STATE OF CONNECTICUT *v.* KENNY HOLLEY (SC 19598)

Rogers, C. J., and Palmer, Eveleigh, McDonald, Espinosa, Robinson and D'Auria, Js.*

Syllabus

Convicted of the crimes of felony murder, home invasion, conspiracy to commit home invasion, burglary in the first degree and robbery in the first degree, the defendant appealed to the Appellate Court, which reversed the trial court's judgment and remanded the case for a new trial. The defendant, along with his accomplice, T, allegedly invaded the apartment of the victim, who was fatally shot during a struggle with T, whom the victim allegedly bit on the wrist. Thereafter, the defendant and T fled by bus, taking cash and sneakers. The trial court ruled that certain out-of-court statements that T had made to the police concerning his bite wound were inadmissible under *Crawford* v. *Washington* (541 U.S. 36), but that any attempt by the defense to contest the state's evidence that the wound was the result of a bite would open the door for the state to present evidence that the court had deemed inadmissible under *Crawford*. At no point before or during the trial did the defendant make an offer of proof or indicate that there was evidence, or the nature of any such evidence, to rebut the circumstantial evidence that T had sustained a bite during the home invasion and that the defendant had been with T when T was bitten. The Appellate Court agreed with the defendant's unpreserved claim that the trial court had violated his constitutional right to present a defense by conditioning its ruling regarding the admissibility of T's statements on the defendant's not presenting evidence regarding the circumstances relating to T's wound, as it effectively precluded the defendant from underminingthe state's evidence that T's wound resulted from a bite. On the granting of certification, the state appealed from the Appellate Court's judgment to this court, claiming, inter alia, that the Appellate Court incorrectly concluded that the trial court had violated the defendant's constitutional right to present a defense by imposing a condition on its decision to preclude the admission of T's statements that were otherwise barred under *Crawford*. *Held*:

1. The Appellate Court improperly ordered a new trial on the basis of its determination that the trial court's conditional ruling violated the defendant's right to present a defense: although the defendant's claim was constitutional in nature, it failed under the first and third prongs of *State* v. *Golding* (213 Conn. 233) because the record was inadequate and did not demonstrate the existence of a violation of his right to

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

present a defense, as the defendant's failure to make an offer of proof at trial rendered it impossible for this court to determine whether he was deprived of his right to present a defense because the record did not disclose the evidence that he would have offered to rebut the inference that T had been bitten by the victim, namely, whether he would have sought to prove that T had been bitten by a person other than the victim or by an animal, that T's wound was caused by something other than a bite or had been sustained before the crime occurred, or that T had sustained no wound at all; moreover, the trial court's ruling was not an absolute bar to the admission of evidence pertaining to T's wound, as the court's conditional ruling left the defendant with a strategic choice that required him to balance the benefits of attacking the source of T's wound with the risks of the admission of T's statement that the victim had bitten him, evidence that otherwise would have been barred by *Crawford*; furthermore, in view of the conditional nature of the trial court's ruling, it was unclear whether the state would have used T's potentially inadmissible statements, and, because there was a disincentive for the state to introduce the challenged *Crawford* material, any objection to which the trial court may have sustained, any violation of the defendant's right to present a defense was even more speculative.

2. The Appellate Court incorrectly concluded that the trial court had abused its discretion in admitting the lay opinion testimony of O, a police detective, that he had observed what appeared to be a bite mark on T's hand: it was within the trial court's broad discretion to determine that O, as a lay witness, was competent to testify regarding the appearance of wounds that he had observed and that O's testimony that T's wound appeared to be a bite mark, based on O's personal observation and rational perception of that wound, was more beneficial to the jury than an abstract recitation or description of it's size, location and shape; moreover, O's testimony regarding the appearance of T's wound was distinguishable from bite mark evidence that is the proper subject of expert testimony, and the trial court reasonably could have determined that O's description of T's wound as an apparent bite mark was within the realm of reason.

3. The Appellate Court incorrectly determined that the trial court had abused its discretion in admitting the lay opinion testimony of S, another police detective, consisting of a narration of a surveillance video and an opinion by S that the contours of an object in the defendant's backpack appeared to be those of a shoe box: even if it was improper for the trial court to admit S's testimony, any error was harmless and did not require reversal because, although S's description of the object in the defendant's backpack as a shoe box was probative evidence connecting the defendant to the crime scene, this court had a fair assurance that the testimony did not substantially affect the verdict, as T was linked to the crime through DNA evidence, the wound his hand, and his sale of the murder weapon, and the defendant's link to T in the immediate aftermath of the crime was established through surveillance video from a convenience

store, which showed T and the defendant traveling together within mere minutes of the crime, the bus surveillance video, and certain other evidence and testimony; moreover, the bus surveillance video was admitted into evidence, and the jury had the opportunity to view it, along with a still image captured from the video depicting the backpack partially open to reveal a grayish white object, the trial court instructed the jury that it was free to reject all, part or none of the testimony, which instructions the jury presumably followed and which were effective in mitigating the harm of potentially improper evidence when delivered contemporaneously with the admission of the challenged evidence, and S was subject to extensive cross-examination, during which he acknowledged that he had never physically obtained or examined the object in the backpack.

4. The defendant could not prevail on his claims, raised as alternative grounds for affirming the judgment of the Appellate Court, that the trial court improperly admitted certain testimony from P, a passenger on the bus on which T and the defendant were riding, M, the bus driver, and S, and improperly denied his motion for a mistrial in response to O's testimony that T had stated to him that the wound on T's hand was a bite: the Appellate Court properly determined that the trial court did not abuse its discretion in determining that P's testimony about a conversation between the defendant and T concerning a dog bite was relevant because it demonstrated the defendant's intimate involvement with T in the criminal events that had occurred moments prior to the conversation; furthermore, because M's testimony that T had asked him for a tissue was elicited on cross-examination by the defendant, the defendant could not successfully challenge the admission of that evidence when he was responsible for placing it before the jury; moreover, the trial court did not abuse its discretion in determining that S's testimony that T had told him that the item in the backpack came from the victim's apartment was responsive to an ambiguous and imprecise question posed by the defendant, nor did it abuse its discretion in denying the defendant's motion for a mistrial and determining that O's testimony, which was stricken by the trial court, was not so prejudicial as to deprive the defendant of a fair trial, as the trial court gave a detailed instruction to the jury directing it not to consider that testimony and reminding it that a determination regarding the nature of T's injury was the province of the jury, given the curative effect of that instruction, the court's refusal to excuse the jury, which caused the defendant to make a motion for a mistrial in its presence, did not highlight the significance of the testimony that the jury had just heard, and the stricken testimony was not overly prejudicial when considered in light of other evidence linking T to the crime scene.

(*Three justices dissenting in one opinion*)

Argued March 27, 2017—officially released January 12, 2018**

** January 12, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Substitute information charging the defendant with the crimes of felony murder, home invasion, conspiracy to commit home invasion, burglary in the first degree, conspiracy to commit burglary in the first degree, robbery in the first degree and conspiracy to commit robbery in the first degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Dewey*, *J.*; thereafter, the court denied the defendant's motions to preclude certain evidence and for a mistrial; verdict of guilty; subsequently, the court denied the defendant's motion for judgment of acquittal and rendered judgment in accordance with the verdict; thereafter, the court vacated the conviction of conspiracy to commit burglary in the first degree and conspiracy to commit robbery in the first degree, and the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Keller* and *Prescott*, *Js.*, which reversed the trial court's judgment and remanded the case for a new trial, and the state, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *John F. Fahey*, senior assistant state's attorney, for the appellant (state).

Raymond L. Durelli, assigned counsel, for the appellee (defendant).

Opinion

ROBINSON, J. A jury found that, in the afternoon of June 30, 2009, the defendant, Kenny Holley, and his accomplice, Donele Taylor, invaded the East Hartford apartment of the victim, William Castillo, intending to commit a robbery. After the victim was shot fatally in the ensuing struggle, the defendant and Taylor fled by bus, taking cash and sneakers with them. The state now

appeals, upon our grant of its petition for certification,[1] from the judgment of the Appellate Court reversing the judgment of the trial court, rendered in accordance with the jury's verdict, convicting the defendant of, inter alia, felony murder in violation of General Statutes § 53a-54c, home invasion in violation of General Statutes § 53a-100aa (a) (1), and robbery in the first degree in violation of General Statutes § 53a-134 (a) (2).[2] *State* v. *Holley*, 160 Conn. App. 578, 127 A.3d 221 (2015). On appeal, the state claims that the Appellate Court improperly concluded that the trial court had (1) violated the defendant's right to present a defense under the sixth amendment to the United States constitution by conditioning its ruling that certain out-of-court statements indicating that the victim had bitten Taylor were inadmissible under *Crawford* v. *Washington*, 541 U.S. 36, 68, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004), on the defendant not presenting evidence regarding the circumstances relating to that wound, (2) abused its discretion by admitting testimony from a police detective indicating that he had observed what appeared to be a bite mark on Taylor's hand, and (3) abused its

[1] We granted the state's petition for certification, limited to the following issues: (1) "Did the Appellate Court correctly determine that the defendant's convictions should be reversed on the basis of his claim that the trial court violated his right to present a defense by preventing him from presenting evidence regarding a bite mark on [Taylor's] hand?" (2) "Did the Appellate Court correctly determine that testimony regarding a witness' observation of a bite mark on [Taylor's] hand violated the limitation on lay opinion testimony [set forth in § 7-1 of the Connecticut Code of Evidence]?" (3) "Did the Appellate Court correctly determine that [the admission of testimony indicating that] an item visible in the defendant's backpack in a surveillance video was a [shoe box] violated the limitation on lay opinion testimony [set forth in § 7-1 of the Connecticut Code of Evidence]?" And (4) "[i]f the answer to questions two [or] three is in the affirmative, was any error harmless?" *State* v. *Holley*, 320 Conn. 906, 127 A.3d 1000 (2015).

[2] We note that the defendant was also convicted of conspiracy to commit home invasion in violation of General Statutes §§ 53a-48 (a) and 53a-100aa (a) (1), and burglary in the first degree in violation of General Statutes § 53a-101 (a) (2). See footnote 3 of this opinion.

discretion by admitting testimony from a police detective narrating a surveillance video recorded on a bus and opining that the contours of an object in the defendant's backpack appeared to be a shoe box.

In addition to responding to the state's claims, the defendant asks us to consider, pursuant to Practice Book § 84-11 (a), numerous alternative grounds on which to affirm the judgment of the Appellate Court. In particular, the defendant contends that the trial court improperly (1) admitted into evidence, over his relevance objection, testimony by Kemorine Parker about a conversation she overheard between the defendant and Taylor while they were passengers on the bus shortly after the commission of the home invasion, (2) admitted into evidence, over his hearsay objection, certain testimony by Dennis Minott, the driver of the bus, indicating that Taylor had asked him for a tissue upon boarding, (3) determined that defense counsel had asked a question of a police detective that invited an answer otherwise barred by *Crawford* v. *Washington*, supra, 541 U.S. 68, and (4) denied the defendant's motion for a mistrial. Insofar as we agree with the state's claims and disagree with the defendant's proffered alternative grounds for affirmance, we reverse the judgment of the Appellate Court.

The Appellate Court's opinion aptly sets forth the following facts and procedural history. On the basis of the evidence adduced at trial, the "jury reasonably could have found that, at the time of the events at issue, the victim . . . lived in an apartment in East Hartford with his girlfriend, Tami Schultz. The victim earned money from selling sneakers both from his automobile and from his residence. At approximately 3:15 p.m. on June 30, 2009, while Schultz was out shopping, the defendant and . . . Taylor entered the victim's residence. A violent struggle involving the victim ensued, during which both Taylor and the victim sustained physical injuries.

Notably, the victim bit Taylor on his right wrist. Before the defendant and Taylor left the victim's residence, which they [had] ransacked in search of valuables, the victim sustained multiple gunshot wounds.

"When the defendant and Taylor fled the victim's residence, the defendant was in possession of property belonging to the victim, specifically, cash and a shoe box. At 3:24 p.m., the victim attempted to dial 911 on his cell phone but he was unable to do so and dialed '922' instead. He perished on his kitchen floor from a gunshot wound in the area of his left chest. A neighbor of the victim, alerted to the sound of uncharacteristically loud music, fighting, gunshots, and pleas for help originating from the victim's residence, called 911 at 3:25 p.m. By 3:30 p.m., the police arrived at the scene, where they discovered the lifeless victim.

"Immediately upon leaving the victim's residence, the defendant and Taylor proceeded to a nearby bus stop that was one-tenth of a mile from the crime scene, from which, at 3:22 p.m., they boarded a bus that transported them to downtown Hartford. At this time, the defendant was carrying a backpack that contained the cash and a shoe box. [Upon boarding, Taylor asked Minott for a tissue.] A fellow passenger, [Parker, then overheard] Taylor comment to the defendant that Taylor had been bitten by a dog, and the defendant was overheard remarking that '[i]t was a big dog.' Images of the defendant and Taylor running toward the bus stop were captured by a video surveillance camera located at a nearby convenience store, and images of the defendant and Taylor while they were on the bus were captured by a video surveillance camera located on the bus. In the video from the bus, the defendant appears to remove cash from his backpack and appears to hand something to Taylor from his backpack.

"By disseminating to the public some of the still images of the defendant and Taylor from the surveil-

lance footage captured on the bus, the police gained information about their identities. When the police interviewed Taylor on July 16, 2009, police observed injuries on or about his hands. Following an unrelated shooting incident in Hartford, the police came to possess a .22 caliber Beretta and determined that it previously had been owned by Taylor. Forensic analysis of the gun and of shell casings found at the crime scene involving the victim linked the gun, and thus Taylor, to the crimes. Moreover, forensic analysis of DNA samples from Taylor and of DNA obtained from the brim of a baseball cap that was found at the crime scene linked Taylor to the crimes." *State* v. *Holley*, supra, 160 Conn. App. 582–84.

The state subsequently charged the defendant with, inter alia, felony murder, home invasion, conspiracy to commit home invasion, burglary in the first degree, and robbery in the first degree. Id., 582. The case was tried to a jury, which returned a verdict of guilty on all counts. Id. The court rendered a judgment of conviction in accordance with the jury's verdict, and imposed a total effective sentence of 105 years incarceration, with a mandatory minimum sentence of twenty-five years incarceration.[3] Id., 582 and n.1.

The defendant appealed from the judgment of conviction to the Appellate Court, raising numerous claims, including an unpreserved claim that his constitutional right to present a defense had been infringed by the trial court's conditional evidentiary ruling with respect

[3] The state also charged the defendant with conspiracy to commit burglary in the first degree in violation of §§ 53a-48 (a) and 53a-101 (a) (2), and conspiracy to commit robbery in the first degree in violation of §§ 53a-48 (a) and 53a-134 (a) (2). *State* v. *Holley*, supra, 160 Conn. App. 582 n.1. The jury found the defendant guilty on these charges. Id. "Although the court sentenced the defendant on the conviction [on] those charges, it subsequently vacated the conviction of those charges and the sentences related to them." Id.

to Taylor's statement to the police about the injuries to his hand.[4] The Appellate Court agreed that the trial court had violated his right to present a defense because, "after the court properly excluded evidence concerning Taylor's statements to the police [pursuant to *Crawford* v. *Washington*, supra, 541 U.S. 68], it improperly restricted his right to challenge the evidence related to Taylor's wounds that it had permitted the state to introduce at trial." *State* v. *Holley*, supra, 160 Conn. App. 607; see id., 611–12. Although it determined that this impropriety required a new trial, the court also considered certain claims as presenting issues likely to arise on remand. Specifically, the Appellate Court determined that the trial court had abused its discretion by admitting lay opinion testimony by two police detectives, one stating that Taylor's wound was a bite, and the other describing an object in the defendant's backpack, based on the officer's observations of the video from the bus, as a shoe box. Id., 621–22, 631–32. The Appellate Court rejected the defendant's claims, however, that the trial court improperly (1) concluded that Parker's testimony about the conversation on the bus between the defendant and Taylor about a dog bite was relevant evidence, and (2) permitted Minott to testify that one of the two men who had boarded the bus had asked him for a tissue. Id., 625–26, 630–31. This certified appeal followed. Additional relevant facts and procedural history will be set forth in detail as necessary.

I

We begin with the state's claim that the Appellate Court improperly concluded that the trial court had violated the defendant's sixth amendment right to pre-

[4] The Appellate Court rejected the defendant's claim that there was insufficient evidence to sustain his conviction of robbery in the first degree, burglary in the first degree, and felony murder. See *State* v. *Holley*, supra, 160 Conn. App. 584–601. The sufficiency of the evidence is not at issue in this certified appeal, and we do not consider it further.

sent a defense by, in essence, precluding him from presenting evidence regarding the nature, source, and timing of Taylor's injuries. The record and the Appellate Court's opinion reveal the following additional facts and procedural history relevant to this claim. The defendant filed a motion in limine seeking to preclude the state from introducing certain statements that were made by Taylor to the police on the ground that they were inadmissible under *Crawford*,[5] as testimonial hearsay from an unavailable witness.[6] *State* v. *Holley*, supra, 160

[5] "Under *Crawford* v. *Washington*, supra, 541 U.S. 68, the hearsay statements of an unavailable witness that are testimonial in nature may be admitted under the sixth amendment's confrontation clause only if the defendant has had a prior opportunity to cross-examine the declarant. Hearsay statements that are nontestimonial in nature are not governed by the confrontation clause, and their admissibility is governed solely by the rules of evidence. . . . The circumstances surrounding Taylor's out-of-court statements, made to the police, do not appear to be in dispute." (Citation omitted; internal quotation marks omitted.) *State* v. *Holley*, supra, 160 Conn. App. 603 n.9.

[6] "The motion in limine provided in relevant part: '[The defendant] and Taylor were charged with almost identical crimes. After confessing to the police on July 16, 2009, Taylor was arrested for felony murder, murder, conspiracy to commit murder, robbery in the first degree and burglary in the first degree. . . . On February 27, 2012, Taylor [pleaded] guilty to felony murder, robbery in the first degree, and conspiracy to commit robbery in the first degree under the *Alford* doctrine. [See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970).] On May 4, 2012, Taylor was sentenced to thirty-two . . . years in prison. . . .

" 'On July 16, 2009, Taylor gave a written confession after speaking with [the] police about his version of the facts and circumstances of the June 30, 2009 incident. After providing [the] police with the . . . written confession, Taylor was immediately arrested and incarcerated on a $2.5 million . . . bond. On July 20, 2009, four . . . days after his arrest, from prison, Taylor recanted his first confession but refused to sign a written statement. The next day [the] police returned to meet with Taylor [and] he participated in a photo[graphic] identification of [the defendant]. Undersigned counsel is led to believe that Taylor may be unavailable to testify at trial and is refusing to cooperate with the state. . . .

" 'If the state offered the statements of Taylor into evidence, it would clearly be an attempt to prove the truth of the matter asserted in the state's case against [the defendant] in that the statements allege that the defendant was present for and participated in the crime which occurred inside of the [victim's] apartment.

Conn. App. 602–603. "In his memorandum of law in support of his motion in limine, the defendant went on to state in relevant part: 'On July 16, 2009 . . . Taylor told Detectives [Donald] Olson and [Jeffrey] Cutler that [the victim] bit him during a struggle in [the victim's East Hartford] apartment . . . . At the time, [Taylor] was in the police department's interview room confessing to the murder of [the victim] in the presence of the two detectives. He signed a confession on that date accepting responsibility for the homicide while stating [that] he did not know what the other male was doing in the apartment at the time of the killing. In the signed confession he stated [that] '[during] the struggle with [the victim], I got a small cut on my left hand and [the victim] bit my right wrist.' He further informed [the] police on July 16, 2009, that he did not know the name of the other person that he was with in the apartment. In his confession, he stated that [the victim] unexpectedly drew a gun on him and the other person in the apartment, leading to a struggle involving Taylor and [the victim] and the eventual shooting by Taylor. . . . Four days later he contacted the police . . . blaming [the defendant] for the shooting and taking the position that he . . . was unaware that any homicide was going to take place.'

"On December 6, 2012, the court heard oral argument on the motion in limine. After the defendant's attorney described the facts, generally as set forth in his motion

" 'Further, and more importantly, upon information and belief, Taylor will not be available for cross-examination relative [to] the aforementioned statements. . . .

" 'In Taylor's written confession he admits to shooting the [victim] and indicates that he does not know what the other person was doing in the apartment while he was struggling with the [victim]. In this statement, Taylor implicates the involvement of [the defendant] by acknowledging that another person was with him inside of the apartment as this crime took place. Further, it indicates that the "other kid" had a shoe box in his backpack.' " (Footnote omitted.) *State* v. *Holley*, supra, 160 Conn. App. 602–603.

and memorandum of law in support thereof, he argued that if Taylor did not testify, the court should exclude his statements from the evidence. The prosecutor responded that the state did not intend to offer all evidence of Taylor's statements to the police, characterizing them generally as 'statements against penal interest' that may be barred under *Crawford*. The prosecutor, however, stated that he intended to offer evidence that Taylor told the police that he had bite marks and scratches on his hands, including a bite mark inflicted by the victim. The prosecutor characterized this portion of Taylor's statements to the police as being nontestimonial in nature. The defendant's attorney argued that the evidence was unduly prejudicial and, because Taylor would not be available for cross-examination, its admission would violate the defendant's right to confront an adverse witness. It appears that the court deferred ruling on the issue until the time of trial.

"Following additional oral argument related to the issue on January 7, 2013, the court ruled that . . . it would permit the state to present evidence of Taylor's statement to the police that he had sustained a bite wound. The state argued that the statement was relevant to one or more issues in the case in light of the evidence of the 'big dog' comments made by the defendant and Taylor on the bus, shortly after the shooting.

"On January 8, 2013, outside of the jury's presence, the state called Taylor to the witness stand. Despite being ordered to do so by the court, Taylor refused to answer any questions posed to him concerning the events underlying the trial. The court held Taylor in contempt and sentenced him to six months incarceration.

"On January 9, 2013, the court revisited its ruling to admit evidence of Taylor's statement that he had sustained a bite wound. At this juncture, the court disal-

lowed the statement related to the bite wound. The court stated: '[R]ight now, based on what the evidence is, because the defense hasn't challenged anything concerning that statement, *I'm going to disallow the statement concerning the bite. I understand that it is a statement against penal interest; the entire confession was a statement against penal interest. But if there's even a hint anywhere that that bite was anything other than where it came from, that statement does come in, and that includes during closing argument as well. I will reopen this case if there's a hint during closing argument that the bite was anything other than what it is*. So, remember, I'll stop the trial and allow [Taylor's statement] in at that point.' The court stated that it would permit Olson to testify that he had interviewed Taylor and that during the course of his interview he photographed Taylor's injuries. The court also stated that the state could present such photographs in evidence. Later, in response to an inquiry by the defendant's attorney concerning the court's ruling, the court stated that it wanted to make it 'very clear that if there's even a hint that that bite mark came from anywhere else, [then evidence of Taylor's statement] comes in.' The defendant's attorney replied, 'Right. And I made a note of that, opening the door.'

"Later, Olson testified that he interviewed Taylor on July 16, 2009, [and] observed injuries on Taylor's hands, and [that] the injuries [were photographed]. The photographs were admitted into evidence. During his testimony, Olson testified: 'He appeared to have a bite mark on his wrist and some lacerations on his other hand.' The defendant objected to Olson's testimony. The court, noting that the testimony was Olson's observation of the injury, overruled the defendant's objection. During subsequent examination by the state, however, Olson testified that he learned from talking to Taylor that the injury on his wrist was '[a] bite.' The court sustained

the defendant's objection to this inquiry and denied the defendant's motion for a mistrial related to it. The court, however, provided the jury with a curative instruction directing it to disregard any testimony from Olson concerning what Taylor may have stated to him about the injury. The court instructed the jury that the nature of any marks on Taylor's hands was a factual matter for the jury to decide.[7]

"In addition to Olson's testimony and the photographs depicting Taylor's injuries, the state presented evidence that was relevant to the issue of Taylor's injuries from . . . Minott, the operator of the bus on which the defendant and Taylor were passengers on June 30, 2009. Minott testified that one of the two black males who got on his bus at Main Street and Brewer Street asked him for 'a tissue,' [from which it could be inferred that Taylor needed to tend to a wound] . . . . [T]he jury also heard evidence related to a bite injury from Parker, who described the conversation that she overheard on the bus." (Emphasis altered; footnotes added and omitted.) Id., 602–606. At no point before or during the trial did the defendant indicate that there was evi-

[7] At the defendant's request, after the luncheon recess, the trial court instructed the jury that "earlier this afternoon before the lunch break . . . Olson was on the stand and there was some testimony of his concerning marks, what may or may not be marks on . . . Taylor's hand, left and right hands. First of all, it's for you to determine whether . . . there were marks on the hands and where those marks came from. Any statements . . . Olson heard from . . . Taylor are obviously not admissible because we don't have . . . Taylor here to discuss what those statements are and he's not subject to cross-examination. . . . That's why I told you that information that comes from out of court is not necessarily reliable. So that's stricken. As I said . . . Olson's observations are just that: observations for you to determine what [exists] on the hands of . . . Taylor, if anything. You have the photographs in evidence."

In its final charge to the jury, the trial court instructed the jury that "[c]ertain things are not evidence and you may not consider them in deciding the facts. These include . . . [t]estimony that has been excluded or stricken. This testimony would include any comment that . . . Taylor allegedly made in the presence of . . . Olson concerning bite marks."

dence, or the nature of any such evidence, to rebut the circumstantial evidence that Taylor had sustained a bite during the robbery and that the defendant had been with Taylor when he sustained that bite.

On appeal, the Appellate Court acknowledged that the defendant's constitutional challenge was unpreserved and reviewed it pursuant to the bypass rule of *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989).[8] See *State* v. *Holley*, supra, 160 Conn. App. 608. The Appellate Court observed that the trial "court unmistakably conveyed in its ruling that any attempt by the defense to contest the state's evidence that the injuries were the result of 'a bite' would open the door for the state to present evidence that the court had deemed inadmissible under *Crawford*." Id., 609. Considering the sixth amendment right to confrontation and to present a defense, as set forth in well established case law, which extends to closing arguments; see id., 610–11; the Appellate Court concluded that the "defendant has demonstrated that a constitutional violation exists and deprived him of a fair trial. Rather than considering the admissibility of Taylor's statements to the police and the defendant's ability to challenge other evidence presented by the state related to Taylor's injuries as distinct matters, the [trial] court issued a ruling that joined the two matters and, in so doing, issued a ruling that effectively precluded the defendant from

[8] Under *Golding*, "a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt. In the absence of any one of these conditions, the defendant's claim will fail." (Emphasis in original; footnote omitted.) *State* v. *Golding*, supra, 213 Conn. 239–40; see *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015) (modifying *Golding*'s third prong).

making any effort to undermine the state's evidence that Taylor's injuries resulted from a bite. The [trial] court improperly left the defense in the untenable position of having to choose between a violation of the defendant's right to confrontation [under *Crawford*] and a violation of the defendant's right to present a defense."[9] Id., 611; see id., 611–12 ("[t]he state has not presented this court with any authority that would permit a court to condition a defendant's right of confrontation on the defendant's not exercising his right to challenge the state's evidence"). The Appellate Court rejected the state's argument that the defendant's failure to make an offer of proof with respect to "what evidence he would have presented to the jury to counter the state's evidence concerning Taylor's injuries" precluded review of this claim.[10] See id., 612–13 n.13.

[9] The Appellate Court observed specifically that the "court's ruling, occurring in the middle of the trial, did not merely infringe upon the defendant's ability to present evidence, but broadly precluded the defense from even 'hinting' during closing argument that the injury was 'anything other' than a bite. The court's ruling was very significant to the defense because the evidence related to Taylor's injuries, and the state's arguments concerning the origin of those injuries, was a key component of the state's case, which was based on circumstantial evidence. After the state presented evidence from Olson, Parker, and Minott that supported a finding that Taylor had sustained a bite injury, the prosecutor suggested in argument that Taylor had been bitten by the victim. By arguing, as it did, that, shortly after the events at issue, the defendant and Taylor referred on the bus to a 'big dog' that had bitten Taylor, the state was able to present a compelling argument that supported a finding that the defendant was present with Taylor in the victim's apartment and guilty of the crimes with which he was charged. In light of all of the circumstances, we conclude that the defendant was deprived of a fair trial." *State* v. *Holley*, supra, 160 Conn. App. 612.

[10] In rejecting the state's arguments with respect to the defendant's failure to make an offer of proof, the Appellate Court stated that the trial court, "in conditioning its *Crawford* ruling in the manner that it did, made an integral component of the state's case off limits to the defense. Moreover, the [trial] court did not merely prohibit the introduction of evidence, but precluded the defendant from challenging, in any manner, the state's evidence concerning Taylor's injuries. The ruling broadly restricted the defendant's right to cross-examine Olson (and other witnesses) and to challenge during argument before the jury the state's evidence related to Taylor's injuries." *State* v. *Holley*, supra, 160 Conn. App. 613 n.13. The Appellate

Observing that the state had not argued that any constitutional error was harmless, the Appellate Court concluded that the defendant was entitled to a new trial. Id., 612–14.

On appeal to this court, the state claims that the Appellate Court improperly concluded that the trial court violated the defendant's right to present a defense by imposing a condition on its decision to preclude the statements to the police by Taylor that were otherwise barred under *Crawford*.[11] Specifically, the state first contends that the trial court's ruling did not preclude the defendant from introducing evidence with respect to the origin of Taylor's injuries, but merely suggested that such evidence would be subject to counterproof in the form of Taylor's statement about the bite, notwithstanding the court's determination that Taylor's statement was otherwise inadmissible under *Crawford*. Relying on, inter alia, *State* v. *Crespo*, 303 Conn. 589, 35 A.3d 243 (2012), the state further argues that any violation of the defendant's right to present a defense is purely "speculative" or "hypothetical," insofar as the defendant's failure to make an offer of proof in response to the trial court's ruling rendered it impossible for him to demonstrate on appeal the adverse effect of the trial court's ruling on his right to present defense.

Court further emphasized that this restriction was significant because the "admissibility of evidence of Taylor's out-of-court statements was hotly contested at trial," and that "the state does not argue that the court's ruling was harmless beyond a reasonable doubt and, from our review of the nature of the defendant's arguments advanced at trial, we conclude that the court's ruling harmed the defense in its ability to counter the state's proof and its theory of the case. Accordingly, we conclude, under these circumstances, that the defendant's failure to make an offer of proof is not fatal to his claim." Id.

[11] The state also claims that the Appellate Court improperly acted sua sponte to consider limitations on the defendant's right to present closing argument on this point, insofar as the defendant's briefing of this claim before that court was limited to the preclusion of evidence, rather than argument. Because we agree with the merits of the state's constitutional arguments, we need not address this claim.

In response, the defendant contends that the Appellate Court properly determined that the trial court's preclusion of evidence about the nature of Taylor's injuries, under penalty of the admission of statements otherwise barred under *Crawford*, deprived him of a meaningful defense. The defendant argues that "[e]vidence of the source, nature, and timing of Taylor's injuries was relevant to refute the testimony of Olson, Parker, and Minott," insofar as it would have allowed the defendant to refute the prosecutor's argument, based on circumstantial evidence, that the defendant and Taylor had been present in the apartment together. The defendant further argues that the trial court's ruling and the resulting harm were clear from the record, and amounted to "implicitly instruct[ing] the defense to not challenge the nature, source, or timing of Taylor's injuries, while warn[ing] the defense of the consequences of doing so." We agree with the state, however, and conclude that the defendant has failed to establish that the trial court's ruling deprived him of the right to present a defense.

"It is fundamental that the defendant's rights to confront the witnesses against him and to present a defense are guaranteed by the sixth amendment to the United States constitution. . . . A defendant's right to present a defense is rooted in the compulsory process and confrontation clauses of the sixth amendment . . . . Furthermore, the sixth amendment rights to confrontation and to compulsory process are made applicable to state prosecutions through the due process clause of the fourteenth amendment. . . .

"In plain terms, the defendant's right to present a defense is the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the truth lies. . . . It guarantees the right to offer the testimony of witnesses, and to compel their attendance, if necessary . . . . There-

fore, exclusion of evidence offered by the defense may result in the denial of the defendant's right to present a defense." (Citations omitted; internal quotation marks omitted.) *State* v. *Wright*, 320 Conn. 781, 816–17, 135 A.3d 1 (2016).

"Although it is within the trial court's discretion to determine the extent of cross-examination and the admissibility of evidence, the preclusion of sufficient inquiry into a particular matter tending to show motive, bias and interest may result in a violation of the constitutional requirements [of the confrontation clause] of the sixth amendment. . . .

"These sixth amendment rights, although substantial, do not suspend the rules of evidence . . . . A court is not required to admit all evidence presented by a defendant; nor is a court required to allow a defendant to engage in unrestricted cross-examination. . . . Instead, [a] defendant is . . . bound by the rules of evidence in presenting a defense . . . . Nevertheless, exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights . . . . Thus, [i]f the proffered evidence is not relevant [or constitutes inadmissible hearsay], the defendant's right[s] to confrontation [and to present a defense are] not affected, and the evidence was properly excluded." (Citations omitted; internal quotation marks omitted.) Id., 818–19; see also *State* v. *Fay*, 326 Conn. 742, 754 n.12, 167 A.3d 897 (2017) ("the right to present a defense, though deeply rooted, rests on somewhat indeterminate grounds—at times, its existence has been attributed to the fourteenth amendment and at times to various clauses of the sixth amendment").

Because the defendant did not raise this claim at trial, we review it under the framework of *State* v. *Golding*, supra, 213 Conn. 239–40; see footnote 8 of this opinion; which is "a narrow exception to the general rule that an appellate court will not entertain a claim that has

not been raised in the trial court." *State* v. *Brunetti*, 279 Conn. 39, 55, 901 A.2d 1 (2006), cert. denied, 549 U.S. 1212, 127 S. Ct. 1328, 167 L. Ed. 2d 85 (2007). It is important to underscore that *Golding* permits the defendant to raise an unpreserved constitutional claim on appeal, and the appellate tribunal to review it, "only if the trial court record is adequate for appellate review. The reason for this requirement demands no great elaboration: in the absence of a sufficient record, there is no way to know whether a violation of constitutional magnitude in fact has occurred. Thus, as we stated in *Golding*, we will not address an unpreserved constitutional claim [i]f the facts revealed by the record are *insufficient, unclear or ambiguous as to whether a constitutional violation has occurred* . . . ." (Emphasis added; footnotes omitted; internal quotation marks omitted.) Id., 55–56; see also *State* v. *Medina*, 228 Conn. 281, 300–302, 636 A.2d 351 (1994). Although the defendant's claim in the present case is constitutional in nature, satisfying *Golding*'s second prong, the state of the record renders the defendant unable to satisfy the first or third prongs of *Golding*, namely, the record is alternately inadequate for review, or even if deemed adequate for review, does not demonstrate the existence of a constitutional violation.

Because *Golding* does not excuse an inadequate record, the absence or inadequacy of an offer of proof[12]

[12] It is well settled that "[o]ffers of proof are allegations by the attorney . . . in which he represents to the court that he could prove them if granted an evidentiary hearing. . . . The purpose of an offer of proof has been well established by our courts. First, it informs the court of the legal theory under which the evidence is admissible. Second, it should inform the trial [court] of the specific nature of the evidence so that the court can judge its admissibility. Third, it creates a record for appellate review. . . . Additionally, an offer of proof should contain specific evidence rather than vague assertions and sheer speculation. . . . The offer of proof may be made in the absence of the jury by the testimony of a witness or by a good faith representation by counsel of what the witness would say if questioned." (Citations omitted; internal quotation marks omitted.) *State* v. *Shaw*, 312 Conn. 85, 105–106 n.13, 90 A.3d 936 (2014).

may prevent a criminal defendant from proving on appeal that the trial court's preclusion of certain evidence violated his right to present a defense. In *State* v. *Wright*, 322 Conn. 270, 272, 140 A.3d 939 (2016), we recently considered whether the trial court's limitation of a defendant's cross-examination of police witnesses violated his right to present a defense, namely, his theory that the police investigation was inadequate. In that case, we concluded that we did not need to consider whether the Appellate Court had properly determined that "the trial court's limitation on cross-examination was of constitutional dimension because it precluded the defendant from placing the police officers' investigation into a meaningful context for purposes of the defendant's inadequate investigation defense."[13] Id., 281. This was because our review of the record demonstrated that "neither the defendant's proposed questions nor his offer of proof established the basis for a claim that the police, in not pursuing certain avenues of investigation, had failed to act in accordance with past established practices or standard police investigative procedures," meaning that the defendant could not "establish that the trial court improperly precluded him from advancing an inadequate investigation defense on this basis." Id., 281–82. Citing *State* v. *Brunetti*, supra, 279 Conn. 63, we emphasized that the defendant's questions failed to satisfy his "duty to put the trial court on notice of his defense theory and to ensure that evidence to support that theory is placed on the record for appellate review." *State* v. *Wright*, supra, 322 Conn. 290; see also id., 290–91 ("Stated simply, the record does not reflect that the defendant expressed an intention to

[13] Although the question in *Wright* as to whether the trial court's limitation on cross-examination was of constitutional dimension was not explored in the context of *Golding* review, the inquiry is effectively the same. See *State* v. *Wright*, supra, 322 Conn. 281; see also *State* v. *Wright*, 152 Conn. App. 260, 265, 268–69, 96 A.3d 638 (2014), rev'd on other grounds, 322 Conn. 270, 140 A.3d 939 (2016).

qualify any of the testifying officers as experts and to inquire about standard operating procedures or routine practices that had not been followed in the investigation at hand. Nor does the record establish such facts. The defendant's claim that the trial court improperly precluded his inadequate investigation defense strategy as to such a line of inquiry therefore necessarily fails.").

