IN RE JOSYAH L.-T.*
(AC 46679)

Bright, C. J., and Suarez and Harper, Js.

Syllabus

The respondent mother appealed to this court from the judgment of the trial court terminating her parental rights with respect to her minor child. She claimed that this court should recognize her right to be the child's legal guardian because she would be a better caregiver to him than the petitioner, the Commissioner of Children and Families. The trial court granted the termination petition, concluding by clear and convincing evidence that the Department of Children and Families had made reasonable efforts to reunify the respondent with the child but that the respondent was unable or unwilling to benefit from those efforts and had not achieved the degree of personal rehabilitation that would encourage the belief that, within a reasonable period of time, considering the child's age and needs, she could assume a responsible position in his life. *Held* that the judgment of the trial court terminating the respondent's parental rights was affirmed, as the respondent abandoned any possible claim related to the judgment by failing to identify in her brief to this court any claim of legal or factual error that the trial court made in its decision; accordingly, as the respondent's status as a self-represented party did not permit this court to overlook that omission, this court was unable to afford her any relief in connection with this appeal.

Argued February 28—officially released March 20, 2024**

Procedural History

Petition by the Commissioner of Children and Families to terminate the respondents' parental rights with

* In accordance with the spirit and intent of General Statutes § 46b-142 (b) and Practice Book § 79a-12, the names of the parties involved in this appeal are not disclosed. The records and papers of this case shall be open for inspection only to persons having a proper interest therein and upon order of the court.

Moreover, in accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

** March 20, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

respect to their minor child, brought to the Superior Court in the judicial district of Middlesex, Juvenile Matters at Middletown, and tried to the court, *Sanchez-Figueroa*, *J.*; judgment terminating the respondent father's parental rights and denying the petition as to the respondent mother; thereafter, the petitioner filed a petition to terminate the respondent mother's parental rights with respect to her minor child, brought to the Superior Court in the judicial district of Middlesex, Child Protection Session at Middletown, and tried to the court, *Burgdorff*, *J.*; judgment terminating the respondent mother's parental rights, from which the respondent mother appealed to this court. *Affirmed*.

Celina T., self-represented, the appellant (respondent mother).

Nisa Khan, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellee (petitioner).

Opinion

PER CURIAM. The respondent, Celina T., appeals from the judgment of the trial court terminating her parental rights with respect to her minor child, Josyah L.-T. (Josyah). The respondent, who is self-represented in this appeal, asserts that this court should recognize her right to be the legal guardian of Josyah because she would be a better caregiver to him than the petitioner, the Commissioner of Children and Families. Because the respondent has failed to identify any cognizable claim of error in relation to the court's decision terminating her parental rights as to Josyah, we affirm the judgment of the trial court.

The following undisputed facts and procedural history are relevant to our resolution of this appeal. Josyah was born in July, 2016. In its May 12, 2023 memorandum of decision terminating the respondent's parental rights

as to Josyah, the trial court, *Burgdorff*, *J.*, found the following: "[The Department of Children and Families' (department)] involvement with this family commenced in August, 2016. A neglect petition was filed on Josyah's behalf on October 7, 2016. The identified concerns at that time included [the respondent's] homelessness and transience, substance abuse issues, and [her] unaddressed mental [health] issues that impacted her ability to parent and care for . . . Josyah. Josyah was adjudicated neglected [on December 15, 2016] and removed from [the respondent's] care on November 13, 2017, due to a domestic dispute involving a physical and verbal altercation with Josyah's current foster mother in the foster mother's home where [the respondent] was also residing.[1] Josyah was present when the altercation occurred. [The respondent] was criminally charged, and a protective order was issued through March, 2018, with the foster mother as the protected person." (Footnote added.) On November 16, 2017, the petitioner filed an ex parte motion for an order of temporary custody. On November 22, 2017, the court, *Woods*, *J.*, sustained the order of temporary custody. On June 28, 2018, Josyah was committed to the care and custody of the petitioner, and the court issued specific steps to the respondent to facilitate her reunification with Josyah.

In its memorandum of decision, the court, *Burgdorff*, *J.*, further stated: "[The respondent] was discharged from . . . [a] housing [assistance] program in December, 2018, and has not demonstrated the ability to obtain and sustain consistent housing since that time. . . . [The respondent] has never been married and reported that she was not in a relationship with [the biological] father. She has had several romantic relationships with

[1] On November 13, 2017, when he was fifteen months old, Josyah was placed in a special study fictive kin medically complex foster home. He continues to reside in that home and has a close attachment with his foster mother.

the most recent being with Kelsey B., which involved intimate partner violence . . . concerns and resulted in two arrests with [the respondent] reported as the aggressor."

On January 15, 2019, the petitioner filed a termination of parental rights petition against both the respondent and the biological father. A trial was held on January 14 and 23, 2020. On June 3, 2020, the court, *Sanchez-Figueroa*, *J.*, issued a memorandum of decision granting the petition as to the biological father[2] and denying the petition as to the respondent. The court also ordered the petitioner to continue making efforts to reunite Josyah with the respondent and to increase visitation between them.

The petitioner made continued efforts without success and, on September 9, 2021, filed a subsequent petition seeking to terminate the respondent's parental rights as to Josyah. In its memorandum of decision granting the petition, the trial court, *Burgdorff*, *J.*, stated: "The petition allege[s] that the parental rights of [the respondent] should be terminated on the ground that Josyah has been found in a prior proceeding to have been neglected or uncared for, and [the respondent] has failed to achieve such a degree of personal rehabilitation as would encourage the belief that within a reasonable period of time, considering the age and needs of Josyah, she could assume a responsible position in the life of Josyah." The court held a trial over the course of four nonconsecutive days between April 5 and 12, 2023. The court heard testimony from multiple witnesses, including the respondent and two expert witnesses. In addition, twenty-eight exhibits were offered by the petitioner and entered into evidence as full exhibits.

[2] Josyah's biological father did not appeal from the June 3, 2020 judgment terminating his parental rights. All references to the respondent in this opinion pertain only to Celina T.

In its memorandum of decision terminating the respondent's parental rights as to Josyah, the court found by clear and convincing evidence that "[the respondent] was born [in July, 1996] and is presently twenty-six years of age. . . . [The respondent] had an extensive history of abuse and neglect as a child and was in [the department's] care from 2009 to 2014. She was placed in residential, group home, and foster care settings. During her childhood, she presented with significant mental health and behavioral issues. She was diagnosed with post-traumatic stress disorder . . . attention deficit/hyperactivity disorder . . . oppositional defiant disorder, and bipolar disorder." (Footnote omitted.) The court also found by clear and convincing evidence that the department made reasonable efforts to reunify Josyah with the respondent, that the respondent was unable or unwilling to benefit from those reunification efforts, and that the respondent "has not achieved the requisite degree of personal rehabilitation that would encourage the belief that, within a reasonable period of time, considering Josyah's age and needs, [she] could assume a responsible position in [his] life . . . ." This appeal followed.

On appeal, the respondent asserts that this court should recognize her right to be the legal guardian of Josyah because she would be a better caregiver to him than the petitioner. The respondent's appellate brief does not identify any claim of legal or factual error that the court made in rendering judgment terminating her parental rights.

It is well established that, "[a]lthough self-represented parties are not excused from complying with relevant rules of procedural and substantive law, [i]t is the established policy of the Connecticut courts to be solicitous of [self-represented] litigants when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party.

