with clear and convincing evidence, that there is no set of circumstances under which Fenwick's Charter could be constitutional.

II. **Appellant's Argument II is denied.** The Decision Below should be affirmed on the independent grounds that ACLU lacks standing to bring this action. ACLU's alleged harm is neither imminent nor particularized but rather is speculative and is traceable to the State of Delaware.

III. **Appellant's Argument III is denied.** This litigation may become moot by the time Fenwick conducts its next contested, municipal election if Delaware's Constitution is amended as ACLU seeks.

STATEMENT OF FACTS

The only named plaintiff in the Complaint below is ACLU. ACLU is a corporation.⁸ ACLU does not claim to have a principal office in Fenwick or any connection to Fenwick. ACLU alleges it has “active members and supporters” who live in Fenwick, are registered to vote in Fenwick’s elections, and have voted in Fenwick’s most recent election.⁹ Yet, ACLU does not name even one Fenwick resident or property owner who avers that the voting process in Fenwick has diluted his or her vote.

The Complaint alleges Fenwick “allows artificial non-human entities to register to vote.”¹⁰ The Complaint alleges Fenwick “allows corporations, partnerships, trusts and limited liability companies to vote in its municipal elections, allowing these entities to participate directly in the democratic process guaranteed to natural born human persons.”¹¹ In addition, the Complaint alleges that Fenwick’s Charter “unnecessarily risks the dilution of votes cast by natural persons” and that a “bedrock principle of American elections is one *person*, one vote.”¹² The Complaint

⁸ A8 ¶ 4.

⁹ A9 ¶ 5.

¹⁰ A10 ¶ 10.

¹¹ A8 ¶ 1.

¹² A8 ¶ 2 (emphasis in original).

alleges that entity voting under Fenwick’s Charter violates the Elections Clause by diluting the votes of “natural persons.”¹³

**RELEVANT PROVISIONS OF
THE DELAWARE CONSTITUTION AND CODE AND
THE CHARTER AND CODE OF FENWICK**

The Elections Clause in Delaware’s Constitution states, in its entirety: “All elections shall be free and equal.”¹⁴

Under Delaware’s “Home Rule” provision for municipalities, the State of Delaware defines “qualified voter” to mean “those persons who, under the terms of a municipal charter, shall be authorized to vote in elections within that municipal corporation.”¹⁵

For municipalities other than the City of Wilmington, Delaware has set forth voter eligibility criteria as follows: “(a) Voter eligibility shall be as specified within the town charter; provided however, that in no event shall a municipality impose a durational residency requirement in excess of 30 days.”¹⁶

Fenwick was incorporated in 1953 by an act of the Delaware General Assembly.¹⁷ Fenwick has amended its charter by acts of the General Assembly “so

¹³ See A8, A13-16 ¶¶ 3, 24, 28, 31, 34.

¹⁴ Del. Const. art. I, § 3.

¹⁵ 22 Del. C. § 801(4).

¹⁶ 15 Del. C. § 7554.

¹⁷ 49 Del. Laws ch. 302 (1953).

as to have and assume *all powers which, under the Constitution of the State, it would be competent for the General Assembly to grant by specific enumeration and which are not denied by statute.*”¹⁸

Nonresident voting in Fenwick has been authorized since Fenwick was incorporated in 1953.¹⁹ In 2008, the General Assembly amended Fenwick’s Charter²⁰ to provide, in relevant part, what remains today as Section 9A(2-4) (emphasis added):

(2) *Non-residents:* Every property owner as of March 1 prior to the annual municipal election, *whether a natural person or artificial entity, including but not limited to corporations, partnerships, trusts, and limited liability companies, and who is registered to vote, if provided by ordinance, shall have one vote.* A natural person shall be a citizen of the United States and age 18 on or before the date of the election. *An artificial entity shall be a domestic entity in the State of Delaware.*

(3) *These provisions shall be construed in accordance with the principle of “one person/entity, one vote.”* Where a voter is entitled to vote by virtue of being both a resident and as an owner of real property, that voter shall be entitled to only one vote; *where a voter is entitled to vote by ownership of two or more parcels of real property, that voter shall be entitled to only one vote.*

(4) *Any legal entity other than a natural person entitled to vote, must cast its vote by a duly executed and notarized power of attorney from the legal entity granting the authority to cast its vote to its designated attorney-in-fact. . . . The person casting the ballot for such entity shall be age 18 on or before the date of the election and a citizen of the United States.*

¹⁸ 22 Del. C. § 802 (emphasis added).

¹⁹ See 49 Del. Laws ch. 302 (1953), § 9 (Qualification of voters).

²⁰ 76 Del. Laws ch. 363 (2008).

ARGUMENT

I. THE SUPERIOR COURT CORRECTLY HELD THAT ACLU FAILED TO STATE A CLAIM THAT FENWICK’S CHARTER VIOLATES THE ELECTIONS CLAUSE OF THE DELAWARE CONSTITUTION BY WAY OF “VOTE DILUTION”

A. Question Presented

Did the Superior Court properly dismiss ACLU’s Complaint for failure to state a claim where ACLU alleges Fenwick’s Charter violates the Elections Clause of the Delaware Constitution by way of “vote dilution”?²¹

B. Scope of Review

This Court reviews the Superior Court’s decision to grant a motion to dismiss *de novo* “to ‘determine whether the trial judge erred as a matter of law in formulating or applying legal precepts.’”²²

Under Rule 12(b)(6) the Superior Court Rules of Civil Procedure, dismissal is warranted where “the plaintiff has failed to plead facts supporting an element of the claim.”²³ A court is not required to accept conclusory allegations without supporting factual allegations.²⁴ Dismissal is appropriate if the plaintiff would not be entitled to relief under any set of circumstances that could be proven “to support

²¹ Fenwick preserved this question below. *See, e.g.*, A44-59; Appellee’s Appendix (B”) 075-080.

²² *Clinton v. Enterprise Rent-A-Car Co.*, 977 A.2d 892, 895 (Del. 2009) (quoting *Feldman v. Cutaia*, 951 A.2d 727, 730-31 (Del. 2008)).

²³ *Hedenberg v. Raber*, 2004 WL 2191164, at *1 (Del. Super. Ct. Aug. 20, 2004).

²⁴ *Isaac v. Politico LLC*, 346 A.3d 103, 115 (Del. 2025).

the claims asserted.”²⁵ It is not the trial court’s duty on a motion to dismiss to evaluate claims not asserted in a complaint.²⁶

Notwithstanding such deference on a motion to dismiss regarding *factual allegations*, the Delaware Supreme Court applies a strong presumption of constitutionality with regard to constitutional challenges to state-enacted laws. ““One who challenges the constitutionality of a statute has the burden of overcoming the presumption of its validity.””²⁷ “Every presumption is in favor of the validity of a legislative act and all doubts are resolved in its favor”²⁸ Fenwick’s Charter is presumed to be constitutional.²⁹ To overcome this presumption, ACLU must provide “clear and convincing evidence” that there is no set of circumstances under which Fenwick’s Charter could be constitutional.³⁰

²⁵ *Clinton*, 977 A.2d at 895.