Similarly, in *State* v. *Crespo*, supra, 303 Conn. 611–12, upon which the state relies heavily, we rejected a defendant's unpreserved claim, raised under *Golding*, that the trial court had violated his rights to confrontation and to present a defense by precluding him from questioning the victim about specific sexual acts in which she had engaged in the past, insofar as she had claimed that she was a virgin when the defendant sexually assaulted her. Beyond noting that the trial court had allowed the defendant to undertake a comprehensive cross-examination of the victim, including discussing her past engagement, relationships, and sexual history, we observed that the defendant's "failure to raise this ground of relevance prevented the trial court from ruling on its admissibility on that ground," complicating the constitutional inquiry because "[a] clear statement of the defendant's theory of relevance is all important in determining whether the evidence is offered for a permissible purpose." (Internal quotation marks omitted.) Id., 612–13; see also *State* v. *Fay*, supra, 326 Conn. 771–72 ("Because the defendant provided no other evidence demonstrating that the victim's psychiatric records were necessary to his defense, he cannot make the required preliminary showing, without improperly supplementing the record on appeal, that he was entitled to an in camera review of those records. Accordingly, the defendant is not entitled to review of his unpreserved claim that the trial court's failure to conduct an in camera review of the records deprived him of his right to present a defense."); cf. *State* v. *Roger*

B., 297 Conn. 607, 615, 999 A.2d 752 (2010) (declining to review claim that delay in seeking arrest warrant deprived defendant of due process rights because record "simply does not contain a sufficient underlying set of facts for [the court] to assess whether the defendant suffered actual prejudice as a result of [the] delay in seeking an arrest warrant"); *State* v. *Moye*, 214 Conn. 89, 97–99, 570 A.2d 209 (1990) (rejecting unpreserved confrontation clause claim raised under *Golding*, with respect to preclusion of questioning of victim about her arrest and detention, on ground of inadequate record because "[a] defendant cannot claim a confrontation clause violation regarding an issue on which he chose not to cross-examine the witness"); *State* v. *Banks*, 117 Conn. App. 102, 110–11, 978 A.2d 519 (rejecting unpreserved confrontation clause claim because there "was no specific ruling" on whether defense counsel could question witness regarding certain "pending [criminal] charges to show motive, interest or bias," and concluding that claim therefore "fail[ed] under the third prong of *Golding*"), cert. denied, 294 Conn. 905, 982 A.2d 1081 (2009).

The conditional nature of the trial court's ruling in the present case, allowing counterproof in the form statements otherwise barred under *Crawford* if the defendant were to challenge the provenance of Taylor's injuries as bites, does not relieve the defendant of the need to make a record demonstrating the existence of harm to his right to present a defense. In reaching this conclusion, we find particularly instructive the decision by the United States Court of Appeals for the Seventh Circuit in *United States* v. *Wilson*, 307 F.3d 596 (7th Cir. 2002). In that case, the defendant, Robert Wilson, claimed that his fifth amendment right to remain silent was violated by a district court's conditional ruling allowing the admission of evidence of selective silence during his interview with an agent from the Federal

Bureau of Investigation, if Wilson used evidence from that interview in support of his alibi defense. Id., 598–600. In rejecting this claim, the Seventh Circuit relied on *Luce* v. *United States*, 469 U.S. 38, 105 S. Ct. 460, 83 L. Ed. 2d 443 (1984). In that case, the United States Supreme Court declined to review a criminal defendant's challenge to a trial court's ruling on his motion in limine seeking to preclude impeachment by prior conviction because the defendant's ultimate failure to testify deprived the reviewing court of "a complete record detailing the nature of petitioner's testimony, the scope of the cross-examination, and the possible impact of the impeachment on the jury's verdict," thus rendering any possible harm flowing from the ruling "wholly speculative."[14] Id., 41. The Seventh Circuit

[14] In *Luce*, the United States Supreme Court observed that in the absence of such testimony, a "reviewing court is handicapped in any effort to rule on subtle evidentiary questions outside a factual context." *Luce* v. *United States*, supra, 469 U.S. 41; see also id., 39–40. In emphasizing the "wholly speculative" nature of the harm without such testimony, the Supreme Court observed that an evidentiary ruling is "subject to change when the case unfolds, particularly if the actual testimony differs from what was contained in the defendant's proffer. Indeed even if nothing unexpected happens at trial, the district judge is free, in the exercise of sound judicial discretion, to alter a previous in limine ruling. On [the record] here, it would be a matter of conjecture whether the District Court would have allowed the [g]overnment to attack petitioner's credibility at trial by means of the prior conviction. When the defendant does not testify, the reviewing court also has no way of knowing whether the [g]overnment would have sought to impeach with the prior conviction." Id., 41–42.

This court adopted the rule of *Luce* in *State* v. *Harrell*, 199 Conn. 255, 265–68, 506 A.2d 1041 (1986). Although some courts have more recently eschewed "*Luce*'s bright-line rule requiring a defendant to testify in order to preserve a claim that a district court improperly ruled that testimony was procured in violation of a defendant's [f]ifth [a]mendment rights," those courts have not, however, "assume[d] that the alleged error must have been harmful in the absence of a record to review. Instead, if a defendant chooses not to testify after the district court finds her statements admissible for impeachment, in order to present a persuasive argument on appeal, that defendant must, by some means, create and present a record in the district court sufficient to permit meaningful appellate review. A defendant who does not wish to testify could, for example, have counsel proffer—or provide affidavits—to create a reviewable record." *Met* v. *State*, 388 P.3d 447, 463–64

observed that "Wilson was given a choice by the district court. This choice, he argues, put him on the horns of a dilemma: he could either explore the issue of his alleged associate, at the price of having the jury hear about his invocation of his right to silence, or he could say nothing about the associate and keep out the testimony about the selective silence. At the trial, Wilson resolved the problem by declining to introduce the part of his [postarrest] statement that related to an associate; thus, the government never introduced the other part

(Utah 2016); accord *United States* v. *Monell*, 801 F.3d 34, 49–50 (1st Cir. 2015) (noting previous suggestion, "in dicta," that "a sufficiently definite preview of the defendant's and the government's proposed evidence could provide a verisimilitudinous enactment of an actual context . . . such that the district court and appellate court can rule without the disadvantages listed in *Luce*" [citation omitted; internal quotation marks omitted]), cert. denied, U.S. , 136 S. Ct. 864, 193 L. Ed. 2d 761 (2016); *State* v. *Cherry*, 139 Idaho 579, 582, 83 P.3d 123 (App. 2003) (requiring offer of proof in lieu of testimony); *Warren* v. *State*, 121 Nev. 886, 894–95, 124 P.3d 522 (2005) (suggesting that extensive offer of proof that would furnish a "sufficient record" to address "problems identified in *Luce*"); cf. *State* v. *Stanin*, 169 N.H. 209, 215–16, 145 A.3d 676 (2016) (requiring testimony but suggesting that detailed proffer might suffice in holding that in absence of "a record of what the defendant would have said during direct examination and of the [s]tate's proposed cross-examination of him," court could not "meaningfully determine whether the trial court's failure to restrict the scope of the [s]tate's cross-examination was unconstitutional"). We acknowledge, however, that some courts reject the rule that there must be an advance offer of proof in lieu of testimony. See, e.g., *Commonwealth* v. *Crouse*, 447 Mass. 558, 564–65, 855 N.E.2d 391 (2006); *State* v. *Whitehead*, 104 N.J. 353, 361–62, 517 A.2d 373 (1986); see also *Wagner* v. *State*, 347 P.3d 109, 112 n.22 (Alaska 2015) (surveying authorities).

In *State* v. *Perez*, 147 Conn. App. 53, 119 n.60, 80 A.3d 103 (2013), aff'd, 322 Conn. 118, 139 A.3d 654 (2016), our Appellate Court rejected the state's reliance on *Harrell* and *Luce* in support of its argument that the defendant's failure to testify at trial deprived him of appellate review of his claim that the trial court improperly denied his motion to sever two cases, based on the fact that he wished to testify in a bribery case, but not the joined extortion case. We view *Perez* as distinguishable from the present case because the record in *Perez* revealed extensive offers of proof of the defendant's anticipated testimony, thus allowing the trial and reviewing courts a record sufficient to determine the effect of the denial of the motion to sever. See id., 116–19 and nn. 58 and 59.

of the statement in which Wilson declined to name the associate." *United States* v. *Wilson*, supra, 599–600. The Seventh Circuit deemed it "inappropriate . . . to review Wilson's claim on the merits . . . . He exercised his constitutional right to refrain from introducing certain evidence at the trial and cannot now attack a potential introduction of evidence by the government in response to his potential testimony. We therefore do not address his arguments with respect to the alleged violation of his [f]ifth [a]mendment rights." Id., 600–601.

Having reviewed the record in the present case, we agree with the state that the defendant's claim fails under the first and third prongs of *State* v. *Golding*, supra, 213 Conn. 239–40, because the record does not demonstrate the existence of the violation of his right to present a defense. There is no indication in the record as to the substance of any evidence that the defendant would have proffered but for the conditional ruling on his motion in limine—whether the defendant would have sought to prove that Taylor had been bitten by a person other than the victim or by an animal, that Taylor's wound was caused by something other than a bite, that Taylor's wound had been sustained before the crime occurred, or that Taylor had sustained no wound at all. There is no indication whether the source of this evidence would have been documentary or testimonial, and, if the latter, whether through an expert, the defendant, or another lay witness.

Thus, notwithstanding the unpreserved nature of this claim, the defendant's failure to make an offer of proof at trial renders it impossible for us to determine whether he was deprived of his right to present a defense because the record does not disclose the evidence that he would have offered to rebut the inference that Taylor had been bitten by the victim. Put differently, with no indication in the record that the defendant was prepared to offer admissible evidence in support of the theory

that Taylor's injuries were not caused by the victim, the defendant cannot prove that the trial court's ruling violated his right to present a defense. See, e.g., *State* v. *Wright*, supra, 320 Conn. 818–19; see also *State* v. *O'Brien-Veader*, 318 Conn. 514, 563–64, 122 A.3d 555 (2015) (failure to establish that evidentiary ruling was improper meant that defendant could not satisfy third prong of *Golding* with respect to claim of confrontation clause violation).

Moreover, the trial court's ruling was not an absolute bar to the admission of evidence pertaining to Taylor's injuries. Rather, it warned the defendant that if he introduced such evidence, the trial court would admit into evidence statements by Taylor that were otherwise barred under *Crawford*, if subsequently offered by the state. To be sure, the trial court's conditional ruling left the defendant with a strategic choice, one that required him to balance the benefits of attacking the provenance of Taylor's injuries with the risks of the admission of Taylor's statement that the victim had bitten him, evidence that otherwise would be barred by *Crawford*. This dilemma did not necessarily deprive the defendant of his right to present a defense because "[t]he criminal process . . . like the rest of the legal system, is replete with situations requiring the making of difficult judgments as to which course to follow." (Internal quotation marks omitted.) *McGautha* v. *California*, 402 U.S. 183, 213, 91 S. Ct. 1454, 28 L. Ed. 2d 711 (1971), vacated in part on other grounds sub nom. *Crampton* v. *Ohio*, 408 U.S. 941, 92 S. Ct. 2873, 33 L. Ed. 2d 765 (1972); see also, e.g., *United States* v. *Valenti*, 60 F.3d 941, 945 (2d Cir. 1995) ("one of the risks any criminal defendant must run is the difficult choice on whether the value of his anticipated evidence would outweigh whatever damaging rebuttal evidence the government might produce" [internal quotation marks omitted]); *State* v. *Moye*, supra, 214 Conn. 99 ("[w]hen a party chooses

not to cross-examine a witness in order to avoid the possibility of eliciting harmful testimony, his right to confront and cross-examine that witness as guaranteed by the sixth and fourteenth amendments of the United States constitution is in no way abridged" [internal quotation marks omitted]); *State* v. *Fisher*, 52 Conn. App. 825, 828–30, 729 A.2d 229 (The court rejected a criminal defendant's unpreserved claim, raised under *Golding*, that the denial of a motion in limine deprived him of the right to testify and the right to a fair trial because, "[a]fter hearing the state's offer of proof on the prior misconduct evidence and the trial court's ruling, the defendant and his attorney made a tactical decision to withdraw the alibi defense to prevent the admission of evidence that could have weighed heavily in the jurors' minds, despite limiting instructions by the court on its purpose. The defendant cannot now complain that he was deprived of his constitutional rights because his trial tactic failed."), cert. denied, 249 Conn. 912, 733 A.2d 232 (1999).

Indeed, given the conditional nature of the trial court's ruling, we do not know whether, in the subsequent trial proceedings, the state would have used Taylor's potentially inadmissible statements. It is not inconceivable that, even if the defendant had introduced evidence concerning Taylor's injuries, the state might well have decided to avoid handing the defendant a potentially strong appellate issue founded on his objection to Taylor's statement under *Crawford*. See *Luce* v. *United States*, supra, 469 U.S. 42 ("[i]f, for example, the [g]overnment's case is strong, and the defendant is subject to impeachment by other means, a prosecutor might elect not to use an arguably inadmissible prior conviction"); *United States* v. *Monell*, 801 F.3d 34, 49 (1st Cir. 2015) ("the government might have elected not to risk a reversible appellate issue, and ultimately might have decided not to introduce the prison recording"),

cert. denied, U.S. , 136 S. Ct. 864, 193 L. Ed. 2d 761 (2016); *Bailey* v. *United States*, 699 A.2d 392, 401–402 (D.C. 1997) (declining to review in limine ruling allowing prior misconduct evidence in event sexual assault defendant raised consent defense because given subsequent developments in testimony, "the prosecutor might well have decided not to introduce into the record material which would bring with it a potentially thorny appellate issue, and which would thus have created the danger that a conviction would be reversed on appeal"). This disincentive for the state to introduce the challenged *Crawford* material, any objection to which the trial court might well have sustained when ultimately offered, renders any violation of the defendant's right to present a defense even more speculative. Accordingly, we conclude that the Appellate Court improperly ordered a new trial on the basis of its determination that the trial court's conditional ruling violated the defendant's right to present a defense.

II

We turn next to the state's evidentiary claims, namely, that the Appellate Court improperly determined that the trial court had abused its discretion in admitting certain lay opinion testimony from two police officers, namely, (1) Olson's testimony that he had observed a bite mark on Taylor's hand, and (2) testimony by Jason Smola, the police detective who narrated the presentation of the bus surveillance video, indicating that an object in the defendant's backpack appeared to be a shoe box. We conclude that the trial court did not abuse its discretion as to the first matter, and that its ruling as to the second matter would be harmless even if it were an abuse of discretion.

Our consideration of these claims is informed by the following general principles concerning lay opinion testimony. Section 7-1 of the Connecticut Code of Evi-

dence provides: "If a witness is not testifying as an expert, the witness may not testify in the form of an opinion, unless the opinion is rationally based on the perception of the witness and is helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." "Section 7-1 is based on the traditional rule that witnesses who did not testify as experts generally were required to limit their testimony to an account of the facts and, with but a few exceptions, could not state an opinion or conclusion. . . . Section 7-1 attempts to preserve the common-law preference for testimony of facts, but recognizes there may be situations in which opinion testimony will be more helpful to the fact finder than a rendition of the observed facts." (Citations omitted.) Conn. Code Evid. § 7-1, commentary. "In some situations, a witness may not be able to convey sufficiently his or her sensory impressions to the fact finder by a mere report of the facts upon which those impressions were based. For example, a witness' testimony that a person appeared to be frightened or nervous would be much more likely to evoke a vivid impression in the fact finder's mind than a lengthy description of that person's outward manifestations. . . . As a matter of practical necessity, this type of nonexpert opinion testimony may be admitted because the facts upon which the witness' opinion is based are so numerous or so complicated as to be incapable of separation, or so evanescent in character [that] they cannot be fully recollected or detailed, or described, or reproduced so as to give the trier the impression they gave the witness . . . ." (Citation omitted; internal quotation marks omitted.) Conn. Code Evid. § 7-1, commentary.

"Because of the wide range of matters on which lay witnesses are permitted to give their opinion, the admissibility of such evidence rests in the sound discretion of the trial court, and the exercise of that discretion,

unless abused, will not constitute reversible error." (Internal quotation marks omitted.) *State* v. *Finan*, 275 Conn. 60, 65–66, 881 A.2d 187 (2005). Under the abuse of discretion standard, "[w]e will make every reasonable presumption in favor of upholding the trial court's ruling . . . ." (Internal quotation marks omitted.) *State* v. *Grant*, 286 Conn. 499, 532, 944 A.2d 947, cert. denied, 555 U.S. 916, 129 S. Ct. 271, 172 L. Ed. 2d 200 (2008).

A

We begin with the state's bite mark claim. The record and Appellate Court opinion reveal the following additional relevant facts and procedural history. At trial, Olson testified that he interviewed Taylor on July 16, 2009, and directed Officer Woodrow Tinsley to take photographs of the injuries to Taylor's hands.[15] The state then asked Olson, "[w]hat was the nature of the injuries?" Olson began to respond to that question by stating that Taylor "had a bite on his wrist," but was interrupted by an objection from defense counsel. "The court, noting that the testimony was Olson's observation of the injury, overruled [that] objection." *State* v. *Holley*, supra, 160 Conn. App. 606. Olson then completed his statement, testifying that Taylor "appeared to have a bite mark on his wrist and some lacerations on his other hand." Following that statement, the state introduced into evidence, without objection, the photographs of Taylor's injuries taken on July 16, 2009.

[15] We note that the recitation of facts in the Appellate Court's opinion may be read to suggest that Olson had taken the photographs personally. See *State* v. *Holley*, supra, 160 Conn. App. 606. Because we believe that whether Olson's testimony provided a sufficient foundation for his lay opinion testimony, namely, whether he had observed Taylor's injuries personally, was not an issue raised before the trial court in connection with the defendant's objection; see, e.g., *State* v. *Jorge P.*, 308 Conn. 740, 753–54, 66 A.3d 869 (2013); Practice Book § 67-4 (3); in contrast to the dissent, the fact that Olson did not take the photographs personally does not affect our analysis of whether his observations were properly admitted as lay opinion testimony.

The Appellate Court concluded that the trial court improperly admitted Olson's testimony under § 7-1 of the Connecticut Code of Evidence because he "was not testifying as an expert witness with any type of training or experience related to the recognition of bite marks. . . . By replying . . . that Taylor appeared to have 'a bite mark on his wrist,' Olson did not merely describe what he had observed in terms of the physical appearance of the skin on Taylor's wrist. Instead, by describing the injury as 'a bite mark,' he unquestionably expressed his opinion that Taylor had been bitten without establishing the necessary expertise or qualifications." *State* v. *Holley*, supra, 160 Conn. App. 621. Ultimately, the Appellate Court concluded that it is not "proper for a lay witness to describe observed injuries in such a manner that suggests the origin of them." Id., 622.

On appeal, the state claims that the Appellate Court improperly determined that Olson's testimony was an improper lay opinion under § 7-1 of the Connecticut Code of Evidence. Relying on the rule's text and commentary, the state contends that, on the basis of the various matters upon which nonexpert opinion testimony has been held admissible, including the physical and mental condition of another person, it is entirely proper for a trial court to admit testimony that a witness had observed what he or she perceived to be a bite mark. The state further claims that Olson's observation was one that he or any other person could derive from their common experiences in life and that no expertise was required.[16]

In response, the defendant claims that the Appellate Court correctly determined that Olson's testimony violated the limitation on lay opinion testimony under § 7-

[16] The state also contends that any error in admitting Olson's testimony was harmless because it was cumulative of the photographs admitted into evidence.

1 of the Connecticut of Code of Evidence. Relying upon *State* v. *Ingram*, 132 Conn. App. 385, 31 A.3d 835 (2011), cert. denied, 303 Conn. 932, 36 A.3d 694 (2012), the defendant contends that Olson's testimony was inadmissible because it was in the nature of expert testimony and (1) no evidence established that Olson was medically qualified to testify about the bite mark, (2) it was the jury's function to determine whether Taylor's injuries were bite marks, and (3) this court will see that the photographic exhibits, when viewed directly, do not depict bite marks. The defendant further claims that the trial court improperly concluded that Olson's testimony was based on his personal observation, because Olson did not describe what he had observed, but rather, expressed his opinion that Taylor had been bitten. Finally, the defendant contends that Olson's testimony was not helpful to the jurors, as the photographic exhibits were fair and accurate representations of Taylor's injuries, from which the jury could have determined the nature and source of the injuries. We, however, agree with the state and conclude that the Appellate Court improperly determined that the trial court had abused its discretion by admitting into evidence Olson's testimony that Taylor's injuries appeared to be bite marks.

In determining whether the trial court abused its discretion in deeming Olson's testimony to be permissible lay opinion; see, e.g., *State* v. *Finan*, supra, 275 Conn. 65–66; we note that the governing rule of evidence requires that the lay opinion testimony (1) must be rationally based on the perception of the witness and (2) helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue. Conn. Code Evid. § 7-1. Indeed, the commentary to the rule cites as illustrative "matters upon which nonexpert opinion testimony has been held admissible include: the market value of property where the witness is the

owner of the property . . . *the appearance of persons or things* . . . sound . . . the speed of an automobile . . . and physical or mental condition." (Citations omitted; emphasis added.) Conn. Code Evid. § 7-1, commentary.

With respect to opinion evidence concerning the appearance of persons or things, we find instructive *State* v. *Grant*, supra, 286 Conn. 499, in which we considered whether a lay person could testify about whether a substance observed by that person appeared to be blood. We determined that "[a] person of ordinary knowledge and experience generally is competent to testify that a substance personally observed by that person appeared to be blood. Although the particular facts and circumstances surrounding the witness' observation of the substance might affect the weight to be given to the testimony, the fact that the substance was not subject to scientific testing to rule out any possibility that it was not blood does not render the testimony inadmissible." Id., 535; see also *Jewett* v. *Jewett*, 265 Conn. 669, 680, 830 A.2d 193 (2003) ("[t]he fact that evidence is susceptible of different explanations or would support various inferences does not affect its admissibility, although it obviously bears upon its weight" [internal quotation marks omitted]). In reaching this conclusion, this court relied on *State* v. *Schaffer*, 168 Conn. 309, 362 A.2d 893 (1975), in which we determined that "[i]t is permissible to admit into evidence the opinions of common observers in regard to common appearances, facts and conditions . . . in a great variety of cases. . . . When the question involved can be answered by the application of ordinary knowledge and experience, expert testimony is not required . . . although [t]o render opinions of common witnesses admissible it is indispensable that the opinions be founded on their own personal observation, and not [on] the testimony of others, or on any hypothetical

statement of facts, as is permitted in the case of experts." (Citations omitted; internal quotation marks omitted.) Id., 318–19; see id., 319 ("[c]onsidering the substance identified, its location, and the normal human experience of the witness . . . the trial court did not abuse its discretion in determining that under the circumstances the [lay] witness was competent to give testimony characterizing as blood the stain she observed on the window of the defendant's car").

We conclude that it was within the trial court's broad discretion to determine that Olson, as a lay witness, was competent to testify regarding the appearance of wounds that he had observed. Indeed, it was well within the trial court's discretion to determine that Olson's testimony that Taylor's wounds appeared to be a bite mark, based on Olson's personal observation and rational perception of Taylor's injuries, was more beneficial to the jury than a more abstract recitation or description of the size, location, and shape of the wound. See Conn. Code Evid. § 7-1, commentary; see also *Turner* v. *State*, Docket No. 1495, 2016 WL 3220541, *6 (Md. Spec. App. June 10, 2016) (police detective had properly offered "his opinion as to what the mark on [the] appellant's hand appeared to be" because he "had [firsthand] knowledge of the mark, having viewed it in person and, as a law enforcement officer, his opinion testimony was helpful to the jury as [the detective] may have encountered more bite marks and wounds than the average juror," and emphasizing that detective's "testimony was not admitted into evidence as expert testimony based on his specialized training or knowledge" and that "[h]e did not testify that the mark was made by the victim, or that there were bite patterns from which it could be concluded that they were inflicted by the victim"); *Mitchell* v. *State*, 270 P.3d 160, 179 (Okla. Crim. App. 2011) (lay fact witness could testify to "his observations and opinions based on those obser-

vations" with respect to description of victim's injuries as "bite marks"); cf. *State* v. *Neal*, 34 Kan. App. 2d 485, 494, 120 P.3d 366 (2005) (The court concluded that a lay witness "was competent to testify that she had an overbite as a result of not wearing a retainer. Furthermore, it was reasonable for her during rebuttal to provide her opinion regarding the comparison of the bite marks in the photographs with her own bite, which she had observed on previous occasions."), review denied, Kansas Supreme Court, Docket No. 04-92522-A (February 14, 2006). Put differently, Olson's testimony regarding the appearance of Taylor's wounds stands in contrast to bite mark evidence that is the proper subject of expert testimony, such as the identification of the origin of a bite mark. See, e.g., *State* v. *Ortiz*, 198 Conn. 220, 227–28, 502 A.2d 400 (1985) (bite mark identification is proper subject of expert testimony).

The Appellate Court's decision in *State* v. *Ingram*, supra, 132 Conn. App. 385, upon which the defendant relies, is not to the contrary. In that case, three witnesses, a police officer with training in dog handling, a police officer with emergency medical training, and a board certified physician's assistant, testified that the defendant had an injury that appeared to be a dog bite. Id., 400–401. The dog handler, in particular, testified that he had commanded his dog to locate and bite the perpetrator of a robbery and that the dog had done so as commanded. Id., 389. The defendant challenged the admission of evidence regarding his injury provided by the three witnesses, claiming that, because they were not qualified as scientific or medical experts in dog bite identification, the trial court improperly admitted their testimony under § 7-2 of the Connecticut Code of Evidence, which governs the admission of expert testimony.[17] Id., 400. The Appellate Court determined that

[17] Section 7-2 of the Connecticut Code of Evidence provides: "A witness qualified as an expert by knowledge, skill, experience, training, education or otherwise may testify in the form of an opinion or otherwise concerning

the trial court did not abuse its discretion in admitting the expert testimony because all three witnesses had relevant training and experience relating to their testimony, and that the court reasonably could have determined that their testimony was not within the common knowledge of the jury and therefore would be helpful to the jury in considering the issues. Id., 402. In our view, *Ingram* is inapposite to the present case because the three witnesses in that case testified as to the source or nature of the bite, and went beyond the scope of Olson's testimony in this case, which was based on his firsthand perception and was not admitted into evidence on the basis of any specialized training or knowledge.

Finally, having accepted the defendant's invitation to view the photographic exhibits ourselves, we believe that the trial court reasonably could have determined that Olson's description of Taylor's injuries as apparent bite marks was within the realm of reason. Accordingly, we conclude that the Appellate Court improperly determined that the trial court had abused its discretion in determining that Olson's testimony was permissible lay opinion evidence.

B

We turn next to the state's claim that the Appellate Court improperly determined that the trial court had abused its discretion by admitting Smola's testimony regarding the object that had been inside of the defendant's backpack on the bus. The record and Appellate Court opinion reveal the following relevant facts and procedural history. The defendant filed a motion in limine seeking to preclude Smola from testifying that the item in the defendant's backpack, as viewed on the

scientific, technical or other specialized knowledge, if the testimony will assist the trier of fact in understanding the evidence or in determining a fact in issue."

bus surveillance video, was a shoe box. The trial court denied the motion and ruled that it would permit Smola to testify "as to what it looks like. This is not [an] expert opinion." Before Smola testified and narrated portions of the bus surveillance video as it played for the jury, the defendant again objected, arguing that the contents of the backpack in the bus surveillance video presented a question of fact for the jury to determine. The trial court overruled the objection, stating that lay opinion evidence is admissible if it is relevant and comes from a competent witness. The trial court then instructed the jury that, "during this testimony there's going to be the introduction of a video. . . . What's in the video is for you to determine. You obviously are the ultimate arbiters of what the facts are in the case, and the testimony is offered as assistance but it's for you to determine. You can reject all, part, or none of the testimony if you wish, but you determine what it is that you see in that." The court then reminded the jury, that "once again, the narration is an aid but it's for you to determine what's actually in that video."

After Smola began testifying, the state asked Smola to narrate the events depicted in the bus surveillance video as it was played for the jury. He testified, over objection, that it was his "belief through investigation [that] it was a sneaker box" visible inside the backpack. The court then instructed the jury: "But once again . . . the narrative that [was] provided, you determine what the facts are in the case." On cross-examination, Smola conceded that he did not know whether the item in the backpack actually was a shoe box, as that item was never recovered.

In its analysis of the defendant's claim that the trial court improperly permitted Smola to testify that the visible contours of an object in the backpack was a shoe box, the Appellate Court emphasized that the state did not present Smola as an expert witness, and Smola

had no firsthand knowledge of the item in the backpack. *State* v. *Holley*, supra, 160 Conn. App. 635. The Appellate Court then stated that it was unaware of any case law "under which a lay witness who lacks firsthand knowledge of matters in evidence may render his or her opinion as to such matters by presenting his interpretation of the evidence to the jury." Id., 635–36. Ultimately, the Appellate Court "conclude[d] that it was improper for the court to have permitted Smola to offer a lay opinion with regard to the contents of the backpack depicted in the bus video." Id., 636–37.

On appeal, the state claims that it was within the trial court's discretion to permit a witness, who was narrating portions of the bus surveillance video as it was played for the jury, to refer to identifiable objects visible on the screen. The state argues that the commentary to § 7-1 of the Connecticut Code of Evidence expressly contemplates that a lay witness may testify to the appearance of persons or things, which extends to the identity or similarity of objects. Finally, the state contends that any error was harmless because the trial court instructed the jury about its responsibility to determine what the surveillance bus video depicted, and that it could reject Smola's testimony accordingly. In response, the defendant contends that the Appellate Court properly determined that the trial court had abused its discretion in admitting the challenged testimony because Smola lacked personal knowledge and, thus, was not competent to testify about these facts. We, however, agree with the state and conclude that any impropriety in the admission of Smola's description of the item inside of the backpack was harmless error.

Although there is some division in the federal and state courts on this point, there is significant authority under rule 701 of the Federal Rules of Evidence to support the proposition that a lay witness narrating a video to a jury may state his or her impressions of what

is depicted in the video, even if he or she did not observe those events firsthand. See, e.g., *United States* v. *Begay*, 42 F.3d 486, 502–503 (9th Cir. 1994), cert. denied sub nom. *McDonald* v. *United States*, 516 U.S. 826, 116 S. Ct. 93, 133 L. Ed. 2d 49 (1995).[18] Nonetheless, we need

[18] Our independent research has revealed numerous cases on point, including *United States* v. *Begay*, supra, 42 F.3d 486, in which the United States Court of Appeals for the Ninth Circuit held that a lay witness could testify about a riot depicted in a video, despite fact that he did not personally witness the riot, because the witness' "perceptions need not be based on the 'live' events . . . because he was not testifying to his eyewitness account of those events" and "concerned only the scenes . . . extracted from . . . the original [video]. Thus, [the witness] need only have perceived the events depicted in [that video]." Id., 502; see also *United States* v. *Torralba-Mendia*, 784 F.3d 652, 659 (9th Cir. 2015) ("an officer who has extensively reviewed a video may offer a narration, pointing out particulars that a casual observer might not see"); *People* v. *Gharrett*, 53 N.E.3d 332, 344 (Ill. App.) (The court concluded that a clerk had properly testified about her perception of an object, namely a bundle of cash and checks, which a surveillance video depicted the defendant taking, despite the fact that she did not personally witness the theft because "[w]hether [her] testimony was rationally based on her perception does not depend on whether [she] had personal knowledge of the actual objects or actions depicted by the video. . . . [A]ll that is relevant is whether [the clerk's] opinion—that the video depicted a particular object—was the kind of opinion that a layperson could normally draw."), appeal denied, 60 N.E.3d 877 (Ill. 2016); *Callaway* v. *State*, Docket No. 2376, 2016 WL 7379300, *12 (Md. Spec. App. December 20, 2016) (police officer properly narrated surveillance video, despite fact that he "did not observe the events depicting on the surveillance video as they were unfolding" because "his familiarity with the areas and streets, gleaned from his experience talking to the victim and canvassing the neighborhood, were a solid foundation for him to narrate the footage in a manner that could be considered, by the [trial] court, to be helpful for the jury"); *People* v. *Fomby*, 300 Mich. App. 46, 50–51, 831 N.W.2d 887 (2013) (police officer properly provided opinions as to identities of individuals on surveillance video because, although he "was not at the scene while the video footage was being recorded and did not observe firsthand the events depicted [in] the video," his personal knowledge was derived from his "scrutiny of the video surveillance footage and the still images he created from the video"); but see *People* v. *Sykes*, 972 N.E.2d 1272, 1281 (Ill. App. 2012) (distinguishing *Begay* on basis of complexity and length of video, concluding that trial court improperly allowed loss prevention officer to narrate because video was "only approximately three minutes in duration" and defendant was "the only person portrayed," and finding that proffered opinion testimony "invaded the province of the jury" because "[t]he only issue the jury needed to determine

not consider whether the Appellate Court properly determined that Smola's narration of the bus surveillance video was not based on his personal observations for purposes of § 7-1 of the Connecticut Code of Evidence, insofar as he did not witness the events on the bus firsthand. See *State* v. *Holley*, supra, 160 Conn. App. 635–36. Even if we assume, without deciding, that the trial court improperly allowed Smola to testify that he perceived the object to be a shoe box, we believe that any error in that regard was harmless and, therefore, does not require reversal.[19]

It is well settled that, "[w]hen an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [an improper ruling] is harmless in a particular case depends upon a number of factors, such as the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength

was whether defendant removed money from the cash register" and officer "was in no better position" to answer that question than jury); *Childers* v. *Commonwealth*, 332 S.W.3d 64, 74 (Ky. 2010) (concluding that police detective improperly testified as to his impressions of statement heard on video because "[w]hile a witness is permitted to testify from recollection about events captured on tape, he may not interpret what is on the tape," and noting that detective's testimony "was not from personal recollection" because "he was sitting in a car at a distance and could not hear firsthand what [was] said"), overruled in part on other grounds by *Allen* v. *Commonwealth*, 395 S.W.3d 451 (Ky. 2013); *State* v. *Buie*, 194 N.C. App. 725, 733, 671 S.E.2d 351 (trial court improperly allowed narration that "was not based on any firsthand knowledge or perception by the officer, but rather solely on the detective's viewing of the surveillance video"), appeal dismissed, 363 N.C. 375, 679 S.E.2d 136 (2009).

[19] We note that, because the Appellate Court addressed the defendant's evidentiary claims in the context of issues likely to arise on remand, it did not consider whether any of the evidentiary rulings constituted harmless error. See *State* v. *Holley*, supra, 160 Conn. App. 614.

of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Bouknight*, 323 Conn. 620, 626–27, 149 A.3d 975 (2016).

Although we acknowledge that Smola's description of the object in the defendant's backpack as a shoe box was probative evidence connecting the defendant to the scene of the crime, we nevertheless have the requisite fair assurance that this testimony did not substantially affect the jury's verdict. First, Taylor was linked to the crime through DNA evidence, the injuries to his hands, and his sale of the murder weapon. The defendant's link to Taylor in the immediate aftermath of the crime was established through the surveillance video from the convenience store, which showed the two men traveling together within mere minutes of the crime, the bus surveillance video, and other evidence, such as Parker's testimony about the conversation between the defendant and Taylor on the bus, which clearly evidenced that the two men were together when Taylor was bitten.

Second, the bus surveillance video was admitted into evidence, and the jury had the opportunity to view it, along with a still image captured from the video depicting the backpack partially open to reveal a grayish white object. See *State* v. *Edwards*, 325 Conn. 97, 134, 156 A.3d 506 (2017) (improper admission of detective's testimony about cell tower coverage, without qualification as expert, was harmless because, even without his "testimony, the jury still could conclude from the cell

phone records themselves that the defendant's cell phone accessed cell towers in Rocky Hill and Wethersfield on the date of the robbery, which coincides with the victim's testimony that she was followed from the grocery store in Rocky Hill and robbed at her home in Wethersfield"); see also *Callaway* v. *State*, Docket No. 2376, 2016 WL 7379300, *13 (Md. Spec. App. December 20, 2016) (any error in admitting testimony of detective who narrated video of event he had not watched was harmless because jurors were "free to view the video for themselves, as the parties reminded them during closing arguments").

Significantly, the trial court instructed the jury that Smola's testimony was "offered as assistance," but that the jury remained "the ultimate arbiters of what the facts are in the case," and it was free to "reject all, part, or none of the testimony if you wish, but you determine what it is that you see in that" video. The trial court reiterated this instruction during the final charge, as well.[20] We presume the jury followed these instructions, particularly because the instructions were given immediately before Smola testified, and "such instructions are far more effective in mitigating the harm of potentially improper evidence when delivered contemporaneously with the admission of that evidence, and addressed specifically thereto." (Internal quotation marks omitted.) *State* v. *Paul B.*, 315 Conn. 19, 32, 105 A.3d 130 (2014).

Finally, Smola was subject to extensive cross-examination, in which he acknowledged that he had never physically obtained or examined the object in the back-

[20] During the final charge, the trial court instructed the jury as follows: "Some testimony and exhibits have been admitted for limited purposes. When I have given a limiting instruction you must follow it. For example . . . Smola supplied a narration concerning alleged events on the bus video. It is for you, the jury, to decide if those events did occur and if so the identity of the individuals in that video."

pack that appeared in the video to be a shoe box. Smola also acknowledged during cross-examination that he could not tell from the video whether the item in the backpack bore any logos, brands, or other distinctive marks like the shoe box that was recovered from the victim's apartment, which was admitted into evidence as Defendant's Exhibit E1. See *State* v. *Edwards*, supra, 325 Conn. 134–35 (improper admission of testimony without qualifying detective as expert in cell tower data was harmless error because, inter alia, "defense counsel rigorously cross-examined [detective] on the accuracy of the cell phone data"). Accordingly, we conclude that any claimed impropriety with respect to the admission of Smola's testimony was harmless error because we have a fair assurance that it did not substantially sway the jury's verdict.

III

In light of our conclusions in parts I and II of this opinion, we must address the defendant's proffered alternative grounds for affirming the judgment of the Appellate Court ordering a new trial, specifically that the trial court improperly (1) admitted Parker's testimony regarding the dog bite conversation between the defendant and Taylor, (2) admitted Minott's testimony that Taylor had asked for a tissue when boarding the bus, (3) admitted Smola's testimony that Taylor told him the backpack came from the victim's apartment in violation of *Crawford* v. *Washington*, supra, 541 U.S. 68, and (4) denied the defendant's motion for a mistrial after Olson testified regarding the nature of Taylor's injuries.[21]

[21] On January 27, 2016, we denied the state's motion to strike the defendant's statement of alternative grounds filed pursuant to Practice Book § 84-11 (a), although we granted the state's motion to strike the defendant's statement of adverse rulings, namely, a challenge to the sufficiency of the evidence. See footnote 4 of this opinion.