. . . Thus, like the trial court, [this court] will endeavor to see that such a litigant shall have the opportunity to have [her] case fully and fairly heard so far as such latitude is consistent with the just rights of any adverse party. . . . Nonetheless, [a]lthough we allow [self-represented] litigants some latitude, the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law . . . and [w]e repeatedly have stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstraction, is required in order to avoid abandoning an issue by failure to brief the issue properly. . . . For a reviewing court to judiciously and efficiently . . . consider claims of error raised on appeal . . . the parties must clearly and fully set forth their arguments in their briefs." (Internal quotation marks omitted.) *In re Olivia W.*, 223 Conn. App. 173, 182–83, 308 A.3d 571 (2024).

By failing to identify any cognizable claim of error in the trial court's decision, the respondent has abandoned any possible claim related to the judgment from which she has appealed. The respondent's status as a self-represented party does not permit us to overlook such omission. Because the respondent has abandoned any claim of error related to the judgment, we are unable to afford her any relief in connection with this appeal.

The judgment is affirmed.

ALBERTO RIOS *v.* COMMISSIONER OF CORRECTION
(AC 46164)

Alvord, Elgo and Prescott, Js.

Syllabus

The petitioner, who had been convicted of several crimes committed in 2013, sought a writ of habeas corpus, claiming that the retroactive

application to him of an amended administrative directive of the respondent, the Commissioner of Correction, violated the ex post facto clause of the federal constitution. The petitioner claimed that the amendment's change in the calculation of risk reduction credit he could earn toward completion of his sentence resulted in a longer period of incarceration for him and a postponement of his parole eligibility date to a time later than had originally been projected. Under the statutorily (§ 18-98e) created risk reduction earned credits program, the respondent had the sole discretion to award up to five days of risk reduction credit per month toward the completion of eligible inmates' sentences. Under the administrative directive in effect in 2013, the petitioner had been earning five days of risk reduction credit per month. In 2016, when the respondent amended the 2013 administrative directive to align the award of risk reduction credit with inmates' overall risk classification levels, the petitioner began earning risk reduction credit at a rate of three days per month due to his risk classification. The petitioner filed a motion for summary judgment, claiming, inter alia, that he had earned approximately 104 fewer risk reduction credits from the time that the 2016 administrative directive was applied to him until the time of the habeas proceedings than he would have earned under the 2013 administrative directive. The respondent filed a motion to dismiss the habeas petition, arguing that, pursuant to the applicable rule of practice (§ 23-29 (1)), the court lacked subject matter jurisdiction over the habeas petition and, alternatively, that, pursuant to Practice Book § 23-29 (2), the petitioner had failed to state a claim on which relief could be granted. The habeas court granted the petitioner's motion for summary judgment, reasoning that the 2016 administrative directive was a law within the meaning of the ex post facto clause and that its retroactive application to the petitioner violated the ex post facto clause because it created a sufficient risk of prolonging his incarceration. The court rendered judgment denying the respondent's motion to dismiss and granting the habeas petition, from which the respondent, on the granting of certification, appealed to this court. *Held* that the habeas court improperly granted the petitioner's motion for summary judgment and improperly denied the respondent's motion to dismiss the habeas petition, as the 2016 amended administrative directive did not constitute a law within the meaning of the ex post facto clause, and, thus, the petitioner failed to state a claim on which relief could be granted: whereas the constitutional prohibition on ex post facto laws applies only to penal statutes that disadvantage the offender affected by them, the 2016 administrative directive was not a law but an internal Department of Correction policy that the respondent adopted in his sole discretion, pursuant to § 18-98e (f), to determine the amount of risk reduction credit that inmates may earn according to their overall security risk level, as the adoption of the 2016 administrative directive was an Executive Branch function that was part of the respondent's responsibility to oversee the internal

management of the correctional system; moreover, although the petitioner correctly asserted that administrative regulations may implicate the ex post facto clause, the respondent did not adopt the 2016 administrative directive in the exercise of authority delegated to him by the legislature to promulgate rules, which are subject to the notice and comment procedures under the Uniform Administrative Procedure Act (§ 4-166 et seq.), as the 2016 administrative directive was not a regulation subject to legislative approval but was merely a notice regarding how the respondent chose to exercise his unilateral statutory discretion concerning risk reduction credit; furthermore, the petitioner's failure to demonstrate that the 2016 administrative directive was a law within the meaning of the ex post facto clause meant that his claim was legally insufficient; accordingly, the habeas court improperly failed to grant the respondent's motion to dismiss on the ground that the habeas petition failed to state a claim on which relief could be granted pursuant to Practice Book § 23-29 (2).

Argued November 6, 2023—officially released March 26, 2024

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the petition was withdrawn in part; thereafter, the court, *Bhatt*, *J.*, denied the respondent's motion to dismiss, and granted the petitioner's motion for summary judgment and rendered judgment thereon, from which the respondent, on the granting of certification, appealed to this court. *Reversed*; *judgment directed.*

Edward Rowley, assistant attorney general, with whom, on the brief, was *William Tong*, attorney general, for the appellant (respondent).

Judie Marshall, assigned counsel, for the appellee (petitioner).

Opinion

PRESCOTT, J. The present appeal concerns the determination of the habeas court that an amended administrative directive of the respondent, the Commissioner of Correction, as applied to the petitioner, Alberto Rios, violated the ex post facto clause of the United States constitution. The amended administrative directive at

issue, which the habeas court concluded constituted a law within the meaning of the ex post facto clause, changed the calculation of credits an inmate may earn under the risk reduction earned credits (RREC) program. That program was created by General Statutes § 18-98e,[1] and allows eligible inmates to earn a certain amount of credit per month toward completion of their sentences.

The respondent appeals from the summary judgment rendered by the habeas court granting the petition for a writ of habeas corpus filed by the petitioner. The respondent also appeals from the court's denial of his motion to dismiss, in which he asserted that the habeas court lacked jurisdiction over the petitioner's ex post facto claim and that the petitioner failed to state a claim upon which habeas corpus relief can be granted.

On appeal, the respondent first claims that the court improperly concluded that the amended administrative directive at issue was subject to ex post facto scrutiny because it constitutes a law within the meaning of that clause. The respondent also argues, in the alternative, that, even if the amended administrative directive were subject to scrutiny under the ex post facto clause because it constitutes a law within the meaning of that clause, the court nonetheless improperly concluded that the application of the amended administrative directive to the petitioner violated the ex post facto clause prohibition. We agree with the respondent's first argument and, accordingly, reverse the judgment of the habeas court.

At the outset, we note that "[t]he ex post facto prohibition forbids the Congress and the [s]tates to enact

[1] Although the legislature has amended § 18-98e since the administrative directive at issue took effect in 2016; see Public Acts 2018, No. 18-155, § 3; that amendment is not relevant to this appeal. We therefore refer in this opinion to the current revision of § 18-98e.

any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed." (Footnote omitted; internal quotation marks omitted.) *Weaver* v. *Graham*, 450 U.S. 24, 28, 101 S. Ct. 960, 67 L. Ed. 2d 17 (1981).

The following undisputed facts and procedural history are relevant to our resolution of the respondent's claims on appeal. The petitioner was convicted, in connection with conduct occurring on April 22, 2013, of assault in the first degree in violation of General Statutes § 53a-59 (a) (1), assault in the second degree in violation of General Statutes § 53a-60, and three counts of reckless endangerment in the first degree in violation of General Statutes § 53a-63. On May 15, 2014, he was sentenced to twenty years of incarceration, suspended after fourteen years, followed by five years of probation.