²⁶ *See Anglo Am. Sec. Fund, L.P. v. S.R. Glob. Int’l Fund, L.P.*, 829 A.2d 143, 155 (Del. Ch. 2003).

²⁷ *Swan Energy, Inc. v. Investor Protection Unit of Del. Dept. of Just.*, 341 A.3d 1036, 1046 (Del. 2025) (quoting *Wilm. Med. Ctr., Inc. v. Bradford*, 382 A.2d 1338, 1342 (Del. 1978)).

²⁸ *Justice v. Gatchell*, 325 A.2d 97, 102 (Del. 1974).

²⁹ *See McGowan v. State of Md.* 366 U.S. 420, 425-26 (1961); *see also Albence v. Higgin*, 295 A.3d 1065, 1088 (Del. 2022); *League of Women Voters, Inc. v. Dep’t of Elections*, 250 A.3d 922, 934 (Del. Ch. 2020).

³⁰ *League of Women Voters of Delaware*, 250 A.3d at 934 *see also Sierra v. Dep’t of Servs. for Children, Youth & Their Families*, 238 A.3d 142, 156 (Del. 2020).

C. Merits of the Argument

ACLU's Complaint fails to state a claim under either the Elections Clause or any jurisprudentially recognized theory of vote dilution, and ACLU's attempt to shoehorn a "novel" theory of vote dilution into the Elections Clause does not constitute clear and convincing evidence to overcome the presumed constitutionality of Fenwick's Charter. As the court below correctly concluded, *none* of the Delaware cases that heretofore had analyzed Delaware's Elections Clause were vote dilution cases, and ACLU "does not cite Delaware case law for the proposition that its vote dilution allegations violate the Elections Clause."³¹

1. Fenwick's Elections Are "Free and Equal" Within the Meaning of the Elections Clause

The Elections Clause states, in its entirety: "All elections shall be free and equal."³² Fenwick's municipal elections conducted pursuant to its Charter are "free and equal" as those terms have been construed by the only Delaware courts that have analyzed the Elections Clause.

³¹ B- 164-65.

³² Del. Const. Art. I, § 3.

a. ACLU Makes No Allegation That Fenwick's Elections Are Not "Free" Within the Meaning of the Elections Clause

The Superior Court correctly held ACLU failed to make any allegations that Fenwick's municipal elections are not "free" within the meaning of the Elections Clause.

In *Abbott v. Gordon*, the court observed that the purpose of the Elections Clause "is to ensure that the right of citizens to vote in an election is unfettered", including specifically "free and equal access to the polls."³³ ACLU does not allege that any natural person's ability to vote in Fenwick, or access to Fenwick's polls, was restricted in any way.

In *Young v. Red Clay Consol. Sch. Dist.*, plaintiffs claimed they did not vote because they were unable to access the polls; they alleged Red Clay raised impediments to voting by elderly and disabled residents.³⁴ ACLU does not allege its members' access to the polls was impeded in any way.

In *League of Women Voters of Delaware, Inc. v. Department of Elections*, plaintiffs alleged that pandemic era delays in mail delivery would result in ballots not being counted,³⁵ and that this alleged burden infringed on their right to vote.³⁶

³³ *Abbott v. Gordon*, 2008 WL 821522 at * 19 (Del. Super. Mar. 27, 2008), *aff'd*, 957 A.2d 1 (Del. 2008).

³⁴ *Young v. Red Clay Consol. Sch. Dist.*, 122 A.3d 784, 790 (Del. Ch. 2015).

³⁵ 250 A.3d 922, at 930-31.

³⁶ *Id.* at 935.

The Court of Chancery concluded that even the “additional burden, incidental to the expansion of voting rights” under the statutes at issue was not clearly incompatible with the Elections Clause.³⁷ ACLU does not allege the votes of natural persons in Fenwick were “burdened” or not counted.

The court below correctly concluded that *Abbott, Young* and *League of Women Voters* together generally construe “free” elections under Delaware’s Elections Clause to mean elections free of fraud, physical coercion, force, improper influence, intimidation, violence, impediments to voting, or bribery.³⁸ As the *Young* Court noted, elections are “free” when ““voters are subjected to no intimidation or improper influence, and where each voter is allowed to cast his ballot as his own conscience dictates.””³⁹ ACLU makes no such allegation here that any Fenwick voter was prevented from voting or voting as his or her own conscience dictated.

ACLU makes no allegations that Fenwick’s elections are not “free” within the meaning of the Elections Clause. Indeed, ACLU’s reliance on its definition of “vote dilution” (as applying when people are *not* actually prevented from casting ballots)⁴⁰ undercuts any argument by ACLU that Fenwick’s elections are not “free.”

³⁷ *Id.* at 936.

³⁸ B- 166.

³⁹ *Young*, 122 A.3d at 841 (quoting *People v. Hoffman*, 116 Ill. 587, 5 N.E. 596, 601 (1886)).

⁴⁰ *See* B- 018-019.

On appeal, ACLU advances no argument that *Abbott*, *Young* or *League of Women Voters* was wrongly decided or that the court below failed to properly construe those cases. As the Superior Court noted, *Abbott*, *Young* and *League of Women Voters* were not vote dilution cases.⁴¹ These decisions (the only Delaware courts to have construed the Elections Clause) represent at least one set of circumstances under which Fenwick’s Charter could be constitutional. ACLU thus fails to meet its burden to rebut the presumptive constitutionality of Fenwick’s Charter.

b. ACLU Makes No Cognizable Allegation that Fenwick’s Elections Are Not “Equal” Within the Meaning of the Elections Clause

Similarly, the court below correctly held that ACLU did not make a compelling argument that Fenwick’s municipal elections are not “equal” within the meaning of the Elections Clause.

The *Young* court determined that: “[a]n election in which certain groups of citizens receive *rewards for voting* is neither ‘free’ nor ‘equal’.”⁴² That court also noted that “[t]he fact that the *rewards are only provided to certain groups* of citizens

⁴¹ B -164-65.

⁴² *Young*, 122 A.3d at 846 (emphasis added).

makes the election unequal.”⁴³ After canvassing cases from other jurisdictions,⁴⁴ the *Young* court noted elections are “equal” when “ ‘the vote of each voter is equal in its influence upon the result to the vote of every other elector - where each ballot is as effective as every other ballot.’ ”⁴⁵

ACLU does not allege entity property owners were provided “rewards” or bribes to actually vote. Nowhere does ACLU allege that its members’ votes are not equal in influence, count less than, or are not as effective as every other ballot. Fenwick’s Charter ensures the concept of one person/entity one vote.⁴⁶ To the extent ACLU’s members are registered to vote in Fenwick, each gets one vote in Fenwick’s single-district, open elections for Town Council.