A

We can quickly dispose of the defendant's claim that the trial court improperly admitted into evidence Parker's testimony regarding the dog bite conversation between the defendant and Taylor because it was not relevant to a material issue in the case.[22] For the reasons aptly stated by the Appellate Court, we conclude that the trial court did not abuse its discretion in determining that Parker's testimony about the dog bite conversation was relevant evidence because it "demonstrat[ed] the defendant's intimate involvement with Taylor in the criminal events that had taken place moments prior to the conversation." *State* v. *Holley*, supra, 160 Conn. App. 626.

B

The defendant's next claim, that the trial court improperly admitted hearsay evidence by permitting Minott to testify regarding Taylor's request for a tissue, similarly requires little discussion. For the reasons aptly stated by the Appellate Court, we conclude that, because Minott's testimony that Taylor had asked him for a tissue was elicited on cross-examination by the defendant, under *State* v. *Smith*, 212 Conn. 593, 610–11, 563 A.2d 671 (1989), "the defendant cannot successfully challenge the admission of evidence when he was responsible for placing that evidence before the jury." *State* v. *Holley*, supra, 160 Conn. App. 631.

C

The defendant's claim that the trial court improperly admitted Smola's testimony that Taylor had told him that the item in the backpack came from the victim's apartment, however, requires a more comprehensive

[22] We note that the defendant concedes that the trial court properly determined that Parker's testimony was not inadmissible hearsay.

discussion.[23] The defendant argues that the trial court improperly applied the open door doctrine to admit this testimony, which was testimonial hearsay barred by *Crawford* v. *Washington*, supra, 541 U.S. 68. See footnote 5 of this opinion. In response, the state, relying on, inter alia, *State* v. *Brokaw*, 183 Conn. 29, 33, 438 A.2d 815 (1981), argues that, because Smola's testimony was responsive to a question that the defendant asked during cross-examination, the trial court properly exercised its discretion in declining to strike the challenged answer. The state further argues that any *Crawford* violation was harmless error not requiring reversal. We agree with the state and conclude that the trial court did not abuse its discretion in determining that Smola's testimony was responsive to the defendant's question.

The record reveals the following additional relevant facts and procedural history. The defendant's motion in limine seeking to preclude Taylor's hearsay statements included Taylor's statement to Olson that the defendant had a pair of boxed sneakers in his backpack that had been taken from the victim's apartment. The trial court granted the motion, indicating that such testimony would violate the defendant's confrontation rights under *Crawford*. As previously noted, the state subsequently called Taylor as a witness at trial, and he refused to testify.

Thereafter, during Smola's testimony; see part II B of this opinion; the defendant cross-examined him about his perceptions with respect to the shoe box in the video, in comparison to one taken from the victim's apartment. The following colloquy ensued:

"[Defense Counsel]: Detective, isn't it true that you cannot testify with any degree of certainty that that

[23] The Appellate Court did not reach this issue, deeming it unlikely to arise on retrial. See *State* v. *Holley*, supra, 160 Conn. App. 636–37.

thing in the backpack came from [the victim's] apartment?

"The Court: Well, it's two questions, with any degree of certainty or cannot testify.

"[Defense Counsel]: Isn't it true that you cannot testify that [the] item, that thing in the backpack—

"[The Witness]: *Someone told me that* [*it*] *was*—

"[Defense Counsel]: Objection, Your Honor.

"The Court: Well, you asked the question, counsel.

"[The Witness]: *Donele Taylor said that.*

"[Defense Counsel]: Your Honor—

"The Court: Quiet." (Emphasis added.)

At the request of defense counsel, the trial court excused the jury and the witness. After argument on the defendant's objection that Smola's answer was nonresponsive because the defendant had sought a yes or no answer, the trial court agreed with the state that Smola's answer was responsive to the defendant's question, albeit in greater elaboration than the defendant had sought.[24] After the jury returned to the courtroom,

[24] With respect to further colloquy on this point, we note that defense counsel stated that, "[a]t the probable cause [hearing, Smola] testified that he could not indicate [if] that item came from [the victim's] apartment; he testified under oath then.

"The Court: The testimony here is he could. So you can impeach him about it, but the testimony here is that he could. There's nothing I can do about his testimony. You asked if he could testify to any degree of certainty, yes, he could . . . . Taylor told him so. It was responsive.

"[Defense Counsel]: That's not responsive, Your Honor.

"The Court: That is responsive, Counsel. You asked repeatedly if he could testify."

After the state argued that Smola's testimony was indeed responsive, defense counsel argued as follows: "Your Honor, I asked him could you—first, I asked that, and then I changed the question: Can you testify that that thing came from the apartment? That's what I said. That calls [for]—

"The Court: No. Then you asked could you testify with any degree of certainty and . . . he answered . . . . You're stuck with the response, Counsel. You certainly can impeach him with the probable cause testimony,

Smola admitted on cross-examination that he had previously testified that he did not know "as a matter of fact" whether the object in the backpack was a shoe box, and that he had "just indicated to the jury that . . . [he did not] know if it's a shoe box."

It is well settled that, "[s]o long as the answer is clearly responsive to the question asked, the questioner may not later secure a reversal on the basis of any invited error." *State* v. *Brokaw*, supra, 183 Conn. 33. This includes those answers that are "not phrased in language the defendant would have preferred." *State* v. *Smith*, supra, 212 Conn. 611; see also *Eberhard* v. *State*, 539 So. 2d 539, 539 (Fla. App. 1989) ("[a]lthough some of the answers by the witness could have been more directly responsive to the question asked, they were generally made in response to the interrogation by defense counsel"). Thus, "[e]xamining another party's witness entails risk in deciding what to ask and how to craft questions"; *United States* v. *Zitt*, 714 F.3d 511, 513 (7th Cir. 2013); because "where the question posed is ambiguous, the latitude for responsiveness of the answer is necessarily broader." *Bryant* v. *State Farm Fire & Casualty Ins. Co.*, 447 So. 2d 181, 184 (Ala. 1984); see also *People* v. *Vincent*, 34 App. Div. 2d 705, 706, 309 N.Y.S.2d 690 ("the defense must bear the burden of its poorly framed question, since it 'opened the

but apparently you were aware that that would have been his testimony, that he knew from . . . Taylor.

"[Defense Counsel]: Your Honor . . . he didn't even interview Taylor.

"The Court: But he said he knew from . . . Taylor. He didn't say he interviewed him; he said he knew from . . . Taylor.

"[Defense Counsel]: My question called for a yes or no answer, Your Honor. It was nonresponsive . . . .

"The Court: It was very responsive, Counsel, he just elaborated on the yes or no, is the difficulty.

"[Defense Counsel]: So, Your Honor, if I impeach him now, is the witness going to be allowed to talk about . . . Taylor's confession?

"The Court: Counsel, I'm not going to tell you how to conduct your cross-examination."

door' to the witness' reply"), aff'd, 27 N.Y.2d 964, 267 N.E.2d 273, 318 N.Y.S.2d 498 (1970). This is particularly so when counsel has "ample warning he [or she is] in a dangerous area," such as topics covered by prior motions in limine. *State* v. *Lawrence*, 123 Ariz. 301, 304, 599 P.2d 754 (1979). Whether to strike an answer as unresponsive to the question asked is a matter committed to the discretion of the trial court, and we review the trial court's decision for an abuse of that discretion.[25] See *State* v. *Pecciulis*, 84 Conn. 152, 163, 79 A. 75 (1911); see also *United States* v. *Johnson-Dix*, 54 F.3d 1295, 1303 (7th Cir. 1995); *Eberhard* v. *State*, supra, 539; *Hufstetler* v. *State*, 171 Ga. App. 106, 108, 319 S.E.2d 869 (1984); *Maisto* v. *Maisto*, 123 N.J.L. 401, 404, 8 A.2d 810 (Sup. 1939), aff'd, 124 N.J.L. 565, 12 A.2d 890 (1940).

Although defense counsel framed the question to Smola in a somewhat leading manner, insofar as the question conceivably could be answered "yes" or "no," this did not mean that the trial court was required to

[25] We note that the defendant has briefed this claim in the context of the open door doctrine, under which "a party who delves into a particular subject during the examination of a witness cannot object if the opposing party later questions the witness on the same subject. . . . The party who initiates discussion on the issue is said to have opened the door to rebuttal by the opposing party. Even though the rebuttal evidence would ordinarily be inadmissible on other grounds, the court may, in its discretion, allow it [when] the party initiating inquiry has made unfair use of the evidence. . . . [T]his rule operates to prevent a defendant from successfully excluding inadmissible prosecution evidence and then selectively introducing pieces of this evidence for his own advantage, without allowing the prosecution to place the evidence in its proper context." (Internal quotation marks omitted.) *State* v. *Payne*, 303 Conn. 538, 557, 34 A.3d 370 (2012). We disagree with the defendant's reliance on this doctrine, insofar as the record indicates that he did not seek to introduce evidence otherwise barred under *Crawford* for his own limited purposes. Rather, we agree with the framework posited by the state pursuant to *State* v. *Brokaw*, supra, 183 Conn. 33, under which the question is whether the trial court reasonably could have exercised its discretion to determine that Smola's answer was a fair response to the question posed by defense counsel.

strike Smola's explanatory response as not responsive.[26] Courts have held that such answers may well be responsive, particularly when the question is poorly framed or broad, despite its somewhat leading nature. For example, in *People* v. *Vincent*, supra, 34 App. Div. 2d 706, a New York court held that the answer, " '[h]e placed his mouth upon my private parts,' " was responsive to the "broad question" of, " '[a]fter this incident occurred were there any further incidents that night?' " Similarly, in *United States* v. *Johnson-Dix*, supra, 54 F.3d 1295, the Seventh Circuit held that the District Court "clearly did not abuse its discretion in allowing [a federal] agent's answer to stand," because that answer, which had indicated that the defendant " 'was . . . telling half-truths the entire night,' " was responsive to, and "invited by," the following question from defense counsel: " 'In other words, you asked—didn't [the defendant] willingly tell you, affirmatively tell you, [that] he [was] willing to answer your questions?' " Id., 1304; see id. (The court agreed with the District Court's assessment of this question as asking the agent " 'whether [the defendant] was being cooperative. That question permitted that answer. You are trying to sug-

[26] Our research indicates that previous Connecticut case law applying this principle does not provide significant guidance, insofar as it considered witness responses to open-ended, nonleading questions on cross-examination. See *State* v. *Brokaw*, supra, 183 Conn. 32 ("[h]aving invited the witness to explain 'how it was' that he felt the situation was dangerous, the defendant cannot now complain that the response, to the extent it was offered for the truth of the matter asserted, consisted of hearsay"); *State* v. *Pecciulis*, supra, 84 Conn. 163 (rejecting challenge to answer to cross-examination question, " '[w]hat did he say' "); *State* v. *Polanco*, 26 Conn. App. 33, 36, 597 A.2d 830 (concluding that "[o]pen ended question," namely, " 'what flagged your memory yesterday that you could talk about the ones you talked about yesterday that you didn't tell the police on October 5, 1988,' " invited detective's reference to defendant's earlier trial"), cert. denied, 220 Conn. 926, 598 A.2d 367 (1991); cf. *State* v. *Smith*, supra, 212 Conn. 609–11 (witness' description of last court proceeding as " 'trial' " was invited by impeachment questions focusing on her prior testimony at " 'another hearing' " or " 'prior hearing' ").

gest through your question that he was cooperative and truthful, and the agent said [the defendant] was [not] telling the truth. So, there is no basis for a mistrial and you invited that answer.' "); see also *United States* v. *Zitt*, supra, 714 F.3d 512–13 (informant fairly answered question of whether defendant had known that he had "gone to prison in 2005" by responding that " 'I was in prison while [the defendant was] locked up,' " despite prohibition on admitting evidence of defendant's prior convictions); *Sherman* v. *Brown*, 160 A. 867, 868 (R.I. 1932) (trial court did not abuse its discretion in denying motion to strike after witness was asked whether he had " 'been hung up before that same day' " and had responded " '[a]t South Kingston and Richmond' ").[27]

Having reviewed authorities on both sides of this issue, we conclude that the trial court did not abuse its discretion in determining that Smola's answer was responsive to the defendant's question about his ability to testify. First, the question—although somewhat leading in nature—was ambiguous and imprecise, insofar as it questioned Smola's ability to testify about the link between the shoe box and the defendant's backpack. This was a particularly high risk question for the defendant, given his awareness that the *Crawford* material had been the subject of the motion in limine, with the possibility that any questioning that might hint at the source of his purported knowledge could trigger the disclosure of that material. Accordingly, we conclude

[27] But see *Fulton* v. *State*, 278 Ga. 58, 61–62 and n.2, 597 S.E.2d 396 (2004) (answer indicating that witness had previously "called police to report appellant had pointed a gun at her" was unresponsive to question asking whether police knew who they were looking for when they came to witness' house weeks later); *Maisto* v. *Maisto*, supra, 123 N.J.L. 404 (trial court did not abuse its discretion in sustaining objection to partial answer beginning with the words " '[i]t was because the place,' " as that answer was "undeniably irresponsive" to question asking whether witness recalled his son "being on a truck" with plaintiff in connection with work for family baking business).

that the trial court did not abuse its discretion in declining to sustain the defendant's objection to Smola's testimony.[28]

D

Finally, we address the defendant's claim that the trial court improperly denied his motion for a mistrial in response to Olson's testimony that Taylor had stated that the injury on his hand was a bite. The defendant contends that the trial court had abused its discretion in declining to declare a mistrial because the jury was present for arguments on his motion and because the court's curative instruction was delivered late and "did more harm than good" by "stress[ing] the significance" of Olson's improper testimony. The defendant further contends that Olson's testimony, when coupled with Parker's testimony about the conversation between Taylor and the defendant on the bus, was itself "sufficient to support a conviction, at a minimum, on the three conspiracy charges with which the defendant had been charged." Finally, the defendant contends that the jury reasonably could infer that Taylor did not testify because he was guilty, and that this evidence was critical to tying the defendant to Taylor. In response, the state contends that the trial court properly denied the defendant's motion for a mistrial because the trial court struck the improper testimony and instructed the jury to disregard it. The state also argues that a mistrial is unwarranted because Olson's improper testimony was a "minor coda to the extensive independent proof connecting Taylor to the crime scene," including DNA evidence, the sale of the murder weapon, and the surveillance videos showing him fleeing the scene. We agree with the state and conclude that the trial court did not abuse its discretion in denying the defendant's motion for a mistrial.

[28] In light of this conclusion, we need not address the state's contention that any error in declining to strike Smola's testimony was harmless.

"[T]he principles that govern our review of a trial court's ruling on a motion for a mistrial are well established. Appellate review of a trial court's decision granting or denying a motion for a [mistrial] must take into account the trial judge's superior opportunity to assess the proceedings over which he or she has personally presided. . . . Thus, [a] motion for a [mistrial] is addressed to the sound discretion of the trial court and is not to be granted except on substantial grounds. . . . In our review of the denial of a motion for [a] mistrial, we have recognized the broad discretion that is vested in the trial court to decide whether an occurrence at trial has so prejudiced a party that he or she can no longer receive a fair trial. The decision of the trial court is therefore reversible on appeal only if there has been an abuse of discretion. . . .

"In reviewing a claim of abuse of discretion, we have stated that [d]iscretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to subserve and not to impede or defeat the ends of substantial justice. . . . In general, abuse of discretion exists when a court could have chosen different alternatives but has decided the matter so arbitrarily as to vitiate logic, or has decided it based on improper or irrelevant factors. . . . Therefore, [i]n those cases in which an abuse of discretion is manifest or where injustice appears to have been done, reversal is required." (Citation omitted; internal quotation marks omitted.) *State* v. *Nash*, 278 Conn. 620, 657–58, 899 A.2d 1 (2006); see *State* v. *Berrios*, 320 Conn. 265, 274, 129 A.3d 696 (2016). In determining whether a mistrial was required because of a potentially prejudicial event during the trial, such as testimony stricken as improper, we also consider "whether the trial court's curative instructions remedied any prejudice that might have occurred." (Internal quotation marks omitted.) *State* v. *Cook*, 262 Conn. 825, 842, 817 A.2d 670 (2003).

We conclude that the trial court did not abuse its discretion in determining that Olson's stricken testimony was not so prejudicial as to deprive the defendant of a fair trial. First, as requested by the defendant, the trial court gave a detailed instruction to the jury, directing it not to consider that testimony and reminding it that determining the nature of the injury was the province of the jury. The trial court reiterated this instruction in its final charge to the jury. See footnote 7 of this opinion. "As we previously have stated, [i]n the absence of an indication to the contrary, the jury is presumed to have followed [the trial court's] curative instructions. . . . [T]he burden is on the defendant to establish that, in the context of the proceedings as a whole, the stricken testimony was so prejudicial, notwithstanding the court's curative instructions, that the jury reasonably cannot be presumed to have disregarded it." (Internal quotation marks omitted.) *State* v. *Cook*, supra, 262 Conn. 844.

Second, given the presumed curative effect of these instructions, we disagree with the defendant's assessment that the trial court's refusal to excuse the jury, which caused him to make a motion for a mistrial in its presence, "thereby highlight[ed] the significance of the testimony that the jurors had just heard." Cf. *State* v. *Edge*, 47 Conn. App. 743, 749, 707 A.2d 1271 (trial court properly denied motion for mistrial when trial court ruled on motion for judgment of acquittal in presence of jury because "the trial court's extensive cautionary instructions to the jury made it clear that the court's ruling on the motion did not constitute an opinion regarding the credibility of the state's witnesses or the defendant's guilt"), cert. denied, 244 Conn. 919, 714 A.2d 7 (1998). We also disagree with the defendant's view that the specificity of the instruction "did more harm than good" and created the "indelible impression . . . that the testimony must be credible" by explaining that

it was stricken because Taylor did not testify. The instruction specifically noted that the testimony was stricken because Taylor was not present for cross-examination, and did not endorse its credibility in even a glancing manner.

Finally, the statement that Taylor had previously indicated that his injury was a bite—even if considered more definitive evidence than the jury's interpretation of the photographic exhibits—was not overly prejudicial when considered in the light of other evidence linking Taylor to the crime scene, namely, DNA evidence from the baseball hat he dropped at the scene, the surveillance videos showing his flight, and the fact that he sold the murder weapon shortly after the murder. "Although the remedy of a mistrial is permitted under the rules of practice, it is not favored. [A] mistrial should be granted only as a result of some occurrence upon the trial of such a character that it is apparent to the court that because of it a party cannot have a fair trial . . . and the whole proceedings are vitiated. . . . If curative action can obviate the prejudice, the drastic remedy of a mistrial should be avoided." (Internal quotation marks omitted.) *State* v. *Guilbert*, 306 Conn. 218, 270, 49 A.3d 705 (2012). Accordingly, we conclude that the trial court did not abuse its discretion in declining to order the drastic remedy of a mistrial.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to affirm the judgment of the trial court.

In this opinion ROGERS, C. J., and EVELEIGH and ESPINOSA, Js., concurred.

D'AURIA, J., with whom PALMER and McDONALD, Js., join, dissenting. I agree with the Appellate Court's conclusion that the trial court improperly admitted certain testimony as lay opinions over the objections of

the defendant, Kenny Holley. *State* v. *Holley*, 160 Conn. App. 578, 619–22, 631–37, 127 A.3d 221 (2015). Specifically, I agree that the trial court improperly admitted Sergeant Donald Olson's testimony that the wounds on the wrist of Donele Taylor, the defendant's alleged accomplice, were the result of a bite. I also agree with the Appellate Court that the trial court improperly allowed Detective Jason Smola to give his opinion that an object depicted in the surveillance video from the bus was a "sneaker box," even though Smola had not personally observed either the object or the events the video depicted. Because I conclude that the admission of this testimony was both improper and harmful, I would affirm the Appellate Court's judgment reversing the defendant's conviction and remanding the case to the trial court for a new trial. I therefore respectfully dissent from the majority's decision to the contrary.

I

I begin with Olson's testimony that Taylor had a bite on his wrist. Olson had interviewed Taylor in the weeks after the murder. During the interview, Taylor told Olson that the victim had bitten him while they struggled inside the victim's apartment, shortly before the victim was shot. At trial, the state asked Olson about the nature of wounds that Taylor had on him at the time of the interview, and Olson responded that Taylor had a "bite on his wrist . . . ." The trial court allowed the testimony on the ground that it was based on what Olson "observed."

The testimony concerning the cause of the marks on Taylor's wrist was critical evidence for the state. The state had strong evidence linking Taylor to the victim's murder, but lacked similarly strong evidence against the defendant. To implicate the defendant in the victim's murder, the state relied on testimony about a conversation between Taylor and someone else, apparently the

defendant, while they rode on a bus just after the crime occurred. A fellow passenger on the bus testified that she overheard Taylor telling his companion, "I can't believe I got bit by the dog—by a dog," to which the companion, allegedly the defendant, responded, "that was a big dog; it was a big dog." The state suggested in its closing argument that the victim was the "big dog" that had bitten Taylor during a struggle and that the defendant's reply indicated he was aware of the size of the "big dog" that had inflicted the bite and he had witnessed the bite occur, helping to place him inside the apartment when Taylor and victim struggled. Olson's testimony helped to establish that the wounds on Taylor's wrists were, in fact, caused by a bite and, thus, bolstered the credibility and accuracy of the passenger's testimony about the statements she heard on the bus.

The Appellate Court concluded, however, that Olson's testimony was not a proper lay opinion because a lay witness generally may not testify about the cause of a wound. See *State* v. *Holley*, supra, 160 Conn. App. 621–22. Regardless of whether I would agree with this general proposition, I am persuaded that Olson's testimony should not have been admitted as a lay opinion. No foundation was laid to show that his testimony was based on his personal observations rather than on inadmissible hearsay from Taylor, and his testimony was not helpful to the jury.

A

Taylor told Olson that his wounds were the result of a bite. But Olson could not testify as to what Taylor had told him because admitting Taylor's hearsay statements into evidence would have violated the defendant's constitutional right to confront his accusers. The confrontation clause of the Sixth Amendment to the United States constitution guarantees that "[i]n all criminal prosecu-

tions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .'' U.S. Const., amend VI. This ''bedrock'' guarantee requires that the defendant have the opportunity to cross-examine any witness who gives testimony against him, and this applies to certain out-of-court statements that the state might seek to introduce into evidence. *Crawford* v. *Washington*, 541 U.S. 36, 42, 50–52, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The confrontation clause bars the state from admitting into evidence, as proof of guilt, any out-of-court statement that is ''testimonial'' in nature unless the defendant has had the opportunity to cross-examine the speaker. Id., 55–56, 68. ''[T]estimonial'' statements include confessions given to police officers and statements made in response to police interrogation. Id., 51–52, 68; accord *State* v. *Pierre*, 277 Conn. 42, 77–78, 890 A.2d 474, cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006).

Taylor's statements to Olson concerning his wound being a bite mark were unquestionably testimonial in nature, as he made the statements when he confessed to Olson of having participated in the victim's murder, and, thus, were barred from admission unless they comported with *Crawford*. The state intended to use them as evidence of the defendant's guilt, but Taylor was unavailable for cross-examination. When called to the stand outside the presence of the jury, Taylor refused to answer any questions and was held in contempt. The defendant, thus, could not cross-examine him concerning his statements, and, consequently, they could not be admitted into evidence against the defendant. See *Crawford* v. *Washington*, supra, 541 U.S. 68. It follows that Olson could not testify as to what Taylor had told him about his wounds.

B

To avoid this confrontation clause problem, the state argues that the trial court properly admitted Olson's

testimony as a lay opinion based on his *observations* of Taylor's injuries, not on what Taylor had *told* him. I am not persuaded.

At the time the evidence was admitted, no foundation whatsoever had been laid to establish that Olson's testimony was an opinion formed on the basis of his personal observations, rather than a parroting of what Taylor had told him. Indeed, all of the information put before the trial court up to the point it admitted Olson's testimony established only that Olson had learned that Taylor's wounds were caused by a bite because Taylor had *told* him so.

Before trial, the defendant filed a motion in limine to exclude any of Taylor's statements to police from being admitted into evidence. As recounted by defense counsel during argument on the motion, Taylor gave two separate confessions to police. In the first, Taylor implicated himself as the shooter and said that someone else had been inside the apartment, but he did not know who that person was or what they were doing there. In the second, Taylor said that he had been in the apartment when the victim was murdered, but that the defendant had shot the victim. While giving these confessions to Olson, Taylor indicated that he still had bite marks and scratches from the struggle with the victim, and he said that the victim had bit him on his wrist. During argument on the motion, the state explained that it did not intend to offer into evidence Taylor's statement implicating the defendant, but would offer his statement that he had a bite on his wrist and that it came from the victim. The state argued that Taylor's statement was admissible because, although hearsay, it was against the speaker's penal interest, rendering it admissible. See *State* v. *Smith*, 289 Conn. 598, 630–31, 960 A.2d 993 (2008). The defendant responded that the state's position was mistaken under *Crawford*, requiring the exclusion of Taylor's statement because of his unavail-

ability for cross-examination. The court took the motion under advisement, explaining that it wanted to further consider whether the statement was against Taylor's penal interest. The defendant reiterated that, even if it was otherwise admissible as a statement against penal interest, Taylor's statement would be barred by *Crawford*.

The admissibility of Taylor's statement, which had significant inconsistencies, came up again early in the trial. During the first day of trial, the state called as a witness Officer Woodrow Tinsley, who had photographed Taylor's injuries. When the state asked Tinsley whether he had been asked to take photographs of Taylor, the defendant's counsel objected and asked to be heard outside the presence of the jury. The defendant apparently was concerned that the state would attempt to elicit Taylor's statements about having a bite mark from the victim, but the state responded that it intended to ask Tinsley only whether he had photographed Taylor's injuries, not about their nature or how he received them. The state further offered, however, that it intended to have Olson testify "that in talking to . . . Taylor . . . Taylor at some point indicated that [he had] injuries on his hands [that] came from being bit by [the victim] during the course of the altercation that resulted in [the victim's] death." The defendant renewed his arguments that any such testimony would be barred under *Crawford*. After further argument, the state represented that the court had already ruled Taylor's statements admissible, stating: "I thought Your Honor had agreed with me that the statements about the bite marks were nontestimonial in nature . . . ." Even though the record contains no indication that the trial court had previously ruled on the matter but indeed indicates it had reserved ruling, the court agreed with the state, responding: "I had; I remember that. Everything else was barred; that was allowed in." Defense counsel pro-

tested, stating that "I did not believe that you had ruled on that specific part," and the court replied, "Well, if it wasn't clear, I'm ruling now: it's allowed in." The defendant continued to argue the effect of *Crawford* and asked permission to further brief the issue, but the trial court denied the request.

Two days later, on the third day of trial, the trial court changed its mind about admitting Taylor's statement concerning the bite mark. The court explained: "Now, I did some research on my own on the statements and right now, based on what the evidence is, because the defense hasn't challenged anything concerning that statement, I'm going to disallow the statement concerning the bite. I understand that it is a statement against penal interest; the entire confession was a statement against penal interest. But if there's even a hint anywhere that that bite was anything other than where it came from, that statement does come in, and that includes during closing argument as well. I will reopen this case if there's a hint during closing argument that the bite was anything other than what it is. So, remember, I'll stop the trial and allow it in at that point."[1] The state responded: "I will intend to have—based on Your Honor's ruling, I will still intend to have [Olson] come back today and testify that he interviewed [Taylor] and during the course of that interview they took the photo-

[1] The defendant challenged this ruling on appeal to the Appellate Court, which concluded that this conditional *Crawford* ruling violated the defendant's right to present a defense. *State* v. *Holley*, supra, 160 Conn. App. 611–14. The majority does not directly address the propriety of the trial court's conditional ruling, but, rather, concludes that the defendant cannot establish a violation to his constitutional right to present a defense because he did not demonstrate what admissible evidence or argument, if any, that the court's conditional ruling prevented him from offering. My conclusion that the trial court improperly admitted certain evidence as lay testimony renders it unnecessary for me to reach that issue, although I note my concern that, irrespective of whether the trial court's ruling violated the defendant's right to present a defense, such a conditional ruling does not appear to have been proper under *Crawford*.

graphs . . . .” The court responded: “That’s fine. But that doesn’t indicate any statement.”

When Olson testified, however, the state asked him whether Taylor had any injuries on him and the nature of those injuries. The following colloquy took place:

“[The Prosecutor]: Continuing on with the investigation into the . . . homicide, did you have occasion to meet with [Taylor] on July 16, [2009]?

“[Olson]: Yes.

“[The Prosecutor]: And did you speak to [Taylor], yes or no?

“[Olson]: Yes.

“[The Prosecutor]: And, as a result of your conversations with [Taylor] and what you knew to date in the investigation, did you ask [Tinsley] to take any photographs of injuries to [Taylor]?

“[Olson]: Yes.

“[The Prosecutor]: What was the nature of the injuries?

“[Olson]: He had a bite on his wrist and—”

“[Defense Counsel]: Objection, Your Honor.

“[The Court]: I’m going to allow the testimony. That’s what he observed. Thank you. You can cross-examine him about that.”

The state argues that, contrary to the Appellate Court’s conclusion, the trial court properly admitted Olson’s testimony as a lay opinion about what had caused Taylor’s injuries based on his observations of Taylor’s wounds. I disagree.

Without any foundation that Olson’s testimony was an opinion based on his own perceptions, rather than

on the inadmissible information he learned from Taylor, it could not properly be admitted as a lay opinion. Lay witnesses generally must testify only to facts within their personal knowledge, not their opinions, and the jury may draw its own conclusions from those facts. See *Jacobs* v. *General Electric Co.*, 275 Conn. 395, 406, 880 A.2d 151 (2005). Nevertheless, opinions from lay witnesses sometimes may better convey an idea to the jury, rather than having the witness recount each individual perception leading to that opinion, for example, an opinion that a person was intoxicated. See, e.g., *State* v. *McNally*, 39 Conn. App. 419, 424, 665 A.2d 137, cert. denied, 235 Conn. 931, 667 A.2d 1269 (1995). A party seeking to admit a lay opinion must first establish that it is based on the witness' own perceptions before it may properly be admitted. See Conn. Code Evid. § 7-1 (lay witness may not testify to opinion "unless the opinion is rationally based on the perception of the witness"); see also *Jacobs* v. *General Electric Co.*, supra, 406–407 (lay witness opinions must be based on personal knowledge of witness). Hearsay does not constitute a proper foundation for a lay opinion. See, e.g., *United States* v. *Lloyd*, 807 F.3d 1128, 1154 (9th Cir. 2015) ("a lay opinion witness may not testify based on speculation [or] rely on hearsay" [internal quotation marks omitted]); *United States* v. *Gadson*, 763 F.3d 1189, 1208 (9th Cir. 2014) (lay opinion that relies on hearsay is inadmissible because it is not based on witness' own perceptions), cert. denied, U.S. , 135 S. Ct. 2350, 192 L. Ed. 2d 149 (2015); *United States* v. *Garcia*, 413 F.3d 201, 213 (2d Cir. 2005) (lay opinion must be based on personal perceptions and cannot be based on information learned from others).[2]

[2] Because the federal rule of evidence governing opinion testimony by a lay witness is sufficiently similar to § 7-1 of the Connecticut Code of Evidence, federal case law may assist our analysis. *Jacobs* v. *General Electric Co.*, supra, 275 Conn. 407.

No proper foundation was laid in the present case. Up to the point when Olson testified that Taylor's wounds were from a bite, Olson had said exactly nothing about forming an opinion of the cause of Taylor's wounds on the basis of his own observations. The only basis given in the record for his testimony was that Taylor had *told* Olson that the victim had bit him. In fact, the questions leading up to Olson's testimony about the bite were directed at Olson's *conversation* with Taylor, not his observations. The state had asked Olson "did you *speak* to [Taylor]" and whether, as a result of his "*conversations*" with Taylor, he had asked another officer to photograph Taylor's injuries.[3] (Emphasis added.) Consequently, at the time the trial court admitted the testimony, it had no basis for concluding that Olson's testimony was based on his observations rather than what Taylor had told him. Its decision to admit this lay opinion evidence was without an adequate foundation.

After the evidence was admitted—and after the trial court's unfounded conclusion that the testimony was based on the witness' observations—Olson clarified that Taylor "*appeared* to have a bite mark on his wrist . . . ." (Emphasis added.) In my view, this was too little and too late to cure the trial court's error. This comment was too late to serve as a foundation for Olson's testimony because it came after the trial court had ruled the testimony admissible and, therefore, it could not possibly have served as a valid basis for the court's exercise of its discretion in admitting the testimony. Even if this after the fact remark could have somehow cured the trial court's error, it was too little because it did not establish whether Olson had reached an independent opinion based solely on the appearance of the

[3] Because Olson had not taken the photographs, the trial court could not infer from the existence of the photographs alone that Olson might have observed the marks closely enough when photographing them to form an opinion about their cause.

wound, or whether his observations were simply consistent with what he had already heard from Taylor. In fact, shortly after this testimony, Olson specifically acknowledged that he had learned that the wound was a bite from talking to Taylor, as evidenced by the following exchange:

"[The Prosecutor]: After talking to [Taylor], yes or no, did you learn what that injury was on his wrist?

"[Olson]: Yes.

"[The Prosecutor]: And what was it?

"[Olson]: A bite."

The defendant's counsel then objected, and the trial court sustained the objection, but the import of the testimony is clear—Olson learned that Taylor's wounds were caused by a bite on the basis of what Taylor had told him.[4] With nothing in the record to establish that Olson had reached an opinion independently based on his own perceptions—an opinion derived from admissible evidence—I conclude that the state failed to lay a proper foundation for the admission of this testimony.

I acknowledge that the trial court has broad discretion when ruling on evidentiary matters, but, in the

[4] As a result of this exchange, the defendant's counsel immediately moved for a mistrial, arguing that the state had violated the trial court's *Crawford* ruling, and counsel asked to heard outside of the jury's presence. The trial court denied the motion and the request. Like the Appellate Court, I do not reach the defendant's alternative claim on appeal that the trial court should have granted the motion for a mistrial. Nevertheless, it is impossible to overlook that excluding the evidence barred by *Crawford* (i.e., Taylor's hearsay statements) was fundamental to a fair trial. As evidenced by the Appellate Court's decision, and the majority's decision not to address its merits head on, the trial court's conditional *Crawford* ruling was highly questionable—another issue I do not reach. See footnote 1 of this opinion. Whatever the merits of the trial court's conditional *Crawford* ruling, however, the state almost immediately violated it, eliciting testimony the trial court had expressly barred. Under those circumstances, granting the motion for a mistrial would have been defensible.

present case, that discretion was constrained by the confrontation clause and the limitations on admitting a lay opinion. Ordinarily, the trial court might be permitted to infer from the circumstances that a witness' testimony was likely based on that witness' own perceptions, but, due to the constitutional implications of the evidence at issue in the present case, the trial court had a responsibility to act with greater care when considering whether to admit this evidence. The trial court's ruling to exclude evidence barred from admission pursuant to the federal constitution was critical to ensuring that the defendant received a fair trial. The court knew from the state's representations that Olson likely derived his knowledge of the bite from what Taylor had told him. It was the responsibility of the trial court to ensure that Olson's supposed opinion was not based on this hearsay, which was constitutionally inadmissible pursuant to *Crawford*. The state failed to lay a proper foundation for Olson's testimony, and the trial court did not insist that it do so. On this record, I am persuaded that the admission of Olson's testimony was not a proper exercise of the court's discretion.

C

Besides the lack of a proper foundation, the trial court's admission of Olson's testimony runs afoul of another requirement for admitting lay opinion testimony. A lay opinion must not only be based on the witness's perceptions, but also must be "helpful to a clear understanding of the testimony of the witness or the determination of a fact in issue." Conn. Code Evid. § 7-1. Olson's supposed opinion on the origin of Taylor's wound was unhelpful and unnecessary because the police had taken photographs depicting how the wounds looked when Olson interviewed Taylor. Olson testified that those photographs were a fair and accurate representation of the marks on Taylor as he saw them. The helpfulness of a lay opinion describing a

wound is diminished, if not extinguished, when the jury has a photograph that fairly and accurately depicts the wound as the witness saw it. Of course, photographs sometimes fail to capture precisely how something appeared and some additional description or an opinion may be called for to facilitate a complete understanding of what the witness saw. The state, however, laid no foundation to suggest that the photograph had not fully captured the appearance of the wound, such that Olson's opinion testimony would be of help. Indeed, the state acknowledged in its brief to this court that "Olson's testimony was cumulative of the photographs in evidence." The state was free to use the picture of Taylor's wound alone to argue that the jury should conclude that it was caused by a bite, but, given the confrontation clause problems associated with Olson's opinion testimony and the lack of any demonstrated need to present that opinion as evidence when the photograph was available, I agree with the Appellate Court that the trial court exceeded the bounds of its discretion when admitting Olson's testimony.

II

I also agree with the Appellate Court that the trial court improperly allowed Smola to testify as to his belief that the defendant was carrying a shoebox in a backpack shortly after the crime occurred. According to the information put before the trial court, the state had a video recording from a bus depicting Taylor and another person, apparently the defendant, getting onto the bus near the location of the murder shortly after it occurred. The defendant is seen carrying a backpack, which he opened to retrieve money to pay the bus fare. Through the small opening in the backpack, there appears to be an object of some sort inside. At an earlier probable cause hearing, Smola testified that he had no personal knowledge of what was in the backpack—he had not personally witnessed the events depicted in the

video, and the backpack and the object inside were not recovered by police. Instead, the state proffered that Smola had a belief about what was in the backpack based on what he saw in the video. In addition, the state proffered that Taylor had told officers during his confessions that he had looked in the defendant's backpack while on the bus and saw a shoebox inside.