Pursuant to the RREC program created by § 18-98e, the respondent has the discretion to award RREC to eligible inmates, which credits count toward a completion of their sentences of up to a maximum of five days per month for such things as good behavior, participation in eligible programs and activities, and obedience to institutional rules. The administrative directive of the Department of Correction (department) concerning the earning of RREC that was in effect at the time the petitioner committed the underlying offenses was administrative directive 4.2A (2013 administrative directive). Conn. Dept. of Correction, Administrative Directive 4.2A (effective March 22, 2013). That administrative directive provided that risk reduction credit is "[t]ime awarded at the discretion of the [respondent] or designee at the rate of five (5) days per month for participation in programs or activities, good conduct and obedience to departmental rules, unit and/or program rules in accordance with RREC guidelines as

determined by the [respondent] or designee." Administrative Directive 4.2A (3) (D) (effective March 22, 2013).

Pursuant to the 2013 administrative directive, once an incarcerated individual signs an offender accountability plan and adheres to the rules and regulations, RREC is calculated and awarded via the department's computer system at a rate of five days per month. The petitioner earned RREC at the rate of five days per month under the 2013 administrative directive.

On February 1, 2016, the 2013 administrative directive was amended. That amendment, which is reflected in administrative directive 4.2A (2016 administrative directive), provides that "[a]n inmate may earn RREC at the rate of three (3) days per month as an Overall Level 4 inmate, four (4) days per month as an Overall Level 2 or 3 inmate and five (5) days per month as an Overall Level 1 inmate or if the inmate is being supervised in the community on early release supervision throughout the sentenced portion of the inmate's incarceration." Conn. Dept. of Correction, Administrative Directive 4.2A (6) (effective February 1, 2016).

The petitioner had been earning five days of RREC under the 2013 administrative directive. Under the 2016 administrative directive, the petitioner began earning RREC at a rate of three days per month due to his risk classification as an overall level 4 inmate. On February 1, 2018, the petitioner's classification changed to an overall level 3 inmate, thereby allowing him to earn RREC at a rate of four days per month. The petitioner earned approximately forty-six fewer days of RREC than he would have received from March 1, 2016, to February 1, 2018, if the 2013 administrative directive had been applied to him during that time period. From February 1, 2018, until the time of the habeas proceedings, the petitioner earned approximately fifty-eight

fewer days of RREC pursuant to the 2016 administrative directive.

Accordingly, by virtue of the application of the 2016 administrative directive to the petitioner, he earned approximately 104 fewer days of RREC from the time the 2016 administrative directive was applied to him until the time of the habeas proceedings than he otherwise would have under the 2013 administrative directive. He will remain ineligible to earn five days of RREC per month, which he had been earning pursuant to the 2013 administrative directive, until and unless he reaches the classification of an overall level 1 inmate.

On December 21, 2020, the petitioner filed a petition for a writ of habeas corpus, alleging that "the retroactive application of this [2016] administrative [directive] violates the prohibition against ex post facto laws contained in the [United States] constitution because it dictates a longer period of incarceration and postpones his parole eligibility date to a date later than was originally projected."[2] The petitioner filed a motion for summary judgment on March 25, 2022, arguing that no genuine issue of material fact existed that the application to him of the 2016 administrative directive violated the ex post facto clause and that he was entitled to judgment as a matter of law.

In response, the respondent filed a motion to dismiss on April 29, 2022, pursuant to Practice Book § 23-29 (1) and (2), arguing that the undisputed facts do not support the petitioner's claim for relief and that, because those undisputed facts demonstrate that the 2016 administrative directive is not a law for purposes of the ex post facto clause, the petitioner failed to state a claim upon

[2] At the September 29, 2022 hearing on the motion for summary judgment and motion to dismiss, the petitioner withdrew the second claim in his petition, which challenged the calculation of his parole eligibility date by the Board of Pardons and Paroles.

which habeas relief can be granted. The respondent also argued that the habeas court lacked subject matter jurisdiction over the petition.

On December 20, 2022, the habeas court issued a memorandum of decision granting the petitioner's motion for summary judgment and denying the respondent's motion to dismiss. The court reasoned that the 2016 administrative directive is a law within the meaning of the ex post facto clause and that the application of the 2016 administrative directive to the petitioner violated the ex post facto clause because it was retroactively applied to the petitioner to create a sufficient risk of prolonging his incarceration. The court determined that no genuine issue of material fact existed and that the petitioner was entitled to judgment as a matter of law. It therefore granted the petitioner's motion for summary judgment and denied the respondent's motion to dismiss. The respondent subsequently filed a petition for certification to appeal, which the habeas court granted. This appeal followed.

Our review of the respondent's claims that the habeas court improperly granted the petitioner's motion for summary judgment and denied the respondent's motion to dismiss are subject to plenary review. "On review from the granting of a motion for summary judgment, our task is to determine whether the court correctly determined that the moving party was entitled, as a matter of law, to summary judgment on the basis of the absence of any genuine issues of material fact requiring a trial. Because this inquiry requires a legal determination, our review is plenary." *Lawrence* v. *Commissioner of Correction*, 125 Conn. App. 759, 762, 9 A.3d 772 (2010), cert. denied, 300 Conn. 936, 17 A.3d 474 (2011); see also Practice Book § 23-37.

Regarding the court's denial of the respondent's motion to dismiss, Practice Book § 23-29 provides in

relevant part that "[t]he judicial authority may, at any time, upon its own motion or upon motion of the respondent, dismiss the petition, or any count thereof, if it determines that: (1) the court lacks jurisdiction; [or] (2) the petition, or a count thereof, fails to state a claim upon which habeas corpus relief can be granted . . . ." "The conclusions reached by the trial court in its decision to dismiss [a] habeas petition are matters of law, subject to plenary review. . . . [When] the legal conclusions of the court are challenged, [the reviewing court] must determine whether they are legally and logically correct . . . and whether they find support in the facts that appear in the record." (Internal quotation marks omitted.) *McMillion* v. *Commissioner of Correction*, 151 Conn. App. 861, 869–70, 97 A.3d 32 (2014).

We turn our attention to the ex post facto question at the center of the motion for summary judgment and the motion to dismiss. Specifically, the respondent argues, among other things, that the habeas court improperly concluded that the 2016 administrative directive constitutes a law within the meaning of the ex post facto clause. We agree.

The following legal principles are relevant to our resolution of the ex post facto claim raised by the respondent. The constitution of the United States provides in article one, § 10, that "[n]o State shall . . . pass any . . . ex post facto Law . . . ."[3] U.S. Const., art. I, § 10, cl. 1. The plain text of this clause clearly states that the prohibition, which is named using the Latin phrase for "after the fact," applies only to laws. "The ex post facto prohibition forbids the Congress and

[3] The constitution of the United States, article one, § 9, prohibits Congress from passing ex post facto laws. "So much importance did the [C]onvention attach to [the ex post facto prohibition], that it is found twice in the Constitution." (Internal quotation marks omitted.) *State* v. *Faraday*, 268 Conn. 174, 195 n.9, 842 A.2d 567 (2004), quoting *Weaver* v. *Graham*, supra, 450 U.S. 28 n.8.

the [s]tates to enact any law which imposes a punishment for an act which was not punishable at the time it was committed; or imposes additional punishment to that then prescribed. . . . Through this prohibition, the [f]ramers sought to assure that legislative [a]cts give fair warning of their effect and permit individuals to rely on their meaning until explicitly changed." (Citations omitted; footnotes omitted; internal quotation marks omitted.) *Weaver* v. *Graham*, supra, 450 U.S. 28–29.