The court below considered *Young*, and the cases canvassed therein, and properly concluded ACLU had failed to make a compelling argument that Fenwick’s elections are not “equal” within the meaning of the Elections Clause.⁴⁷ ACLU does not allege entity property owners receive any special treatment in voting, as each person in Fenwick gets one vote, no more no less than a vote cast on behalf of an entity property owner.⁴⁸

⁴³ *Id.* (emphasis added).

⁴⁴ *Id.* at 838-43.

⁴⁵ *Id.* at 841 (quoting *Moran v. Bowley*, 347 Ill. 148, 179 N.E. 526, 531 (1932)).

⁴⁶ Fenwick Charter § 9(A)(3).

⁴⁷ B- 166-67.

⁴⁸ B- 167.

On appeal, ACLU again advances no argument that *Young* was wrongly decided or that the court below failed to properly construe *Young* and the cases cited therein. *Young* was not a vote dilution case.⁴⁹ *Young* and the Decision below represent at least one set of circumstances under which Fenwick’s Charter could be constitutional.

c. Fenwick’s Charter is Consistent with Other Delaware Law That Might Imbue the Elections Clause With Meaning

The court below looked to other *Delaware* statutes that might imbue the Elections Clause with meaning in the context of ACLU’s allegations. The court below correctly determined such Delaware legislation did not support ACLU’s argument.

For example, the court below noted that the General Assembly had expressly authorized, by way of charter, voting on behalf of entity property owners in several jurisdictions other than Fenwick, such as the small towns of Rehoboth Beach, Dewey and Henlopen Acres.⁵⁰ The Superior Court also correctly observed that the Delaware General Assembly has defined qualified voters for special elections of

⁴⁹ *Id.*

⁵⁰ B-168. *See, e.g.*, Town of Henlopen Acres, Del., Charter, § C-5B(2) (2014); City of Rehoboth Beach, Del., Charter, § 7(d) (2019); Town of Dewey Beach, Del., Charter, § 10(b)(4) (2021).

annexation in the City of Wilmington to include entity property owners.⁵¹ The court below noted that the General Assembly’s treatment of Fenwick therefore “is not unique, different or unusual.”⁵²

Similarly, the court below discussed other Delaware constitutional and statutory provisions (cited by ACLU below) regarding statewide elections, including with respect to: bribery and the prevention of voting by force or threat; a definition of “citizen” inapplicable to municipal elections (and that does not exclude entity property owners); and a process to challenge election results deemed not “free and equal”.⁵³ The court below found these provisions did not support ACLU’s argument under the Elections Clause.

On appeal ACLU fails to even acknowledge, let alone address, the foregoing aspect of the Decision below. These Delaware statutes and constitutional provisions represent another set of circumstances under which Fenwick’s Charter could be constitutional.

⁵¹ *Id.* See 15 *Del. C.* § 7543(a)(2). Delaware is not alone in allowing voting on behalf of entity property owners. Several jurisdictions expressly authorize entities to participate as voters in local elections where voting is sensibly tied to property ownership in an area. *See, e.g.*, W. Va. Code § 8-6-2 (2003) 7-25-10 (2022); Wyo. Stat. Ann. §§ 18-16-102, 18-16-119, 18-12-102, 22-29-104 (2025); Ariz. Rev. Stat. § 48-6818 (2025); Utah Code Ann. § 17B-1-306 (2025).

⁵² B- 169.

⁵³ B- 173-75. *See* Del. Const. art. V, § 7; Del. Const. art. V, § 2; 15 *Del. C.* § 101A.

2. ACLU’s Complaint Fails to Allege Any Cognizable Theory of Vote Dilution

a. *The Apparent Source of ACLU’s Phrase “Political Efficacy of Peoples’ Votes”*

The phrase “political efficacy of peoples’ votes” does not appear anywhere in ACLU’s Complaint. Rather, the Complaint alleges dilution of votes of “natural persons” as a result of votes cast (by persons) on behalf of nonresident property owners.

The source of ACLU’s definition of “vote dilution” on appeal (“reducing the effectiveness of certain people’s votes without actually preventing them from casting ballots”) appears to be a law review article cited in this Court’s decision in *Albence v. Mennella*,⁵⁴ which dismissed a putative vote dilution claim on standing grounds.⁵⁵ But other than repeatedly invoking the phrase “political efficacy of peoples’ ballots”, ACLU digs no deeper in its legal analysis.

⁵⁴ 320 A.3d at 224; (Del. 2024); *see* B-018-19.

⁵⁵ Fenwick addresses ACLU’s lack of standing *infra* Part II.

b. ACLU's Complaint Fails to Allege Any Cognizable Theory of Vote Dilution

ACLU does not acknowledge, let alone discuss, *Mennella*'s ensuing survey of specific cases in which the theory of vote dilution has been “historically” and “traditionally” employed: cases involving allegations of “malapportionment, racial vote dilution and partisan gerrymandering.”⁵⁶

Although ACLU “did not raise an equal protection challenge to the Fenwick Charter”,⁵⁷ the court below addressed in *dicta* the concept of vote dilution advanced by ACLU. The court below noted that the concept of “vote dilution” derives from race discrimination cases involving unlawful electoral apportionment schemes challenged under the Voting Rights Act of 1965 and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.⁵⁸ The court below also stated that “[v]ote dilution is typically invoked in claims asserting the abridgement or denial of voting rights of racial minorities” under the Voting Rights Act of 1965.⁵⁹

⁵⁶ *Mennella*, 320 A.3d at 224.

⁵⁷ B- 171.

⁵⁸ *Id.*

⁵⁹ *Id.* The court below noted that even if vote dilution cases under the Voting Rights Act were still viable, a plaintiff would still have to establish that (1) the minority group must be “sufficiently large and geographically compact to constitute a majority” in a hypothetical single-member district; (2) the minority group must be “politically cohesive”; and (3) the majority group must “vote sufficiently as a bloc to enable it . . . to defeat the minority’s preferred candidate.” *Id.*

The court concluded that, in view of recent U.S. Supreme Court rulings, it is probable vote dilution cases under the Voting Rights Act are “no longer viable.”⁶⁰

Partisan gerrymandering “resembles racial vote dilution but creates districts with reference to partisanship instead of race”.⁶¹ In view of recent United States Supreme Court rulings, claims of partisan gerrymandering are likely no longer justiciable.⁶²

The principle of “one person one vote” has its roots in a series of United States Supreme Court cases pre-dating the Voting Rights Act of 1965.⁶³ These cases reviewed the constitutionality of legislative apportionment schemes under the Fourteenth Amendment whereby residents in less populous voting districts were afforded disproportional (more) electoral power (in the form of elected representatives) compared to residents in more populous districts. Citizens in more populous districts consequently had *less representational power* because their votes carried less weight. The *representational power* of citizens in the more populous districts was effectively “diluted”. Hence the phrase “one person one vote”.