The defendant moved to preclude Smola from identifying the object in the backpack because he lacked personal knowledge of what it was, but the trial court allowed him to testify as to his opinion about what the object looked like. While the video was playing before the jury at trial, the prosecutor noted that there appeared to be a backpack depicted in the video and asked Smola, "[w]ere you able to determine *through your investigation* what you believe is contained within that backpack?" (Emphasis added.) After the trial court overruled the defendant's objection, Smola answered: "It's my belief *through investigation* it was a sneaker box." (Emphasis added.) The testimony was significant for the state because the victim was known to sell shoes, and the defendant's possession of a shoebox shortly after the crime could implicate him in the robbery and murder.

In my view, however, Smola's testimony was not properly admitted as a lay opinion. The majority does not directly address the propriety of admitting his testimony, but, before concluding that any error was harmless, cites to mixed authority about whether witnesses generally may narrate events depicted in a video that the witness did not personally observe. Compare *United States* v. *Begay*, 42 F.3d 486, 502–503 (9th Cir. 1994) with *People* v. *Sykes*, 972 N.E.2d 1272, 1278 (Ill. App. 2012). Perhaps, in some circumstances, our rules of evidence should permit a lay witness to narrate or opine about what they see depicted in a video, even without personal knowledge of what is depicted. As the majority

points out, courts are divided on whether such narration is appropriate. But that is not what Smola was asked to do in the present case. The state's question instead asked Smola whether he had determined *through his investigation*, what he believed was in the backpack. The question was not limited to asking what Smola had seen in the video, but explicitly asked him to draw more broadly upon other knowledge from his investigation when answering. This would, presumably, include the information he had learned from Taylor's statements to police—hearsay evidence that was inadmissible under *Crawford*. See part I A of this dissenting opinion. By the time the state posed the question, it had previously alerted the trial court to the inadmissible hearsay evidence that Taylor told police that the defendant had a shoebox in his backpack. As a result, the court should have acted with greater care to ensure that Smola's testimony was founded solely on his own impressions and did not improperly rely on hearsay evidence barred from admission by the confrontation clause. The state's question, however, explicitly invited Smola to rely on this inadmissible hearsay evidence. Moreover, because the jurors could view the video for themselves and draw their own conclusions about what it depicted, Smola's opinion about what the backpack contained would be unhelpful and unnecessary to the members of the jury. The state certainly could point to the video during its closing argument and claim to the jury that the object shown in the backpack could be a shoebox, but I am persuaded that Smola's testimony, impermissibly bolstering the state's theory in response to the state's question, should have been excluded.

III

Although the Appellate Court concluded that Olson's and Smola's challenged testimony could not properly be admitted as lay opinions, it did not conduct a harmful error analysis because it had separately concluded that

the defendant was entitled to a new trial based on a violation of his right to present a defense. *State* v. *Holley*, supra, 160 Conn. App. 619 n.15. Even though constitutional concerns are present, upon conducting my own analysis under the standard of review for a nonconstitutional error, I "do not have the requisite fair assurance that the error did not substantially affect the verdict," leading me to conclude that the defendant has established that a new trial is warranted. (Internal quotation marks omitted.) *State* v. *Favoccia*, 306 Conn. 770, 809, 51 A.3d 1002 (2012). In my view, the improperly admitted evidence helped to significantly strengthen the state's evidence tying the defendant to the murder, which was otherwise rather thin.

The state had strong evidence implicating Taylor in the victim's murder, including DNA evidence placing him inside the victim's apartment and Taylor's confessions, but the state's case against the defendant was not nearly as strong. With Taylor's statements inadmissible against the defendant, the state's case turned on its ability to present other evidence to show that the defendant had actually participated in the robbery and/or the murder. The state had no forensic evidence to accomplish this—investigators did not find either the defendant's fingerprints or DNA in the apartment. Other than Taylor's inadmissible statements, the state had no eyewitness testimony to directly implicate the defendant. Unlike Taylor, the defendant did not give any self-incriminating statements to police.

Without the challenged testimony from Olson and Smola, the state's evidence linking the defendant to the murder was limited. The state had video recordings that put Taylor together with the defendant as they ran to a bus stop and boarded a bus near the crime scene around the time the crime occurred. Those recordings, however, did not show whether the defendant had been inside the apartment with Taylor when the victim was

murdered, leaving open the possibility that he had met up with Taylor after Taylor had left the apartment, or that the defendant had waited outside the apartment while Taylor went in, without any knowledge of what Taylor might have been doing inside.

The only other evidence that arguably could have placed the defendant inside the apartment was the testimony from another passenger on the bus, who had overheard the defendant make the "big dog" comment. The passenger testified, however, that she did not see any injuries or blood on the person who said he had been bitten. The state also called the bus driver to testify that, after boarding the bus, Taylor had asked for a tissue, presumably for his wounds, but the driver testified that he did not see anything about Taylor that would have required use of a tissue.

To connect the defendant to the murder with this evidence, the jury was required to draw a chain of inferences. The jury would first have to conclude that the defendant was the person with Taylor and then infer from their comments on the bus that Taylor had recently been bitten, that the "big dog" that bit Taylor was actually the victim, and that the defendant's knowledge of the victim's size suggested that the defendant had seen the victim and knew that he had bitten Taylor. From these inferences, the jury would have to be satisfied, beyond a reasonable doubt, that the defendant had participated in the crime. Without the challenged testimony from Olson and Smola, any conviction would thus turn solely on the credibility and accuracy of the testimony from the passenger and the bus driver.

Olson's and Smola's challenged testimony thus significantly filled in holes in the state's case. Olson's testimony that Taylor, in fact, had a bite wound on his wrist in the days after the murder corroborated the passenger's testimony and helped mitigate the impact

of the evidence that neither the passenger nor the bus driver had noticed any wounds on Taylor while he was on the bus. In addition, Smola's testimony that the defendant had a shoebox with him on the bus just after the crime provided an alternative basis for inferring that the defendant had been inside the victim's apartment and had participated in the crime by suggesting that he may have taken the shoebox from the victim's apartment, implicating him in the robbery and murder. I am not sufficiently confident that the jury would have found the defendant guilty of the crimes charged without this additional evidence. I thus cannot conclude that the trial court's evidentiary errors were harmless.

The state nevertheless asserts that the admission of Olson's and Smola's challenged testimony, even if improper, was harmless. I disagree.

The state first asserts that Olson's testimony about Taylor having been bitten on his wrist was harmless because the jury could have viewed the photographs and likely would have concluded for itself that the marks were from a bite, even in the absence of Olson's testimony. I have viewed those same photographs, and, like the Appellate Court, I am not persuaded. The marks on Taylor's wrist, as depicted in the photographs, appear to be a series of small, parallel scratches, rather than a small arc of impressions that one might normally associate with a bite wound.

Moreover, the lack of clarity about what the photographs depict is demonstrated by the state's arguments to this court, which express some confusion about which of Taylor's marks were the result of a bite. Olson testified that the marks from what he believed to be a bite were on Taylor's wrist and that Taylor also had other lacerations on his hand. But, in its brief and at oral argument, the state directed this court's attention to the photographs and argued that the bite might have

been on Taylor's hand, not his wrist, and that Olson was possibly mistaken in his testimony about where Taylor had been bitten. The state's lack of certainty, a product of the lack of foundation for Olson's testimony to begin with, demonstrates just how unclear it is from the photographs that the marks on Taylor's wrist (or hand) were caused by a bite. As a result, I disagree that Olson's confirmatory testimony concerning the nature of the marks was inconsequential.

That the marks on Taylor's wrist do not obviously resemble bite marks, along with the state's supposition that Olson might have testified incorrectly about where the bite marks were located, also undercuts, in my view, a conclusion that Olson was testifying from his own observation when he identified the marks on Taylor's wrist as being caused by a bite. The state did not seek to qualify Olson as an expert in recognizing whether marks on a person's skin were caused by a bite. Because it is not at all clear what the marks depicted in the photograph are, or what caused them, admitting Olson's testimony created a danger that the jury might infer that he knew they were bite marks from some source other than his observation, such as from Taylor. This would have been a fair inference for the jury given that Olson soon after stated exactly that in response to a question that plainly violated the trial court's ruling excluding Taylor's statements from evidence, which forced the trial court to strike the testimony.

As for Smola's testimony identifying the shoebox, the state asserts that the trial court's instructions to the jury mitigated any harm it might have caused. The state notes that the trial court instructed that it was up to the jury members to determine for themselves what was depicted in the video from the bus. The state argues that we must presume the jury followed this instruction and reached its own conclusions about what the video depicted, without placing added weight on Smola's tes-

timony. Of course, this argument further establishes why it was unnecessary and unhelpful to admit any opinion from Smola about what the video depicted. In any event, the court's instruction did not address the state's question and Smola's response concerning the defendant's possession of a shoebox. Specifically, as discussed previously, the state's question did not limit the basis for Smola's testimony about the defendant having a shoebox in his backpack to only what Smola had seen in the video. He was instead asked whether, *as a result of his investigation* generally, he had formed a belief about what was in the backpack. This question allowed Smola to draw upon a broader range of information beyond what the video depicted. The jury, thus, could have accepted the trial court's instruction to draw its own conclusion about what the video depicted, but, nevertheless, placed added weight on Smola's testimony on the basis of their belief that he had somehow confirmed—using information other than the video—that the defendant did, in fact, have a shoebox with him on the bus shortly after the crime occurred.

Lastly, I do not believe that subsequent testimony from Smola during cross-examination eliminated any harm from the improper admission of Smola's testimony regarding the shoebox. During cross-examination, the defendant's counsel asked a question presumably aimed at having Smola agree that he had no personal knowledge of what was contained in the backpack. In the course of responding, however, Smola stated that Taylor had told the police that the defendant had a shoebox with him. The defendant's counsel asked, "[i]sn't it true that you cannot testify that that item, that thing in the backpack," at which point Smola interrupted and responded, "[s]omeone told me that that was . . . Taylor said that." The defendant moved to strike the answer, but the trial court allowed it because it was responsive to the question. Because the defen-

dant elicited this testimony, its admission would not be precluded by *Crawford* if otherwise admissible. In my view, however, this exchange did not overcome any harm from the trial court's earlier improper admission of Smola's testimony about the defendant having a shoebox in the backpack because the defendant should not have been placed in the position of having to cross-examine Smola about the shoebox in the first place. If the trial court had properly excluded Smola's challenged testimony, the defendant would have had no reason to question Smola about it, and Smola's response about what Taylor had told police, which the state could not cross examine Taylor about because he was unavailable, would never have been put before the jury.

Because I am persuaded that these evidentiary errors require reversal of the defendant's conviction, I would affirm the Appellate Court decision on these grounds, without considering the first certified question of whether the trial court violated the defendant's constitutional right to present a defense or the defendant's alternative grounds for affirmance. I therefore take no position on how those remaining questions should be decided, and I respectfully dissent from the majority's decision to reverse the Appellate Court's judgment.

CONNECTICUT COALITION FOR JUSTICE IN EDUCATION FUNDING, INC., ET AL. *v.* GOVERNOR M. JODI RELL ET AL.
(SC 19768)

Rogers, C. J., and Palmer, Eveleigh, Robinson, Vertefeuille, Alvord and Sheldon, Js.*

Syllabus

The named plaintiff, C Co., a voluntary membership organization incorporated to engage in activities that promote adequate state educational

* The listing of justices reflects their seniority status on this court as of the date of oral argument.

funding, and the individual plaintiffs, schoolchildren and parents thereof who reside in various municipalities, brought this action against the defendants, various state officials and members of the State Board of Education, seeking, inter alia, a declaratory judgment that the defendants' failure to provide suitable and substantially equal educational opportunities to the individual plaintiffs violated article eighth, § 1, of the Connecticut constitution, which provides that there shall always be free public elementary and secondary schools in this state, as well as the equal rights provision of article first, § 1, of the Connecticut constitution, and the equal protection provision of article first, § 20, of the Connecticut constitution, as amended by articles five and twenty-one of the amendments. The trial court granted the defendants' motion to strike certain counts of the plaintiffs' complaint on the ground that article eighth, § 1, did not guarantee a right to a suitable public education, and the plaintiffs appealed to this court, which concluded that the trial court had improperly granted the defendants' motion to strike. In *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell* (295 Conn. 240), a plurality of this court agreed that the criteria enumerated by the New York Court of Appeals in *Campaign for Fiscal Equity, Inc.* v. *State* (86 N.Y.2d 307) (*Campaign I*) provided the essential components of a constitutionally adequate education, specifically, minimally adequate physical facilities and classrooms, minimally adequate instrumentalities of learning such as desks and reasonably current textbooks, minimally adequate teaching of reasonably up-to-date, basic curricula, and sufficient personnel adequately trained to teach. The plurality further concluded that article eighth, § 1, entitles schoolchildren to an education that is suitable to give them the opportunity to be responsible citizens who are able to participate fully in democratic institutions and that prepares them to either progress to institutions of higher education or attain productive employment. Justice Palmer, in a concurring opinion in *Rell*, agreed that the *Campaign I* criteria provided the appropriate constitutional standard, but rejected the plurality's suggestion that the standard was broader than those criteria insofar as that standard required the courts to examine educational outputs. On remand, the trial court determined that Justice Palmer's concurring opinion had provided the narrowest grounds for agreement among a majority of the justices, and, therefore, his opinion provided the controlling standard as to whether the state has fulfilled its obligations under article eighth, § 1. The court found that the plaintiffs had not proved by a preponderance of the evidence that the state failed to satisfy the *Campaign I* criteria as set forth in Justice Palmer's concurring opinion. The trial court also concluded, however, that the state's current educational system was unconstitutional under article eighth, § 1, because it did not deploy resources and standards that were rationally, substantially and verifiably connected to teaching children. The court further concluded that, in light of the fact that the state spent more funds on the poorer school

districts than on the wealthier ones, there was no merit to the plaintiffs' equal protection claim that the state was failing to ensure that the poorer school districts and wealthier ones had substantially equal funding. The defendants appealed from the trial court's judgment to this court, claiming that the individual plaintiffs lacked standing because they failed to present any evidence that they were specifically injured and that the C Co. lacked associational standing. Moreover, the defendants claimed that the trial court improperly applied a constitutional standard of its own devising after it had concluded that the state's schools met the *Campaign I* criteria. The plaintiffs filed a cross appeal, claiming that the trial court incorrectly concluded that the state's educational system met the *Campaign I* criteria and did not violate the equal rights and protection provisions of the state constitution. *Held*:

1. The trial court correctly determined that the individual plaintiffs had standing, as the complaint raised a colorable claim that their specific, personal, and legal interest in receiving the opportunity for an education that complied with the state constitution was being specially and injuriously affected by the defendants' acts or omissions.

2. C Co. met all of the prongs of the test for associational standing set forth in *Connecticut Assn. of Health Care Facilities, Inc.* v. *Worrell* (199 Conn. 609):

   a. The defendants could not prevail on their claim that C Co. did not satisfy the first prong of the *Worrell* test, that its members would otherwise have had standing to bring the present action, which was based on their claim that the parent members of C Co. were not true members because they did not have the right to vote to elect the board of directors, which had the authority to initiate and pursue litigation: the right to vote was not an essential characteristic of membership in C Co. for purposes of establishing the first prong of the *Worrell* test when, as in the present case, there was other evidence of representation and control sufficient to demonstrate that C Co. represented the views of the parent members, as there were two parent members who served on C Co.'s steering committee, and the fact that the parent members had voluntarily joined C Co. knowing that it had publicly advocated in favor of specific public school funding policies also provided sufficient evidence that C Co. represented their views; moreover, although C Co. had no parent members when the plaintiffs filed their original complaint and the trial court dismissed C Co.'s claims after finding that it lacked standing, it would elevate form over substance to hold that the trial court improperly allowed the plaintiffs to cure the jurisdictional defect that existed when the complaint was filed by amending their complaint to allege that C Co. then had parent members, as the original complaint was not dismissed because the individual plaintiffs had standing, C Co. would have been permitted to join the action pursuant to the relevant rule of practice (§ 9-3) after acquiring parent members and satisfying *Worrell*, and the

defendants did not explain how the plaintiffs were allowed to reap any procedural advantage therefrom.

b. The potential conflicts of interest among C Co.'s members were not so profound as to deprive C Co. of associational standing under the second prong of the *Worrell* test, which requires that the interests that C Co. seeks to protect are germane to its purpose; there was no evidence that a majority of C Co.'s members disagreed with the claims asserted, C Co.'s primary ligation goal was not directly at odds with the interests of some of its members, no members objected to the initiation of the present action or expressed a belief that the relief sought would not be generally beneficial to the state's educational system, and there was no evidence that C Co. either was operating for a purpose other than that stated in its bylaws or brought this action without first informing its members or following the procedures in its bylaws.

c. C Co. satisfied the third prong of the *Worrell* test because neither the claim asserted nor the relief requested required the participation of C Co.'s individual members, as the trial court did not have to consider specific evidence as it pertained to the individual members in order to dispose of the claims presented; the *Campaign I* criteria focus exclusively on the characteristics of schools and not on individual achievement, and nothing in Justice Palmer's concurring opinion in *Rell* suggested that the determination as to whether the state was providing a minimally adequate educational opportunity must be made on the basis of individual student performance.

3. The trial court improperly applied a constitutional standard of its own devising in concluding that the state's educational system was unconstitutional, as that court, upon finding that the schools were minimally adequate under the narrow and specific *Campaign I* criteria, should have concluded that the state's educational system was constitutional under article eighth, § 1:

a. The improper standard that the trial court applied, whether the state deployed in its schools resources and standards that are rationally, substantially and verifiably connected to teaching children, was inconsistent with Justice Palmer's concurring opinion in *Rell* and repeated statements in that opinion that courts are ill equipped and lack the specialized knowledge to address the complex and intractable problems of educational policy: although Justice Palmer's concurring opinion provided that the state must operate within the limits of rationality and that the educational system cannot be so lacking as to be unreasonable by any fair or objective standard, those statements meant that the state's efforts to comply with its obligations under article eighth, § 1, must reasonably address the minimal educational needs of the state's students as described in the *Campaign I* criteria, and any reasonableness component contained therein was not a separate rationality test applicable to all educational policies and programs; accordingly, the trial court, in applying a constitutional standard of its own devising, clearly violated

separation of powers principles by failing to defer to the legislature and usurping the legislative responsibility to determine how additional funding beyond the constitutionally required minimum should be allocated and how to craft educational policies that, in its view, best balance the wide variety of interests at issue.

b. The plaintiffs could not prevail on their claim on cross appeal that the trial court's interpretation of the *Campaign I* criteria was improperly narrow, as that court properly determined initially that the narrow and specific *Campaign I* standard set forth in Justice Palmer's concurring opinion in *Rell* was the controlling constitutional standard: there was no evidence in Justice Palmer's concurring opinion that the narrow and specific *Campaign I* criteria that it identified for determining whether the state is providing minimally adequate educational resources would be subject to modification on remand, as Justice Palmer's concurring opinion made no reference to the subsequent history of *Campaign I* but, rather, emphasized that a broader standard was inappropriate, emphasized that the trial court should give great deference to the legislature's educational policy choices, and emphasized that the court's primary focus should be on the adequacy of educational inputs and not the level of educational achievement; moreover, although Justice Palmer's concurring opinion recognized that the plaintiffs' allegations were sufficiently broad and general so as to support a conclusion that the *Campaign I* criteria had not been met and to withstand a motion to strike, he did not suggest that the *Campaign I* criteria were part of a broader constitutional inquiry that included an analysis of whether the state's educational offerings were sufficient to overcome disadvantaging conditions outside of the state's control that affect educational outcomes; furthermore, there was no merit to the plaintiffs' claim that the trial court improperly failed to consider whether the state's educational offerings reasonably addressed the minimal educational needs of the state's children, as the trial court's finding that the state's educational offerings satisfied the *Campaign I* criteria for a minimally adequate educational opportunity necessarily encompassed a finding that those educational offerings reasonably addressed the minimal educational needs of the state's children.

4. The plaintiffs' claim that the trial court incorrectly concluded that the evidence did not support their claim that the *Campaign I* criteria were not satisfied was unavailing; the trial court's findings did not compel the conclusion that, as a matter of law, the defendants failed to provide the plaintiffs with a minimally adequate educational opportunity, as the facts on which the plaintiffs relied in support of that claim either did not compel the conclusion that the overall level of teaching in certain school districts was inadequate or did not relate to the narrow *Campaign I* criteria.

5. The plaintiffs failed to establish that the disparities between the funding of the neediest and least needy school districts violated article eighth,

§ 1, and article first, §§ 1 and 20, on the basis of the three part test in *Horton* v. *Meskill* (195 Conn. 24):

a. The defendants' claim that there can be no equal protection violation if the plaintiffs are receiving a minimally adequate educational opportunity under article eighth, § 1, was without merit; the fundamental right to education referred to in *Horton* was the right to a substantially equal educational opportunity, and this court has never suggested that discrimination in the provision of services is constitutionally excusable because some adequate level of benefits was provided to all schoolchildren.

b. The evidence did not support a prima facie showing by the plaintiffs that the disparities in educational funding between school districts with large numbers of poor and needy students and school districts with small numbers of such students are more than de minimis; the evidence did not establish that the particular school districts to which the plaintiffs referred may be treated as proxies for school districts with the least and most number of poor and needy students, and the plaintiffs' evidence tended to undermine their equal protection claim because it showed that the relevant disparity in per pupil spending was less than in *Horton* and that the state was allocating more funds per pupil to the poorer school districts than the wealthier ones.

c. Regardless of whether the plaintiffs established a prima facie showing of more than de minimis disparities in funding, the defendants satisfied the second and third parts of *Horton*, which require proof that disparities in education spending are justified by a legitimate state policy and are not so great as to be unconstitutional; this court has recognized that there is a salutary role for preserving local school choice by guaranteeing minimum funds without imposing a ceiling on what a city or town might elect to spend on public education, the fact that wealthier school districts spent more per pupil than poorer districts by supplementing state educational funds with funds from local property taxes did not render the funding scheme unconstitutional, and the trial court's finding that state educational spending is skewed in favor of needier school districts showed that the disparities are not so great as to be unconstitutional.

(*Three justices concurring in part and dissenting in part in one opinion*)

Argued September 28, 2017—officially released January 17, 2018**

Procedural History

Action for a judgment declaring, inter alia, that the plaintiff public schoolchildren have a state constitutional right to receive suitable and substantially equal educational opportunities, and for other relief, brought

** January 17, 2018, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

to the Superior Court in the judicial district of Hartford, where the court, *Shortall*, *J.*, granted the defendants' motion to strike certain counts of the second amended complaint, from which the plaintiffs, upon certification by the Chief Justice pursuant to General Statutes § 52-265a that a matter of substantial public interest was at issue, appealed to this court, which reversed the trial court's judgment and remanded the case for further proceedings; thereafter, the case was transferred to the Complex Litigation Docket and the plaintiffs filed a third amended complaint; subsequently, the court, *Dubay*, *J.*, denied in part the defendants' motion to dismiss; thereafter, the matter was tried to the court, *Moukawsher*, *J.*; judgment in part for the plaintiffs, from which the defendants, upon certification by the Chief Justice pursuant to General Statutes § 52-265a that a matter of substantial public interest was at issue, appealed and the plaintiffs cross appealed to this court. *Affirmed in part; reversed in part; judgment directed.*

Joseph Rubin, associate attorney general, with whom were *Beth Z. Margulies*, *Eleanor M. Mullen*, and *Darren P. Cunningham*, assistant attorneys general, and, on the brief, *George Jepsen*, attorney general, and *John P. DiManno*, former assistant attorney general, for the appellants-cross appellees (defendants).

Joseph P. Moodhe, pro hac vice, with whom were *David N. Rosen*, *Olivia Cheng*, pro hac vice, and *Christel Y. Tham*, pro hac vice, and, on the brief, *Edward Bradley*, *Gregory P. Copeland*, *Cara A. Moore*, *Megan K. Bannigan*, pro hac vice, *Emily A. Johnson*, pro hac vice, *John S. Kiernan*, pro hac vice, *Dustin N. Nofziger*, pro hac vice, *David B. Noland*, pro hac vice, and *Alexandra S. Thompson*, pro hac vice, for the appellees-cross appellants (plaintiffs).

Nancy B. Alisberg and *Samuel R. Bagenstos*, pro hac vice, filed a brief for the National Disability Rights Network et al. as amici curiae.

James P. Sexton, *Emily Graner Sexton* and *Marina L. Green* filed a brief for The Arc of the United States et al. as amici curiae.

Wendy Lecker filed a brief for the Education Law Center as amicus curiae.

Gabrielle Levin and *Joshua S. Lipshutz*, pro hac vice, field a brief for the Connecticut Coalition for Achievement Now et al. as amici curiae.

Michael Roberts and *Scott Madeo* filed a brief for the Commission on Human Rights and Opportunities as amicus curiae.

Andrew A. Feinstein and *Jillian L. Griswold* filed a brief for twelve individuals with severe disabilities who have filed in fictitious names as amici curiae.

Opinion

ROGERS, C. J. "Next in importance to freedom and justice is popular education, without which neither justice nor freedom can be permanently maintained." Letter from James A. Garfield accepting the presidential nomination (July 12, 1880), The American Presidency Project, available at http://www.presidency.ucsb.edu/ws/index.php?pid=76221 (last visited January 17, 2018). In the present case, we acknowledge that the plaintiffs have painted a vivid picture of an imperfect public educational system in this state that is straining to serve many students who, because their basic needs for, among other things, adequate parenting, financial resources, housing, nutrition and care for their physical and psychological health are not being met, cannot take advantage of the educational opportunities that the state is offering.[1] We are highly sympathetic to the plight

[1] For example, the trial court found that, in Bridgeport, school "[a]dministrators, clerks, guidance counselors and technicians are being shed. Kindergarten and special education paraprofessionals are being let go. Some schools have no extras like music and athletics left to cut. The school year is to be shortened. Class sizes are increasing in many places to twenty-nine children per room—rooms where teachers might have a class with one third

of these struggling students. Indeed, we join our voice to the voices of those who urge the state to do all that it reasonably can to ensure not only that all children in this state have the bare opportunity to receive the minimally adequate education required by article eighth, § 1, of the Connecticut constitution,[2] but also that the neediest children have the support that they need to actually take advantage of that opportunity. It is not the function of the courts, however, to create educational policy or to attempt by judicial fiat to eliminate all of the societal deficiencies that continue to frustrate the state's educational efforts. Rather, the function of the courts is to determine whether the narrow and specific criteria for a minimally adequate educational system under our state constitution have been satisfied. Once a determination of minimal adequacy has been made, courts simply are not in a position to determine whether schools in poorer districts would be better off expending scarce additional resources on more teachers, more computers, more books, more technical staff, more meals, more guidance counselors, more health care, more English instruction, greater preschool availability, or some other resource. Such judgments are quintessentially legislative in nature. Because we conclude that the trial court was correct in its initial

requiring special education, many of them speaking limited English, and almost all of them working considerably below grade level. Many of these children get their only meals at school. They don't have two parents at home. Sometimes, they have no homes at all. They bounce from place to place and from school to school as the system struggles to find some way to teach them.

"For almost all students, there will be no high school buses in Bridgeport. Children will get tokens for the public transit system and some youngsters will have to figure out how to switch multiple transit buses just to make it to school in the morning. . . . It's the same in other poor towns. Too little money is chasing too many needs."

[2] Article eighth, § 1, of the constitution of Connecticut provides: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." Hereinafter, we refer to this provision as article eighth, § 1.

determination that the plaintiffs failed to establish that the state's educational offerings are not minimally adequate under article eighth, § 1, and in its determination that the state has not violated their equal protection rights under the state constitution, the plaintiffs cannot prevail on their claims that the state has not provided them with a suitable and substantially equal educational opportunity.

The individual plaintiffs[3] and the named plaintiff, the Connecticut Coalition for Justice in Education Funding, Inc. (Coalition), brought this action seeking, among other things, a declaratory judgment that the defendants, various state officials and members of the State Board of Education,[4] failed to provide suitable and substantially equal educational opportunities to the individual plaintiffs in violation of article eighth, § 1, and article first, §§ 1 and 20, of the Connecticut constitution, as amended by articles five and twenty-one of the amendments.[5] Applying the controlling legal standard, as set

[3] The individual plaintiffs who are participating in this appeal are Sherry Major and her daughter Nichole Major, who reside in Willimantic, Brenda Miller-Black and her daughters, Alison Black and Carolyn Black, who reside in Norwich, Walter and Janet Rivera and their daughter, Melody Rivera, who reside in New Britain, Lisette Velasquez, her son Ashariel Velasquez and her daughter Lyonece Velasquez, who reside in New Britain, Mary Gallucci and her sons, Pascal Phillips-Gallucci and Ellis Phillips-Gallucci, who reside in Willimantic, and Andrew Sklover and his daughters, Ryan Sklover and Marley Sklover, who reside in Stamford.

[4] The defendants, who were named in their official capacities, are Governor M. Jodi Rell or her successor; State Board of Education members Betty J. Sternberg, Allan B. Taylor, Beverly R. Bobroske, Donald J. Coolican, Lynne S. Farrell, Janet M. Finneran, Theresa Hopkins-Staten, Patricia B. Luke and Timothy J. McDonald, or their successors; State Treasurer Denise L. Nappier or her successor; and State Comptroller Nancy S. Wyman or her successor.

[5] Article first, § 1, of the constitution of Connecticut provides: "All men when they form a social compact, are equal in rights; and no man or set of men are entitled to exclusive public emoluments or privileges from the community." Hereinafter, we refer to this provision as article first, § 1.

Article first, § 20, of the constitution of Connecticut, as amended by articles five and twenty-one of the amendments, provides: "No person shall be denied the equal protection of the law nor be subjected to segregation or discrimination in the exercise or enjoyment of his or her civil or political

forth in *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 342–43, 990 A.2d 206 (2010) (*Palmer*, *J.*, concurring in the judgment), the trial court held that the plaintiffs have not established that the state has failed to provide children in any school district in this state with minimally adequate teachers, educational facilities and instrumentalities, as required by article eighth, § 1. In addition, the court concluded that the plaintiffs had failed to establish a violation of the equal protection provisions of the state constitution, article first, §§ 1 and 20. The trial court then proceeded to apply, however, a new legal standard that is not supported by our precedent, pursuant to which that court considered numerous educational policies and practices that are not part of the controlling standard, and held that the state's educational policies and spending practices violate article eighth, § 1, because they are not "rationally, substantially and verifiably connected to creating educational opportunities for children."

The defendants appeal from the trial court's decision that they have violated article eighth, § 1, and the plaintiffs cross appeal from the trial court's rulings that they did not establish that the state has failed to provide minimally adequate educational opportunities to the children in any school district in the state and have not violated the plaintiffs' equal protection rights under the state constitution.[6] We conclude that the trial court

rights because of religion, race, color, ancestry, national origin, sex or physical or mental disability." Hereinafter, we refer to this provision as article first, § 20, of the Connecticut constitution, as amended by articles five and twenty-one of the amendments, as article first, § 20, and to article first, §§ 1 and 20, collectively, as the equal protection provisions.

[6] The defendants filed an application for certification to appeal to this court from the judgment of the trial court pursuant to General Statutes § 52-265a, which the Chief Justice granted. The Chief Justice also granted the plaintiffs' request under § 52-265a that this court review issues decided adversely to them.

properly found that the plaintiffs have failed to present sufficient evidence that the state is not providing children in this state with minimally adequate educational resources that satisfy the requirements of article eighth, § 1. We further conclude that, having made this determination, the trial court should have held that the defendants have not violated that constitutional provision, and it should not have gone on to apply a new constitutional test. Finally, we conclude that the trial court properly found that the plaintiffs failed to establish that the state has violated the equal protection provisions of the state constitution. We therefore conclude that the plaintiffs have failed to establish that the defendants have violated the plaintiffs' rights under article eighth, § 1, and article first, §§ 1 and 20. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

The record reveals the following procedural history and facts that either were found by the trial court or are undisputed. In 2005, the plaintiffs filed a complaint alleging, among other things, that the defendants had violated article eighth, § 1, and article first, §§1 and 20, of the state constitution by "failing to maintain a public school system that provides [them] with suitable and substantially equal educational opportunities . . . ." Thereafter, the defendants filed a motion to strike certain portions of the complaint, claiming that these state constitutional provisions do not confer a right to " 'suitable' " educational opportunities and do not "guarantee equality or parity of educational achievement or results." The trial court concluded that the plaintiffs' claims were justiciable, but that article eighth, § 1, did not guarantee a right to a suitable public education. Accordingly, the trial court granted the defendants' motion to strike the portions of the plaintiffs' complaint making that claim.

Thereafter, the Chief Justice granted the plaintiffs' application for certification to appeal to this court pur-

suant to General Statutes § 52-265a. See *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 243–44. In a split opinion, a majority of this court concluded that the trial court had improperly granted the defendants' motion to strike. Id., 320; id., 320–21 (*Palmer, J.*, concurring in the judgment). As the following discussion of the positions taken by the justices in their respective opinions makes clear, because Justice Palmer's concurring opinion provided the narrowest grounds of agreement, it was controlling. See *State* v. *Ross*, 272 Conn. 577, 604 n.13, 863 A.2d 654 (2005) ("[w]hen a fragmented [c]ourt decides a case and no single rationale explaining the result enjoys the assent of [a majority], the holding of the [c]ourt may be viewed as the position taken by those [m]embers who concurred in the judgments on the narrowest grounds" [internal quotation marks omitted]), quoting *Marks* v. *United States*, 430 U.S. 188, 193, 97 S. Ct. 990, 51 L. Ed. 2d 260 (1977).

Justices Norcott, Katz and Schaller concluded in a plurality opinion that the plaintiffs' claims were justiciable and, therefore, that this court had subject matter jurisdiction over the appeal. See *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 269 (plurality opinion). The plurality then agreed with "the New York Court of Appeals' explication of the 'essential' components requisite to this constitutionally adequate education, namely: (1) 'minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn'; (2) 'minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks'; (3) 'minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies'; and (4) 'sufficient personnel adequately trained to teach those subject areas.' [*Campaign for Fiscal Equity, Inc.*

v. *State*, 86 N.Y.2d 307, 317, 655 N.E.2d 661, 631 N.Y.S.2d 565 (1995) (*Campaign I*)]; see also, e.g., [*Abbeville County School District* v. *State*, 335 S.C. 58, 68, 515 S.E.2d 535 (1999)] (state constitution requires provision to students of 'adequate and safe facilities in which they have the opportunity to acquire: [1] the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; [2] a fundamental knowledge of economic, social, and political systems, and of history and governmental processes; and [3] academic and vocational skills'); *Pauley* v. *Kelly*, 162 W. Va. 672, 706, 255 S.E.2d 859 (1979) (provision of constitutionally adequate education 'implict[ly]' requires 'supportive services: [1] good physical facilities, instructional materials and personnel; [2] careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency')." *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 316.

The plurality further concluded that "article eighth, § 1, entitles Connecticut public school students to an education suitable to give them the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting. A constitutionally adequate education also will leave Connecticut's students prepared to progress to institutions of higher education, or to attain productive employment and otherwise contribute to the state's economy. To satisfy this standard, the state, through the local school districts, must provide students with an objectively meaningful opportunity to receive the benefits of this constitutional right." (Footnote omitted; internal quotation marks omitted.) Id., 314–15.

The plurality emphasized, however, that a public education system "need not operate perfectly" to be constitutionally adequate; (internal quotation marks omitted) id., 315–16, quoting *Neeley* v. *West Orange-Cove Consol-*

idated Independent School District, 176 S.W.3d 746, 787 (Tex. 2005); and that constitutional adequacy is determined not by " 'what level of achievement students reach, but on what the state reasonably attempts to make available to them, taking into account any special needs of a particular local school system.' " *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 316, quoting *Sheff* v. *O'Neill*, 238 Conn. 1, 143, 678 A.2d 1267 (1996) (*Borden, J.*, dissenting); see also *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 318–20 (discussing cases supporting notion that article eighth, § 1, was not intended to require state to provide remedies for all social ills that might hinder ability of students to take advantage of educational opportunities). Thus, the plurality recognized that "the education clause [of our state constitution] is not a panacea for all of the social ills that contribute to many of the achievement deficiencies identified by the plaintiffs in their complaint . . . ." *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 320. Having concluded that the plaintiffs' claims pursuant to article eighth, § 1, were justiciable and that the constitutional provision contains a qualitative component, the plurality concluded that the trial court had improperly stricken the plaintiffs' claims pursuant to that provision. See id.

In his concurring opinion, Justice Palmer agreed with the plurality that the plaintiffs' claims were justiciable, although he did not entirely agree with the plurality's analysis of that issue. Id., 322 (*Palmer, J.*, concurring in the judgment). With respect to the "qualitative component" of the right guaranteed by article eighth, § 1, Justice Palmer concluded that that provision "requires only that the legislature establish and maintain a minimally adequate system of free public schools." Id., 332. Specifically, Justice Palmer agreed with the four criteria

adopted by the New York Court of Appeals in *Campaign I*, supra, 86 N.Y.2d 317, and adopted by the plurality as part of its constitutional standard. See *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 342 (*Palmer*, *J.*, concurring in the judgment). In addition, Justice Palmer concluded that "a safe and secure environment also is an essential element of a constitutionally adequate education."[7] Id., 342 n.15. Justice Palmer ultimately concluded that, although "portions of the plaintiffs' complaint reasonably may be read as asserting a right to a quality of education under article eighth, § 1, that exceeds the parameters of the right" as he conceived it, their allegations were sufficiently broad to withstand a motion to strike under this standard. Id., 346 n.20.