In The Federalist, No. 44, James Madison opined that "ex-post-facto laws . . . are contrary to the first principles of the social compact, and to every principle of sound legislation." The Federalist, No. 44, p. 351 (J. Hamilton ed. 1865). Alexander Hamilton reasoned in The Federalist, No. 84, that prohibitions on ex post facto laws were necessary by arguing that "[t]he creation of crimes after the commission of the fact, or . . . punishment for things which, when they were done, were breaches of no law, and the practice of arbitrary imprisonments, have been, in all ages, the favorite and most formidable instruments of tyranny." The Federalist, No. 84, supra, p. 629.

In the 1798 decision of *Calder* v. *Bull*, 3 U.S. (3 Dall.) 386, 1 L. Ed. 648 (1798), the United States Supreme Court observed that "[t]he prohibition against their making any ex post facto laws was introduced for greater caution, and very probably arose from the knowledge, that the Parliament of Great Britain claimed and exercised a power to pass such laws . . . inflicting . . . punishment." Id., 389. The court described four categories of laws that violate the ex post facto clause: (1) "[e]very *law* that makes an action, done before the passing of the law, and which was innocent when done, criminal; and punishes such action"; (2) "[e]very *law* that aggravates a crime, or makes it greater than it was, when committed"; (3) "[e]very *law* that changes the punishment, and inflicts a greater punishment, than the

law annexed to the crime, when committed"; and (4) "[e]very *law* that alters the legal rules of evidence, and receives less, or different, testimony, than the law required at the time of the commission of the offence, in order to convict the offender." (Emphasis added.) Id., 390.

"It is well established that the constitutional prohibition on ex post facto laws applies only to penal statutes which disadvantage the offender affected by them." (Internal quotation marks omitted.) *State* v. *Banks*, 321 Conn. 821, 845, 146 A.3d 1 (2016). "[I]n an ex post facto analysis, a court must first determine whether the challenged law is a penal statute . . . ." *Beasley* v. *Commissioner of Correction*, 50 Conn. App. 421, 431, 718 A.2d 487 (1998), aff'd, 249 Conn. 499, 733 A.2d 833 (1999); see also *Abed* v. *Commissioner of Correction*, 43 Conn. App. 176, 182, 682 A.2d 558 ("[w]e have long held that an act ex post facto relates to crimes only; it is emphatically the making of an innocent action criminal" (emphasis omitted; internal quotation marks omitted)), cert. denied, 239 Conn. 937, 684 A.2d 707 (1996).

In determining whether the court in the present case improperly concluded that the 2016 administrative directive constitutes a law within the meaning of the ex post facto clause, we next examine § 18-98e, the statute creating the RREC program and authorizing the respondent, in his sole discretion, to award RREC up to a maximum of five days per month, and the language of the administrative directive at issue. Section 18-98e (a) provides in relevant part that any person sentenced to a term of imprisonment for eligible crimes "may be eligible to earn risk reduction credit toward a reduction of such person's sentence, in an amount not to exceed five days per month, *at the discretion of the Commissioner of Correction* . . . ."[4] (Emphasis added.) The

[4] General Statutes § 18-98e (b) provides that "[a]n inmate may earn risk reduction credit for adherence to the inmate's offender accountability plan,

petitioner does not challenge the application to him of § 18-98e but, rather, challenges the application to him of the 2016 administrative directive, which was issued unilaterally by the respondent pursuant to subsection (f) of § 18-98e. That subsection provides in relevant part that "[t]he commissioner shall adopt policies and procedures to determine the amount of credit an inmate may earn toward a reduction in his or her sentence and to phase in the awarding of retroactive credit . . . ." General Statutes § 18-98e (f). Notably, according to § 18-98e (f), the policies adopted by the respondent reflect the RREC that an "inmate *may* earn"; in other words, RREC is not guaranteed and is awarded at the discretion of the respondent.

The 2016 administrative directive, a copy of which was appended to the petitioner's motion for summary judgment, describes in paragraph 1 the general policy of the RREC program in stating that RREC "may be awarded or rescinded at any time prior to discharge at the discretion of the Commissioner or designee in the interest of public safety." Administrative Directive 4.2A (1) (effective February 1, 2016). Paragraph 4 of the 2016 administrative directive describes the general principles and guidelines underlying the 2016 amendment, stating, "[t]he basic principles of RREC is for the Department of Correction to provide an incentive to inmates and have the ability to earn credit based on an

for participation in eligible programs and activities, and for good conduct and obedience to institutional rules as designated by the commissioner, provided (1) good conduct and obedience to institutional rules alone shall not entitle an inmate to such credit, and (2) the commissioner or the commissioner's designee may, in his or her discretion, cause the loss of all or any portion of such earned risk reduction credit for any act of misconduct or insubordination or refusal to conform to recommended programs or activities or institutional rules occurring at any time during the service of the sentence or for other good cause. If an inmate has not earned sufficient risk reduction credit at the time the commissioner or the commissioner's designee orders the loss of all or a portion of earned credit, such loss shall be deducted from any credit earned by such inmate in the future."

inmate's overall risk level. Inmates who choose to be in compliance and participate in available programs and activities, coupled with good conduct and obedience to departmental, unit and/or program rules shall earn RREC as noted in this directive. Programs shall be offered providing inmates with valuable tools to be better prepared for reintegration into the community. RREC could affect an inmate's discharge date if in compliance. However, refusal to participate in programs or failure to abide by Departmental, Unit and/or Program rules may result in the inmate not earning RREC, forfeiture of RREC and ineligibility to earn RREC. In addition, RREC may be rescinded and/or an inmate may be excluded from earning RREC at any time at the discretion of the Commissioner or designee." Administrative Directive 4.2A (4) (effective February 1, 2016).

Paragraph 6, which is titled "Credit Earned," details the number of days of RREC an inmate may earn per month based on the overall risk classification level of the inmate. Administrative Directive 4.2A (6) (effective February 1, 2016). The final paragraph, entitled "Exceptions," which provides that "[a]ny exceptions to the procedures in this Administrative Directive shall require the prior written approval of the [respondent]"; Administrative Directive 4.2A (18) (effective February 1, 2016); further demonstrates the amount of discretion that is given to the respondent. The 2016 administrative directive states that it was approved by the respondent who signed the directive.

Also appended to the petitioner's memorandum of law in support of his motion for summary judgment is a notice from the respondent, titled "RREC Notice to Offender Population." The notice states that "[e]ffective February 1, 2016 the earning of Risk Reduction Earned Credit (RREC) will be aligned with an [offender's] overall risk [classification] level. Connecticut General Statute[s] Section 18-98e states that the earning of RREC

will be based on an offender's adherence to their offender accountability plan, for participation in eligible programs and activities, and for good conduct and obedience to institutional rules as designated by the [respondent]. RREC shall be earned in the following manner as long as an offender complies with their offender accountability plan and follows all institutional policies and procedures . . . ." The notice then details the amount of maximum RREC that may be earned per month based on an inmate's overall risk level.

It is undisputed that the 2016 administrative directive is an internal policy within the department that was issued and adopted by the respondent in his sole discretion pursuant to § 18-98e (f) to determine the amount of RREC inmates may earn. The 2016 administrative directive is a discretionary internal policy that provides inmates with notice detailing the respondent's current position regarding the rate at which inmates "may earn RREC" according to the inmate's overall security risk level. It is not subject to approval by the legislature, has not been promulgated as a regulation pursuant to General Statutes § 4-168, and it does not grant by its terms any entitlement of inmates to RREC. Nothing in the 2016 administrative directive indicates that the respondent cannot deviate from it.