ACLU elides over this limited, and increasingly narrow, judicial application of “vote dilution”, for obvious reasons: ACLU does not and cannot allege

⁶⁰ *Id.*

⁶¹ *Mennella*, 320 A.3d at 224.

⁶² *See Rucho v. Common Cause*, 588 U.S. 684, 718 (2019).

⁶³ *See Baker v. Carr*, 369 U.S. 186 (1962); *see also Gray v. Sanders*, 372 U.S. 368 (1963); *Reynolds v. Sims*, 377 U.S. 533 (1964).

malapportionment, racial vote dilution or partisan gerrymandering in Fenwick’s municipal elections (even if those theories remain judicially viable).

ACLU does not allege that voting districts were drawn in such a way as to effectively reduce the representational power of a racial minority, let alone any “natural person”. ACLU does not allege that voting districts were drawn in such a way as to favor or disadvantage any political party, let alone any “natural person”. Indeed, ACLU does not allege any malapportionment scheme among voting districts in Fenwick that could diminish the representational power of any voter or person. Nor can it. Fenwick is a small town with a *single voting district* in which voters cast ballots to fill multiple open Council seats.

ACLU’s continued reliance on gerrymandering cases from Pennsylvania and other states is therefore self-defeating.⁶⁴ ACLU does not, and cannot, allege gerrymandering here (even if political gerrymandering remained justiciable).

As this Court held in *Mennella* (despite citing a definition of vote dilution upon which ACLU relies), ACLU’s Complaint here fails to “map” onto any traditional or cognizable theory of vote dilution.⁶⁵

The court below reviewed two Delaware cases that discussed equal protection claims. In *Mayor & Council of City of Dover v. Kelley*,⁶⁶ this Court concluded

⁶⁴ See, e.g., OB at 15-16 and n.34.

⁶⁵ See *Mennella*, 320 A.3d at 225.

⁶⁶ *Mayor & Council of City of Dover v. Kelley*, 327 A.2d 748 (Del. 1974).

weighted voting provisions (based on assessed value of real estate owned by each voter) constituted “an infringement or burden upon the right to vote.”⁶⁷ And in *Young*, the Court of Chancery articulated the equal protection issue as whether Red Clay treated identifiable groups differently, with discriminatory intent, favoring some groups and disfavoring others, based on the way they were likely to vote (including by fencing out the disfavored group).⁶⁸

Although ACLU does not assert an equal protection claim in this litigation, to the extent its vote dilution argument under Delaware’s Election Clause borrows from equal protection jurisprudence, ACLU must contend with its restrictions. But ACLU does not allege in its Complaint that Fenwick weighed votes differently or that Fenwick acted with discriminatory intent to fence out certain groups of voters based on the way they were likely to vote.

Nor does ACLU’s Complaint challenge nonresident voting generally. ACLU’s Complaint only seeks to disenfranchise a certain subset of nonresidents – those who own property in Fenwick through an entity, rather than as individuals. ACLU’s assertion of an entirely new claim on appeal under federal law is inappropriate, but the cases upon which ACLU relies are nonetheless inapplicable.⁶⁹

⁶⁷ *Id.* at 743 (citing *Stewart v. Parish School Board of the Parish of St. Charles*, 310 F.Supp. 1172, 1173, (E.D La 1970).

⁶⁸ *See Young*, 122 A.3d at 831, 836.

⁶⁹ *See, e.g., Bjornestad v. Hulse*, 229 Cal. App. 3d 1568, 1585 (Cal. Ct. App. 1991) (involving allegations that certain residents who did not own property were

c. ACLU’s “Novel” and “Broad” Application of Vote Dilution Has No Basis

ACLU seeks to fashion an entirely new theory of vote dilution having no basis in law or fact. ACLU alleges that voting (by humans) on behalf of nonresident entity property owners in Fenwick’s municipal elections somehow “dilutes” or “frustrates” the votes cast by individual residents.⁷⁰ ACLU contends that votes cast on behalf of nonresident property owners holding title through an entity exceeded the margin of victory among competing candidates for Town Council in the last two open elections.⁷¹ As a matter of law, these allegations do not amount to any cognizable theory of vote dilution here.⁷²

First, only human beings actually cast ballots in Fenwick. ACLU’s “human voter” distinction therefore is meaningless. There is no other type or class of voter in Fenwick. Fenwick’s Charter requires that human beings actually cast ballots on behalf of nonresident entity property owners. Votes on behalf of entity property

foreclosed from voting); *Spahos v. Mayor & Councilmen of Town of Savannah Beach Tybee Island Ga.*, 207 F. Supp. 688 (S.D. Ga 1962) (involving allegations that certain councilpersons would be elected *only* from a class of nonresident voters).

⁷⁰ See A8, A12, A14-15 ¶¶ 2, 18-21, 28, 31; OB at 3.

⁷¹ See A12 ¶¶ 19-21.

⁷² Neither *Baker v. Carr*, 369 U.S. 186 (1962) nor *Avery v. Midland Cnty., Tex.*, 390 U.S. 474 (1968) supports ACLU’s expansive interpretation. *Baker* was an equal protection case involving vote dilution resulting from malapportionment of voting districts. *Avery* was an equal protection case involving the election of county officials from voting districts of substantially unequal populations, resulting in unequal weighting of votes.

owners must be cast by “voters”, that is, persons at least 18 years old who are also citizens.⁷³

Second, ACLU makes no allegation to support any inference, let alone a reasonable one, that human beings casting votes on behalf of family trusts, for example, are likely to vote as a bloc, differently, or frustrate, the votes of residents or nonresident persons who own their property as individuals. It is undisputed that the vast majority of entity property owners registered to vote in Fenwick are trusts.

At its core, ACLU’s Complaint boils down to ACLU’s view that Fenwick’s Charter allows for illegal votes – that is, that votes cast (by individuals) on behalf of Delaware entities owning property in Fenwick should not count.⁷⁴ But such claims are precisely the type of generalized allegations the Delaware Supreme Court, and several federal courts, have held to be insufficient as a matter of law to establish standing, including specifically in the face of allegations (as ACLU makes here) that allegedly improper votes could have had a mathematical impact on the final vote tally.⁷⁵

⁷³ Fenwick Charter, §§ 9A(3)-(4).

⁷⁴ See A8 ¶¶ 1, 3.