Justice Palmer expressly rejected, however, the plurality's suggestion that it was appropriate "to craft the constitutional standard in broad terms." (Internal quotation marks omitted.) Id., 342 n.17 (*Palmer*, *J.*, concurring in the jugment); see also id., 317 (plurality opinion) ("[w]e recognize that our explication of a constitutionally adequate education under article eighth, § 1, is crafted in broad terms"). Justice Palmer contended that, "the broader the standard, the more vague it is likely to be. In addition, the broader the standard, the more difficult it will be for the parties and the court to under-

[7] The court in *Campaign I* indicated that, in New York, the state legislature "has made prescriptions . . . with reference to the minimum number of days of school attendance, required courses, textbooks, qualifications of teachers and of certain nonteaching personnel, pupil transportation, and other matters. If what is made available by this system (which is what is to be maintained and supported) may properly be said to constitute an education, the constitutional mandate is satisfied." (Internal quotation marks omitted.) *Campaign I*, supra, 86 N.Y.2d 316. The plaintiffs in the present case have not relied on any similar statutory prescriptions in Connecticut. We assume for purposes of this opinion, however, that evidence that the state is operating its schools for only a very few days per year or is failing to provide minimally adequate student transportation could be considered as part of the court's adequacy determination.

stand and apply it. . . . Although some constitutional standards must be defined in broad terms because of their applicability to a vast number of fact patterns, this is not such a case; for purposes of a case like the present one, in which it is critically important to give as much guidance to the court and the parties as possible, the more clearly defined the standard, the better. Cf. *Moore* v. *Ganim*, 233 Conn. 557, 629, 660 A.2d 742 (1995) (*Peters*, *C. J.*, concurring) ('well established jurisprudential doctrine counsels us to construe ambiguous constitutional principles narrowly')." *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 342–43 n.17 (*Palmer*, *J.*, concurring in the judgment).

In addition, Justice Palmer disagreed with the plurality's decision to the extent that it could be interpreted to require the courts to examine educational outputs when determining the constitutional adequacy of the state's educational offerings.[8] See id., 345 n.19 (*Palmer*, *J.*, concurring in the judgment) (rejecting plurality's assertion that "[a] constitutionally adequate education . . . will leave Connecticut's students prepared to progress to institutions of higher education, or to attain productive employment and otherwise contribute to the state's economy" because court's focus should be on adequacy of educational inputs, not level of achievement [internal quotation marks omitted]). This is because, although "schools are important socializing institutions in our democratic society, they cannot be constitutionally required to overcome every serious social and personal disadvantage that students bring with them to school, and that seriously hinder[s] the

[8] In this regard, it is important to distinguish educational outputs, i.e., the actual level of student achievement, from the qualitative component of article eighth, § 1, i.e., the level of achievement that a student *may* attain *if* the student takes advantage of the educational opportunity that the state is offering.

academic achievement of those students." (Internal quotation marks omitted.) Id., 344–45 (*Palmer*, *J.*, concurring in the judgment). "[B]ecause student achievement may be affected by so many factors outside the state's control, including, perhaps most particularly, the disadvantaging characteristics of poverty . . . educational inputs must provide the primary basis for that determination." (Citation omitted; internal quotation marks omitted.) Id., 345 n.19 (*Palmer*, *J.*, concurring in the judgment).

Justice Palmer also repeatedly emphasized that "the legislature is entitled to considerable deference with respect to both its conception of the scope of the right and its implementation of the right"; id., 332 (*Palmer*, *J.*, concurring in the judgment); because "courts are ill equipped to deal with issues of educational policy; in other words, courts lack [the] specialized knowledge and experience to address the many persistent and difficult questions of educational policy that invariably arise in connection with the establishment and maintenance of a statewide system of education. . . . Thus, these issues are best addressed by our elected and appointed officials in the exercise of their informed judgment." (Citation omitted; internal quotation marks omitted.) Id., 335–36 (*Palmer*, *J.*, concurring in the judgment); see also id. 321 (courts should not "second-guess the reasoned judgment of the legislative and executive branches with respect to the education policy of this state"); id., 328–29 (courts should defer "to the reasoned determination of the political branches with respect to the precise parameters of the right" to free public education); id., 335 (courts should defer "to the reasoned judgment of the political branches with respect to the determination, in practice, of the parameters of the right" to free public education); id., 336 ("within the limits of rationality, the legislature's efforts to tackle the problems [of education] should be entitled to

respect" [internal quotation marks omitted]); id., 335 ("[t]he judicial branch must accord the legislative branch great deference in this area"); id., 336 ("[s]pecial deference is warranted in the present case due to the fact that the framers reserved to the legislature the responsibility of implementing the mandate of a free public education"); id., 337 ("[a]nother compelling reason for judicial restraint in matters relating to educational policy is the potential that exists for a costly and intrusive remedy"); id., 338 ("the significant separation of powers issues that any . . . remedy invariably would spawn must be given due consideration in determining the scope of the right" to free public education); id., 341–42 (courts must employ "a mode of constitutional interpretation that affords considerable deference to the legislature with respect to the manner in which the right to a minimally adequate free public education is conceived and implemented"); id., 344 n.18 (approach of New York Court of Appeals in *Campaign I* "gives due regard to the prudential considerations that militate strongly in favor of judicial restraint in such matters"). Indeed, Justice Palmer recounted that "education . . . presents a myriad of intractable economic, social, and even philosophical problems. . . . The very complexity of the problems of financing and managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them, and that, within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect. . . . On even the most basic questions in this area the scholars and educational experts are divided." (Internal quotation marks omitted.) Id., 336 (*Palmer*, *J.*, concurring in the judgment). "In such circumstances, the judiciary is well advised to refrain from imposing on the [state] inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation

so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions."[9] (Internal quotation marks omitted.) Id. (*Palmer*, *J.*, concurring in the judgment).

Thus, a majority of this court—Justices Norcott, Katz, Palmer and Schaller—agreed that the trial court had improperly struck the plaintiffs' claims, although Justice Palmer did not agree with the qualitative component of the right to free public education under article eighth, § 1, as described in the plurality opinion. Accordingly, this court remanded the case to the trial court for further proceedings on the claim that the defendants had failed to provide the plaintiffs with a suitable public education.

Thereafter, the plaintiffs filed a third amended complaint containing four counts, which is the operative pleading for purposes of this appeal.[10] The plaintiffs claimed that "[b]y failing to maintain a public school system that provides the plaintiffs with suitable and substantially equal educational opportunities, the state is violating article eighth, § 1, and article first, §§ 1 and 20, of the state constitution" (first count); "[b]y failing to maintain a public school system that provides the plaintiffs with suitable educational opportunities, the state is violating article eighth, § 1, of the state constitution" (second count); "[b]y failing to maintain a public

[9] In his dissenting opinion, Justice Zarella, joined by Justice McLachlan, contended that the stricken claims presented a nonjusticiable political question, and, therefore, the court lacked subject matter jurisdiction. *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 399–400 (*Zarella*, *J.*, dissenting). In her dissenting opinion, Justice Vertefeuille concluded that the stricken claims were justiciable, but that the trial court properly struck the claims because article eighth, § 1, was "intended to ensure the perpetuation of Connecticut's statewide system of free public schools, and was not intended to guarantee a 'suitable' education as interpreted by the majority." Id., 384 (*Vertefeuille*, *J.*, dissenting).

[10] Hereinafter, we refer to the plaintiffs' third amended complaint as the complaint.

school system that provides the plaintiffs with substantially equal educational opportunities, the state is violating article eighth, § 1, and article first §§ 1 and 20, of the state constitution" (third count); and "the state's failure to maintain a public school system that provides the plaintiffs with suitable and substantially equal educational opportunities has disproportionately impacted African-American, Latino, and other minority students in violation of article eighth, § 1, and article first, §§1 and 20, of the [s]tate [c]onstitution and 42 U.S.C. § 1983" (fourth count).[11]

The defendants filed a motion to dismiss the complaint on the grounds that the plaintiffs' claims were not ripe for adjudication in light of certain education reforms that the legislature enacted in 2012, that their claims were moot in light of these reforms and that the Coalition lacked associational standing to raise claims that its rights under article eighth, § 1, and article first, §§ 1 and 20, had been violated. The trial court, *Dubay*, *J.*, deferred ruling on the first two claims until a full trial on the merits had occurred and denied the motion to dismiss the Coalition's claims for lack of standing.

Thereafter, the case was tried before the court, *Moukawsher*, *J.*[12] In their posttrial brief, the defendants renewed their jurisdictional claims and, in addition, claimed that the individual plaintiffs lacked standing because, among other reasons, they had failed to establish any harm to any specific plaintiff. The trial court rejected the defendants' jurisdictional claims. The court then determined that Justice Palmer's concurring opin-

[11] The trial court's memorandum of decision did not contain an express ruling on the fourth count of the complaint, and the plaintiffs are not pursuing any claims on appeal to this court pursuant to 42 U.S.C. § 1983 (2012), which pertains to the deprivation of federal constitutional rights under color of state law.

[12] Hereinafter, all references to the trial court are to Judge Moukawsher, unless otherwise indicated.

ion in *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 320, provided the narrowest grounds of agreement among the four justices who had concluded that the plaintiffs' claims were justiciable and that article eighth, § 1, contains a qualitative component, and, therefore, his opinion was controlling. See *State* v. *Ross*, supra, 272 Conn. 604 n.13. Applying the *Campaign I* criteria that Justice Palmer had adopted,[13] the trial court specifically found that (1) "[t]he plaintiffs [have not] proved by a preponderance of the evidence, or beyond a reasonable doubt, that the state's schools lack enough light, space, heat, and air to permit children to learn," (2) "the plaintiffs have not proved by a preponderance, and certainly not beyond a reasonable doubt, that there is a systemic problem that should spark a constitutional crisis and an order to spend more on [desks, chairs, pencils and reasonably current textbooks]," and (3) "the plaintiffs have plainly not met their burden to show beyond a reasonable doubt that Connecticut lacks minimally adequate teaching and curricula, nor have they proved it by a preponderance of the evidence."[14] Accordingly, the court held that the *Campaign I* criteria were satisfied.

The court then observed that, since 2012, the state had funneled "over $400 million in new money" into the state's thirty lowest performing school districts. In addition, the state had provided $13 million in financial

[13] The criteria articulated by the New York Court of Appeals in *Campaign I*, supra, 86 N.Y.2d 317, were that the state must provide (1) "minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn," (2) "minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks," (3) "minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies," and (4) "sufficient personnel adequately trained to teach those subject areas." See part II of this opinion. Hereinafter, we refer to these as the *Campaign I* criteria.

[14] The trial court apparently merged the third and fourth *Campaign I* criteria. See footnote 13 of this opinion.

support to fourteen "failing schools," plus $4 million per year for school improvement grants to approximately thirty "high needs" schools. Finally, the court noted that there are numerous state and federal programs that are designed to provide meals to needy students, even during the summer, to invite parents into schools to share in learning, to attend to the needs of homeless students, to prevent sexually transmitted diseases, to attend to the needs of young parents and pregnant students, and to provide mental health support. The court found that "[a]ll of this extra spending benefits poor districts but not wealthier districts. [This] is on top of basic education aid that has a history of strongly favoring poor districts over wealthier ones. This heavy tilt in state education aid in favor of the state's poorer communities shows the state is devoting to needy schools a great deal more in resources than is required by the modest standard [set forth by the *Campaign I* criteria and adopted by Justice Palmer]." Thus, the trial court expressly found that the state's educational offerings in needy districts are constitutionally adequate under *Campaign I*.[15] The court also concluded that this "tilt" was "fatal to the plaintiffs' equal protection claim" under article first, §§ 1 and 20, that the state has failed to provide substantially equal educational funding to needy and wealthy school districts.

The trial court then concluded, however, that, notwithstanding its conclusion that the state had satisfied

[15] We recognize that, if the plaintiffs had established that a particular school district did not meet the *Campaign I* criteria, the trial court could have found a violation of article eighth, § 1, with respect to that school district, and the plaintiffs were not required to prove that the educational system, considered as a whole, was constitutionally inadequate in order to obtain relief. As we discuss more fully later in this opinion, however, the plaintiffs have pointed to no factual findings or evidence that, under the *Campaign I* criteria, would compel the conclusion that the state's educational offerings in any particular school district are not constitutionally adequate. See part III of this opinion.

the *Campaign I* criteria set forth in Justice Palmer's controlling opinion, the state's educational system would not satisfy the requirements of article eighth, § 1, unless the state "deploy[ed] in its schools resources and standards that are rationally, substantially and verifiably connected to teaching children." The trial court apparently derived this standard from Justice Palmer's statements that the state's educational programs and policies would be unconstitutional if they were "so lacking as to be unreasonable by any fair or objective standard"; *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 321 (*Palmer*, *J.*, concurring in the judgment); and that the state must operate "within the limits of rationality." (Internal quotation marks omitted.) Id., 336 (*Palmer*, *J.*, concurring in the judgment). The trial court reasoned that this rationality standard could not be the same as the low "[r]ational basis" standard for determining the constitutionality of legislative acts; *State* v. *Long*, 268 Conn. 508, 535, 847 A.2d 862 ("Rational basis review is satisfied so long as there is a plausible policy reason for the classification . . . . [I]t is irrelevant whether the conceivable basis for the challenged distinction actually motivated the legislature." [Internal quotation marks omitted.]), cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004); because this court held in *Horton* v. *Meskill*, 172 Conn. 615, 646, 376 A.2d 359 (1977) (*Horton I*), that "in Connecticut the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized." Applying this "rationally, substantially and verifiably connected" standard that had not previously been specified in Justice Palmer's concurring opinion, the trial court concluded that the state's current "school program" is unconstitutional because "[the state] has no rational, substantial and verifiable plan to distribute money for education aid and school construction," it has no

"objective and mandatory statewide graduation standard," "there is no way to know who the best teachers are and no rational and substantial connection between their compensation and their effect on teaching children," and the state's program of special education spending is irrational. The court ordered the defendants to submit to the court plans to remedy these constitutional deficiencies within 180 days of the date of the judgment.[16]

The defendants then filed this appeal, in which they renew their claims that the individual plaintiffs lack standing because they have failed to present evidence that any of them has been specifically injured by the defendants' acts or omissions and that the Coalition lacks associational standing to raise claims under article eighth, § 1, and article first, §§ 1 and 20. The defendants also claim that, after the trial court found that the state's schools met the *Campaign I* criteria adopted by Justice Palmer, that court improperly went on to apply a constitutional standard of its own devising. The defendants further contend that, even if the trial court properly adopted this new constitutional standard, it improperly applied it to conclude that the educational system is unconstitutional under article eighth, § 1. On cross appeal, the plaintiffs contend that the trial court improperly concluded that (1) the state's educational system meets the *Campaign I* criteria for determining the adequacy of the state's schools under article eighth, § 1, and (2) the state's educational system does not violate their equal protection rights under article first, §§ 1 and 20.[17]

[16] This court granted the defendants' request to stay further proceedings pending this appeal.

[17] After this appeal was filed, this court granted permission to the following amici curiae to file briefs: Advocates for Educational Choice; twelve individuals with severe disabilities who have filed in fictitious names; Education Law Center; Connecticut Commission on Human Rights and Opportunities; National Disability Rights Network, Association of University Centers on Disabilities, Autistic Self Advocacy Network, Disability Rights Education

We conclude that all of the plaintiffs have standing. We also conclude that the trial court properly held that the plaintiffs failed to establish that the state's schools do not satisfy the *Campaign I* criteria, which is the controlling constitutional standard under Justice Palmer's concurring opinion in *Connecticut Coalition for Justice in Education Funding, Inc.* We agree with the defendants, however, that the trial court went on to improperly apply a constitutional standard of its own devising after concluding that the state's schools satisfied the controlling *Campaign I* criteria. Finally, based on the factual findings of the trial court, we conclude that the trial court properly determined that the plaintiffs failed to establish that the educational system in this state violates the equal protection provisions of the state constitution by failing to ensure that the poorer school districts had funding that is substantially equal to the wealthier school districts.

I

JURISDICTIONAL CLAIMS

We begin by addressing the defendants' jurisdictional claims that the individual plaintiffs lack standing because none of them has been specifically injured and that the Coalition lacks associational standing to raise its claims pursuant to article eighth, § 1, and article first, §§ 1 and 20. We disagree.

A

Standing of Individual Plaintiffs

It is well established that, "to have standing . . . the plaintiffs necessarily must establish that they are classi-

and Defense Fund, Judge David L. Bazelon Center for Mental Health Law, National Association of Councils on Developmental Disabilities, National Down Syndrome Congress, and the Connecticut Office of Protection and Advocacy for Persons with Disabilities; and The Arc of the United States and The Arc of Connecticut.

cally aggrieved. In other words, they must demonstrate a specific, personal and legal interest in the subject matter of the controversy and that the defendants' conduct has specially and injuriously affected that specific personal or legal interest." *Andross* v. *West Hartford*, 285 Conn. 309, 324, 939 A.2d 1146 (2008). "Standing requires no more than a colorable claim of injury; a [party] ordinarily establishes . . . standing by allegations of injury. Similarly, standing exists to attempt to vindicate arguably protected interests." (Internal quotation marks omitted.) *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 411, 35 A.3d 188 (2012). "[A] trial court's determination that it lacks subject matter jurisdiction because of a plaintiff's lack of standing is a conclusion of law that is subject to plenary review on appeal." (Internal quotation marks omitted.) *Isabella D.* v. *Dept. of Children & Families*, 320 Conn. 215, 228, 128 A.3d 916, cert. denied, U.S. , 137 S. Ct. 181, 196 L. Ed. 2d 124 (2016).

In the present case, the plaintiffs' complaint alleged that "[t]he state's failure to provide suitable education opportunities is evidenced by the fact that many plaintiffs attend schools that do not have the resources necessary to educate their high concentrations of poorly performing students" and that "[t]he state's failure to provide substantially equal educational opportunities is evidenced by the fact that, when compared to [other] students, a disparate number of the plaintiff students attend schools that do not have the resources necessary to educate their high concentrations of poorly performing students." If the plaintiffs had proved these allegations at trial, the trial court could have inferred a specific injury to the individual plaintiffs from the fact that they attended constitutionally inadequate schools. Although we conclude in parts III and IV of this opinion that the plaintiffs failed to prove any constitutional violation, the failure of a plaintiff to *prove* a colorable

claim of specific harm at trial does not deprive the trial court of subject matter jurisdiction. See *In re Jose B.*, 303 Conn. 569, 579, 34 A.3d 975 (2012) (rejecting "bizarre result that the failure to prove an essential fact at trial deprives the court of subject matter jurisdiction"). Accordingly, we conclude that the trial court properly determined that the complaint raised a colorable claim that the individual plaintiffs' "specific, personal and legal interest" in receiving the opportunity for an education that complies with the qualitative component of article eighth, § 1, and their interest in receiving an educational opportunity that is substantially equal to the opportunity received by other public school students in accordance with article first, §§ 1 and 20, was being "specially and injuriously affected" by the defendants' acts or omissions. *Andross* v. *West Hartford*, supra, 285 Conn. 324.

B

Coalition's Associational Standing

We next address the defendants' claim that the Coalition lacked associational standing. This court has held that "[a]n association has standing to bring [an action] on behalf of its members when: (a) its members would otherwise have standing to [bring the action] in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the [action]." (Internal quotation marks omitted.) *Connecticut Assn. of Health Care Facilities, Inc.* v. *Worrell*, 199 Conn. 609, 616, 508 A.2d 743 (1986) (*Worrell*). The defendants contend that the Coalition meets none of the prongs of the *Worrell* test. For the following reasons, we disagree.

1

First Prong of the *Worrell* Test

The defendants contend that the Coalition does not satisfy the first prong of the *Worrell* test for associational standing because the only individual members of the Coalition that would have personal standing to raise the claims set forth in the complaint are the members who are the parents of students attending public schools, and the parents "are not in fact 'members' in any real sense" because they lack voting rights in the Coalition.[18] The defendants point out that, when this action was initiated in 2005, the Coalition's bylaws provided that the Coalition "shall act by and through its [b]oard of [d]irectors. . . . The [b]oard's powers include, but are not limited to, the power to initiate and pursue litigation . . . and to make spending decisions." The bylaws also provided for several categories of membership, including individual members, which is the category that would include parents. All classes of membership *except* the class of individual members had the right to elect a member or members from their class to serve on the Coalition's board of directors.

The 2013 version of the Coalition's bylaws authorized a membership class specifically for parents. Parent members still did not have the right to vote,[19] but they

[18] The other members of the Coalition are various education advocacy organizations, community groups, municipalities, local boards of education and teachers' unions.

[19] Voting members of the Coalition had the right to participate in the election or removal of members of the steering committee, proposed amendments to the Coalition's certification of incorporation or bylaws that would deprive the members of their right to vote in an election or would result in the removal of any member of the Coalition, and any proposed amendment to the Coalition's certificate of incorporation or bylaws pertaining to dues, assessments, fines or penalties to be levied or imposed upon members. In addition, each voting member had one vote on each matter submitted to a vote at a general membership meeting, except for the election or removal of members of the steering committee.

did have the right to participate in general membership meetings. The bylaws also provided that the powers of *all* members of the Coalition "include, but are not limited to, the power to initiate and pursue litigation, to hire experts and other staff, and to make spending decisions." In addition, the bylaws provided that two parent members would be members of the Coalition's steering committee, which, among other duties, had the responsibility to oversee the Coalition's routine business, to "steer policies and promote strategies aimed at ensuring progress toward achieving the goals and objectives" of the Coalition, to "provide ongoing direction, advice, and support to [a]gents of the [c]orporation," and to "modify the budget as is reasonable and necessary . . . ."

The defendants contend that the parents were not true members of the Coalition because the 2005 version of the Coalition's bylaws "gave the power to initiate and pursue litigation to a board over which the parent members had no voice whatsoever" because they lacked voting rights. The defendants also contend that, despite the provisions of the 2013 bylaws allowing parent members to belong to the Coalition's steering committee and to have the same powers as other members "to initiate and pursue litigation, to hire experts and other staff, and to make spending decisions," these powers were illusory because the parent members still had no right to vote. Thus, the defendants claim, the parent members are not true members of the Coalition, but "are simply pawns added in an attempt to provide standing."

The decision of the United States Supreme Court in *Hunt* v. *Washington State Apple Advertising Commission*, 432 U.S. 333, 343, 97 S. Ct. 2434, 53 L. Ed. 2d 383 (1977), from which the *Worrell* test is derived; see *Connecticut Assn. of Health Care Facilities, Inc.* v. *Worrell*, supra, 199 Conn. 615–16; provides some guidance on this issue. In *Hunt*, the defendant, the governor

of North Carolina, contended that the plaintiff, a Washington state agency charged with promoting and protecting the apple industry of the state of Washington (commission), lacked associational standing to bring a claim challenging the constitutionality of a North Carolina statute because the commission did not have any personal stake in the outcome of the litigation, and it was not a proper representative of the apple growers and dealers, who might have such a personal stake, because the apple growers and dealers were not members of the commission. See *Hunt* v. *Washington State Apple Advertising Commission*, supra, 336–37, 341–42. The United States Supreme Court held that, "while the apple growers and dealers are not 'members' of the [c]ommission in the traditional trade association sense, they possess all of the indicia of membership in an organization. They alone elect the members of the [c]ommission; they alone may serve on the [c]ommission; they alone finance its activities, including the costs of this lawsuit, through assessments levied upon them. In a very real sense, therefore, the [c]ommission represents the [s]tate's growers and dealers and provides the means by which they express their collective views and protect their collective interests." Id., 344–45. Accordingly, the court concluded, the commission had associational standing. Id., 345.

We conclude that, contrary to the defendants' claim in the present case, *Hunt* does not stand for the proposition that the right to vote is an essential characteristic of membership in an association for purposes of establishing the first prong of the *Worrell* test. Although the court in *Hunt* observed that the apple growers and dealers elected the commission's members and financed its activities, the court did not say that those facts were *necessary* to establish associational standing if there was other evidence of representation and control. Rather, the court determined that the facts that

the apple growers and dealers served on the commission and that the commission represented their interests and provided a means for them to express their collective views were indicia of membership for purposes of establishing associational standing. See *Disability Advocates, Inc.* v. *New York Coalition for Quality Assisted Living, Inc.*, 675 F.3d 149, 157–59 (2d Cir. 2012) (characterizing *Hunt* as holding that "representation and control" are indicia of membership that gives rise to associational standing); see also *Citizens Coal Council* v. *Matt Canestrale Contracting, Inc.*, 40 F. Supp. 3d 632, 640 (W.D. Pa. 2014) ("[J]ust because [the association's members] lacked voting rights when this [action] was commenced, that factor alone is not sufficient to defeat associational standing . . . . Nothing in *Hunt* indicates that the factors delineated there are the only factors to be considered. . . . Rather, the purpose of the *Hunt* inquiry is to determine whether an organization provides its members with the means to express their collective views and protect their collective interests." [Internal quotation marks omitted.]).

In any event, *Hunt* involved a plaintiff that was not a true voluntary membership association. See *Hunt* v. *Washington State Apple Advertising Commission*, supra, 432 U.S. 342 ("the [c]ommission is not a traditional voluntary membership organization such as a trade association, for it has no members at all"). At least one court has held that, when a plaintiff *is* a true voluntary membership organization, as in the present case, *Hunt*'s "indicia of membership" test does not apply. *California Sportfishing Protection Alliance* v. *Diablo Grande, Inc.*, 209 F. Supp. 2d 1059, 1066 (E.D. Cal. 2002) (*Hunt*'s "indicia of membership" test does not apply to true voluntary membership association); see *Citizens Coal Council* v. *Matt Canestrale Contracting, Inc.*, supra, 40 F. Supp. 3d 643 (members' lack

of voting rights did not defeat associational standing of voluntary membership association).

Nevertheless, even if some evidence of representation and control were required to establish membership, even for a true voluntary membership association, we conclude that the fact that two parent members of the Coalition serve on its steering committee provides sufficient evidence of their control, and the fact that the parent members have voluntarily joined the Coalition knowing that it has publicly advocated in favor of specific public school funding policies provides sufficient evidence that the Coalition represents their views. See *Citizens Coal Council* v. *Matt Canestrale Contracting, Inc.*, supra, 40 F. Supp. 3d 640 ("[t]he affirmative action of an organization's constituents to affiliate with the organization in order to support its advocacy efforts, and to disaffiliate with the organization when they are dissatisfied with those efforts, may provide nearly as much practical influence on management as the bare right to vote for directors" [internal quotation marks omitted]). Indeed, we cannot perceive why the parent members would, by maintaining their membership status, allow the Coalition to use them as "pawns . . . in an attempt to provide standing," as the defendants claim, if the Coalition was not representing their views or protecting their interests as they perceive them. We conclude, therefore, that the fact that the parent members lack voting rights does not defeat the Coalition's associational standing.

The defendants also claim, however, that, even if the parent members are now actual members of the Coalition for purposes of the first prong of the *Worrell* test, because the Coalition had no parent members when this action was initiated in 2005 the Coalition lacked standing at that time, and a subject matter jurisdictional defect that existed when the complaint was filed cannot be cured by a subsequent amendment. The

following additional procedural history is relevant to our resolution of this claim. After the plaintiffs filed their original complaint in 2005, the defendants filed a motion to dismiss the Coalition's claims for lack of standing under *Worrell*. The trial court, *Shortall*, *J.*, granted the motion. In his memorandum of decision, Judge Shortall noted that, according to an affidavit filed by counsel for the Coalition, and contrary to the allegations of the original complaint, the Coalition had no parent members when the complaint was filed. Although the plaintiffs had filed an amended complaint alleging that the Coalition now had parent members, and submitted an affidavit to that effect, the amended complaint did not allege that the parent members were "parents of students in the public schools of Connecticut." Accordingly, the court concluded that the Coalition did not meet the first prong of the *Worrell* test.

Thereafter, the plaintiffs sought leave to file a second amended complaint in order to cure the standing deficiency by including an allegation that the Coalition's parent members were parents of students in the Connecticut public schools. The trial court granted the request for leave to amend over the objection of the defendants. As we have previously explained in this opinion, the trial court subsequently granted the defendants' motion to strike portions of the second amended complaint, and the plaintiffs appealed from that ruling to this court pursuant to § 52-265a. After this court reversed the decision of the trial court and remanded the case for further proceedings, the plaintiffs were granted leave to file a third amended complaint and defendants filed another motion to dismiss the Coalition's claims for lack of standing. The trial court, *Dubay*, *J.*, denied the motion.

The defendants claim that Judge Dubay improperly denied their motion to dismiss the Coalition's claims because, at the time that the original complaint was

filed, the Coalition had no parent members who would have had standing to bring this action in their own right, and a jurisdictional defect cannot be cured retroactively. To support this claim, the defendants rely on *Fairchild Heights Residents Assn., Inc.* v. *Fairchild Heights, Inc.*, 131 Conn. App. 567, 574 n.8, 27 A.3d 467 (2011) ("[t]he lack of subject matter jurisdiction . . . cannot be cured retrospectively" [internal quotation marks omitted]), rev'd in part on other grounds, 310 Conn. 797, 82 A.3d 602 (2014), and *Connecticut Associated Builders & Contractors* v. *Hartford*, 251 Conn. 169, 186, 740 A.2d 813 (1999) (determining subject matter jurisdiction on basis of facts at time that original complaint was filed). We conclude that these cases are distinguishable.

In *Fairchild Heights Residents Assn., Inc.*, the plaintiff claimed that the defendant had violated various provisions of General Statutes § 21-82 (a) governing, inter alia, a landlord's responsibilities in operating a mobile home park. See *Fairchild Heights Residents Assn., Inc.* v. *Fairchild Heights, Inc.*, supra, 131 Conn. App. 574. The defendant claimed on appeal that the trial court lacked subject matter jurisdiction because the plaintiff had failed to exhaust its remedies pursuant to a statutory scheme for addressing complaints related to mobile home parks. Id., 571, 576. The Appellate Court agreed. Id., 577. In a footnote, the Appellate Court noted that, although the trial court had tried the case on the basis of the plaintiff's amended complaint, "[t]he operative complaint for jurisdictional purposes is that included with the writ of summons. The lack of subject matter jurisdiction to render a final judgment cannot be cured retrospectively." (Internal quotation marks omitted.) Id., 574 n.8.

In *Connecticut Associated Builders & Contractors* v. *Hartford*, supra, 251 Conn. 171, the named plaintiff, a trade association, and two plaintiff subcontractors,

claimed that the defendant's procedures for bidding on a municipal construction contract violated various state and local statutes as well as the state and federal constitutions. Id. This court concluded that the subcontractors lacked standing because the statutes on which they relied were designed to protect the public, not bidders. Id.,184. This court also concluded that the trade association lacked standing because none of its members would have had standing to challenge the bidding procedures "[a]t the time of the filing of the complaint . . . ." Id., 186.

Thus, *Fairchild Heights Residents Assn., Inc.* v. *Fairchild Heights, Inc.*, supra, 131 Conn. App. 574, and *Connecticut Associated Builders & Contractors* v. *Hartford*, supra, 251 Conn. 169, are distinguishable from the present case because, in both of those cases, the *original complaint* should have been dismissed because no plaintiff had standing. If the trial court had rendered a judgment of dismissal in those cases, the plaintiffs would not have been permitted to cure the jurisdictional defects with subsequent pleadings because there no longer would have been any pending action in which to file them. In contrast, the original complaint in the present case was not dismissed when the trial court initially determined that the Coalition lacked standing because the individual plaintiffs named in the original complaint still had standing as parents of students in Connecticut schools. Accordingly, the sole effect of dismissing the Coalition's claims was to remove the Coalition as a plaintiff. When the Coalition subsequently gained associational standing to raise the claims, however, we can perceive no reason why it would not have been permitted to join the action as a plaintiff pursuant to Practice Book § 9-3, assuming, of course, that it satisfied all prongs of the *Worrell* test.[20]

[20] Practice Book § 9-3 provides in relevant part: "All persons having an interest in the subject of the action, and in obtaining the judgment demanded, may be joined as plaintiffs, except as otherwise expressly provided . . . ."

We conclude, therefore, that it would elevate form over substance to hold that the trial court improperly allowed the plaintiffs to cure the jurisdictional defect with respect to the Coalition's claims by amending the complaint. The defendants have not explained how allowing the plaintiffs to amend their complaint, instead of requiring the Coalition to file a motion to join the action as a plaintiff, could have allowed the plaintiffs to reap any procedural advantage or caused any detriment to the defendants. Accordingly, we reject the defendants' claim that the Coalition lacks associational standing under the first prong of *Worrell* because none of its members had standing to bring this action in their own right when the original complaint was filed.

2

Second Prong of the *Worrell* Test

The defendants also claim that the Coalition fails the second prong of the *Worrell* associational standing test, i.e., that "the interests [that the Coalition] seeks to protect are germane to the organization's purpose"; *Connecticut Assn. of Health Care Facilities, Inc.* v. *Worrell*, supra, 199 Conn. 616; because "its membership is irremediably riddled with inherent conflicts regarding educational policy issues germane to this case." Specifi-

The defendants rely on the statement of the United States Court of Appeals for the Second Circuit in *Disability Advocates, Inc.* v. *New York Coalition for Quality Assisted Living, Inc.*, supra, 675 F.3d 160, that "if jurisdiction is lacking at the commencement of [an action], it cannot be aided by the intervention of a [plaintiff] with a sufficient claim." (Internal quotation marks omitted.) As we have explained, however, jurisdiction over the original *complaint* was not lacking in the present case; rather, jurisdiction was lacking over the *Coalition's claims*. Thus, after the Coalition's claims were dismissed, the Coalition would not have been attempting to intervene in a nonexistent action if it had filed a motion to join the action. Cf. id. ("since intervention contemplates an existing [action] in a court of competent jurisdiction and because intervention is ancillary to the main cause of action, intervention will not be permitted to breathe life into a nonexistent [action]" [internal quotation marks omitted]).

cally, the defendants claim that the Coalition's membership includes, among others, municipalities and local school boards with diverse locations and demographics, teachers' unions and parents. The defendants contend that, although all members might agree on one point—the need for the state to put more money into the educational system—they would not agree on how the money should be distributed. The defendants point out that potential changes in funding that would benefit one school district might harm another district. The defendants also point out that one member of the Coalition, the Connecticut Association of Public School Superintendents, is opposed to laws governing binding arbitration for teacher pay. According to the defendants, this position is squarely at odds with the interests of the two teachers' unions that are members of the Coalition. As another example, the defendants point out that one member of the Coalition, the city of Bridgeport, has taken the position through the testimony of its superintendent of schools that teacher termination laws and due process requirements should be changed to make it easier to terminate ineffective administrators and teachers, a position with which the teachers' unions also would disagree. We conclude that these potential conflicts do not deprive the Coalition of associational standing.

As noted by the United States Court of Appeals for the Seventh Circuit, courts "have not been uniform in their approach to the presence of conflicts of interest in an association seeking standing." *Retired Chicago Police Assn.* v. *Chicago*, 7 F.3d 584, 603 (7th Cir. 1993). Specifically, some courts have concluded that conflicts among the members of an association are simply "not relevant to whether associational standing ought to be permitted"; id., 603–605 (discussing cases); while other courts have concluded that, under certain circumstances, conflicts of interest may be so profound as to

deprive the association of standing. Id., 605–607 (discussing cases).[21]

The courts that have held that conflicts of interest among members of an association generally do not deprive the association of standing have relied on the decision of the United States Supreme Court in *International Union, United Automobile, Aerospace & Agricultural Implement Workers of America* v. *Brock*, 477 U.S. 274, 290, 106 S. Ct. 2523, 91 L. Ed. 2d 228 (1986) (*Brock*). See, e.g., *Retired Chicago Police Assn.* v. *Chicago*, supra, 7 F.3d 603–605 (discussing cases). In *Brock*, the court acknowledged that the position taken by an association in a particular litigation "might reflect the views of only a bare majority—or even an influential minority—of the full membership." *Brock*, supra, 289. Nevertheless, the court concluded that the potential for

[21] In addition, some courts have held that the existence of potential conflicts of interest implicates the second prong of the *Worrell* test; see *Retired Chicago Police Assn.* v. *Chicago*, supra, 7 F.3d 607, citing *Humane Society of the United States* v. *Hodel*, 840 F.2d 45, 56 (D.C. Cir. 1988); while some have held that it implicates the third prong. See *Retired Chicago Police Assn.* v. *Chicago*, supra, 603, citing *Associated General Contractors of California, Inc.* v. *Coalition for Economic Equity*, 950 F.2d 1401, 1408 (9th Cir. 1991), cert. denied, 503 U.S. 985, 112 S. Ct. 1670, 118 L. Ed. 2d 390 (1992). In our view, the defendants' claim fits more comfortably under the second prong of the *Worrell* test. The third prong, requiring proof that "neither the claim asserted nor the relief requested requires the participation of individual members in the [action]"; (internal quotation marks omitted) *Connecticut Assn. of Health Care Facilities, Inc.* v. *Worrell*, supra, 199 Conn. 616; does not address the situation in which a conflict of interest would require an individual member of the association to challenge the position taken by the association in court in order to protect his or her interests, but the situation in which "the individual participation of each injured party [is] indispensable to proper resolution of the cause . . . ." (Internal quotation marks omitted.) *Hunt* v. *Washington State Apple Advertising Commission*, supra, 432 U.S. 342–43; see also *Connecticut State Medical Society* v. *Board of Examiners in Podiatry*, 203 Conn. 295, 305, 524 A.2d 636 (1987) (when association sought declaratory relief but does not seek money damages, association meets third prong of *Worrell* test because court is not required to consider particular circumstances of each individual member); *Paucatuck Eastern Pequot Indians* v. *Indian Affairs Council*, 18 Conn. App. 4, 10, 555 A.2d 1003 (1989) (same).

a conflict of interest was outweighed by the benefits provided by associational standing, namely, that many associations have "a [preexisting] reservoir of expertise and capital" upon which its members can draw and that associations provide people with "an effective vehicle for vindicating interests that they share with others." Id., 289–90. In addition, the court in *Brock* noted that any harm to a member of an association who did not agree with the position taken by the association would not be irremediable because, if an association is not "able to represent adequately the interests of all their injured members," a judgment won by the association "might not preclude subsequent claims by the association's members without offending due process principles." Id., 290; see also *Retired Chicago Police Assn.* v. *Chicago*, supra, 605 (summarizing authority from United States Third Circuit Court of Appeals that when there is no evidence that position taken by association is "contrary to the interests of a majority of its members, and there [is] nothing on the record to indicate that [the association] had failed to follow [its] own internal rules before joining the litigation, [a] perceived conflict of interest [does] not bar associational standing"); *Humane Society of the United States* v. *Hodel*, 840 F.2d 45, 56 (D.C. Cir. 1988) (If "forces that cause individuals to band together guarantee some degree of fair representation, they surely guarantee as well that associational policymakers will not run roughshod over the strongly held views of association members in fashioning litigation goals. . . . [The germaneness test] requires . . . that an organization's litigation goals be pertinent to its special expertise and the grounds that bring its membership together." [Footnote omitted; internal quotation marks omitted.]); *National Maritime Union of America, AFL-CIO* v. *Commander, Military Sealift Command*, 824 F.2d 1228, 1234 (D.C. Cir. 1987) ("the mere fact of conflicting interests among members

of an association does not of itself defeat the association's standing to urge the interests of some members in litigation, even though success may harm the legal interests of other members"); *Laflamme* v. *New Horizons, Inc.*, 605 F. Supp. 2d 378, 396–97 (D. Conn. 2009) (same).