Our decisions in *Beasley* and *Abed* significantly bear upon the petitioner's ex post facto claim.[5] In *Beasley*

[5] In *Breton* v. *Commissioner of Correction*, 330 Conn. 462, 196 A.3d 789 (2018), our Supreme Court agreed with the claim of the petitioner in that case that the retroactive application to him of a 2013 amendment to General Statutes (Rev. to 2013) § 54-125a violated the ex post facto clause. That amendment eliminated, by virtue of his status as a violent offender, the RREC awarded to him pursuant to § 18-98e from the calculation of his initial parole eligibility date, thereby requiring him to complete 85 percent of his definite sentence before becoming parole eligible. The court reasoned that " 'it is unconstitutional to apply a statute that alters, to the defendant's disadvantage, the terms under which eligibility for [parole] is calculated, if that statute was enacted after the date of the underlying offense' "; id., 473; and further stated that "it cannot reasonably be argued that the 2013 amendment to General Statutes (Rev. to 2013) § 54-125a (b) (2) does not

v. *Commissioner of Correction*, supra, 50 Conn. App. 421, this court analyzed a claim that an administrative directive promulgated by the respondent, which operated so as to restrict statutory good time eligibility for inmates classified in administrative segregation, violated the ex post facto clause of the United States constitution. This court rejected that claim. See id., 433.

The petitioners in *Beasley* conceded that the decision in *Abed* v. *Commissioner of Correction*, supra, 43 Conn. App. 176, controlled the resolution of the issue and, if applied, would require their argument to fail, but they

alter the calculation of when [the petitioner] is eligible for parole . . . . It clearly does so by eliminating risk reduction credit from that calculation. Indeed, the petitioner has consistently earned the maximum number of risk reduction credits that were available to him, and the respondent has provided no reason to believe either that the petitioner will be denied risk reduction credit in the future or that any credit that he earns or already has earned is likely to be revoked. In such circumstances, it strikes us as quite speculative to conclude that the petitioner's release date will not be adversely affected by retroactively applying the 2013 amendment to him." (Citation omitted; emphasis omitted; internal quotation marks omitted.) Id., 478.

Breton is not applicable to the present case. First, *Breton* involved a statute governing parole eligibility, which pursuant to "firmly established" precedent is "part of the law annexed to the crime for ex post facto clause purposes." (Internal quotation marks omitted.) Id., 472. The present case, however, involves an administrative directive that does not satisfy the preliminary hurdle of being subject to the ex post facto clause prohibition because it does not constitute a law within the meaning of that clause. Second, in *Breton*, the 2013 statutory amendment undisputedly was being applied retroactively to the petitioner, and our Supreme Court reasoned that such retroactive application presented a significant risk that the petitioner's parole eligibility date would be adversely affected. In the present case, however, the 2016 administrative directive does not revoke any RREC credits that the petitioner already had earned pursuant to the 2013 administrative directive and, as a result, the effect of the 2016 administrative directive on the ultimate length of the petitioner's sentence is less clear than the effect of the statutory amendment on the parole eligibility date of the petitioner in *Breton*. In any event, we do not address the issue of whether the application of the 2016 administrative directive to the petitioner in the present case created a significant risk of increasing the measure of punishment because the preliminary hurdle that the administrative directive constitutes a law within the meaning of the ex post facto clause has not been satisfied.

argued that *Abed* should be reversed. *Beasley* v. *Commissioner of Correction*, supra, 50 Conn. App. 427. This court concluded that *Abed* remained good law in Connecticut and rejected the petitioners' ex post facto claim. See id.

In so doing, this court reasoned that, "[i]n *Abed* v. *Commissioner of Correction*, supra, 43 Conn. App. 178 . . . the [respondent] had adopted a new directive that authorized a segregated classification for prison gang inmates who were considered a safety threat to other inmates and to prison staff. Once classified in this manner, the inmate became ineligible to earn statutory good time pursuant to the directive. . . . The petitioner in *Abed*, who had been incarcerated prior to the adoption of this directive, challenged the directive on ex post facto grounds. . . . Our Supreme Court has held that an act *ex post facto* relates to *crimes* only; it is, emphatically, the making of an innocent action criminal. . . . There is nothing in [the *Abed*] directive . . . that attempts to criminalize an otherwise lawful act. . . . The ex post facto clause does not prevent prison administrators from adopting and enforcing reasonable regulations that are consistent with prison administration, safety and efficiency." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 427–28.

In concluding that the habeas court properly determined that the directive did not violate the ex post facto clause of the United States constitution, the court in *Beasley* reasoned that, "as in *Abed*, the challenged directive was not a penal statute and cannot be said to be punitive in nature. The habeas court found, and we agree, that the purpose for the rule precluding inmates from being eligible to earn statutory good time while classified in administrative segregation was not to punish but to aid in controlling the inmate population. Pursuant to the commissioner's authority, such administrative rules are explicitly permitted." Id., 432.

Federal courts, and in particular the United States Court of Appeals for the Second Circuit, that have considered similar ex post facto claims also have made clear that administrative directives that are not subject to legislative approval are not classified as laws for purposes of the ex post facto clause. See *U.S. Bank, National Assn.* v. *Mamudi*, 197 Conn. App. 31, 42, 231 A.3d 297 (in general, we look to federal courts for guidance in resolving issues of federal law), cert. denied, 335 Conn. 921, 231 A.3d 1169 (2020). In *Connelly* v. *Lantz*, 366 Fed. Appx. 194 (2d Cir.), cert. denied, 562 U.S. 950, 131 S. Ct. 126, 178 L. Ed. 2d 247 (2010), the Second Circuit rejected an inmate's claim that the application to him of an administrative directive of the respondent concerning community release violated the ex post facto clause by succinctly reasoning both that he did not raise the issue in his complaint and that, "in any event, the ex post facto clause does not apply to the [d]epartment's guidelines or administrative directives." Id., 195.

Similarly, in *Barna* v. *Travis*, 239 F.3d 169 (2d Cir. 2001), in determining that there was no merit to a claim that a change in New York's parole procedures violated the ex post facto clause, the Second Circuit reasoned that the ex post facto clause "does not apply to guidelines that do not create mandatory rules for release but are promulgated simply to guide the parole board in the exercise of its discretion. . . . Such guidelines are not laws within the meaning of the ex post facto clause." (Citation omitted; internal quotation marks omitted.) Id., 171; see also *DiNapoli* v. *Northeast Regional Parole Commission*, 764 F.2d 143, 145–46 (2d Cir.) (federal parole guidelines, promulgated to assist parole commission in its exercise of discretion and under which commission remained free to recommend parole date above or below guidelines while retaining discretion to revise or modify guidelines at any time, did not constitute

laws within meaning of ex post facto clause), cert. denied, 474 U.S. 1020, 106 S. Ct. 568, 88 L. Ed. 2d 553 (1985); see also *Warren* v. *Baskerville*, 233 F.3d 204, 207 (4th Cir. 2000) ("change in an administrative policy that was in effect at the time of [the underlying] offenses does not run afoul of the prohibition against ex post facto laws"), cert. denied, 534 U.S. 831, 122 S. Ct. 76, 151 L. Ed. 2d 41 (2001); *Pindle* v. *Poteat*, 360 F. Supp. 2d 17, 20 (D.D.C. 2003) ("[m]ost courts of appeals addressing the question have held that [p]arole [c]ommission guidelines, which simply provide guides for the exercise of discretion, cannot be considered laws for [the] purpose of the [e]x [p]ost [f]acto [c]lause of the Constitution" (internal quotation marks omitted)).