⁷⁵ See *Mennella*, 320 A.3d at 224-229 and the cases discussed therein; e.g., *Martel v. Condos*, 487 F. Supp. 3d 247, 253 (D. Vt. 2020) (concluding that although a vote cast by fraud has a “*mathematical impact on the final tally*” and thus on the proportional effect of every vote, plaintiffs lacked standing because if every voter suffers the same incremental dilution, the voters have experienced a generalized injury); *Wood v. Raffensperger*, 981 F.3d 1307, 1314-15 (11th Cir. 2020) (stating that “[a]n injury to the right ‘to require that the government be administered according

Perhaps recognizing this fatal standing flaw,⁷⁶ ACLU misstates what this case is “about”. ACLU claims this case is “about” whether the “fundamental”, “constitutional” right in “our democracy” to vote “belongs” to human beings or should be “shared” with artificial entities.⁷⁷ But this case is *not* about whether entities such as corporations or family trusts have a constitutional right to vote in this country, this state or even in the small town of Fenwick. Fenwick has never so contended in this case. On the contrary, Fenwick argued below,⁷⁸ and the court below agreed,⁷⁹ that we need *not* reach in this case the question whether entity property owners in Fenwick have a constitutional right to have votes cast on their behalf. In 2008, the State of Delaware expanded (by *statute*) the voting franchise in Fenwick’s municipal elections to include *votes cast by human beings* on behalf of nonresident entity property owners. Nothing more.

to the law’ is a generalized grievance”, that “ ‘no single voter is specifically disadvantaged’ if a vote is counted improperly, even if the error *might have ‘a mathematical impact on the final tally* and thus on the proportional effect of every vote” and that “[v]ote dilution in this context is a ‘paradigmatic generalized grievance that cannot support standing’”) (emphasis added) (citations omitted), *cert. denied*, 141 S. Ct. 1379 (2021).

⁷⁶ Fenwick discusses ACLU’s lack of standing in more detail *infra* at Part II.

⁷⁷ OB at 1.

⁷⁸ See A52.

⁷⁹ B- 170.

3. The Delaware General Assembly's June 2026 Step to Amend Delaware's Constitution Confirms, Conclusively, That Fenwick's Charter is Constitutional.

The court below presciently concluded that matters of policy such as the arguments raised by ACLU below are best left to legislative bodies, not the courts.⁸⁰ After the Superior Court's Decision, the Delaware General Assembly took an initial step to amend Delaware's Constitution specifically to prohibit through legislation what ACLU claims is already prohibited by judicial application of Delaware's Election Clause.⁸¹ In fact, ACLU goes so far as to claim the General Assembly's efforts to amend Delaware's Constitution stem directly from the Decision below.⁸² Obviously, if the Delaware Constitution has to be amended to prohibit what ACLU contends through this litigation already is prohibited, ACLU cannot meet its burden to overcome the presumptive constitutionality of Fenwick's Charter.

⁸⁰ B- 175.

⁸¹ H.B. 430, 153d Gen. Assemb. Reg. Sess. (Del. 2026).

⁸² OB at 21.

4. ACLU's Remaining Arguments on the Merits Are Impermissible, Incorrect, And Fall Well Short of Its Burden to Overcome the Presumption that Fenwick's Charter Is Constitutional

ACLU resorts on appeal to unfairly attacking the court below for not undertaking a type of analysis ACLU never asked it to perform and to impermissibly asserting a claim under federal law that it did not plead below.

a. ACLU Unfairly and Incorrectly Takes the Superior Court to Task for Allegedly Not Conducting a Type of Analysis ACLU Never Asked the Superior Court to Undertake Below

On appeal, ACLU criticizes the court below for not conducting a “logical, deductive analytical process”⁸³ using “factors” articulated by a New Jersey Court in *State v. Hunt*.⁸⁴ ACLU’s attack is both unfair and incorrect.

ACLU never cited *Hunt* below and never requested the Superior Court to conduct a “*Hunt* analysis” in the first place. The *Hunt* factors were referenced by this Court in *Jones v. State* as “useful criteria for determining whether a provision of the United States Constitution has a meaning identical to a similar provision on the same subject in a state’s constitution.”⁸⁵ It is hardly surprising that ACLU did not

⁸³ OB at 10.

⁸⁴ 450 A.2d 952 (N.J. 1982).

⁸⁵ 745 A.2d 856, 864 (Del. 1999) (applied in context of criminal procedure protections against unlawful search and seizures under both constitutions.)

rely on *Hunt* or *Jones* below.⁸⁶ They don't apply. Delaware's Election Clause and the federal Equal Protection Clause are neither identical nor similar. In fact, ACLU affirmatively alleged in its Complaint, citing *Young*, that Delaware's Constitution should *not* be construed in "lockstep" with the federal constitution.⁸⁷ Fenwick has never argued otherwise. ACLU cannot now reverse course on appeal.

In any event, the court below quoted the text of the Elections Clause, discussed the only Delaware cases construing the meaning of the Elections Clause, and discussed other provisions of the Delaware Code and Constitution that might give meaning to the Election Clause. With regard to *Young* (which undertook a *Jones/Hunt* analysis when it discussed the meaning of Delaware's Election Clause),⁸⁸ both parties briefed *Young* extensively below, and the Superior Court discussed *Young* in the Decision. The court below noted *Young* was not a vote dilution case and concluded that ACLU had failed to allege Fenwick's elections are not "free and equal" within the meaning of the Elections Clause, including specifically as construed by the court in *Young*.⁸⁹

Thus, the Superior Court did not err below analytically. ACLU offers no basis for its criticism that the Superior Court was required to perform, *sua sponte*, a

⁸⁶ ACLU did not discuss *Jones* below. ACLU only cited *Jones* once below, and then only because the *Young* court cited *Jones*. See B- 031.

⁸⁷ A14 ¶ 29 (quoting *Young*).

⁸⁸ See 122 A.3d at 809-827.

⁸⁹ B- 164-67.

specific type of analysis to find a cause of action for ACLU on the basis of constitutional similarity that ACLU eschewed in its Complaint, Fenwick never asserted, and *Young* rejected.

*b. In Any Event, the Decision Below Is Far More Logical,
Deductive and Analytical Than Anything ACLU Argues
on Appeal*

Even if the predicate of *Jones* were applicable here, all that *Jones* requires is the application of a “logical, deductive analytical process” to determine the meaning of the language at issue.⁹⁰ Fenwick respectfully submits the Superior Court’s analysis of the meaning of the Elections Clause is far more logical, deductive and analytical than what ACLU musters on appeal.

ACLU’s discussion of the text of the Elections Clause focuses on dictionary definitions and highlighting words such as “people” or “person”, regardless of the context in which such terms are actually used in the cited source material (none of which supports ACLU’s theory of vote dilution in this case). ACLU’s discussion of Delaware cases fails to establish any legal error by the court below. ACLU relies heavily on cases from outside Delaware addressing the constitutionality of gerrymandering cases,⁹¹ even though this is not a gerrymandering case (and

⁹⁰ 745 A.2d at 864. Application of the factors articulated in *Hunt* is not required by *Jones*. This Court merely stated such factors may be useful.