Other courts, however, have recognized that there may be circumstances under which conflicts among the members would deprive an association of standing. For example, the United States Court of Appeals for the Fourth Circuit has held that an association lacks associational standing when "conflicts of interest among members of [an] association require that the members must join the [action] individually in order to protect their own interests" by taking a position adverse to that taken by the association, and the association initiated the litigation without first informing its membership. *Maryland Highways Contractors Assn., Inc.* v. *Maryland*, 933 F.2d 1246, 1252–53 (4th Cir.), cert. denied, 502 U.S. 939, 112 S. Ct. 373, 116 L. Ed. 2d 325 (1991). Similarly, the United States Court of Appeals for the Seventh Circuit has held that an association lacked associational standing when it was "in effect suing certain of its members on behalf of other members." *Retired Chicago Police Assn.* v. *Chicago*, supra, 7 F.3d 606, citing *Southwest Suburban Board of Realtors, Inc.* v. *Beverly Area Planning Assn.*, 830 F.2d 1374, 1381 (7th Cir. 1987). As noted by the court in *Retired Chicago Police Assn.* v. *Chicago*, supra, 606, in both of these cases "the conflict of interest among the members was profound. In *Maryland Highways* [*Contractors Assn., Inc.*], the [action] not only worked to the direct detriment of the minority members of the [a]ssociation, but was undertaken by the [a]ssociation without observance of its own [bylaws]. In *Southwest Suburban* [*Board of Realtors, Inc.*], [the court] noted that 'what this [action] amounts to is [the association bringing an

action against] certain of its members on behalf of other of its members.' " In addition, in both cases, "the associations were not really operating along the lines for which they had been organized. In each case, they were operating as less permanent structures merely for litigation purposes and not for the purposes stated in their charters." Id., 607.

With these principles in mind, we address the defendants' claim in the present case that the conflicts of interest among the Coalition's members deprive it of associational standing. Although the defendants' claim highlights the immense complexity of the state's educational system and the wide variety of interests that the state must consider when formulating educational policies—circumstances that certainly support the notion that courts have very limited institutional competence to craft educational remedies for the types of claims raised in the present case and, therefore, must be extremely cautious when inserting themselves into this area—we conclude that the conflicts of interests among the Coalition's members are not so profound as to deprive the Coalition of associational standing. There is no evidence that a majority of the Coalition's members disagrees with the Coalition's claim that the defendants have deprived students in the state's poorer school districts with a suitable and substantially equal educational opportunity in violation of article eighth, § 1, and article first, §§ 1 and 20; the Coalition's primary litigation goal is not directly at odds with the interests of part of its membership; no members objected to the Coalition initiating this action; no member of the Coalition has expressed the belief that the relief sought by the plaintiffs in this action would not be generally beneficial to the state's educational system; there is no evidence that any member has challenged or intends to challenge the Coalition's claims in this litigation in

court;[22] there is no evidence that the Coalition is operating for the purposes other than those stated in its bylaws;[23] and there is no claim that the Coalition brought this litigation without first informing its members or following the procedures in its own bylaws. In the absence of any such evidence, any harm resulting to any member of the Coalition as the result of this litigation would be simply "part of the cost of obtaining the benefits of the association." (Internal quotation marks omitted.) *Retired Chicago Police Assn.* v. *Chicago*, supra, 7 F.3d 604. Accordingly, we reject this claim.

3

Third Prong of the *Worrell* Test

The defendants next contend that the plaintiffs cannot satisfy the third prong of the *Worrell* test, i.e., that "neither the claim asserted nor the relief requested requires the participation of individual members in the

[22] As we have explained herein, the United States Supreme Court appears to have suggested that even if a member of an association would likely challenge the position taken by the association in court that would not necessarily defeat associational standing if other members agree with the association's position. See *Brock*, supra, 477 U.S. 290 (members of association harmed by judgment won by association might not be precluded from bringing subsequent claim); but see *Maryland Highways Contractors Assn., Inc.* v. *Maryland*, supra, 933 F.2d 1252 (association cannot establish associational standing when "conflicts of interest among members of the association require that the members must join the [action] individually in order to protect their own interests"). We need not decide in the present case whether associational standing can be established when members of an association would be required to intervene in the action or bring a subsequent action to protect their interests because, even if that were the case, the defendants have provided no evidence that any member of the Coalition intends to challenge the positions taken by the Coalition in court.

[23] The Coalition's 2005 bylaws provide that the purposes of the Coalition are, inter alia, to "(a) engage in activities that promote the adequate funding of education in the [s]tate of Connecticut [and] (b) engage in activities that relieve the burdens of Connecticut municipalities in funding education . . . ."

[action]." (Internal quotation marks omitted.) *Connecticut Assn. of Health Care Facilities, Inc.* v. *Worrell*, supra, 199 Conn. 616. Specifically, the defendants contend that a court cannot determine whether the individual members of the Coalition "have been denied their constitutional right to a substantially equal and minimally adequate public education without considering specific evidence as to those individuals." According to the defendants, this is so because "[t]he minimum services needed for a precocious reader, an 'average' student, a multiply handicapped student, a student from a troubled home life, a student whose native language is not English, a student with mild cognitive impairment, or any other student, are plainly all different."

We disagree that the plaintiffs have not satisfied the third prong of the *Worrell* test. Nothing in Justice Palmer's concurring opinion in *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 320, suggests that the determination as to whether the state is providing a minimally adequate educational opportunity that complies with article eighth, § 1, must be made on a student by student basis, taking into consideration the special needs and abilities of each individual. To the contrary, the *Campaign I* criteria that Justice Palmer adopted focus exclusively on the characteristics of *schools*; id., 342 (*Palmer, J.*, concurring in the judgment) (citing *Campaign I* criteria); and he emphasized that the focus of the court's inquiry should be on educational inputs, not individual achievement. Id., 345 n.19 (*Palmer, J.*, concurring in the judgment). Accordingly, as we have already explained in part I A of this opinion, injury to all individual students could be inferred from proof that the state's schools do not meet the *Campaign I* criteria even in the absence of evidence that each individual student has suffered some identifiable harm. Accordingly, we reject this claim.

II

WHETHER THE TRIAL COURT APPLIED AN IMPROPER CONSTITUTIONAL STANDARD TO THE PLAINTIFFS' CLAIMS PURSUANT TO ARTICLE EIGHTH, § 1

We next address the defendants' claim that the trial court, after determining that plaintiffs did not establish that the state has failed to provide children in any school district in this state with a minimally adequate educational system under the *Campaign I* criteria, improperly applied a constitutional standard of its own devising to conclude that the defendants have violated the plaintiffs' rights under article eighth, § 1. The plaintiffs disagree and argue that, if we agree with the defendants' claim, the trial court's interpretation of the *Campaign I* criteria nonetheless was unduly narrow. We agree with the defendants and conclude that the trial court properly interpreted and applied the *Campaign I* criteria adopted by Justice Palmer in his concurring opinion in *Connecticut Coalition for Justice in Education Funding, Inc.*, but then went on to improperly apply a constitutional standard of its own devising.

A

We begin with the standard of review. The scope of the right guaranteed by article eighth, § 1, is a question of law subject to plenary review. See *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 270–71 (plurality opinion) (considering scope of right guaranteed by article eighth, § 1, as matter of law); id., 342–43 (*Palmer, J.*, concurring in the judgment) (same).

As we have previously explained herein, the trial court concluded after a trial that the *Campaign I* criteria for a minimally adequate system of free public

schools were met. The trial court also concluded, however, that the state's educational system would not satisfy article eighth, § 1, unless the state "deploy[ed] in its schools resources and standards that are rationally, substantially and verifiably connected to teaching children." The trial court apparently derived this standard from Justice Palmer's statements that the state's educational programs and policies would be unconstitutional if they were "so lacking as to be unreasonable by any fair or objective standard"; *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 321 (*Palmer, J.*, concurring in the judgment); and that the state must operate "within the limits of rationality . . . ." (Internal quotation marks omitted.) Id., 336 (*Palmer, J.*, concurring in the judgment). The trial court concluded that this "rationality" requirement could not be the low rational basis standard because this court had held in *Horton I*, supra, 172 Conn. 646, that "in Connecticut the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized." Applying this "rationally, substantially and verifiably connected" standard, the trial court concluded that the state's current "school program" is unconstitutional because "[the state] has no rational, substantial and verifiable plan to distribute money for education aid and school construction," it has no "objective and mandatory statewide graduation standard," "there is no way to know who the best teachers are and no rational and substantial connection between their compensation and their effect on teaching children," and the state's program of special education spending is irrational.

The defendants claim on appeal that, once the trial court concluded that the *Campaign I* criteria were met, that court should have concluded that the state's educational system does not violate article eighth, § 1, and it should not have gone on to consider whether the state

"deploy[ed] in its schools resources and standards that are rationally, substantially and verifiably connected to teaching children." We agree. We conclude that Justice Palmer's statements that the state's educational programs and policies cannot be "so lacking as to be unreasonable by any fair or objective standard" and that the state must operate "within the limits of rationality" mean that the efforts that the state makes to comply with its obligations under article eighth, § 1, must *reasonably* address the minimal educational needs of the state's students, as described in *Campaign I*, and that the standard applied by the trial court is inconsistent with Justice Palmer's repeated statements that courts are ill equipped to address the complex and intractable problems of financing and managing a statewide public school system. (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 321, 326, 336 (*Palmer, J.*, concurring in the judgment). We further conclude that, having found that the schools are minimally adequate under the *Campaign I* criteria, the trial court should have determined that the state has fulfilled its obligations under article eighth, § 1, and, therefore, the trial court improperly applied the "rationally, substantially and verifiably connected to teaching children" standard to conclude that the state's educational system is unconstitutional.

As we have indicated, under the *Campaign I* standard, the state must provide (1) "minimally adequate physical facilities and classrooms which provide enough light, space, heat, and air to permit children to learn," (2) "minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks," (3) "minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies," and (4) "sufficient personnel adequately trained to teach

those subject areas." *Campaign I*, supra, 86 N.Y.2d 317.[24] Inasmuch as the phrase "minimally adequate" is not self-defining, a trial court making the determination as to whether this standard has been met necessarily is required to exercise some degree of judgment. It is reasonable to conclude, therefore, that Justice Palmer's statements that the state must operate "within the limits of rationality"; (internal quotation marks omitted) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 336 (*Palmer, J.*, concurring in the judgment); and that the educational opportunity provided by the state cannot be "so lacking as to be unreasonable by any fair or objective standard"; id., 321 (*Palmer*, *J.*, concurring in the judgment); meant simply that the trial court should determine whether the specific educational facilities, instrumentalities, curricula and personnel that the state is required to provide, as described in *Campaign I*, *reasonably* address the minimal educational needs of this state's children, that is, whether the state's offerings are sufficient to enable a student who takes advantage of them

[24] The plaintiffs contend that the trial court improperly determined that, under the "narrowest grounds" of agreement approach set forth in *State* v. *Ross*, supra, 272 Conn. 604 n.13, Justice Palmer's concurring opinion in *Connecticut Coalition for Justice in Education Funding, Inc.*, provides the controlling constitutional standard because there was no agreement among the three plurality justices and Justice Palmer as to either the plurality's broad constitutional standard or Justice Palmer's narrower standard based on the *Campaign I* criteria. Because there was no majority support for either standard, the plaintiffs contend, neither is controlling. The plaintiffs fail to recognize, however, that the three justices in the plurality and Justice Palmer all agreed that article eighth, § 1, requires the state to provide *at least* the educational facilities, instrumentalities, curricula and personnel described in *Campaign I*. In addition, the three dissenting justices and Justice Palmer all agreed that the plurality's broader standard was *too* broad and would improperly entangle the courts in the legislative function of forming educational policy. See *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 398 (*Vertefeuille, J.*, dissenting), 399–400 (*Zarella*, *J.*, dissenting). Thus, Justice Palmer's concurring opinion reflects the controlling majority agreement on both of those points.

to become a functional member of society.[25] For example, if the plaintiffs had shown that the state was providing elementary school students with books and curricula intended for only advanced college students, a court could conclude that the state was not reasonably meeting the minimal educational needs of these students—in other words, that these instrumentalities and curricula were not minimally adequate. Similarly, if no reasonable person could conclude that a single heat lamp is sufficient to heat a classroom during the winter, a school that routinely used this heating method would not be minimally adequate.

Justice Palmer never suggested, however, that, after determining that the specific instrumentalities, facilities, curricula and personnel that the state is required to provide in its elementary and secondary schools reasonably address the minimal educational needs of their students, the courts must nevertheless examine *all* of

[25] Justice Palmer did not expressly discuss in his concurring opinion in *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 320, the *purpose* for which the state's educational offerings must be minimally adequate. It is implicit in the *Campaign I* criteria, however, that the educational opportunities offered by the state must be sufficient to enable a student who takes advantage of them to attain a level of knowledge of reading, writing, mathematics, science and social studies that will enable the student to perform the basic functions of an employable adult in our society, such as reading newspapers, tax forms and other basic texts, writing a basic letter, preparing a household budget, buying groceries, operating cars and household appliances, serving on a jury and voting. See *Campaign I*, supra, 86 N.Y.2d 316 (sound basic education "should consist of the basic literacy, calculating, and verbal skills necessary to enable children to eventually function productively as civic participants capable of voting and serving on a jury"); see also *Abbeville County School District* v. *State*, supra, 335 S.C. 68 (under state constitution, minimally adequate education will provide students with opportunity to "acquire: [1] the ability to read, write, and speak the English language, and knowledge of mathematics and physical science; [2] a fundamental knowledge of economic, social, and political systems, and of history and governmental process; and [3] academic and vocational skills"). We emphasize, however, that it is not the actual ability to carry out these functions that is constitutionally guaranteed, but only the opportunity to achieve that ability.

the state's educational policies and programs, such as its funding formulas, school construction policies, graduation standards, teacher evaluation practices, teacher compensation practices and special education policies, to ensure that they are "rationally, substantially and verifiably connected to teaching children." Rather, if the state is providing a minimally adequate educational opportunity to all of its elementary and secondary school students under the *Campaign I* criteria, the fact that some educational policies and programs are not, in the trial court's personal view, "rationally, substantially and verifiably connected to teaching children" is constitutionally irrelevant. For example, if a court concludes that the state's educational system satisfies the *Campaign I* criteria, the fact that the state spends large sums of money on special education that, in the court's personal view, would be better spent on hiring teachers for regular classrooms is no more relevant than the fact that the state spends large sums of money on its Medicaid program or on road construction. It is irrefutable that the court's role is not to determine how programs should be funded, both within the educational system and beyond, but, instead, only to ensure that the state is meeting the minimal constitutional requirements for education.

Indeed, Justice Palmer expressly recognized that "courts are ill equipped to deal with issues of educational policy" and "lack [the] specialized knowledge and experience to address the many persistent and difficult questions of educational policy that invariably arise in connection with the establishment and maintenance of a statewide system of education." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 335 (*Palmer, J.*, concurring in the judgment). Thus, the constitutional standard that the trial court applied in the present case would entangle the courts in the very pol-

icy determinations that Justice Palmer repeatedly warned against,[26] thereby creating a very substantial likelihood that the court would violate constitutional separation of powers principles. See id., 314 (plurality opinion), quoting *Campaign for Fiscal Equity, Inc.* v. *State*, 8 N.Y.3d 14, 27–28, 861 N.E.2d 50, 828 N.Y.S.2d 235 (2006) ("[t]he role of the courts is not . . . to determine the best way to calculate the cost of a sound basic education . . . but to determine whether the [s]tate's proposed calculation of that cost is rational" because of "limited access of the [j]udiciary to the controlling economic and social facts, but also [because of] our abiding respect for the separation of powers upon which our system of government is based" [internal quotation marks omitted]); see also *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 326 (*Palmer, J.*, concurring in the judgment), quoting R. Levy, "Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation," 54 U. Kan. L. Rev. 1021, 1033–34 (2006) ("Defining levels of adequacy requires that courts become involved in determining educational policies—the goals and the methods of delivering education—in a way that equity litigation does not. Likewise, fashioning remedies for violations of adequacy requirements is more problematic because legislatures may be reluctant to provide sufficient funding and because judicial enforcement of remedies against the legislature presents practical difficulties and raises serious [separation of powers concerns]."); *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 338 (*Palmer, J.*, concurring in the judgment) ("the significant separation of powers issues that [crafting a judicial remedy for a violation of article eighth, § 1] invariably would

[26] See various portions of Justice Palmer's concurring opinion in *Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 328–29, 332, 336, 337, 338, 341–42, 344 n.18.

spawn must be given due consideration in determining the scope of the right").

Relatedly, requiring courts to determine, as an issue entirely distinct from the question of whether the state is providing minimally adequate schools under the narrow and specific *Campaign I* criteria, whether the state's educational policies and programs "are rationally, substantially and verifiably connected to teaching children" would be entirely inconsistent with Justice Palmer's rejection of the plurality's suggestion that it would be appropriate "to craft the constitutional standard 'in broad terms' [because] the broader the standard, the more vague it is likely to be. In addition, the broader the standard, the more difficult it will be for the parties and the court to understand and apply it." *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 342–43 n.17 (*Palmer*, *J.*, concurring in the judgment). Accordingly, we agree with the defendants that, upon finding that the state's educational system reasonably satisfies the narrow and specific *Campaign I* criteria, the court should have found that the system is constitutional under article eighth, § 1.

The plaintiffs contend that this conclusion cannot be reconciled with Justice Palmer's suggestion that an "education funding system [that] is 'arbitrary and inadequate,' and not related to the actual costs of providing an education that meets constitutional standards" would be unconstitutional. Id., 346 n.20 (*Palmer*, *J.*, concurring in the judgment). We conclude, however, that, for the reasons that we have already given, this statement merely supports the notion that state funding must be sufficient to allow schools to meet the minimally adequate *Campaign I* criteria. Indeed, the plaintiffs ultimately contend in their reply brief to this court that the conclusion that the trial court drew from the evidence should not have been that the state's gradua-

tion standards, teacher evaluation and compensation schemes, and spending on special education are irrational, but that "many districts with high needs populations are not receiving adequate resources to provide an adequate educational opportunity to many of their students."[27] Thus, the plaintiffs appear to concede that, to the extent that Justice Palmer's concurring opinion in *Connecticut Coalition for Justice in Education Funding, Inc.*, contained a reasonableness component, that component is part and parcel of the constitutional standard for determining the minimal adequacy of the state's educational offerings and not a separate rationality test applicable to *all* educational policies and programs, even when the *Campaign I* criteria have been satisfied. Accordingly, we agree with the defendants that, having found that the educational resources provided by the state reasonably meet the minimal needs of the state's students—that is, the state's educational offerings, even in the poorest school districts, are sufficient to enable students who take advantage of them to become functional members of society—and that the *Campaign I* criteria were therefore met, the trial court should have concluded that the state's educational system satisfies article eighth, § 1, and it should not have gone on to apply a constitutional standard of its own devising. By doing so, not only did the trial court fail to defer to the legislature, it also usurped the legislative responsibility to determine how additional funding, beyond the constitutionally required minimum, should be allocated and how to craft educational policies that, in its view, best balance the wide variety of interests at issue. This action was in clear violation of separation of powers principles.

B

The plaintiffs claim on cross appeal that, if we agree with the defendants' claim that the trial court improp-

[27] We address the merits of this equal protection claim in part IV of this opinion.

erly applied the "rationally, substantially and verifiably connected to teaching children" standard to conclude that the defendants have violated article eighth, § 1, we should also determine that the trial court's interpretation of the *Campaign I* criteria was unduly narrow. We disagree.

The plaintiffs contend that the subsequent history of the *Campaign I* case shows that the court in *Campaign I* contemplated a far broader standard than the trial court applied in this case. The plaintiffs point out that, after the court in *Campaign I* remanded the case for application of the standard that it had adopted, the trial court conducted a searching and detailed examination of New York City's educational system and concluded that the *Campaign I* standard was not met. See *Campaign for Fiscal Equality, Inc.* v. *State*, 187 Misc. 2d 1, 4, 719 N.Y.S.2d 475 (2001) (*Campaign II*).[28] The New York Court of Appeals ultimately upheld the trial court's determination on appeal. *Campaign for Fiscal Equity, Inc.* v. *State*, 100 N.Y.2d 893, 903, 801 N.E.2d 326, 769

[28] Specifically, the trial court considered measures of teacher quality, including the percentage of teachers who are certified, passage rates on certification examinations, years of experience, the ranking of the colleges that teachers attended, school spending on professional development and the adequacy of internal rating systems for teacher quality; see *Campaign II*, supra, 187 Misc. 2d 24–33; the school system's competitiveness in the market for quality teachers; id., 34; the adequacy of delivery systems for school curricula, including "noncore" subjects, such as the arts and physical education, that are required to "provide a means of expression and achievement which foster self-confidence and positive attitudes about school"; id., 37; the poor condition of school facilities and classrooms, including "overcrowding, poor wiring, pock-marked plaster and peeling paint [and] inadequate (or nonexistent) climate control"; id., 39; classroom overcrowding and class size; id., 49; the quantity and quality of textbooks; id., 56–57; the number of library books per student; id., 57; the adequacy of classroom supplies and equipment, such as beakers, Bunsen burners, beam balances, microscopes, chalk, paper, art supplies, desks and chairs; id., 57–58; the adequacy of instructional technology, such as computers, printers, modems and software; id., 58; graduation rates; id., 60; scores on standardized tests; id., 64; and whether there was a causal link between the state's public school funding system and the educational opportunity that the plaintiffs were receiving. Id., 68.

N.Y.S.2d 106 (2003) (*Campaign III*) (affirming portion of decision of Appellate Division of the New York Supreme Court dismissing plaintiffs' "title VI"[29] claim and reversing portions of order finding error in *Campaign II*). The plaintiffs contend that this shows that the *Campaign I* standard demands the type of searching and detailed analysis that the New York Court of Appeals approved in *Campaign III*.

We are not persuaded. Rather, a review of the subsequent history of *Campaign I* shows why Justice Palmer's concurring opinion did *not* contemplate that the trial court would apply the broader standard that the New York trial court applied in *Campaign II*. The trial court in *Campaign II* considered on remand a broad range of factors that were not specifically mentioned in *Campaign I*. See footnote 28 of this opinion. The trial court also applied a comparative standard, repeatedly considering whether the educational instrumentalities, facilities, curricula and personnel provided by New York City schools were equivalent to those provided elsewhere in the state,[30] despite the fact that nothing in

[29] "Title VI [of the Civil Rights Act of 1964, 42 U.S.C. § 2000d et seq. (2012)] provides [in relevant part]: 'No person in the United States Shall on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.' " *Campaign I*, supra, 86 N.Y.2d 321.

[30] See *Campaign II*, supra, 187 Misc. 2d 27 ("in New York [s]tate, localities other than New York City experience nowhere near the shortages [of certified teachers] seen in the [c]ity"; id., 28 (first time failure rate for teachers taking basic liberal arts and science test "was 31.1 [percent in New York City], compared with 4.7 [percent] for teachers elsewhere in the [s]tate"); id., 29 (evidence showed that "the average New York City public school teacher attended a less competitive college than the average public school teacher in the rest of the [s]tate"); id., 34 ("New York City's public schools' lack of competitiveness in the relevant labor market can be seen by comparing the qualifications of New York City's public school teachers with those who work in public schools in the counties near New York City"); id., 53 ("New York City's class sizes have been consistently higher than the [s]tate average"); id., 58 ("[i]n 1997, districts in the [s]tate outside of New York City had twice as many computers per 100 students as did the [c]ity").

Campaign I had suggested that, in determining whether New York City's school system was minimally adequate, the trial court should consider the level of resources provided by other school districts.

Moreover, the trial court in *Campaign II* was not persuaded by the state's contention that it was "required only to provide the *opportunity* for a sound basic education" and that "students' failure to seize this opportunity is a product of various socioeconomic deficits experienced by the large number of [at risk] students in New York City public schools." (Emphasis in original.) *Campaign II*, supra, 187 Misc. 2d 63. The court stated that "the [s]tate must only provide the opportunity for a sound basic education, but this opportunity must be placed within reach of all students. The court rejects the argument that the [s]tate is excused from its constitutional obligations when public school students present with socioeconomic deficits."[31] Id. Thus, the standard that the trial court applied in *Campaign II*, which was implicitly approved by the New York Court of Appeals in *Campaign III*, was clearly a different and far broader standard than the one set forth in *Campaign I*.

We see no evidence in Justice Palmer's concurring opinion in *Connecticut Coalition for Justice in Education Funding, Inc.*, that he contemplated that the narrow and specific criteria that he had identified for determining whether the state is providing minimally adequate educational resources would be subject to modification on remand. To the contrary, he repeatedly emphasized that a broader standard was inappropriate, that the trial court should give great deference to the

[31] Of course, the state did not claim in *Campaign II* that it was "excused" from providing a sound, basic education to students with "socioeconomic deficits." *Campaign II*, supra, 187 Misc. 2d 63. It claimed only that its constitutional obligation was satisfied if it provided those students with an *opportunity* for a sound basic education. Id.

legislature's educational policy choices, and that the court's primary focus should be on the adequacy of educational inputs, not on the level of educational achievement. See *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 342 n.17, 345 n.19 (*Palmer, J.*, concurring in the judgment). Moreover, unlike the justices in the plurality, Justice Palmer made no direct reference to the subsequent history of *Campaign I* in his concurring opinion. See id., 302 (plurality opinion) (*Campaign III* "further developed [the *Campaign I*] standard to provide that students have a right to a meaningful high school education, one which prepares them to function productively as civic participants, although not necessarily a high school diploma" [internal quotation marks omitted]). Indeed, Justice Palmer expressly *rejected* the part of the plurality's standard that, like *Campaign III*, focused on educational outputs. See id., 345 n.19 (*Palmer, J.*, concurring in the judgment). We conclude, therefore, that, at least initially, the trial court properly determined that the narrow and specific *Campaign I* standard, as set forth in Justice Palmer's concurring opinion in *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 342, is the controlling constitutional standard, not the broader standard that the New York courts applied in *Campaign II* and *Campaign III*.

The plaintiffs also contend that the standard applied by the trial court was too narrow because Justice Palmer recognized that the *Campaign I* criteria "must be evaluated in light of current educational standards, which continue to evolve." See *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 320–21 (*Palmer, J.*, concurring in the judgment) (educational opportunity provided by state pursuant to article eighth, § 1, must be "minimally adequate by modern educational standards"). In our view, how-

ever, this statement simply means that the fact that a school would be minimally adequate under 1850 educational standards does not necessarily mean that it is minimally adequate under modern standards. In other words, the fact that a school with a single classroom containing forty students ranging in age from six to eighteen, heated by a wood stove, and providing only handheld chalkboards for instruction may have been considered adequate in 1850 does not mean that the school would be adequate today.

The plaintiffs further rely on Justice Palmer's suggestion that their allegations that "many [students] attend schools that do not have the resources necessary to educate their high concentration of poorly performing students" and that "the state has failed to provide the resources necessary to intervene effectively on behalf of [at risk] students, that is, students who, because of [a] wide range of financial, familial, and social circumstances, [are] at greater risk of failing or experiencing other unwanted outcomes unless intervention occurs" were sufficient to withstand a motion to strike because, if proven, they might establish "a violation of the standard articulated in this opinion." (Internal quotation marks omitted.) Id., 346 n.20 (*Palmer*, *J.*, concurring in the judgment). Because these allegations focus on the special needs of at risk students and on educational outcomes, the plaintiffs contend, Justice Palmer must have intended for the trial court to consider those factors.

This interpretation simply cannot be squared, however, with Justice Palmer's unequivocal statement elsewhere in his opinion that schools "cannot be constitutionally required to overcome every serious social and personal disadvantage that students bring with them to school, and that seriously hinder[s] the academic achievement of those students." (Internal quotation marks omitted.) Id., 345 (*Palmer*, *J.*, concur-

ring in the judgment). In addition, although Justice Palmer was reluctant to conclude that "educational 'outputs' are *never* relevant to the determination of whether the state has complied with the requirements of article eighth, § 1"; (emphasis added) id., 345 n.19; he clearly indicated that "because student achievement may be affected by so many factors outside the state's control, including, perhaps most particularly, the disadvantaging characteristics of poverty . . . educational inputs must provide the primary basis for that determination."[32] (Citation omitted; internal quotation marks omitted.) Id. (*Palmer*, *J.*, concurring in the judgment). Indeed, to conclude otherwise would convert the constitutional mandate that the state provide minimally adequate elementary and secondary schools into a mandate that the state ensure that all school age children have sufficiently good parenting, financial resources, housing, nutrition, health care, clothes and other social goods to enable them to take advantage of the educational opportunity that the state is offering.

We are compelled to conclude, therefore, that when Justice Palmer determined that the plaintiffs' allegations were sufficient to withstand the defendants' motion to strike, he did not intend to suggest that the *Campaign I* criteria were merely one part of a broader constitutional inquiry that should include an analysis of whether the state's educational offerings are sufficient to overcome disadvantaging conditions outside of the state's control that affect educational outcomes.

[32] Although disparities in achievement that are the result of disadvantaging conditions are generally uninformative on the question of whether the state is providing a minimally adequate educational opportunity, there are situations in which disparities in outcome might be informative. For example, if two school districts with similar demographic characteristics have wide disparities in educational outputs, that fact might inform a court's constitutional analysis because it reasonably might be inferred that the gap is the result of disparities in educational inputs, which are the proper subject of the court's constitutional analysis.

Rather, he was recognizing that the allegations were sufficiently broad and general that the evidence that the plaintiffs presented to support them at trial might support a conclusion that the narrow and specific *Campaign I* criteria had not been met.[33] See id., 346 n.20 (*Palmer*, *J.*, concurring in the judgment) ("[t]he plaintiffs have asserted extensive factual allegations . . . and their claims are cast in broad terms"). Indeed, because Justice Palmer had articulated the controlling constitutional standard for the first time in his concurring opinion in *Connecticut Coalition for Justice in Education Funding*, *Inc.*, it would have been unfair to the plaintiffs to refuse to afford them an opportunity to refine their claims to meet the standard. Cf. *Cefaratti* v. *Aranow*, 321 Conn. 593, 625, 141 A.3d 752 (2016) ("[b]ecause we have adopted the detrimental reliance standard for the first time in this opinion . . . we believe that fairness requires us to remand the case to the trial court so that the plaintiff may have an opportunity to present evidence" that would satisfy new standard). Accordingly, we conclude that the trial court initially applied the proper standard when it concluded that the state's educational offerings satisfy the minimal constitutional standard set forth in Justice Palmer's

[33] In his concurring and dissenting opinion in this case, Justice Palmer contends that it is clear, from his conclusion in *Connecticut Coalition for Justice in Education Funding*, *Inc.*, that the plaintiffs' claims were legally cognizable, that he contemplated that *Campaign I* "requires not only that the state provide the essential components of a minimally adequate education, including facilities, instrumentalities, curricula, and personnel, but also that some reasonable effort be made to ensure that those modalities are designed to address the basic educational needs of at risk learners in underprivileged communities." As we explain more fully later in this opinion, it is clear to us that this is an expansion of the *Campaign I* criteria. We note, however, that Justice Palmer makes no claim that the trial court should have considered all of the factors that the court considered in *Campaign II*.

We note that the opinion by Justice Palmer in this case concurs with the majority in part and dissents in part. For purposes of simplicity, we refer to it as the dissenting opinion.

concurring opinion in *Connecticut Coalition for Justice in Education Funding, Inc.*

Finally, to the extent that the plaintiffs contend that, even if the *Campaign II* standard does not apply, the trial court failed to apply the *Campaign I* criteria properly because it did not consider whether the state's educational offerings *reasonably* address the minimal educational needs of the state's children, we disagree. As we have explained, it is implicit in the *Campaign I* standard that the educational opportunities offered by the state must be sufficient to enable a student who takes advantage of them to attain a level of knowledge of reading, writing, mathematics, science, and social studies that will, in turn, enable the student to perform the basic functions of an adult in our society.[34] See footnote 25 of this opinion. There simply is no sense in which a teacher providing instruction pursuant to a particular curriculum under particular classroom conditions could be considered a minimally adequate educational opportunity if the teacher, the curriculum or the conditions were not sufficient to enable a student who attends to the instruction to obtain a minimally adequate education. In turn, there is no sense in which an education can be considered minimally adequate if a person who has acquired that level of education is unable to perform the basic functions of an adult. Accordingly, the trial court's finding that the state's educational offerings satisfy the *Campaign I* criteria for a minimally adequate educational opportunity necessarily encompassed a finding that those educational offerings reasonably address the minimal educational needs of the state's children.[35]

[34] Thus, the dissent's contention that we have failed to recognize that "the rationality test is part and parcel of *Campaign I*" is incorrect. To the contrary, that is the very basis for our conclusion that the trial court properly considered the reasonableness of the state's educational offerings.

[35] The dissent contends that this reasoning is "circular," and that we have improperly presumed that the trial court properly applied the *Campaign I* criteria. It is well established, however, that, "[a]bsent a record that demon-

The dissent disagrees, and would conclude that the trial court improperly applied the *Campaign I* criteria. In support of this conclusion, the dissent claims that (1) although the *Campaign I* criteria are *necessary* components of a minimally adequate educational opportunity, the trial court improperly assumed that, if satisfied, the criteria are *sufficient* to establish a minimally adequate educational opportunity; (2) the trial court failed to consider whether the state is making an effort "to ensure that [the minimal educational offerings required by *Campaign I*] are designed to address the basic educational needs of at risk learners in underprivileged communities"; (3) the trial court improperly stripped out "rationality review" from its *Campaign I* analysis; (4) the trial court improperly assessed the *Campaign I* criteria on a statewide basis, instead of at the school district or school level; and (5) the trial court failed to consider whether the poor educational outcomes in the neediest school districts are "the result of specific deficient educational inputs, or [have been] caused by factors not attributable to, or capable of remediation by, state action or omission . . . ." (Internal quotation marks omitted.)

These claims, however, simply cannot be reconciled with Justice Palmer's concurring opinion in *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 320. With respect to the dissent's claim that satisfaction of the *Campaign I* criteria is necessary, but not sufficient, to establish a constitution-

strates that the trial court's reasoning was in error, we presume that the trial court correctly analyzed the law and the facts in rendering its judgment." *DiBella* v. *Widlitz*, 207 Conn. 194, 203–204, 541 A.2d 91 (1988). Contrary to the dissent's contention, it has not "demonstrated" that the trial court misapplied *Campaign I*. Rather, as we discuss more fully later in this opinion, because nothing in the record demonstrates that the trial court misunderstood the *Campaign I* standard or failed to consider the evidence presented by the plaintiffs, the dissent has improperly presumed that the trial court did not properly apply that standard.

ally adequate educational opportunity, Justice Palmer could not have been clearer in his concurring opinion in *Connecticut Coalition for Justice in Education Funding, Inc.*, that the constitutional standard to be applied by the courts should not be broad and vague, but must be narrow and specific. See id., 342 n.17 (*Palmer, J.*, concurring in the judgment) ("I disagree with the plurality that it is appropriate to craft the constitutional standard 'in broad terms.' In my view, the broader the standard, the more vague it is likely to be. In addition, the broader the standard, the more difficult it will be for the parties and the court to understand and apply it. I also disagree with the plurality's suggestion that a broad standard is beneficial because it may be 'refined and developed further' at trial. Although some constitutional standards must be defined in broad terms because of the applicability to a vast number of fact patterns, this is not such a case; for purposes of a case like the present one, in which it is critically important to give as much guidance to the court and the parties as possible, the more clearly defined the standard, the better."). The dissent's claim in the present case is entirely inconsistent with these principles; a standard that fails to specify all of the criteria that must be met in order to establish that the state's educational offerings meet the constitutional minimum is neither narrow nor specific. Accordingly, we conclude that the trial court properly determined that, if the *Campaign I* criteria are satisfied, the state's educational offerings are not constitutionally inadequate.

With respect to the dissent's claim that the trial court failed to consider whether the state's educational offerings are "designed to address the basic educational needs of at risk learners in underprivileged communities," the dissent has failed to explain why the courts must make this determination when it agrees that they are barred from requiring the state either "to overcome

every serious social and personal disadvantage that students bring with them to school"; *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 344–45 (*Palmer, J.*, concurring in the judgment); or to guarantee good educational outcomes. See id., 345 n.19 (*Palmer, J.*, concurring in the judgment) ("[p]erformance or achievement of the student population, taken generally, cannot . . . be the principle [on] which [a constitutionally required minimally adequate education] is based," rather, "obligation to provide a minimally adequate education must be based generally, not on what level of achievement students reach, but on what the state reasonably attempts to make available to them" [internal quotation marks omitted]). As Justice Palmer repeatedly emphasized in *Connecticut Coalition for Justice in Education Funding, Inc.*, courts have little institutional competence to make the determination as to which disadvantaging conditions are the most serious or how and to what extent those conditions should be alleviated by the state. See footnote 26 of this opinion. Moreover, it is difficult to imagine a broader or vaguer standard than whether the state's educational offerings are "designed to address the basic educational needs of at risk learners in underprivileged communities." We conclude, therefore, that this standard is not encompassed by the narrow and specific *Campaign I* criteria.