The petitioner argues that "actions of administrative agencies are not exempt from ex post facto scrutiny." He cites *Ross* v. *Oregon*, 227 U.S. 150, 33 S. Ct. 220, 57 L. Ed. 458 (1913), for the principle that the ex post facto clause is a restraint upon legislative power and has with uniformity been regarded "as reaching every form in which the legislative power of a [s]tate is exerted, whether it be a constitution, a constitutional amendment, an enactment of the legislature, a by-law or ordinance of a municipal corporation, or a regulation or order of some other instrumentality of the [s]tate exercising delegated legislative authority." Id., 162–63. The Supreme Court in *Ross* determined that article one, § 10, of the federal constitution[6] does not apply to judicial decisions because the ex post facto clause, "according to the natural import of its terms, is a restraint upon legislative power and concerns the making of laws, not their construction by the courts"; id., 161; and that "the ruling here in question was by an instrumentality of the [s]tate, but as its purpose was, not to prescribe a new

[6] The constitution of the United States, article one, § 10, provides in relevant part: "No State shall . . . pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts . . . ."

law for the future . . . it is quite plain that the ruling was a judicial act and not an exercise of legislative authority." Id., 163.

Ross does not bear the weight placed on it by the petitioner because it involved a challenge to a judicial decision rather than a legislative enactment. The court in *Ross* was not asked to decide, nor did it decide, whether an administrative directive that is not subject to legislative approval constitutes an ex post facto law. Additionally, the broad principle in *Ross* regarding the applicability of the ex post facto clause to various forms of delegated legislative authority does not alter our conclusion.

The description set forth by our Supreme Court in *Washington* v. *Commissioner of Correction*, 287 Conn. 792, 950 A.2d 1220 (2008), of the separation of powers within our criminal justice system is helpful to consider. In *Washington*, our Supreme Court explained that, "[w]ith respect to our criminal justice system, we have recognized that there are duties and responsibilities that are dedicated to each of our three branches of government. We have acknowledged the legislature's authority to define crimes and the appropriate penalties for them. . . . We have recognized that the judicial branch is charged with the responsibility of adjudicating criminal charges and ultimately determining the sentence of incarceration, if any, to be imposed. . . . Finally, we have recognized the executive branch's responsibility of managing our correctional institutions, parole system and the administration of prisoners' sentences, including transfers among facilities and the application of sentence credits." (Citations omitted.) Id., 828. This description, coupled with the designation in § 18-98e (f) to the respondent of the discretionary authority to unilaterally adopt policies regarding RREC, which policies are not subject to approval by the legislature, demonstrate that the respondent's adoption of the

2016 administrative directive is an executive branch function taken as part of his responsibility to oversee the correctional system.

Neither the petitioner nor the habeas court cited any law on point, nor are we aware of any, establishing that the 2016 administrative directive has the force or effect of law because it involves an instrumentality of the state exercising delegated legislative authority. Rather, in support of his argument that the 2016 administrative directive constitutes a law within the meaning of the ex post facto clause, the petitioner cites cases wherein courts have held that certain rules made by agencies pursuant to the federal Administrative Procedure Act (APA), 5 U.S.C. § 701 et seq., and therefore subject to legislative approval, implicate the ex post facto clause.

For example, he cites the decision of the United States Court of Appeals for the Seventh Circuit in *Rodriguez* v. *United States Parole Commission*, 594 F.2d 170 (7th Cir. 1979), which concerned whether the ex post facto clause was violated by the retroactive application to a federal prisoner sentenced under 18 U.S.C. § 4205 (b) (2) of an administrative regulation of the parole commission that denied him any meaningful consideration for parole. Id. In determining that the ex post facto clause was applicable to the administrative regulation at issue, the court reasoned: "The first part of this inquiry, whether the regulation involved here is equivalent to a statute for purposes of the [ex post facto] clause, need not detain us long. When Congress has delegated to an agency the authority to make a rule instead of making the rule itself, the resulting administrative rule is an extension of the statute for purposes of the clause. What Congress cannot do directly, it cannot do by delegation. . . . The [Parole Commission and Reorganization] Act expressly authorizes the commission to adopt rules and regulations as are necessary to carry out a

national parole policy. 18 U.S.C. § 4203 (a) (1). Legislative rules adopted by the commission pursuant to statutory power have the force and effect of law." (Citations omitted; internal quotation marks omitted.) *Rodriguez* v. *United States Parole Commission*, supra, 173.

That regulations adopted by an agency pursuant to the rule-making authority delegated to it by Congress may constitute a law for purposes of the ex post facto clause is not dispositive in the present case, as the 2016 administrative directive is not a regulation subject to the requirements of the Uniform Administrative Procedure Act (UAPA), General Statutes § 4-166 et seq., which requires legislative approval before having the force and effect of law.[7] Rather, the 2016 administrative directive was created for the internal management of correctional institutions and to provide inmates with notice as to the respondent's current policy on how he chooses to exercise his statutory discretion to award RREC of up to five days per month.

Although the 2016 administrative directive is not an administrative regulation subject to legislative approval, the petitioner cites multiple cases involving the applicability of the ex post facto clause to such administrative regulations. For example, he argues that "[i]t does not matter that it was an administrative directive, rather than a statutory amendment, because case law establishes that administrative rules are not exempt from [the] ex post facto clause protections." He contends that *Garner* v. *Jones*, 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000), "makes explicitly clear that administrative directives can be subject to ex post facto protections." A careful reading of *Garner* undermines the petitioner's reliance on it.

[7] In *Pierce* v. *Lantz*, 113 Conn. App. 98, 965 A.2d 576, cert. denied, 293 Conn. 915, 979 A.2d 490 (2009), this court observed that "[a]dministrative directives are created for the internal management of the correctional institutions and are not regulations that are subject to the UAPA requirements." Id., 104–105.

The inmate in *Garner*, following his escape from prison while serving a life sentence for murder, committed another murder and thereafter was sentenced to a second life term. Id., 247. He challenged on ex post facto grounds the retroactive application to him of an amendment to rule 475-3-.05 (2), which had been adopted by Georgia's State Board of Pardons and Paroles in the exercise of its statutorily delegated authority to determine the interval at which inmates serving life sentences would be reconsidered for parole and which lengthened the time interval between proceedings to reconsider an inmate's eligibility for parole after an initial consideration had taken place following an inmate's having served seven years of incarceration. Id., 246–49. The United States Supreme Court reversed the judgment of the United States Court of Appeals for the Eleventh Circuit, which held that the retroactive application of the change in the law was necessarily an ex post facto violation, and remanded the case for consideration of the relevant question of "whether the amended Georgia [r]ule creates a significant risk of prolonging [the inmate's] incarceration." Id., 251.

Importantly, *Garner* does not state whether the rule at issue in that case was subject to approval by the Georgia legislature. As the habeas court in the present case recognized in its decision, *Garner* contains "no mention, let alone any discussion, of whether the ex post facto clause is *inapplicable* to administrative regulations." (Emphasis in original.) We note that *Garner*'s holding that, under certain circumstances, rules adopted by a state's Board of Pardons and Paroles can implicate the ex post facto clause, does not inform our analysis of whether, in the present case, the unilaterally adopted, discretionary administrative directive of the respondent implicates the ex post facto clause.