⁹¹ OB at 15–17 and n.34.

gerrymandering is likely no longer justiciable). And ACLU discusses legislative history that has nothing to do with vote dilution.

In short, ACLU's argument is far less logical, deductive and analytical than the Decision below, and it fails to meet ACLU's burden of demonstrating by clear and convincing evidence that there are no circumstances under which Fenwick's Charter could be constitutional.

c. ACLU Improperly Advances Arguments Under Federal Law that ACLU Did Not Plead Below

ACLU's Complaint specifically does not assert a claim under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. ACLU's Complaint specifically does not challenge the constitutionality of nonresident voting generally.

However, on appeal ACLU improperly attempts to do just that. ACLU now argues that it "states a claim" that Fenwick's Charter violates the United States Constitution by permitting nonresidential voting generally (not just voting on behalf of nonresident entity property owners but also by nonresident individuals).⁹²

⁹² OB at 22–27.

It is axiomatic that on appeal a party cannot assert a new theory of the case. “Only questions fairly presented to the trial court may be presented for review . . .”⁹³

Perhaps ACLU makes this unpled argument on appeal to shirk its burden to rebut the presumption of constitutionality of Fenwick’s Charter and to avoid Delaware’s “sliding scale” standard of review in voting rights cases.⁹⁴ Where the state’s alleged burden on voting is not severe, the state’s intervention need only have served a legitimate interest.⁹⁵ Here, of course, ACLU has not alleged *any* cognizable burden on the rights of natural persons to vote in Fenwick. Courts have had no problem finding a rational basis for *expanding* the voting franchise, as was done here.⁹⁶

⁹³ Del. Supr. Ct. R. 8. *See Shawe v. Elting*, 157 A.3d 152, 168 (Del. 2017) (holding that “the [Supreme] Court only considers questions fairly presented to the trial court.”) This Court applies narrow exceptions to this rule “when the interests of justice so require”, *id.*, such as where “the trial court committed plain error” or where “material defects . . . clearly deprive an accused of a substantial right.” *Protech Mins., Inc. v. Dugout Team, LLC*, 284 A.3d 369, 378 (Del. 2022) (internal quotations omitted). No such interest of justice exception to Rule 8 applies here.

⁹⁴ *Young*, 122 A.3d at 832-33; *League of Women Voters*, 250 A.3d at 936-37.

⁹⁵ *Young*, 122 A.3d at 833; *League of Women Voters*, 250 A.3d at 936. ACLU seeks to take Fenwick to task for not advancing a rational basis for Fenwick’s Charter. ACLU forgets that Fenwick prevailed below on a motion to dismiss.

⁹⁶ *See Dupont v. Mills*, 39 Del. 42 (Del. 1937); *May v. Town of Mountain Village*, 969 P.2d 790, 793 (Col. App. 1998); *see also* Del. Op. Att’y. Gen 09-IB05, 2009 WL 1805910 (2009) (finding the precedent of cases applying rational basis test to nonresident vote dilution cases to be “overwhelming”).

If ACLU wishes to assert new claims, it can attempt to seek leave of the lower court to amend its Complaint or it can try to file a new lawsuit altogether. But it cannot do so for the first time on appeal.⁹⁷

⁹⁷ Fenwick notes that Delaware’s legislature expressly forbids attempts to disenfranchise existing nonresident voters. 22 *Del. C.* § 835(b) provides, “No municipal corporation charter which permits nonresident persons to vote in any municipal election or to hold any municipal office shall be amended, pursuant to this chapter, so as to eliminate or limit the right of nonresident persons to vote or hold office, nor shall the percentage of nonresident officials allowed or required be changed.”

II. THE SUPERIOR COURT’S DECISION SHOULD BE AFFIRMED ON THE INDEPENDENT GROUND THAT ACLU LACKS STANDING TO BRING THIS ACTION

A. Question Presented

Should the Decision be upheld on the independent ground that ACLU lacks standing to bring this action?⁹⁸

B. Scope of Review

Although the Superior Court below did not reach, and did not need to reach, Fenwick’s independent argument that ACLU lacks standing, this Court may consider Fenwick’s standing argument on appeal.⁹⁹

As this Court made clear in *Albence v. Mennella*, ACLU bears the burden of establishing standing.¹⁰⁰ The Court in *Mennella* concluded that a motion to dismiss for lack of standing should be brought under Rule 12(b)(6) for failure to state a claim.¹⁰¹

As the Court in *Mennella* articulated:

Standing “refers to the right of a party to invoke the jurisdiction of a court to enforce a claim or to redress a grievance.” Standing is assessed when the complaint is filed. “The party invoking the jurisdiction of a court bears the burden of establishing the elements of standing.” Generally, to establish standing plaintiffs must: (i) “allege an injury in fact, which is both concrete and actual or imminent” such that “[a]n

⁹⁸ Fenwick preserved this argument below. *See, e.g.*, A35-44; B- 059-74.

⁹⁹ *See Dover Hist. Soc. v. City of Dover Plan. Comm’n*, 838 A.2d 1103, 1109 (Del. 2003).

¹⁰⁰ 320 A.3d 212, 220 (Del. 2024).

¹⁰¹ *Id.* at 220-21 (Del. 2024).

actual or imminent injury is one that is neither hypothetical nor conjectural”; (ii) “show that the injury is caused by the defendant’s actions[,]” meaning that “the injury is ‘fairly traceable’ to the defendant’s ‘complained-of conduct’”; (iii) “show that their requested relief is likely to redress the injury”; and (iv) show “that the interest they seek to vindicate is ‘arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question.’” We have noted that “‘a generalized grievance shared by the population at large cannot be a basis for standing.’”¹⁰²

The *Mennella* Court elaborated that “[a]s the United States Supreme Court has observed, requiring imminent, particularized harm for standing ensures litigants have ‘a direct stake in the controversy and prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of the concerned bystanders.’”¹⁰³

¹⁰² 320 A.3d at 220 (citations omitted).

¹⁰³ *Id.* at 216 (citations omitted).

C. Merits of Argument

Standing is a threshold issue to ensure a case or controversy exists, warranting the exercise of a court's judicial powers.¹⁰⁴ ACLU lacked standing¹⁰⁵ to bring this action. Developments since the Decision only confirm Fenwick's standing arguments below.

1. ACLU's Alleged Harm Is Not Imminent

ACLU lacks standing because its alleged harm is not "imminent".¹⁰⁶ The Charter provisions ACLU attacks here were adopted by the Delaware General Assembly 18 years ago.¹⁰⁷ And as ACLU's own briefing below admits,¹⁰⁸ the issue of voting in Delaware municipal elections on behalf of nonresident entity property owners has been widely covered in the media since at least 2023.