In any event, even if this were the proper standard, the trial court *expressly found* that there are numerous state and federal programs that are designed to provide needy students with "breakfast, lunch, and many times food to take home," even during the summer months when school is not in session, to provide parental education, to address the needs of homeless students, to prevent sexually transmitted diseases, to address the needs of students who are parents as well as pregnant students, and to provide mental health programs. The

court concluded that the existence of these programs shows that "the state is devoting to needy schools a great deal more in resources than is required by the modest standard [set forth in *Campaign I*]." As we conclude in part III of this opinion, we see nothing in the record that would compel a different conclusion, and the dissent provides no guidance on the nature or quantity of the additional resources that the state would be required to devote to needy students in order to meet the dissent's new standard.

The dissent also claims that the trial court stripped "rationality review" from its analysis pursuant to *Campaign I*. For the reasons that we have already explained, we disagree. We further disagree with the dissent's claim that "there is no indication that the court considered any of [the specific factual findings that the plaintiffs rely on] . . . ." We decline to presume that the trial court made 1060 specific factual findings, filling 157 single-spaced pages, only to then conclude that the findings were completely irrelevant to its legal analysis.[36]

We also disagree with the dissent's contention that the trial court improperly applied the *Campaign I* criteria on a statewide basis instead of determining on a school by school or school district by school district basis whether the state's educational offerings are constitutionally adequate. As we have already explained at length, the trial court made copious factual findings regarding conditions in specific schools and school districts and expressly found that the state is meeting its

[36] We conclude in part III of this opinion that the trial court's factual findings do not compel the conclusion that the state's educational offerings are constitutionally inadequate.

constitutional obligations in the poorest and neediest schools.[37]

Finally, the dissent contends that, in applying the constitutional standard, the trial court was required "first [to determine] whether students have in fact been unable to obtain a minimally adequate education" and then to consider whether any poor educational outcomes that the court discovered were " 'the result of specific deficient educational inputs, or [have been] caused by factors not attributable to, or capable of remediation by, state action or omission . . . .' "[38] This is yet another variation on the theme that the trial court was required to consider educational outcomes as part of its *Campaign I* analysis, a theme that is completely discordant with the overall tenor of Justice Palmer's concurring opinion in *Connecticut Coalition for Justice in Education Funding, Inc.*, in which he emphasized that the trial court's focus must be on *inputs*. See *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 345 n.19 (*Palmer, J.*, con-

[37] We do not disagree that the trial court found that many poor and needy schools are "utterly failing." Taken in context, however, it is clear that the trial court was not suggesting that the state is failing to meet its constitutional obligation. Specifically, immediately before making this observation, the court noted that the state's new academic standards governing what high school students must learn in order to graduate "can't do much good where they're needed most because they don't stop students from graduating when they fall miles below the standard." Thus, this finding related to educational *outcomes*, which are not the proper subject of a *Campaign I* analysis. The dissent also contends that the trial court improperly focused on the state's expenditures rather than the adequacy of its educational offerings. As we have explained, however, the court expressly found that the state is making these expenditures in order to provide specific resources for needy students.

[38] We note that the dissent relies on a quote from the plurality opinion in *Connecticut Coalition for Justice in Education Funding, Inc.*, not from Justice Palmer's concurring opinion, in which he expressly *rejected* the plurality's suggestion that the trial court could consider educational outcomes as part of its constitutional analysis. See *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 345 n.19 (*Palmer, J.*, concurring in the judgment).

curring in the judgment). If the court determines that educational *inputs* are minimally adequate to enable a student who takes advantage of them to perform the basic functions of an adult, it necessarily follows that poor outcomes must be caused by disadvantaging factors for which the court has no authority to order a remedy under the guise of enforcing the educational guarantee embodied in article eighth, § 1. That is the very rationale for limiting the trial court's consideration to inputs. Indeed, even the plurality opinion in *Connecticut Coalition for Justice in Education Funding, Inc.*, on which the dissent relies instead of Justice Palmer's controlling opinion, expressly recognized that article eighth, § 1, "is not a panacea for all of the social ills that contribute to many of the achievement deficiencies identified by the plaintiffs"; id., 320 (plurality opinion); and declined to take any stand on the question of the extent to which the trial court could consider outputs, if at all. See id., 318 n.60 (plurality opinion). Accordingly, we emphatically reject the dissent's suggestion that the "evaluation of educational outputs will, in many instances, be a fundamental and necessary starting point in evaluating claims brought under article eighth, § 1," and that "outcomes provide the clearest evidence of whether Connecticut's students are in fact receiving a minimally adequate education."

In short, the dissent has adopted a new constitutional standard that is far broader and vaguer than the *Campaign I* criteria that Justice Palmer adopted in his concurring opinion in *Connecticut Coalition for Justice in Education Funding, Inc.*, which is controlling. This new constitutional standard is entirely inconsistent with Justice Palmer's conclusions that the criteria for determining whether the state's schools are minimally adequate must be narrow and specific, that the courts must defer to the educational policy choices of the political branches, that the state is not constitutionally

required to overcome all disadvantages that students bring with them to school and that courts have little institutional competence to address the intractable and complex questions that arise in the area of educational policy. We believe that, to the contrary, because the role of the court is to apply the precedent on which the parties and the trial court reasonably relied, the narrow and specific *Campaign I* criteria that Justice Palmer outlined in his concurring opinion in *Connecticut Coalition for Justice in Education Funding, Inc.*, provide the correct constitutional standard, and we conclude that the trial court properly applied that standard.

III

PLAINTIFFS' CLAIM THAT THE TRIAL COURT IMPROPERLY CONCLUDED THAT THE EVIDENCE DID NOT SUPPORT THEIR CLAIM THAT THE *CAMPAIGN I* CRITERIA WERE NOT SATISFIED

The plaintiffs next claim that the trial court improperly concluded that the state has not violated article eighth, § 1, by failing to provide educational resources that comply with the *Campaign I* criteria adopted by Justice Palmer in his concurring opinion in *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 342. Specifically, the plaintiffs contend that the trial court's conclusion that the *Campaign I* criteria have been satisfied cannot be reconciled with the trial court's findings that the school districts with the neediest students have fewer experienced teachers than other districts, shortages of specialist teachers, interventionists and counselors, inadequate classroom facilities, and insufficient quantities of educational technologies and instructional resources. In addition, they claim, the court's conclusion was contradicted by its findings that large numbers of students in poverty and students in high needs districts are not achieving, or even approaching, appropriate educa-

tional outcomes as measured by standardized test scores, that classrooms in high needs districts "often" have significantly more students per class than other schools, that high needs districts are unable to provide sufficient "socioemotional and related support services," such as guidance counselors, psychologists, social workers and special education teachers, to their students, and that preschool opportunities are unavailable for large numbers of low income students. The plaintiffs claim that, if the trial court had properly taken these findings into account, it would have been compelled to conclude as a matter of law that the defendants did not satisfy the *Campaign I* criteria. We disagree.

The plaintiffs' claim involves a question of law subject to plenary review. See *Right* v. *Breen*, 277 Conn. 364, 371, 890 A.2d 1287 (2006) (whether trial court was compelled to act in particular fashion as matter of law is subject to plenary review); see also *Parker* v. *Meeks*, 96 Conn. 319, 325, 114 A. 123 (1921) (legal conclusion to be drawn from undisputed facts is question of law). Although the judgment of the trial court ordinarily "is entitled to great weight and every reasonable presumption should be indulged in favor of its correctness"; (internal quotation marks omitted) *Label Systems Corp.* v. *Aghamohammadi*, 270 Conn. 291, 320, 852 A.2d 703 (2004); because the plaintiffs' claim implicates their fundamental right to an education under article eighth, § 1, the trial court's conclusions are subject to the "independent and scrupulous examination of the entire record that we employ in our review of constitutional fact-finding, such as the voluntariness of a confession . . . or the seizure of a defendant." (Citations omitted.) *State* v. *Ross*, 230 Conn. 183, 259, 646 A.2d 1318 (1994), cert. denied, 513 U.S. 1165, 115 S. Ct. 1133, 130 L. Ed. 2d 1095 (1995).

In support of the plaintiffs' claim that the trial court's factual findings cannot be reconciled with its conclusion that the state is providing the neediest schools with

constitutionally adequate teachers, classroom facilities, educational technologies and instructional resources, the plaintiffs rely on these court findings: Bridgeport has filled 11.5 teaching positions with permanent substitutes instead of certified teachers; during the 2015–16 school year, New London High School filled four teaching positions by hiring substitute teachers who could teach for only a maximum of forty days, some of whom were not familiar with the subjects that they were assigned to teach; some classrooms in Bridgeport and New Britain are overcrowded, with up to twenty-nine students; East Hartford has allotted zero dollars in its budget for school library books; and Danbury High School has provided zero dollars in its budget for textbooks.[39]

We are not persuaded. Although it may be cause for concern that a school district or a school has filled a small number of teaching positions with substitute teachers for a specified period, that fact does not compel the conclusion that the overall level of teaching in the district or school is inadequate. Similarly, although a class size of twenty-nine students might not be ideal for needier students, we are unable to say that classes of that size render a school inadequate as a matter of

[39] The trial court did not specify the periods for which the East Hartford and Danbury budgets for, respectively, library books and textbooks were zero.

The plaintiffs also contend that the state is not providing minimally adequate access to modern technology in some schools. Even if we were to assume, however, that the adequacy of computer access must be considered under the *Campaign I* criteria; cf. *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 342 n.16 (*Palmer, J.*, concurring in the judgment) ("I express no view . . as to whether [technologies such as computers] . . . may be necessary to a minimally adequate education"); the trial court expressly found that, although "[t]here are certainly some hardships with computers and significant disparities in computer access," the state is providing the constitutionally required minimum. The plaintiffs have not explained why this conclusion was erroneous as a matter of law, or what specific level of computer access would be required to be minimally adequate.

law. Indeed, the trial court expressly found that the scientific research on the impact of class size on educational outcomes is inconclusive. Finally, the fact that, during particular years, particular schools have no money budgeted for library books or textbooks does not compel the conclusion that those schools lack minimally adequate books.[40]

With respect to the other factual findings relied on by the plaintiffs, such as the findings that there are low test scores in schools with large numbers of poor and needy students and the findings that the state has provided inadequate socioemotional and related support services, specialist teachers, interventionists and preschool opportunities to its poorer students, we conclude that, in contrast to the court's findings regarding the adequacy of teachers, class size, library books and textbooks, these findings do not relate to the narrow *Campaign I* criteria.[41] See *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295

[40] The dissenting opinion contends that there "is no indication that the trial court even considered whether school security, transportation, and other essentials are minimally adequate before concluding that the plaintiffs had failed to establish a violation under *Campaign I*." The plaintiffs make no claim on appeal, however, and point to no evidence that would support a finding that school security or transportation is so lacking in any particular school district that the district does not satisfy the constitutional standard. The only evidence in the record on this issue is the trial court's finding that some high school students in Bridgeport are required to take municipal buses to school at the government's expense. We conclude that, as a matter of law, this does not render the Bridgeport schools constitutionally inadequate.

[41] We recognize, of course, that the lack of such support services makes it extremely difficult for many students in the state's neediest school districts to take advantage of the state's educational offerings. Schools, however, are not the exclusive source of these services. Rather, the Department of Social Services, the Department of Children and Families, the Department of Mental Health and Addiction Services and other state agencies all play a role in providing such services to those in need. It simply is not the role of the courts to determine the extent to which such services must be provided by the schools rather than these other state agencies, as this would be a clear violation of the separation of powers.

Conn. 345 n.19 (*Palmer*, *J.*, concurring in the judgment) ("because student achievement may be affected by so many factors outside the state's control, including, perhaps most particularly, the disadvantaging characteristics of poverty . . . educational inputs must provide the primary basis for that determination" [internal quotation marks omitted]); id., 345 ("[schools] cannot be constitutionally required to overcome every serious social and personal disadvantage that students bring with them to school, and that seriously hinder[s] the academic achievement of those students" [internal quotation marks omitted]). Rather, the plaintiffs have essentially reiterated the claim that we addressed and rejected in part II B of this opinion, specifically, that the *Campaign I* criteria are too narrow. Therefore, we must also conclude that these facts do not compel the conclusion that the defendants have violated article eighth, § 1, by failing to provide the plaintiffs with a minimally adequate educational opportunity. Accordingly, we must reject this claim.

IV

PLAINTIFFS' CLAIM THAT THE TRIAL COURT INCORRECTLY CONCLUDED THAT THEIR EQUAL PROTECTION RIGHTS UNDER THE STATE CONSTITUTION HAVE NOT BEEN VIOLATED

Finally, we address the plaintiffs' claim that, contrary to the trial court's determination, the evidence that they presented at trial compels the conclusion that the defendants have violated their rights under the state constitution's equal protection provisions, article first, §§ 1 and 20, by failing to provide a substantially equal educational opportunity to all of the state's schoolchildren.[42] We disagree.

[42] We apply the same standard of review to this claim that we applied to the plaintiffs' claim pursuant to article eighth, § 1. See part III of this opinion.

As we previously have indicated herein, the trial court found that, since 2012, the state had funneled "over $400 million in new money" into the state's thirty lowest performing schools. In addition, the state had provided $13 million in financial support to fourteen "failing schools" in 2015, plus $4 million per year for school improvement grants to approximately thirty high needs schools under the state's Alliance District program.[43] Finally, the court noted that there are numerous state and federal programs that are designed to provide meals to needy students, even during the summer, to invite parents into schools to share in learning, to attend to the needs of homeless students, to prevent sexually transmitted diseases, to attend to the needs of young parents and pregnant students, and to provide mental health support. The court found that "[a]ll of this extra spending benefits poor districts but not wealthier districts. It is on top of basic education aid that has a history of strongly favoring poor districts over wealthier ones."

The court concluded that this "tilt" in spending was "fatal to the plaintiffs' equal protection claim . . . . In [*Horton* v. *Meskill*, 195 Conn. 24, 38, 486 A.2d 1099 (1985) (*Horton III*)] our Supreme Court held that an equal protection claim based on spending disparities can only succeed if, among other things, any claimant can show that the disparities 'jeopardize the plaintiffs' fundamental right to education.'[44] Unlike the disparities in [*Horton III*], the state's current education spending disparity favors the impoverished districts with which the plaintiffs are most concerned. They can hardly claim

[43] The thirty Alliance District program school districts are Ansonia, Bloomfield, Bridgeport, Bristol, Danbury, Derby, East Hartford, East Haven, East Windsor, Hamden, Hartford, Killingly, Manchester, Meriden, Middletown, Naugatuck, New Britain, New Haven, New London, Norwalk, Norwich, Putnam, Stamford, Vernon, Waterbury, West Haven, Winchester, Windham, Windsor and Windsor Locks.

[44] "In *Horton* v. *Meskill*, 187 Conn. 187, 445 A.2d 579 (1982) (*Horton II*), we addressed the ability of municipalities to intervene in the litigation arising out of our decision in *Horton I*." *Sheff* v. *O'Neill*, supra, 238 Conn. 14 n.15.

[that] getting more money compared to other towns is the cause of their woes." (Footnote added; footnote omitted.)

The plaintiffs now claim that, in reaching this determination, the trial court failed to properly apply the three part standard that this court adopted in *Horton III*, supra, 195 Conn. 38. Under that standard, to establish that the state has failed to provide substantially equal educational opportunities to its students in violation of the state constitution's equal protection provisions, the plaintiffs must first "make a prima facie showing that disparities in educational expenditures are more than de minimis in that the disparities continue to jeopardize the plaintiffs' fundamental right to education. If they make that showing, the burden then shifts to the state to justify these disparities as incident to the advancement of a legitimate state policy. If the state's justification is acceptable, the state must further demonstrate that the continuing disparities are nevertheless not so great as to be unconstitutional. In other words . . . a school financing plan must, as a whole, further the policy of providing significant equalizing state support to local education. . . . However, no such plan will be constitutional if the remaining level of disparity continues to emasculate the goal of substantial equality." (Citation omitted; internal quotation marks omitted.) Id. The plaintiffs contend that the undisputed evidence presented at trial compels the conclusion that they have satisfied the first part of *Horton III* and that the defendants have failed to meet their burden under the second and third parts.

Before addressing this claim, we address the defendants' claim that the trial court properly declined to apply the three part *Horton III* standard because the plaintiffs failed to establish that they are not receiving a minimally adequate educational opportunity under the *Campaign I* standard. See id., 38 (plaintiffs "must make a prima facie showing that disparities in educa-

tional expenditures are more than de minimis *in that the disparities continue to jeopardize the plaintiffs' fundamental right to education*" [emphasis added]) We are not persuaded. The court in *Horton III* expressly recognized that discrimination among school districts based on wealth is "relative rather than absolute"; (internal quotation marks omitted) id., 35; and ultimately concluded that the plaintiffs in that case had met their burden of establishing a prima facie case of more than de minimis disparities without conducting any analysis as to whether the education that they were receiving was minimally adequate. Id., 39. That approach is consistent with this court's statement in *Horton I*, supra, 172 Conn. 645–46, that "[t]his [c]ourt has never suggested that because some adequate level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The [e]qual [p]rotection [c]lause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action." (Internal quotation marks omitted.) We must conclude, therefore, that the "fundamental right" to education that the court was referring to in *Horton III* was the right to "a substantially *equal* educational opportunity." (Emphasis added; internal quotation marks omitted.) *Horton III*, supra, 36. Accordingly, we emphatically reject the defendants' claim that there can be no equal protection violation if the plaintiffs are receiving a minimally adequate educational opportunity, and we address the merits of the plaintiffs' claim that, under *Horton III*, the evidence compelled a finding that disparities between the funding of the neediest and the least needy school districts are more than de minimis and are not justified by legitimate public policies.[45]

[45] Although the trial court did not apply the three part *Horton III* standard when it concluded that the plaintiffs had failed to establish an equal protection violation under the state constitution, because the issue involves a question of law, we may apply that standard in the first instance, as the court did in *Horton III*. See *Horton III*, supra, 195 Conn. 38, 41 (adopting

In support of their claim that disparities in per pupil expenditures between schools with large numbers of poor and needy students and other schools are more than de minimis, the plaintiffs rely on undisputed evidence showing that, in 2013, "the ratio between the highest spending town [i.e., Cornwall, with net current education expenditures per pupil of $25,718] and the lowest spending town [i.e., Ellington, with expenditures of $11,180, was] 2.30—squarely in the middle range [that] the . . . court [in *Horton III*] determined was [not] de minimis." See *Horton III*, supra, 195 Conn. 39 n.15 (from 1973 through 1984, ratio of educational spending in highest spending town to spending in lowest spending town ranged from low of 2.14 in 1980–81 school year to high of 2.45 in 1977–78 school year). In addition, the plaintiffs contend, the undisputed evidence showed that the ratio of education spending in the ninety-fifth percentile town ranked by "equalized net grand list per capita," Cornwall, to education spending in the fifth percentile town, West Haven, was $25,718 to $12,157, or 2.12, much worse than the same ratio for any year considered by the court in *Horton III*. See id. (highest ratio from 1973 through 1984 was 1.87 and lowest was 1.68). Because the court in *Horton III* concluded that the plaintiffs had established more than de minimis disparities in educational spending sufficient to satisfy the first part of the constitutional standard, the plaintiffs contend, they also necessarily satisfied the first part.

three part standard for first time and concluding that plaintiffs had not satisfied it); see also *Lapointe* v. *Commissioner of Correction*, 316 Conn. 225, 310, 112 A.3d 1 (2015) ("[a]mong the questions of law belonging to the jurisdiction of this court . . . are . . . questions of legal conclusion when law and fact are so intermingled that the main fact is not a pure question of fact but a question of the legal conclusion to be drawn from subordinate facts" [internal quotation marks omitted]).

We are not persuaded. The plaintiffs in the present case are not claiming, as the plaintiffs did in *Horton I*, that the state has discriminated against property poor towns by requiring all towns to fund education primarily with local property taxes.[46] Rather, they are claiming that the state is discriminating against schools with high numbers of poor and needy students by failing to ensure that such schools have funding that is substantially equal to the funding provided to other schools.[47] Thus,

[46] The specific claim that the plaintiffs raised in the *Horton* case was that "the present system of financing public education in Connecticut, principally embodied in [General Statutes §§] 10-240 and 10-241 . . . insofar as the system purports to delegate to the town of Canton the duty of raising taxes to operate free public elementary and secondary schools and insofar as it purports to delegate to Canton the duty of operating and maintaining free public elementary and secondary schools violates the constitution of Connecticut, article first, §§ 1 and 20, and article eighth, § 1 . . . ." *Horton I*, supra, 172 Conn. 621. Because the state contributed only 20 to 25 percent of the total cost of education statewide, and because the amount of state aid provided to the towns was not based on their respective ability to finance education; id., 628–29; all towns were heavily dependent on local property taxes to fund education. Id., 630. Thus, the focus of the judicial inquiry in that case was the comparative ability of towns with high property tax bases and towns with low property tax bases to fund education. Id., 629–32. It was in this context that the court in *Horton III* relied on continuing significant disparities in educational spending among the various towns, including a high-to-low spending ratio ranging from 2.14 to 2.45 over the relevant time period, to support the parties' concession that the plaintiffs had established the first prong of the constitutional standard, that there were "continued significant disparities in the funds that local communities spend on basic public education." *Horton III*, supra, 195 Conn. 39.

We recognize that the statistical evidence that the court cited in *Horton III* did not expressly correlate these spending disparities among the towns to disparities in the wealth of the towns as reflected in their property tax bases. See id., 39 n.15. Because the disparities between education spending by wealthy towns as compared to poorer towns was the sole issue in *Horton I*, however, it is reasonable to conclude that that correlation continued to exist. Otherwise, the comparisons that the court cited in *Horton III* would have been meaningless. If there was no such correlation, that fact would only highlight the dangers that lurk when courts rely on complex statistical analyses without fully understanding their implications. It would not justify relying on an equally meaningless comparison in the present case.

[47] To the extent that the plaintiffs contend that the disparities in spending between schools with large numbers of poor and needy students and other

to make a prima facie case under article first, §§ 1 and 20, the plaintiffs must show that disparities in educational funding between towns with large numbers of poor and needy students and schools with small numbers of such students are more than de minimis. Contrary to the plaintiffs' contention, this claim is not supported by the evidence showing that the ratio between the highest spending town and the lowest spending town is 2.30 and that the ratio of educational spending in the ninety-fifth percentile town ranked by "equalized net grand list per capita" to the educational spending in the fifth percentile town was 2.12 because the plaintiffs have not established that these particular school districts reasonably may be treated as proxies

schools is more than de minimis because the state's neediest students require significantly more funds than other students to achieve a substantially equal level of educational *achievement*, we are not persuaded. In support of this claim, the plaintiffs rely on the 2011 report of their expert witnesses, Bruce Baker and Robert Bifulco. Baker and Bifulco concluded that "the highest need districts require 50 [percent] to 100 [percent] more funding than the lowest need districts to provide equal educational opportunities." Baker and Bifulco incorrectly assumed, however, that the plurality opinion in *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 240, provides the governing constitutional standard. Specifically, they assumed that the Connecticut constitution "guarantees Connecticut's public school students educational standards and resources suitable to [prepare them to] participate in democratic institutions, and . . . to attain productive employment and otherwise to contribute to the state's economy, or to progress on to higher education." Id., 244–45 (plurality opinion). As we have explained, however, Justice Palmer's concurring opinion in *Connecticut Coalition for Justice in Education Funding, Inc.* is controlling, not the plurality opinion. See footnote 24 of this opinion. As we have also explained, Justice Palmer expressly rejected this portion of the plurality's constitutional standard; see id., 345 n.19 (*Palmer J.*, concurring in the judgment); in favor of a standard that focused on educational *inputs*, specifically, the *Campaign I* criteria. See id., 342 (*Palmer, J.*, concurring in the judgment); see also footnote 24 of this opinion. We conclude, therefore, that the fact that the state is not providing funds to schools with large numbers of poor and needy students in an amount that would allow those students to achieve the same educational level as other students does not constitute prima facie evidence of unconstitutional disparities in funding.

for the school districts with the least and the most numbers of poor and needy students.[48]

The only evidence that the plaintiffs have cited that *does* shed light on the question of whether there are more than de minimis disparities in funding between schools serving large numbers of poor and needy students and other schools tends to undermine their claim. For example, they have cited undisputed evidence that shows that, in 2013, of the towns having student enrollments greater than 1000,[49] total education spending per pupil in the wealthiest decile as measured by "equalized net grand list per capita" was, on average, $15,713.61, compared to an average of $13,416.29 in the poorest decile.[50] This spending ratio is 1.17, a figure that is significantly lower than any of the figures that the court in *Horton III* cited as prima facie evidence of more than de minimis disparities. Other undisputed evidence shows that, in the same year, the state provided funding of nearly $9500 per student to schools in the poorest

[48] We note, for example, that the evidence shows that, in 2013, the town that was ranked last out of 169 towns in per student expenditures, namely, Ellington, was ranked 114th in wealth as measured by "equalized net grand list per capita." Similarly, a number of towns that ranked very low in wealth ranked relatively high in student expenditures. For example, Hartford, Bridgeport, and New Haven, which ranked, respectively, 165th, 164th and 163rd out of 169 towns in wealth, ranked 19th, 114th and 31st, respectively, in per student spending. Although we draw no definitive conclusions from this evidence, it certainly does not seem to *support* the inference that per student expenditures are directly correlated to the number of poor and needy students in a town.

[49] The defendants' expert witness, Michael Wolkoff, explained in his expert report that he limited his analysis to school districts with enrollments greater than 1000 because "[s]maller school districts have the potential to influence the results as they are most likely to have their per pupil expenditure totals elevated due to diseconomies of scale." He also indicated, however, that his "analyses for districts with enrollments greater than 1000 are very similar to those that [he] found using all districts . . . ."

[50] Other evidence shows a similar discrepancy between per pupil spending in the neediest and the least needy decile of school districts as measured by the number of students receiving a free lunch.

decile of school districts with at least 1000 students, compared to less than $1200 per pupil in the wealthiest decile, a ratio of approximately eight to one.[51] As the trial court observed, it is difficult to see how this evidence supports the plaintiffs' claim that the state is discriminating *against* its poorest and neediest students.

We conclude, however, that we need not determine whether the plaintiffs have established a prima facie showing of more than de minimis disparities because, even if they have, we conclude that the defendants have satisfied the second and third parts of *Horton III*, requiring them to prove that disparities in education spending are justified by a legitimate state policy and are not so great as to be unconstitutional. See *Horton III*, supra, 195 Conn. 38. With respect to the second part, the legitimate state policies that this court approved in *Horton III* were that the state's funding program "would provide sufficient overall expenditures for public

[51] Other evidence shows a similar discrepancy in the aid provided to the school districts with the largest percentage of needy students and school districts with the smallest percentage of such students, as measured by the percentage of students receiving a free lunch.

The trial court noted that in 2016, in the face of "a bone crushing fiscal crisis," the state cut education funds to fourteen of the neediest school districts by approximately $5.3 million at the same time that it increased funds to twenty-two comparatively wealthy school districts by approximately $5.2 million. Such anecdotal evidence, however, does not compel the conclusion that, contrary to the trial court's finding, there are systematic and ongoing disparities in the education funds that the state provides to needy districts as compared to wealthier districts, especially in light of the trial court's finding that, since 2012, the state had funneled "over $400 million in new money" into the state's thirty lowest performing schools. Indeed, we take judicial notice that, in 2017, the legislature adopted a budget that cut primary state grants to public schools by $30 million overall, but shielded the thirty Alliance Districts from any cuts. See J. Thomas, "Education Aid: Here's What is in the Bipartisan [Connecticut] Budget Plan," The Connecticut Mirror, October 25, 2017, available at https://ctmirror.org/2017/10/25/education-aid-heres-what-is-in-the-bipartisan-ct-budget-plan, last visited January 17, 2018.

school education . . . and a proper balance between state and local contributions thereto." Id., 39–40. This court expressly recognized that there is "a salutary role for [preserving] local choice by guaranteeing minimum funds without imposing a ceiling on what a town might elect to spend for public education." Id., 40. We have concluded in the present case that the trial court properly found that the state is providing a minimally adequate educational opportunity in all school districts according to the *Campaign I* criteria. Thus, the state is providing "sufficient overall expenditures for public education . . . ." Id., 39. In addition, the trial court found that the state is contributing significantly more funds to the neediest school districts than to the least needy, a finding that is also supported by the evidence. Under these circumstances, we do not believe that the fact that the wealthier school districts spend more per pupil on education than the poorer school districts by supplementing educational funds provided by the state with funds derived from local property taxes renders the funding scheme unconstitutional. Indeed, the court in *Horton III* found that the policy in favor of preserving "local choice" justified far greater disparities in per student spending than the disparity in per student spending that has been established in the present case between the towns in the wealthiest decile and those in the poorest decile. Id., 40.

The plaintiffs contend, however, that this court rejected the maintenance of local control of schools as a legitimate public policy that would justify disparities in education spending in *Horton I*, supra, 172 Conn. 638, 649, when this court recounted with approval the trial court's finding that, "although local control of public schools is a legitimate state objective, since local control of education need not be diminished if the ability of towns to finance education is equalized, the local control objective is not a rational basis for retention of

the present financing system . . . .'' In *Horton III*, however, we clarified this statement when we held that, if the state provides significant equalizing funds to poorer towns, the state need not place limits on what wealthier towns may spend on education, thereby retaining room for local control. See *Horton III*, supra, 195 Conn. 40. We express no opinion on whether allowing wealthier towns to supplement education spending through local property taxes is the best education policy. We do conclude, however, that such a policy is not unconstitutional.

Under the third part of *Horton III*, the state must prove that the effect of the state's education funding system is ''to narrow significantly disparities in the ability of local communities to finance local education and to increase significantly the state's share of overall educational costs for public schools.'' (Footnote omitted.) Id., 40. Again, this part is satisfied by the trial court's finding that the state's education spending is ''tilt[ed]'' strongly in favor of needier school districts, a finding that was supported by the undisputed evidence showing that, in 2013, there was a strong inverse correlation between the wealth of a school district and the amount of state aid that it received. Although neither the plaintiffs nor the defendants have directed us to any evidence that is probative on the issue of whether the state's share of overall education funding has increased significantly from some benchmark date, the trial court expressly found that ''the state has not violated the constitution by devoting an overall inadequate level of resources to the schools,'' and the plaintiffs have not directly challenged that finding on appeal. Rather, they have relied on disparities in educational funding.

Although the plaintiffs have convincingly demonstrated that in this state there is a gap in educational achievement between the poorest and neediest students and their more fortunate peers, disparities in educa-

tional achievement, standing alone, do not constitute proof that our state constitution's equal protection provisions have been violated. The plaintiffs have not shown that this gap is the result of the state's unlawful discrimination against poor and needy students in its provision of educational resources as opposed to the complex web of disadvantaging societal conditions over which the schools have no control. Indeed, the trial court found that the state is providing significantly more educational resources to schools with large numbers of poor and needy students than to other schools. We conclude, therefore, that the plaintiffs have failed to establish that the defendants have violated article eighth, § 1, and article first, §§ 1 and 20, by failing to provide a minimally adequate and substantially equal educational opportunity to all students in this state.

The judgment is reversed with respect to the trial court's determination that the defendants are violating article eighth, § 1, of the Connecticut constitution and the case is remanded to that court with direction to render judgment for the defendants on that claim; the judgment is affirmed with respect to the trial court's determination that the defendants are providing a substantially equal educational opportunity under article first, §§ 1 and 20, of the Connecticut constitution.

In this opinion EVELEIGH, VERTEFEUILLE and ALVORD, Js., concurred.

PALMER, J., with whom ROBINSON and SHELDON, Js., join, concurring in part and dissenting in part. "[A] sound education is the 'very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed

in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.' *Brown* v. *Board of Education*, [347 U.S. 483, 493, 74 S. Ct. 686, 98 L. Ed. 873 (1954)]. 'The American people have always regarded education and [the] acquisition of knowledge as matters of supreme importance. . . . We have recognized the public schools as a most vital civic institution for the preservation of a democratic system of government . . . and as the primary vehicle for transmitting the values on which our society rests. . . . [E]ducation provides the basic tools by which individuals might lead economically productive lives to the benefit of us all. In sum, education has a fundamental role in maintaining the fabric of our society. We cannot ignore the significant social costs borne by our [n]ation when select groups are denied the means to absorb the values and skills [on] which our social order rests.' " *Sheff* v. *O'Neill*, 238 Conn. 1, 43–44, 678 A.2d 1267 (1996). That is what this case is about.

I

A

Before I explain the nature of my disagreements with the majority, I begin by noting the substantial overlap between my views and those of the majority. As an initial matter, I agree, for the reasons articulated in the majority opinion, that both the individual plaintiffs[1] and the named plaintiff, the Connecticut Coalition for Justice in Education Funding, Inc., have standing to pursue the present action. I also agree with the majority's analysis of the equal protection issue and with its conclusion that the trial court correctly determined that there was no equal protection violation.

[1] See footnote 3 of the majority opinion.

Turning to the principal substantive question—whether the state has satisfied its obligation to provide underprivileged children with minimally adequate educational opportunities as required by article eighth, § 1, of the Connecticut constitution—I agree with the majority's threshold determination that my articulation of the *Campaign I*[2] test in *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 342, 990 A.2d 206 (2010) (*Palmer, J.*, concurring in the judgment), represents the controlling legal standard. Furthermore, I largely agree with the way in which the majority characterizes my position in *Rell*, both in terms of how I articulated the *Campaign I* test and the extent to which my views differed from those of the plurality. First, the majority properly recognizes that whether the state has satisfied its obligation to afford minimally adequate educational opportunities may be evaluated on a district-by-district basis, and even at the level of individual schools;[3] the question is not merely whether Connecticut residents, in the aggregate, receive adequate schooling.[4] See, e.g., footnote 15 of the majority opinion.

Second, I agree with the majority that, when we consider whether the various *Campaign I* factors have been satisfied, we do not do so in a vacuum, divorced from the goals and purposes of a minimally adequate education. Instead, the state's compliance with its constitutional mandates must be evaluated in light of

[2] *Campaign for Fiscal Equity, Inc.* v. *State*, 86 N.Y.2d 307, 655 N.E.2d 661, 631 N.Y.S.2d 565 (1995).

[3] See *Campaign for Fiscal Equity, Inc.* v. *State*, supra, 86 N.Y.2d 307, 318, 655 N.E.2d 661, 631 N.Y.S.2d 565 (1995) (trial court required to determine whether New York City school children were receiving sound, basic education).

[4] Because the question is not before us, I express no opinion as to whether and under what circumstances article eighth, § 1, might be offended solely on the basis of evidence that an individual *student* has been denied minimally adequate educational opportunities.

whether the specific educational facilities, instrumentalities, curricula, and personnel; see part I B of this opinion; that the state provides are rationally calculated to allow a student who takes advantage of them to become a functional member of society. As the majority explains, "[i]t is implicit in the *Campaign I* criteria . . . that the educational opportunities offered by the state must be sufficient to enable a student who takes advantage of them to attain a level of knowledge of reading, writing, mathematics, science, and social studies that will enable the student to perform the basic functions of an employable adult in our society, such as reading newspapers, tax forms and other basic texts, writing a basic letter, preparing a household budget, buying groceries, operating cars and household appliances, serving on a jury and voting." Footnote 25 of the majority opinion.

Third, the majority properly emphasizes that judicial review of the state's education policies and spending priorities under article eighth, § 1, should be highly deferential, as such considerations are quintessentially legislative in nature. As I explained in *Rell*, "the plaintiffs will not be able to prevail on their claims unless they are able to establish that what the state has done to discharge its obligations under article eighth, § 1, is so lacking as to be unreasonable by any fair or objective standard." *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 321 (*Palmer*, *J.*, concurring in the judgment); see id., 343 (*Palmer*, *J.*, concurring in the judgment) (plaintiffs must demonstrate that education "reasonably cannot be considered sufficient by any fair measure"); see also id., 335–43 (*Palmer*, *J.*, concurring in the judgment) (explaining reasons why "[s]pecial deference" to legislature is warranted in matters of educational policy and funding).

Fourth, the majority recognizes that the scope of my disagreement with the plurality in *Rell* was quite

narrow. See footnote 47 of the majority opinion. My primary concern in *Rell* was that certain language in the plurality opinion could be construed to mean that article eighth, § 1, requires that the state *guarantee* that each student will receive a minimally adequate education.[5] I concluded, by contrast, that the state constitution only guarantees each student the *opportunity* to obtain such an education. As the majority puts it, "the state's offerings [must be] sufficient to enable a student who takes advantage of them to become a functional member of society." Text accompanying footnote 25 of the majority opinion. Requiring that each student actually be adequately educated would place an unreasonable burden on the state, insofar as schools "cannot be constitutionally required to overcome every serious social and personal disadvantage that students bring with them to school, and that seriously hinder[s] the academic achievement of those students." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 345 (*Palmer, J.*, concurring in the judgment); see also id. (because students' failure to achieve goals of constitutionally mandated education may be caused by factors not capable of remediation by state action, article eighth, § 1, "is not a panacea for all of the social ills" that contribute to achievement deficiencies of

[5] See, e.g., *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 244–45 (plurality opinion) ("we conclude that article eighth, § 1, of the Connecticut constitution *guarantees* Connecticut's public school students educational standards and resources suitable to participate in democratic institutions, and to prepare them to attain productive employment and otherwise to contribute to the state's economy, or to progress on to higher education" [emphasis added]); id., 314–15 (plurality opinion) ("Thus, we conclude that article eighth, § 1, entitles Connecticut public school students to an education suitable to give them the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting. A constitutionally adequate education also will leave Connecticut's students prepared to progress to institutions of higher education, or to attain productive employment and otherwise contribute to the state's economy.").

underprivileged students [internal quotation marks omitted]). Beyond that, however, my understanding of the *Campaign I* test was not—and is not—substantively different from the standard that the plurality articulated in *Rell*.[6]

Finally, as I discuss more fully in part II B of this opinion, I agree with the majority that the trial court exceeded its mandate and failed to apply the proper standard of review in the second half (parts 5 through 8) of its memorandum of decision, in which it scrutinized the rationality of the state's various educational policies, procedures, and spending priorities. In the remainder of this opinion, I explain in what respects I do *not* agree with the majority opinion.