We also are not persuaded by the habeas court's reliance on *Secretary, Dept. of Public Safety & Correctional Services* v. *Demby*, 390 Md. 580, 890 A.2d 310

(2006), to support its conclusion that the 2016 administrative directive constitutes a law within the meaning of the ex post facto clause. *Demby* concerned a challenge on ex post facto grounds by several inmates who previously had been eligible for special project credits for "double celling," or, in other words, sharing a cell with another prisoner, but were later precluded from obtaining such credits pursuant to an amendment to a regulation. Id., 584–90. In concluding that the ex post facto clause was applicable to the amendment, the court in *Demby* noted that "[t]he amendment in question here is clearly a regulation pursuant to the definition of regulation in the [Maryland] Administrative Procedure Act"; id., 606; and reasoned that, because the regulation was not merely interpretive in nature but, rather, was substantive, it had "the force of law," which "is evident in the fact that the adoption of the amendments immediately prohibits various categories of inmates from receiving special housing credits for double celling." (Internal quotation marks omitted.) Id., 608.

Demby, however, is inapposite because it concerns a regulation adopted pursuant to Maryland's Administrative Procedure Act, and, as noted in *Demby*, "under the Maryland APA, an agency's organizational rules, procedural rules, interpretive rules and statements of policy all must go through the same procedures as required for legislative rules." (Emphasis omitted; internal quotation marks omitted.) Id., 607 n.13. The administrative directive challenged in the present appeal is not subject to such approval procedures.

The petitioner also contends that "[w]hether an agency regulation can be deemed legislative in nature depends on whether the regulation imposes a substantive rule, rather than merely providing interpretive guidance." He cites the decision of the United States Court of Appeals for the Tenth Circuit in *Smith* v. *Scott*, 223 F.3d 1191 (10th Cir. 2000), for the principle that "an

agency regulation which is legislative in nature is encompassed by [the ex post facto clause] because a legislative body cannot escape the [c]onstitutional constraints on its power by delegating its lawmaking function to an agency." (Internal quotation marks omitted.) Id., 1193–94. The petitioner further contends, citing *Prater* v. *United States Parole Commission*, 802 F.2d 948 (7th Cir. 1986), that the constitutional prohibition against ex post facto laws "applies to statutory changes and also (we may assume) to changes in administrative regulations that represent an exercise of delegated legislative authority . . . ." Id., 953–54.

The petitioner's argument is consistent with the reasoning of the habeas court wherein it determined, citing *United States* v. *Ellen*, 961 F.2d 462 (4th Cir.), cert. denied, 506 U.S. 875, 113 S. Ct. 217, 121 L. Ed. 2d 155 (1992), that the answer to the question of "under what circumstances is an administrative directive subject to the ex post facto clause" is dependent "on whether it is a substantive or legislative rule as opposed to an interpretive guide." In *Ellen*, the United States Court of Appeals for the Fourth Circuit noted that, "[w]hen Congress has delegated to an agency the authority to make a rule instead of making the rule itself, the resulting administrative rule is an extension of the statute for purposes of the [ex post facto clause]. . . . The reason for applying the [c]lause to such legislative rules is straightforward: Congress should not be allowed to do indirectly what it is forbidden to do directly. . . . But when an agency promulgates an interpretive rule, the [e]x [p]ost [f]acto [c]lause is inapplicable. [I]nterpretive rules simply state what the administrative agency thinks the statute means, and only remind affected parties of existing duties. . . . Unlike legislative rules, which ha[ve] the force of law . . . interpretive rules are statements of enforcement policy. They are . . . merely guides, and not laws: guides may be discarded

where circumstances require; laws may not." (Citations omitted; internal quotation marks omitted.) Id., 465.

In concluding that the manual at issue was not a law within the meaning of the ex post facto clause, the Fourth Circuit reasoned that it did not "purport to [create new] law or [impose new] rights or duties . . . and it was not promulgated through the notice and comment rulemaking procedures of the Administrative Procedure Act, 5 U.S.C. § 551 et seq., through which all legislative rules must pass." (Citation omitted; internal quotation marks omitted.) Id., 466. Employing similar reasoning, the Seventh Circuit in *Prater* explained that "[t]he rule against ex post facto laws applies to statutory changes and also (we may assume) to changes in administrative regulations that represent an exercise of delegated legislative authority, as opposed to an interpretation of legislation by an agency authorized to execute, not make, laws. . . . The legislature should not be allowed to do indirectly what it is forbidden to do directly. Thus if Congress authorizes an agency to make rules governing procedure before the agency . . . and the agency does so, the rules are as if made by Congress; Congress could have made them, if it had had time. But if the Justice Department issues guidelines for the enforcement of a federal statute that it administers . . . this is the performance of an interpretive function that every law enforcement agency has; it is not the enactment of a law. . . . If the law is unchanged and no legislative regulations are promulgated, a mere change in enforcement methods, priorities, or policies, written or unwritten—a change within the scope of the executive branch's discretion in enforcing the laws passed by Congress—does not activate the prohibition against ex post facto laws." (Citations omitted.) *Prater* v. *United States Parole Commission*, supra, 802 F.2d 953–54.

The Seventh Circuit in *Prater* reasoned that the guidelines at issue in that case "are interpretive rather than legislative. They are not the exercise of delegated authority (e.g., to make rules of procedure); they are statements of enforcement policy. They are . . . merely guides, and not laws: guides may be discarded where circumstances require; laws may not." (Internal quotation marks omitted.) Id., 954.

The decision in *Prater*, which we are not obligated to follow, is inconsistent with precedent in other circuit courts of appeals including that of the Second Circuit. Even if we assume, arguendo, that the rubric underlying *Ellen* and *Prater* is applicable in the present case, the result would not change. The 2016 administrative directive was not adopted by the respondent in the exercise of authority delegated to him by the legislature to promulgate rules subject to the notice and comment procedures under the UAPA. It is not a regulation subject to legislative approval; rather, it is merely a notice regarding how the respondent chooses to exercise his unilateral discretion to award RREC, if at all.

For the foregoing reasons, we determine that the court improperly determined that the 2016 administrative directive fell within the ambit of the ex post facto clause. On the basis of this legal determination, we conclude that the petitioner was not entitled to judgment as a matter of law, and, thus, the court improperly granted the motion for summary judgment.

We now turn to the respondent's claim that the court improperly denied the motion to dismiss. The respondent sought dismissal of the habeas petition on two grounds: that the habeas court lacked subject matter jurisdiction over the petition; see Practice Book § 23-29 (1); and that the petitioner failed to state a claim upon which habeas relief could be granted. See Practice Book § 23-29 (2). In denying the motion to dismiss, the

court stated that "[t]his court has jurisdiction . . . ." The court, however, in denying the motion to dismiss, also implicitly rejected the alternative ground on which the respondent sought dismissal: the failure of the petition to state a claim upon which habeas corpus relief could be granted.

We agree with the respondent that the court improperly denied the motion to dismiss. The question arises, however, as to whether the court properly should have granted the motion to dismiss on the basis of subsection (1) or (2) of Practice Book § 23-29. In adjudicating this issue, we recognize that we have not always spoken consistently concerning the subtle distinctions between a habeas court's lack of subject matter jurisdiction and the failure of a habeas petition to state a claim upon which relief can be granted.

As explained by our Supreme Court in *Wolfork* v. *Yale Medical Group*, 335 Conn. 448, 239 A.3d 272 (2020), "[s]ubject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action." (Internal quotation marks omitted.) Id., 463.

Although it is true that we have referred to a habeas court as having a "limited" jurisdiction, the principles articulated in *Wolfork* should apply with equal force in habeas proceedings. "With respect to the habeas court's jurisdiction, [t]he scope of relief available through a petition for habeas corpus is limited. In order to invoke the trial court's subject matter jurisdiction in a habeas

action, a petitioner must allege that he is illegally confined or has been deprived of his liberty. . . . In other words, a petitioner must allege an interest sufficient to give rise to habeas relief. . . . In order to . . . qualify as a constitutionally protected liberty [interest] . . . the interest must be one that is assured either by statute, judicial decree, or regulation." (Citations omitted; internal quotation marks omitted.) *Green* v. *Commissioner of Correction*, 184 Conn. App. 76, 85, 194 A.3d 857, cert. denied, 330 Conn. 933, 195 A.3d 383 (2018).