¹⁰⁴ *Brookfield Asset Mgmt., Inc. v. Rosson*, 261 A.3d 1251, 1262 (Del. 2021); *see Morris v. Spectra Energy Partners (DE) GP, LP*, 246 A.3d 121, 138 (Del. 2021).

¹⁰⁵ ACLU qua ACLU lacks standing. It does not purport to be registered to vote in Fenwick. And it is axiomatic that ACLU cannot assert organizational standing if its members themselves do not have standing. *Oceanport Indus., Inc. v. Wilmington Stevedores, Inc.*, 636 A.2d 892, 902 (Del. 1994). Ironically, in another action, ACLU could just as easily claim standing on behalf of the nonresident voters whose right to vote ACLU seeks to suppress in this action. ACLU does not confirm whether it searched to identify whether any of its members are also nonresidents who hold title to property in Fenwick through a trust or other legal entity and would lose the right to vote based on its position. And now on appeal, ACLU claims to challenge nonresident voting even by individuals.

¹⁰⁶ *Mennella*, 320 A.3d at 220.

¹⁰⁷ 76 Del. Laws ch. 363 (2008) (H.B. 402, 144th Gen. Assemb.).

¹⁰⁸ *See, e.g.*, B- 021 and n.12.

Moreover, as discussed herein,¹⁰⁹ by the time Fenwick’s next election for Town Council is held in August 2027 (assuming that election is contested), Delaware’s Constitution may have been amended in such a way as to render ACLU’s current constitutional attack moot. The “harm” ACLU seeks to address by this litigation may not occur at all.

ACLU has not “lost” standing in this case, as ACLU appears to contend when discussing mootness.¹¹⁰ Rather, Fenwick argued below ACLU never had standing to begin with, and the court below did not conclude that ACLU had established standing. The court below simply did not need to reach that issue. In any event, standing is not static, and a change in a party’s standing “may result from a myriad of subsequent legal or factual causes that occur while the litigation is in progress.”¹¹¹

2. ACLU’s Alleged Harm Is Speculative

Even if Delaware’s Constitution is not amended to render this action moot before Fenwick’s next election, ACLU’s alleged harm is speculative. As discussed above, ACLU has not alleged *how* the votes of “natural persons” were or even could have been diluted by votes cast on behalf of entity property owners. Instead, ACLU engages in sheer speculation, which is fatal to standing. ACLU alleges: that

¹⁰⁹ See *supra* at I.C.3; *infra* at III. C.

¹¹⁰ See OB at 37-39.

¹¹¹ *Gen. Motors Corp. v. New Castle Cnty.*, 701 A.2d 819, 824 (Del. 1997).

Fenwick’s Charter “*unnecessarily risks* the dilution of votes cast by natural persons”;¹¹² that “artificial entity votes *may* sway the outcome of elections”;¹¹³ that votes cast on behalf of entity property owners “*could have*” determined the outcome of the 2024 election;¹¹⁴ and that discovery “will *likely* demonstrate that the number of artificial entity votes exceeded the margin of victory between candidates in the Town’s 2023 election”.¹¹⁵

However, absent specific allegations regarding how natural persons voted, likely voted or would tend to vote as a politically cohesive group, as compared to Delaware entity property owners as a voting bloc, the notion that voting on behalf of entity property owners could actually sway the outcome of an election is purely speculative. This is especially the case in a municipal election, as in Fenwick, where a single voter casts a ballot for multiple open seats.¹¹⁶ ACLU therefore lacks standing.¹¹⁷

¹¹² A8 ¶ 2 (emphasis added).

¹¹³ A12 ¶ 18 (emphasis added).

¹¹⁴ *Id.* ¶ 19 (emphasis added).

¹¹⁵ *Id.* ¶ 21 (emphasis added).

¹¹⁶ See A12 ¶¶ 19-20; <https://elections.delaware.gov/municipality/#templates>, “Instructions for Completing and Returning an Absentee Ballot”.

¹¹⁷ ACLU’s refusal to contest Fenwick’s 2024 election under the very statutory scheme designed to ensure “free and equal” elections based on actual impacts on election results, *see* 15 *Del. C.* § 5943, further underscores the speculative nature of ACLU’s alleged harm. *See also Lammot v. Walz*, 107 A.2d 905, 913 (Del. Super. 1954).

To support its organizational standing argument, ACLU relies on an affidavit attached to its Complaint.¹¹⁸ But critically, that affidavit fails to assert that the vote of any “human voter”, anonymous or not, was actually harmed or diluted in any way. Not surprisingly, the court below found that ACLU’s allegations that “voting on behalf of entity property owners could have affected the 2024 election results are speculative.”¹¹⁹ ACLU continues to rely on racial gerrymandering cases to establish standing, but ACLU does not allege racial discrimination or gerrymandering in this case.

3. ACLU’s Alleged Harm Is A Generalized Grievance

As discussed above, at its root, ACLU’s claim in this case stems from ACLU’s belief that votes cast on behalf of nonresident entity property owners should not count or are unlawful. But those types of allegations are exactly the kinds of claims this Court in *Mennella* held must be dismissed on standing grounds.

Mennella concluded the plaintiffs’ claims in that case more closely resembled theories of “vote dilution through fraud facilitation”,¹²⁰ whereby allegedly

¹¹⁸ A78-80.

¹¹⁹ B-175. ACLU’s purely academic allegations speculating about potential voting abuse by minority interest holders (A11 ¶¶ 12-14) not only ignore Fenwick’s Charter provisions but would have been the types of allegations to raise before the State Department of Elections in an actual election contest.

¹²⁰ *Mennella*, 320 A.3d at 225 (citation omitted).

fraudulent (ineligible) votes cancelled out lawfully cast votes, ““dilutive of honest citizens’ valid votes.””¹²¹ Here, ACLU argued below that “[o]f relevance” to this case is Delaware’s “fraudulent voting statute” which “prevents fraudulent voting.”¹²² *Mennella* noted that courts have held plaintiffs asserting vote dilution claims of this ilk lack standing even when they allege (as ACLU does here) that the unlawful (ineligible) votes would have had a mathematical impact on the final vote tally.¹²³

ACLU’s generalized grievance that votes cast on behalf of entity property owners should not count cannot be a basis for standing. ACLU improperly seeks to use the judicial process as a vehicle for vindicating its apparent policy distaste for voting on behalf of entity property owners (in particular, business property owners formed as corporations).¹²⁴

Even under a more flexible standard of judicial “self-restraint to avoid the rendering of advisory opinions at the behest of parties who are ‘mere intermeddlers,’”¹²⁵ ACLU would lack standing. A mere intermeddler who seeks an advisory opinion is precisely what ACLU is here.

¹²¹ *Id.* (citation omitted).

¹²² B- 033-34.

¹²³ *Mennella*, 320 A.3d at 225-26.

¹²⁴ *See* A15 ¶ 32.