B

Before I explain in what respects I think that both the trial court and the majority have gone astray, it will be helpful briefly to review the *Campaign I* test and to set forth with greater precision certain aspects of that test that could perhaps have been stated more directly in my concurrence in *Rell*. At the most basic level, *Campaign I* stands for the proposition that, to afford students the opportunity to obtain a minimally adequate education, the state must ensure the presence of certain core or essential components: "Children are entitled to minimally adequate physical facilities and

[6] I wrote separately in *Rell* primarily (1) to emphasize the special and considerable deference that is owed to the legislature in these matters; see, e.g., *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 321–22, 332, 335–43, 344 n.18 (*Palmer, J.*, concurring in the judgment); (2) to highlight the importance of defining the constitutional standard with sufficient precision at the outset to give the parties and the trial court adequate guidance; id., 342–43 n.17 (*Palmer, J.*, concurring in the judgment); and (3) to express my belief that it was inappropriate to defer to the remedy stage (a) the question of whether the plaintiffs' claims were justiciable; id., 327–28 n.10 (*Palmer, J.*, concurring in the judgment); and (b) related prudential considerations. Id., 338–39 n.12 (*Palmer, J.*, concurring in the judgment).

classrooms which provide enough light, space, heat, and air to permit children to learn. [Facilities]. Children should have access to minimally adequate instrumentalities of learning such as desks, chairs, pencils, and reasonably current textbooks. [Instrumentalities]. Children are also entitled to minimally adequate teaching of reasonably up-to-date basic curricula such as reading, writing, mathematics, science, and social studies [curricula], by sufficient personnel adequately trained to teach those subject areas. [Personnel]." *Campaign for Fiscal Equity, Inc.* v. *State*, 86 N.Y.2d 307, 317, 655 N.E.2d 661, 631 N.Y.S.2d 565 (1995). These core components—educational facilities, instrumentalities, curricula, and personnel—constitute the sine qua non of any educational system.

1

Although these four components are individually necessary to the provision of a minimally adequate education, neither my concurrence in *Rell* nor *Campaign I* itself suggested that they are jointly sufficient. As I observed in *Rell*, for example, "[i]t goes without saying that a safe and secure environment also is an essential element of a constitutionally adequate education." *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 342 n.15 (*Palmer, J.*, concurring in the judgment). By the same token, in *Campaign I*, the New York Court of Appeals suggested that school transportation is necessary to ensure that students attend school a minimum number of days and thus receive a sound education. See *Campaign for Fiscal Equity, Inc.* v. *State*, supra, 86 N.Y.2d 316. Ensuring that students have access to sustenance of some sort during the school day is almost certainly of the same ilk. The point, which I think is beyond cavil, is that it is not enough to satisfy constitutional requirements for the state simply to set up and equip school buildings and then hire teachers to teach therein. Reasonable

efforts must be made to ensure that those students who would avail themselves of the educational opportunity have a means of getting themselves to school and, once there, are not so preoccupied by hunger, fear for their personal safety, or other serious distractions as to render learning effectively impossible. See *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 315 (plurality opinion) ("[t]o satisfy this standard, the state, through the local school districts, must provide students with an objectively meaningful opportunity to receive the benefits of this constitutional right" [internal quotation marks omitted]).

2

It also bears emphasizing that the provision of books, teachers, buildings, and the like is not an end in itself, but all to the purpose of giving students the opportunity to obtain a minimally adequate modern education. What constitutes a minimally adequate education is, within reasonable limits, to be left to the discretion of the legislature. See, e.g., id., 332 (*Palmer*, *J.*, concurring in the judgment). Viewed in the broadest terms, such an education is one "suitable to give [its students] the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting, and to prepare them to progress to institutions of higher education, or to attain productive employment and otherwise to contribute to the state's economy." Id., 270 (plurality opinion). On a more practical level, the state has established various benchmarks, including standardized test scores, that, when taken together, help to inform our understanding of what a student who has received a minimally adequate education can be expected to know. What article eighth, § 1, requires, then, is that the state establish and maintain free public schools the core elements of which are reasonably calculated to deliver a minimally adequate

education, as so defined, to all those students who would take advantage of the opportunity.

3

It follows from these principles that the state, in designing an educational system and delivering educational services, must make at least some reasonable effort to account for the distinct learning challenges that confront many of our state's least fortunate children. Although it may be assumed that many if not most of the students in Connecticut's more affluent towns have had their basic needs satisfied and arrive at school ready to learn, the same cannot be said for children who have spent their entire lives in poverty. Residents of our poorest communities, even those hungry to learn, may have to overcome a host of obstacles before they are able to attend to fractions and Fitzgerald. These run the gamut from homelessness, malnutrition, and illness, to violence in the home and in the community, to the pervasive and pernicious effects of racism. Some students struggle to learn in a non-native tongue; others wrestle with undiagnosed disabilities, whether physical, academic, or emotional/psychological.

As I acknowledged in *Rell*, article eighth, § 1, is not a panacea for all of society's ills, and the state cannot be expected to "overcome every serious social and personal disadvantage that students bring with them to school . . . ." (Internal quotation marks omitted.) Id., 345 (*Palmer*, *J.*, concurring in the judgment). As I also made clear in that decision, however, as part of its reasonable efforts to afford each child the opportunity to obtain a minimally adequate education, the state must "tak[e] into account any special needs of a particular local school system." (Internal quotation marks omitted.) Id., 345 n.19 (*Palmer*, *J.*, concurring in the judgment). The quoted language is drawn from Justice Borden's dissent in *Sheff* v. *O'Neill*, supra, 238 Conn.

143, an opinion in which I joined. That part of Justice Borden's opinion makes clear that the symptoms of poverty that I have described are precisely the types of "special needs of a particular local school system"; id. (*Borden*, *J.*, dissenting); that the state must take into consideration: "[T]est scores do not take into account important variables that erect difficult barriers to achievement, such as socioeconomic status, early environmental deprivations, low birth weight, mothers on drugs [when their children are born], diminished motivation to succeed academically, extraordinary mobility, limited English proficiency, and all of the other dismal factors associated with the concentration of poverty in the Hartford school district." Id., 144 (*Borden*, *J.*, dissenting). "This is not to say that, as part of its . . . constitutional obligation to provide a minimally adequate education, the state has no obligation to attempt, by reasonable means, to ameliorate these problems." Id. Consistent with Justice Borden's opinion, I concluded in *Rell* that the plaintiffs had stated a legally cognizable cause of action when they alleged, among other things, that "significant disparities in [education] input statistics [exist] between the plaintiffs' schools and the state school average . . . . [M]any [students] attend schools that do not have the resources necessary to educate their high concentration of poorly performing students . . . [and] the state has failed to provide the resources necessary to intervene effectively on behalf of [at risk] students, that is, students who, because of [a] wide range of financial, familial, and social circumstances, [are] at greater risk of failing or experiencing other unwanted outcomes unless intervention occurs . . . . As a consequence . . . Connecticut has an educational underclass that is being educated in a system [that] sets them up for economic, social, and intellectual failure." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in*

Education Funding, Inc. v. *Rell*, supra, 295 Conn. 346 n.20 (*Palmer, J.*, concurring in the judgment). There should be no doubt, then, that the *Campaign I* test, as articulated and applied in my concurrence in *Rell*, requires not only that the state provide the essential components of a minimally adequate education, including facilities, instrumentalities, curricula, and personnel, but also that some reasonable effort be made to ensure that those modalities are designed to address the basic educational needs of at risk learners in underprivileged communities.

The majority correctly notes that elementary and secondary schools are not the only source of support services, and that the state may choose to address the social, economic, and mental and physical health needs of underprivileged students through other state agencies, preschools, and other programs. See footnote 41 of the majority opinion. It is important to bear in mind, however, that article eighth, § 1, requires that the *state*, not the schools, provide students with the opportunity to obtain a minimally adequate education. If the plaintiffs were able to establish that (1) such needs can be met through reasonable interventions, (2) the schools are not meeting such needs, and (3) the failure to meet such needs is denying high needs children the opportunity to receive a minimally adequate education, then the state must prove that it is addressing such needs outside of the school environment. In other words, the fact that the state has the discretion to address educational impediments through nonschool agencies does not relieve the state of its ultimate constitutional responsibility to ensure adequate educational opportunities.[7]

[7] The majority contends that the standard that I articulate in this opinion goes beyond and is broader than the one that I articulated in *Rell*. For the reasons set forth herein, that is incorrect. In any event, as I explain in part II of this opinion, the trial court failed to properly apply the *Campaign I* test under even the narrowest fair reading of that standard.

II

In order to understand how this constitutional standard applies in practice, it will be helpful to briefly review where and how the trial court went astray. Although it is not entirely clear, I understand the trial court to have taken the following path.[8]

A

The court appears to have concluded that the *Campaign I* test that this court articulated in *Rell* involves two components, each of which is subject to a different standard of review. The first component is adequate funding. In the first half (parts 3 and 4) of its memorandum of decision, the trial court evaluated aggregate state funding of facilities, equipment, teachers, and curricula, and assessed whether those expenditures were constitutionally sufficient. The trial court reviewed the state's educational expenditures according to a highly deferential standard, as prescribed in my concurrence in *Rell*, proceeding according to the principle that "any constitutional standard the courts set for overall spending levels must be modest." The court evaluated whether overall state educational spending levels exceed the bare constitutional minimum, bearing in mind that, to find a violation, it had to conclude beyond a reasonable doubt that the resources that the state dedicates to education are "unreasonable by any fair or objective standard . . . ." (Internal quotation marks omitted.) Assessing the trial evidence according to this standard, the court concluded that the plaintiffs had failed to demonstrate that the state's aggregate educational expenditures are constitutionally insufficient.

[8] I wish to recognize, and to emphasize, that the trial court had before it a Herculean task. It was charged with divining a governing legal standard from the area of overlap between two less than crystal clear opinions in *Rell* and then applying that standard, with virtually no guiding precedent, to an enormous and complex factual record covering a field—education—that accounts for a significant share of all public expenditures.

In this first portion of its analysis, the trial court also specifically concluded that the state has spent more than the constitutional minimum—whatever that sum might be—on new school building projects. It noted that the state (1) allocated $1 billion per year to spending on school buildings, (2) increased such spending over the course of the prior decade, and (3) approved and helped to fund more or less every new building project proposed by poor school districts such as those in the cities of Bridgeport and Hartford. The court further concluded that, when judged by a "minimal standard," there was no evidence that there was a "statewide failure" to provide schools with adequate resources to train their teachers, to acquire reasonably current books and other suitable equipment and facilities, or to deploy interventionists, teacher coaches, and technical support staff. In addition, the court discussed the various financial resources that are available to help the lowest performing districts invest in areas such as school improvements, student meals, after-school programs, and services for homeless and pregnant students, young parents, and individuals with mental health needs. Although the court's primary focus in this section of its decision was on financial resources, the court did also briefly observe that Connecticut's children are taught by minimally adequate teachers and provided with reasonably up-to-date basic curricula, and also that there was no evidence that the state's schools, when considered in the aggregate, lack enough light, space, heat, air, desks, chairs, pencils, or textbooks to permit children to learn. On the basis of these findings and conclusions, the court ultimately concluded that the *Campaign I* test that this court adopted in *Rell* had been satisfied and that the plaintiffs had failed to establish a constitutional violation in that respect.

The second portion of the trial court's analysis involved a more wide ranging review of the state's spe-

cific educational policies, procedures, and priorities. In parts 5 through 8 of its decision, the trial court scrutinized everything from the amount of money spent on educating severely disabled students to the formula for teacher compensation set forth in individual school districts' collective bargaining agreements; from social promotion policies to the role that pork-barrel politics play in deciding which school construction projects will be authorized. The court appears to have concluded that its assessment of the rationality of these various policies and priorities was subject to a heightened standard of review rather than the highly deferential standard that I articulated in my concurrence in *Rell* and that the trial court itself applied in parts 3 and 4 of its decision when it assessed the state's aggregate spending in accordance with the four *Campaign I* factors. Specifically, the court proceeded on the assumption that not only specific educational policies and priorities but also the "first principles" that underlie them must be "rationally, substantially, and verifiably" related to teaching.

B

In analyzing the plaintiffs' claims under article eighth, § 1, in this manner, the trial court failed to properly apply the *Campaign I* test in several respects. First, and most fundamentally, the court should not have treated educational funding and educational policy as distinct legal issues, subject to different legal standards. Rather, the proper approach was to evaluate whether the state's comprehensive system for delivering educational services—including financial and other resources, policies, and procedures—is rationally designed to ensure that each student will have the opportunity to obtain a minimally adequate education.

In this respect, I agree with the majority insofar as it holds that the trial court, having once concluded that the *Campaign I* test was satisfied, should not have

proceeded to assess the rationality of the state's various education policies. There is no rationality test above and beyond the *Campaign I* standards. Rather, the rationality test is part and parcel of *Campaign I*.

What the majority fails to recognize, however, is that the trial court improperly stripped out this rationality review from its *Campaign I* analysis and thus fundamentally misapplied that test. As I set forth in greater detail in part III of this opinion, it is clear that the trial court ultimately concluded that schools in many of our state's less affluent cities and towns are "utterly failing . . . ." The court found that underprivileged students attend schools staffed by inexperienced and unqualified teachers. It determined that some cities and towns routinely ignore or under identify students with learning disabilities, and that guidance, counseling, and early intervention resources are woefully inadequate. It observed how the elimination of school bus services in Bridgeport requires some high school students to switch multiple transit buses just to make it to school in the morning. It concluded that many impoverished students, and many racial minorities, reach adulthood without having achieved even basic literacy and numeracy skills, and suggested that dedicating additional resources to programs such as high quality preschool could improve high school success rates. Many of these findings would, presumably, be highly relevant to the question of whether the state is affording minimally adequate educational opportunities to all of its students.

And yet there is no indication that the court considered any of these findings in parts 3 and 4 of its decision before it concluded that the plaintiffs had failed to demonstrate that the state does not provide minimally adequate facilities, instrumentalities, curricula, and per-

sonnel.[9] Although the court made a few references to "anecdotal evidence" of physical deficiencies in some schools and of teachers having to purchase their own supplies, it appears to have proceeded on the assumption that the *Campaign I* test is concerned largely, if not exclusively, with financial matters—whether the state is spending large sums on education, in the aggregate, and is helping cities and towns to build new schools and to pay for support services.[10] In other words, the court appears to have believed that it was not free to consider most of the potentially relevant evidence before it when it was conducting its constitutional analysis.[11] I fail to understand how that could not constitute reversible error. See part III of this opinion.

[9] There also is no indication that the trial court even considered whether school security, transportation, and other essentials are minimally adequate before concluding that the plaintiffs had failed to establish a violation under *Campaign I*.

[10] The trial court appears to have read my concurrence in *Rell* to mean that *Campaign I* was concerned principally with questions of financial resources. The court stated, for example, that "Justice Palmer appeared to view [*Campaign I*] as enough to consider *about resources* . . . ." (Emphasis added.) The court also referenced my concurrence in support of its conclusion that, "[b]eyond a bare minimum, the judiciary is constitutionally unfit to set the total amount of money the state has to spend on schools." I do not believe, and I do not understand the majority to believe, that my concurrence in *Rell* supports such an interpretation.

[11] The majority contends that we must assume that the trial court considered all of its 1060 specific factual findings in conducting the *Campaign I* analysis in parts 3 and 4 of its decision, and that it is implicit in the trial court's factual findings that this reasonableness standard was met. This reading of the trial court's decision, however, is demonstrably wrong. It defies logic to think that the trial court, which waited to expressly evaluate these findings and described the state's educational failings at great length in the second half of its decision, already had considered all of them sub silentio in the context of its *Campaign I* analysis but concluded that not even one of its hundreds of troubling findings regarding deficiencies in the schools warranted mention or discussion therein. That would be a truly bizarre way to craft a judicial decision, and there is simply no indication that the court did so. Rather, it is readily apparent that the court misread *Rell* and felt constrained not to consider in the context of *Campaign I* either its conclusion that many of Connecticut's schools are "utterly failing" or the myriad factual findings that supported that conclusion. If there were

A second problem with the trial court's *Campaign I* analysis is that the court appears to have been operating under the mistaken belief that the four *Campaign I* factors are to be assessed solely at the statewide level, rather than with regard to specific districts and schools. In the course of its analysis, the court made numerous statements suggesting that it felt constrained to evaluate the state's educational spending, and compliance with the *Campaign I* requirements more generally, solely in the aggregate. The court began by noting, in the context of discussing its standard of review, that "the judiciary is constitutionally unfit to set the *total amount* of money the state has to spend on schools." (Emphasis added.) "Thus, if the court weren't limited by the minimal elements listed in [*Campaign I*], it would still reject an expansive view of its power to set *overall* state educational spending levels." (Emphasis added.) Turning to the first *Campaign I* factor, namely, facilities, the court began and more or less ended its analysis with the observation that the state spends $1 billion per year on school buildings. The court proceeded to emphasize that the state has committed $378 million for new projects in Bridgeport alone and briefly alluded to "anecdotal evidence of physical deficiencies in some schools . . . ." Nonetheless, it dismissed such concerns not by concluding that each such deficiency failed to reach the level of a constitutional violation but, instead, by explaining that the record contained

any doubt as to whether the court factored its findings into its *Campaign I* analysis, then this court should order an articulation. See Practice Book § 60-5.

For the same reason, the majority's reliance on the assumption that the court found that "the state's educational offerings, even in the poorest school districts, are sufficient to enable students who take advantage of them to become functional members of society" is misplaced. There is no indication whatsoever in the trial court's memorandum of decision that the trial court ever made such a finding, and the majority is unable to point to any language to support its reading of the court's decision.

"nothing to suggest a *statewide* failure to provide adequate facilities . . . ."[12] (Emphasis added.)

The court's analysis of the other *Campaign I* factors likewise suggests that the court was concerned only with whether the plaintiffs could establish systemic, statewide failures to provide minimally adequate educational opportunities. With regard to instrumentalities, the court reasoned: "[T]here is no proof of a *statewide* problem caused by the state sending school districts too little money. . . . There are certainly some hardships with computers and significant disparities in computer access, but against a minimal standard the plaintiffs have not proved . . . that there is a *systemic* problem that should spark a constitutional crisis and an order to spend more on school supplies." (Emphasis added.) The court's analysis of the state's educational personnel was in the same vein: "No one suggests that teaching in Connecticut is *broadly incompetent*. The claim is that opportunities for good teaching are not being rationally marshaled in favor of needy kids. Judged against a low minimum *and judged as a system*, the plaintiffs have plainly not met their burden . . . ." (Emphasis added.) True, the court proceeded to consider whether the state dedicates enough resources to "needy schools," concluding that it does. Even there, however, the court considered such spending only in the aggregate. The theory seemed to be that, if the state budget contains a sizable line item for needy school support, then the constitutional requirement is necessarily satisfied. No consideration was given to whether there are *particular* schools in which spending on *particular* academic programs or needs is insufficient to

[12] The court also noted that facility issues in the town of Windham and the city of New London were "already on the state's list to be fixed and fixed mostly with state money." It is unclear how this observation factored into the court's *Campaign I* analysis.

provide the students who attend those schools with minimally adequate educational opportunities.[13]

The trial court made other, different missteps in the second half of its decision. In that section of the analysis, the court properly considered the specific quality of education afforded to students in individual school districts such as Bridgeport, specifically, whether schools receive adequate financial support to hire and retain essential support staff, whether students are provided with adequate transportation, whether they are able to master basic literacy skills, and how they perform on standardized assessment tests and based on other measures of high school achievement.

But, here, the court applied a standard of review—requiring that the state's educational policies and priorities be reasonably, substantially, and verifiably related to teaching—that finds no support in *Rell* and that had the practical effect of shifting to the state the burden of proving that every aspect of its educational system complies with article eighth, § 1, by requiring that all of the state's "efforts" be "verifiable enough to be measured . . . ." Having adopted this novel standard of review, the trial court proceeded to identify various, purported irrationalities in the system that required the court to choose sides on philosophical questions that are hotly contested by educators and academics, some

[13] That the court considered educational adequacy only from an aggregate standpoint in the first half of its decision becomes clear in the second half, when the court turns its attention to the problems facing individual school districts, explains the "flaw of averages," and concludes that the state is not allocating sufficient funds to its poorer cities. The court states, for example, that "[t]he children in most Connecticut towns do well on tests and some do extremely well, pulling up the average to impressive heights. But viewed individually, the state of education in some towns is alarming." The court ultimately concluded: "But if the egregious gaps between rich and poor school districts in this state don't require more overall state spending, they at least cry out for coherently calibrated state spending."

of which the plaintiffs had not even challenged.[14] All of this ran afoul of my warning in *Rell* that "[t]he very complexity of the problems of financing and managing a statewide public school system suggests that there will be more than one constitutionally permissible method of solving them, and that, within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect. . . . In such circumstances, the judiciary is well advised to refrain from imposing on the [state] inflexible constitutional restraints . . . ." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 336 (*Palmer, J.*, concurring in the judgment); see also id., 344 n.18 (*Palmer, J.*, concurring in the judgment) ("[I]t is one thing for a court to determine whether the legislature has acted rationally in fulfilling its obligation under article eighth, § 1, and something entirely different for a court to decide which of two positions concerning the specific parameters of a minimally adequate education in practice . . . is the better position. . . . [T]he latter methodology unduly involves the judiciary in matters of educational policy that are primarily reserved to the political branches, and for which the judiciary is both ill suited and ill equipped.").

So what should the trial court have done? It should have performed a single legal analysis, applying the *Campaign I* test, as articulated in my concurrence in *Rell*, to the specific educational failings that the plaintiffs allege exist in specific schools and school districts. It should have determined whether, in light of its factual

[14] The court concluded, for example, that a different method of evaluating and compensating teachers would be preferable, social promotion should be curtailed, and fewer resources should be spent educating severely disabled children. These are matters over which administrators reasonably may disagree with teachers, parents with students, and legislators with taxpayers. The irrationality of one position or the other would have to be far more conspicuous for a court to be justified in resolving the debate by judicial fiat.

findings regarding both financial and nonfinancial considerations, the state's educational programs are reasonably calculated to satisfy each of the *Campaign I* criteria so as to ensure that students in those districts have the opportunity to secure the fruits of a minimally adequate education. And it should have made these determinations in light of the "special needs of . . . particular local school system[s]," as defined in Justice Borden's dissent in *Sheff* v. *O'Neill*, supra, 238 Conn. 143.

III

My disagreement with the majority over the controlling legal standard compels me to part ways with respect to the appropriate resolution of this appeal. The majority concludes that the trial court (1) applied the correct legal standard in parts 3 and 4 of its decision, and (2) properly determined that the plaintiffs had failed to establish that Connecticut's schools have delivered less than a minimally adequate education. For this reason, the majority would simply reverse the judgment of the trial court—because it exceeded its mandate in parts 5 through 8 of its decision—with direction to render judgment for the defendants.

The plaintiffs argue that they are entitled to an opportunity to prevail at a new trial under the *Campaign I* standard, as properly applied. They emphasize, and the majority acknowledges, that the trial court found, among other things, that (1) the Bridgeport public schools have been forced to cut key support personnel and even school bus service at the same time as some wealthier districts have received an influx of new state funds; see footnote 1 of the majority opinion; (2) other high needs schools have inadequate classroom facilities and shortages of experienced teachers, specialists, interventionists, and counselors, (3) large numbers of high needs students are not even approaching appro-

priate educational outcomes, (4) preschool opportunities are unavailable for large numbers of low income students, despite their proven link to improved educational outcomes, and (5) the state has provided inadequate socioemotional and related support services for high needs students. Indeed, the majority readily acknowledges that "the plaintiffs have convincingly demonstrated that in this state there is a gap in educational achievement between the poorest and neediest students and their more fortunate peers . . . ." Nevertheless, it is the view of the majority that such findings are simply irrelevant under the "narrow *Campaign I* criteria."[15] Text accompanying footnote 41 of the majority opinion.

I disagree. As I explained in part II B of this opinion, I believe that the trial court misapplied *Campaign I* in several respects. "We have often stated that a party is generally entitled to a new trial when, on appeal, a different legal standard is determined to be required, unless we conclude that, based on the evidence, a new trial would be pointless." *McDermott* v. *State*, 316 Conn. 601, 611, 113 A.3d 419 (2015); see, e.g., id., 612 (holding that Appellate Court, having concluded that trial court applied wrong legal standard, should have remanded case for new trial rather than directing judgment); see also *In re Joseph W.*, 305 Conn. 633, 648, 46 A.3d 59 (2012) (citing cases). Having reviewed the trial record in the present case, I cannot conclude that a new trial under the correct legal standard would be pointless. Rather, the trial court's factual findings indicate that

[15] The majority relies in this respect on the circular argument that, because the *Campaign I* test encompasses certain considerations, and because the trial court purported to apply *Campaign I*, the court must have taken those considerations into account and found them to be satisfied. The obvious flaw in this reasoning is that, if the court misunderstood and misapplied *Campaign I*, as I have demonstrated in part II B of this opinion, then there is no reason to assume consequences that would flow from the court's proper application of the test.

some of our state's most disadvantaged students may not be receiving a minimally adequate education, which is their constitutional right. The evidence that, according to the plaintiffs, warrants a new trial falls into three broad categories: (1) academic outcomes; (2) educational inputs; and (3) educational policies. I briefly consider each in turn.[16]

A

I agree with the majority that the trial court's *primary* focus in evaluating whether the state has complied with its constitutional obligations should be on the adequacy of educational inputs, rather than on students' level of academic achievement. As I explained in *Rell*, "student achievement may be affected by [too] many factors outside the state's control" for the state to be able to guarantee academic outcomes. *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 345 n.19 (*Palmer*, *J.*, concurring in the judgment).

I have never suggested, however, that educational outcomes are uninformative or irrelevant to the constitutional analysis. See id. ("I do not suggest that educational 'outputs' are never relevant to the determination of whether the state has complied with the requirements of article eighth, § 1"). I agree with the majority, for example, that the fact that high needs students in one school or district have experienced some measure of academic success while students with a similar demographic profile in another school or district have failed, in the aggregate, to demonstrate even minimal progress may indicate that the latter have not been afforded

[16] What follows should not be taken either as a determination that the plaintiffs have established a constitutional violation or as a comprehensive canvass of the constitutionally relevant evidence that was presented at trial. My purpose is merely to identify examples of some of the types of evidence the plaintiffs have presented that the trial court, serving as the finder of fact, would need to consider under the proper legal standard.

minimally adequate educational opportunities. See footnote 32 of the majority opinion. At the very least, it suggests that closer scrutiny is warranted.

More fundamentally, evaluation of educational outputs will, in many instances, be a fundamental and necessary starting point in evaluating claims brought under article eighth, § 1. This is because outcomes provide the clearest evidence of whether Connecticut's students are in fact receiving a minimally adequate education. Although one can imagine extreme cases in which the failure to achieve educational objectives may be presumed,[17] challenges such as those brought by the plaintiffs in the present case are most reasonably resolved by first determining whether students have in fact been unable to obtain a minimally adequate education, as defined by the state. If the plaintiffs can establish such a deficiency, then the trial court must determine whether "the failure of students to achieve the goals of a constitutionally mandated education [are] the result of specific deficient educational inputs, or [have been] caused by factors not attributable to, or capable of remediation by, state action or omission . . . ." *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 318 (plurality opinion).

In the present case, the trial court found that a number of the state's schools are "utterly failing" and that one third of high school students in poorer communities such as Bridgeport, Windham, and New Britain fail to reach even the most basic levels in math and reading. In the trial court's words, "[n]ot reaching the most basic level means they [do not] have even limited ability to read and respond to grade level material. There can be

[17] For example, "[a] town may not [merely] herd children in an open field to hear lectures by illiterates." (Emphasis omitted; internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 295 Conn. 283–84 (plurality opinion).

no serious talk of these children having reached the goals set for them." The trial court made numerous specific findings regarding the failure of different underprivileged student populations to achieve minimal academic success according to various objective benchmarks established by the state.

With respect to economically disadvantaged students, the court found, among other things, that Connecticut's fourth and eighth grade students who qualify for free and reduced lunch services rank among the lowest in the nation on National Assessment of Educational Progress (NAEP) math assessments. Between 80 and 90 percent of the state's poor students failed to reach the minimum standards for high school reading as assessed by Smarter Balanced Assessment Consortium (SBAC) tests. More than 70 percent of the impoverished students entering the state's higher education system lack basic literacy and numeracy skills.

The court also found that success rates for economically disadvantaged students vary dramatically between school districts, which suggests that differing academic outcomes may arise from differing inputs and educational strategies rather than any intractable barriers to learning created by poverty. On the 2015 SBAC mathematics test, for example, only 9.1 percent of Bridgeport students and 11 percent of New Britain students who qualified for free or reduced lunch performed at level 3 or above, whereas over 40 percent of students who qualified for free and reduced lunch reached that level in towns such as Darien, Ridgefield, and Weston. At the other end of the spectrum, approximately two thirds of students eligible for free and reduced lunch in Bridgeport and New Britain performed only at level 1, more than twice the rate as in Darien.

More generally, the trial court's findings highlight the dramatic differences in educational outcomes between

the state's more affluent and less affluent communities. The court found that students in struggling elementary schools in poor communities are not acquiring basic reading, writing, and math skills, and that virtually none of the students in many inner-city schools has the skills needed to progress beyond third grade. On the 2013 Connecticut Academic Performance Test (CAPT) mathematics assessment, over 38 percent of students in New Britain, over 41 percent of students in Bridgeport, and nearly one half of all Windham students scored in the "Below Basic" range. In more affluent towns such as Westport and Weston, by contrast, the number of students scoring in the "Below Basic" range was negligible. Similar disparities were observed on the CAPT reading and science assessments.

With respect to the secondary level, out of 1177 students attending Bridgeport's Bassick High School in 2013, only 6 percent even attempted to take an advanced placement (AP) exam, and, of those who did, only 3 students earned a qualifying score, which indicates an ability to complete college level work. By contrast, approximately one fourth of all students at Darien High School took AP exams and almost all earned qualifying scores. No more than 15 percent of high school graduates in Bridgeport, Hartford, New Haven, and Waterbury were deemed to be college and career ready. As judged by Preliminary Scholastic Aptitude Test (PSAT) scores, less than 2 percent of students in Bridgeport were on track to be college and career ready.

The court also made specific findings with respect to the academic success of students who are not native English speakers or are racial minorities. As of 2012–2013, for example, the school districts of Bridgeport, Danbury, East Hartford, Hartford, Meriden, New Britain, New Haven, New London, Norwalk, Norwich, Stamford and Waterbury all had failed to meet Annual Measurable Achievement Objectives (AMAO) perfor-

mance targets for English as a Second Language students for the previous ten years. This means that English language learning students do not have the language or vocabulary skills needed to pass a language proficiency test. On the 2013 CAPT mathematics assessment, nearly 50 percent of all African-American students scored in the "Below Proficient" range versus 10.6 percent of white students.[18] Ultimately, on the basis of such findings, the trial court concluded beyond a reasonable doubt that, "for thousands of Connecticut students there is no elementary education, and without an elementary education there is no secondary education." (Emphasis omitted.)

B

There is little dispute that educational inputs represent the most important consideration in assessing whether the state has satisfied its constitutional obligation to ensure that Connecticut residents have a reasonable opportunity to obtain a minimally adequate education. If students in each school have access to adequate facilities, equipment, teachers, and curricula, as well as other essentials such as transportation and security, then a presumption arises that they have been afforded this opportunity. By contrast, the failure to provide these basic essentials supports a conclusion that the state has failed to meet its obligations under article eighth, § 1.

In the present case, notwithstanding its conclusion that the four *Campaign I* factors have been satisfied and that the state invests heavily in the lowest performing and highest needs schools, the trial court clearly was of the view that academic inputs in our state's most disadvantaged communities are not reasonably calibrated to achieve minimally adequate academic

[18] The term "white students," as used in this opinion, refers to non-Hispanic, white students.

outcomes. With respect to staffing levels, for example, the court emphasized that schools with higher percentages of low income and minority students are forced to hire inexperienced and unqualified teachers and administrators at higher rates, and that more than one half of the professional staff in such schools depart, on average, within five years. Moreover, although wage premiums are often required to attract teachers to high poverty and high minority school districts and thereby improve student achievement, state educational funds have flowed in the opposite direction. Although educator salaries in the state's poorest communities are significantly lower than the state average, wealthy school districts have been allowed "to raid money desperately needed by poor towns . . . ." For instance, the state recently cut educational aid to the poorest school districts by over $5.3 million, forcing districts such as Bridgeport to cut essential staff, including guidance counselors and special education paraprofessionals, while simultaneously increasing aid to many comparatively wealthy towns.

Schools in low income, high poverty districts already had significantly fewer counselors and academic support staff per student, despite demonstrably greater needs. Among the court's many specific findings in this regard: Bridgeport's Bassick High School has only 4 full-time guidance counselors for nearly 1200 students and New London has only 3 to serve over 900 students. Windham has only 4 full-time school psychologists serving a population of almost 3200 students; the student to psychologist ratio is far lower in more affluent towns such as Greenwich and Westport, even though those towns have a lower percentage of students with disabilities. Waltersville School in Bridgeport, which has a student population of approximately 600 ranging from prekindergarten to eighth grade, has only one literacy coach, one guidance counselor, and no social workers

available to meet the socioemotional needs of students who do not have individual education plans. Roosevelt School and Bryant Elementary School in Bridgeport suffer from similar staffing shortages. Ultimately, the court found that inadequate staffing levels meant that schools in certain less affluent school districts were unable to satisfy their legal requirements to meet the needs of special education students.

Turning to East Hartford, the trial court found that that economically disadvantaged school district has only one translator, who speaks Spanish, even though the district's students collectively speak 50 different languages; has 4 or 5 elementary schools that do not have a social worker; has only 1 social worker for 400 ninth grade students, which is insufficient to meet their varied socioemotional needs; has only 1 high school reading intervention teacher, which leaves many students who are far below grade level unable to access reading support services; and employs only 1 high school psychologist who, despite working 70 to 90 hours per week, is unable to meet the needs of the district's 1700 high school students.

Some of the court's findings in this respect were so dramatic that it is questionable whether the *Campaign I* factors are being satisfied even under the narrowest reading of that case. For example, there are no reading teachers or reading interventionists to provide necessary literacy interventions in Bridgeport's comprehensive high schools. During the 2015–2016 school year, New London High School filled a Spanish language instruction position with a substitute teacher who could not even speak or read that language. New Britain has no significant programs for homeless students, despite having approximately 500 homeless students in the district.

The court also found that, while there is widespread agreement that high quality preschool is perhaps the

single most effective tool for narrowing achievement gaps and preparing underprivileged students for success at the primary and secondary levels, a great number of children in Connecticut do not participate in preschool programs, and not all children who live in poverty have access to affordable programs. The court also found that insufficient funding was a significant impediment to broader access. Although there is no express constitutional requirement that the state provide free preschool programs, the state is required to take reasonable steps to ensure that students are able to learn, with an eye toward all of the available tools and their proven effectiveness. See part I B 3 of this opinion.

Finally, with respect to transportation and facilities, the trial court found that Bridgeport no longer provides school bus service to the comprehensive high schools, forcing students to transfer between multiple public transit buses to get to school in the morning. Some Bridgeport schools also have unreliable boilers, and ceilings fell in one building. In light of these findings, the trial court's ultimate conclusion appears to be that our "constitution's promise of a free elementary school education" could be realized if additional resources were marshaled in support of "drastic interventions" for the most troubled school districts.

C

Finally, the trial court identified various policies and procedures that, in its view, the state could modify in order to improve educational outcomes for underprivileged students. Indeed, the court went so far as to conclude that "many of our most important [educational] policies are so befuddled or misdirected as to be irrational."

As I explained in part II B of this opinion, I agree with the majority that the trial court generally overstepped its authority in parts 5 through 8 of its decision.

Some of its policy prescriptions and related findings fail to afford sufficient deference to the political branches and to school administrators, taking sides in ongoing debates among educational experts or requiring that the state adopt or reject one among many facially reasonable approaches. In other instances, the court invalidates certain educational policies without making the necessary predicate finding that those policies have resulted in the state's failure to afford minimally adequate educational opportunities.

That is not to say, however, that policy questions fall completely beyond the legitimate ambit of the court's authority to review alleged violations of article eighth, § 1, or that a violation of that provision might not result from policy choices rather than from inadequate resourcing. This idea is implicit in *Campaign I*, which requires that schools adopt modern, age appropriate educational curricula. The majority concedes as much when it recognizes that "if the plaintiffs had shown that the state was providing elementary school students with books and curricula only intended for advanced college students, a court could conclude that the state was not reasonably meeting the minimal educational needs of these students . . . ."

The majority fails, however, to follow this hypothetical to its logical conclusion. If the constitution is violated when schools do not provide students with learning materials reasonably suited to their level of cognitive development, why is it not also offended if, for example, a school fails to provide instruction or instructional materials that are comprehensible to a substantial subpopulation of students whose primary language is not English? At a minimum, it would seem that public schools must supply adequate professional staff to screen for and identify students who have serious impediments to learning and to refer them for appropriate services. In the present case, the trial court

found, among other things, that some poor school districts consistently ignore or under identify students with special educational needs and, therefore, fail to provide them with appropriate support services. In the face of such findings, I am unable to conclude that, if the plaintiffs were afforded the opportunity to prove their allegations under the correct legal standard, it is impossible that they could demonstrate that their right to a minimally adequate education has been violated.

IV

The state's duty to act rationally in developing and implementing a system for affording all students the opportunity to receive a minimally adequate education is not a duty disconnected from reality but a duty that must be exercised with a clear-eyed view of its essential purpose and a commitment to dealing with those circumstances of modern life that tend to frustrate that purpose. It is not enough to seek success in some places, for some children. Our schools must carry on in the faith that all students can learn, and our state must aspire to no less. Although the ultimate measure of an adequate educational opportunity for purposes of article eighth, § 1, cannot be educational outputs, the educational system must be reasonably designed to achieve results in every district and neighborhood. Our state constitution simply will not allow us to leave our neediest children behind.

Because the plaintiffs were not afforded the opportunity to prove their case according to the correct legal standard, and because there is reason to believe that the trial court may have found one or more violations of *Campaign I* if that test had been applied properly, I dissent from that portion of the majority opinion that directs judgment for the defendants. Instead, I would remand the case for a new trial.