¹²⁵ *Mennella*, 320 A.3d at 230 (Valihura, J., concurring).

ACLU has not met its burden to demonstrate standing. ACLU simply has a policy disagreement with the fact that in 2008, the General Assembly authorized voting on behalf of nonresident entity property owners in Fenwick.

4. ACLU's Alleged Harm Arises From a Law Enacted by the State of Delaware.

To establish standing, ACLU must show that its alleged injury is caused by Fenwick's actions, meaning that the injury is fairly traceable to Fenwick's complained-of conduct.¹²⁶ This ACLU cannot do. ACLU's alleged injury is traceable to the conduct of the State of Delaware, a non-party to this litigation.

ACLU's challenge to Fenwick's Charter is, for all intents and purposes, a *facial* challenge to certain of Fenwick's Charter provisions that were adopted and amended by an act of the Delaware General Assembly. In such instances, the powers of a chartered municipality are limited by the scope of powers conferred by the General Assembly.¹²⁷ Municipal elections in Delaware, including in Fenwick, are conducted under the auspices of the State of Delaware.¹²⁸

¹²⁶ *Mennella*, 320 A.3d at 220.

¹²⁷ 76 Del. Laws ch. 363 (2008); *see Schadt v. Latchford*, 843 A.2d 689, 691 (Del. 2004).

¹²⁸ *See, e.g.*, 15 Del. C. §§ 7550-7585. Section 13-6 of Fenwick's Code expressly references these provisions of the Delaware Code.

ACLU chose to sue only Fenwick in this litigation, but ACLU could have (and Fenwick contended below should have) sued other municipalities with similar Charter and statutory provisions, such as Rehoboth Beach, Dewey, Henlopen Acres and the City of Wilmington. ACLU cannot use its own strategic litigation decision to avoid its standing dilemma here. As the court below observed (even without ruling on standing), these similar charter and statutory provisions “show that the General Assembly’s treatment of Fenwick is not unique, different or unusual.”¹²⁹

ACLU ironically admits on appeal that its alleged injury arises out of the conduct of the State of Delaware rather than Fenwick. ACLU oddly argues that the State of Delaware somehow invited this litigation due to the state’s preeminence in the area of corporate law.¹³⁰ Although that allegation, on the merits, is baseless, it betrays an admission by ACLU that its alleged injury does not arise from Fenwick.

Finally, the State General Assembly’s efforts to amend Delaware’s Constitution “to forbid corporations and other artificial entities from voting” in *any* election in the State of Delaware,¹³¹ which ACLU contends arose directly in response to the Decision below, only reinforces that ACLU’s alleged injury in this lawsuit is traceable to the conduct of the State of Delaware, not the small town of Fenwick.

¹²⁹ B- 168-69.

¹³⁰ OB at 20-21.

¹³¹ H.B. 430 syn., 153d Gen. Assemb. Reg. Sess. (Del. 2026).

III. THIS ACTION MAY BECOME MOOT BY THE TIME FENWICK CONDUCTS ITS NEXT CONTESTED MUNICIPAL ELECTION IF DELAWARE’S CONSTITUTION IS AMENDED AS ACLU SEEKS HERE

A. Question Presented

Is this appeal moot?¹³²

B. Scope of Review

Under the mootness doctrine, “although there may have been a justiciable controversy at the time the litigation was commenced, the action will be dismissed if that controversy ceases to exist.”¹³³

C. Merits of Argument

ACLU contends this appeal is not moot because it retains standing and the matter is still “amenable to judicial resolution.”¹³⁴ Neither statement is correct.

As discussed above, ACLU lacked standing when it filed this litigation. The cancellation of Fenwick’s 2026 election and the pending amendment to the Delaware Constitution only underscore that ACLU’s alleged harm is speculative and not imminent.

¹³² This Court specifically asked the parties “to address in their briefing whether the appeal is moot.” *See* Order, *Am. Civil Liberties Union of Delaware v. Town of Fenwick Island*, No. 229, 2026 (Del. Jun. 22, 2026).

¹³³ *Am. Littoral Soc., Inc. v. Bernie’s Conchs, LLC*, 954 A.2d 909 (Del. 2008).

¹³⁴ OB at 37.

Although standing, ripeness,¹³⁵ and mootness are distinct concepts analytically, all three concepts are designed to ensure that the judicial branch does not waste its time by engaging in academic disputes and rendering advisory opinions.¹³⁶ Moreover, here, the concepts converge on the same, undeniable fact: by the time Fenwick conducts its next, contested municipal election (in August 2027, if even then), the Delaware Constitution may have been amended in the manner ACLU seeks to achieve in this litigation by way of declaratory judgment.

Fenwick’s last municipal election on August 1, 2026, was uncontested and cancelled. Its next election in August 2027 may also be uncontested. But even if that election is held, the 154th General Assembly will have been in session for half a year by August 2027, and the Delaware Constitution may have been amended in a manner that moots this litigation.¹³⁷

¹³⁵ Fenwick specifically reserved its right below to raise the Superior Court’s lack of subject matter jurisdiction for lack of ripeness. See A35 n.24.

¹³⁶ See *Mennella*, 320 A.3d at 216 (standing “prevents the judicial process from becoming no more than a vehicle for the vindication of the value interests of the concerned bystanders”) (quoting *United States v. Students Challenging Regul. Agency Procs.* (SCRAP), 412 U.S. 669, (1973); *Crescent/Mach I Partners, L.P. v. Dr Pepper Bottling Co. of Texas*, 962 A.2d 205, 208 (Del. 2008) (“Our law requires that a dispute not be moot and that it be ripe for adjudication to avoid wasting judicial resources on academic disputes.”); *XL Specialty v. WMI Liquidating Trust*, 93 A.3d 1208, 1217–18 (Del. 2014) (“a dispute will be deemed not ripe where the claim is based on uncertain and contingent events that may not occur, or where future events may obviate the need for judicial intervention.”)

¹³⁷ H.B. 430 syn., 153rd Gen. Assemb. Reg. Sess. (Del. 2026).

ACLU rejected Fenwick’s suggestion that ACLU dismiss this appeal in the wake of the General Assembly’s passage of HB 430 on June 30, 2026. Fenwick respectfully submits that ACLU may be proceeding with this appeal for reasons other than to resolve this dispute before this Court.

CONCLUSION

For the foregoing reasons, the Decision below should be affirmed.

**BROCKSTEDT MANDALAS
FEDERICO LLC**

/s/ Luke W. Mette

Luke W. Mette, Esq. (Bar ID 2540)

Joseph Grubb, Esq. (Bar ID 4712)

Mark A. Denney, Esq. (Bar ID 5156)

1413 Savannah Road, Suite 1

Lewes, DE 19958

(302) 645-2262

Lmette@lawbmf.com

Attorneys for Defendant- Appellee

Dated: August 17, 2026