"[T]he presence or absence of an affirmative, enforceable right is not relevant [however] . . . to the ex post facto prohibition, which forbids the imposition of punishment more severe than the punishment assigned by law when the act to be punished has occurred. Critical to relief under the [e]x [p]ost [f]acto [c]lause is not an individual's right to less punishment, but the lack of fair notice and governmental restraint when the legislature increases punishment beyond what was prescribed when the crime was consummated. . . . [T]he primary focus of an ex post facto claim is the probability of increased punishment. To establish a cognizable claim under the ex post facto clause, therefore, a habeas petitioner need only make a colorable showing that the new law creates a genuine risk that he or she will be incarcerated longer under that new law than under the old law." (Citations omitted; internal quotation marks omitted.) *Perez* v. *Commissioner of Correction*, 326 Conn. 357, 375, 163 A.3d 597 (2017).

Our jurisprudence has, at times, conflated the concepts of a lack of subject matter jurisdiction and the failure to state a claim upon which relief can be granted. Our Supreme Court, however, held in *In re Jose B.*, 303 Conn. 569, 34 A.3d 975 (2012), that "the failure to allege an essential fact under a particular statute goes to the legal sufficiency of the complaint, not to the subject matter jurisdiction of the trial court." Id., 579. The court

in *In re Jose B.* reasoned that "[t]his conclusion is consistent with the rule that every presumption is to be indulged in favor of jurisdiction . . . is consistent with the judicial policy preference to bring about a trial on the merits of a dispute whenever possible and to secure for the litigant his day in court . . . by allowing the litigant, if possible, to amend the complaint to correct the defect . . . ." (Citations omitted; internal quotation marks omitted.) Id. That same presumption in favor of jurisdiction applies equally to habeas courts. See, e.g., *Stafford* v. *Commissioner of Correction*, 207 Conn. App. 85, 94, 261 A.3d 791 (2021) (it is well established that, in determining whether court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged).

In the present case, the petitioner alleges a violation of the ex post facto clause, arguing that the 2016 administrative directive creates a genuine risk that he will be incarcerated longer than he would have been under the 2013 administrative directive. His failure to demonstrate that the administrative directive is a "law" within the meaning of the ex post facto clause simply means that he has not stated a claim upon which relief can be granted. It does not alter the fact that habeas courts have subject matter jurisdiction to adjudicate ex post facto claims in which a petitioner asserts that punishment for the offense he committed has increased as a result of a subsequent change in the law.

Because the ex post facto clause applies only to laws and the 2016 administrative directive is not a law within the meaning of the clause, the petitioner's claim is legally insufficient. Accordingly, the habeas court improperly failed to grant the motion to dismiss on the ground that the petition failed, pursuant to Practice Book § 23-29 (2), to state a claim upon which habeas corpus relief could be granted.[8]

[8] Additionally, because we conclude that the 2016 administrative directive does not constitute a law within the meaning of the ex post facto clause,

The judgment is reversed and the case is remanded with direction to render judgment denying the petitioner's motion for summary judgment and granting the respondent's motion to dismiss for failure to state a claim upon which relief may be granted.

In this opinion the other judges concurred.

BLACK ROCK GARDENS, LLC *v.* HENRY BERRY (AC 46942)

Bright, C. J., and Moll and Clark, Js.

Syllabus

The plaintiff landlord sought, by way of summary process, to regain possession of certain premises leased to the defendant tenant. The defendant filed a special motion to dismiss pursuant to the anti-SLAPP statute (§ 52-196a), arguing that the plaintiff violated his first amendment rights, right of association, and right to petition the government by filing a fraudulent and frivolous summary process action to evict him. The trial court denied the motion, and the defendant appealed to this court. The plaintiff filed a motion to dismiss the defendant's appeal, claiming that the trial court's denial of the defendant's special motion to dismiss was not an appealable final judgment. *Held* that this court lacked subject matter jurisdiction over the defendant's appeal, and, accordingly, the appeal was dismissed: the defendant failed to assert a colorable claim that would entitle him to an immediate review of the trial court's denial of his special motion to dismiss pursuant to § 52-196a because none of the allegations in the plaintiff's complaint was based on the defendant's exercise of his right of free speech, to petition the government, or of association, as the complaint made clear that the summary process action was predicated solely on the defendant's alleged failure to pay rent owed to the plaintiff and the fact that the written lease agreement between the parties had lapsed and had not been renewed, and the complaint did not contain any allegations about things the defendant said or communicated or about other actions that would otherwise implicate the defendant's right of free speech, to petition the government, or of association, as those terms were understood under § 52-196a;

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we need not address the respondent's additional claims that that directive did not violate the ex post facto clause because it was not applied retroactively, and, furthermore, it did not create a sufficient risk of increasing the petitioner's measure of punishment. See, e.g., *State* v. *Banks*, supra, 321 Conn. 846 n.10.

moreover, the defendant's allegation that the summary process action was motivated by a complaint he had filed against the plaintiff with the state's Commission on Human Rights and Opportunities did not transform the action into a claim that was based on the defendant's exercise of his right of free speech, to petition the government, or of association, as required by § 52-196a.

Considered December 6, 2023—officially released March 26, 2024

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Bridgeport, Housing Session, where the court, *Cirello*, *J.*, denied the defendant's special motion to dismiss, and the defendant appealed to this court; thereafter, the plaintiff filed a motion to dismiss the appeal. *Appeal dismissed.*

Matthew M. Hausman, in support of the motion.

Henry Berry, self-represented, in opposition to the motion.

Opinion

CLARK, J. The defendant, Henry Berry, appeals from the trial court's denial of a special motion to dismiss that he filed pursuant to Connecticut's anti-SLAPP statute, General Statutes § 52-196a,[1] in a summary process action brought against him by the plaintiff, Black Rock Gardens, LLC. Before this court is the plaintiff's motion to dismiss the defendant's appeal in which the plaintiff claims that the defendant has not appealed from a final judgment. Specifically, the plaintiff claims that the defendant has failed to assert a colorable claim to the protections afforded by the anti-SLAPP statute and, consequently, pursuant to *Smith* v. *Supple*, 346 Conn. 928, 952, 293 A.3d 851 (2023), this court lacks subject matter jurisdiction over the appeal. For the reasons

[1] "SLAPP is an acronym for strategic lawsuit against public participation . . . ." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 336 Conn. 332, 337 n.4, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021).

that follow, we agree with the plaintiff and dismiss the defendant's appeal.

We begin with the relevant facts and procedural history of this case. On July 28, 2023, the plaintiff commenced the underlying summary process action against the defendant. In its complaint, the plaintiff alleges that it is the owner of premises located at 293 Ellsworth Street, Apartment 8D, in Bridgeport and that the defendant failed to make full rental payments beginning in August, 2022, and thereafter. The plaintiff alleges that the defendant no longer has the right or privilege to occupy the premises and that the lease agreement between the parties has lapsed by its terms and has not been renewed. The complaint requests a judgment for immediate possession of the premises and forfeiture of the defendant's possessions and personal effects within the premises.

On August 1, 2023, the defendant filed his answer denying the allegations against him and checked off or wrote in a host of special defenses on Judicial Form JD-HM-5, titled "Summary Process (Eviction) Answer to Complaint,"[2] including, inter alia, that rent had been paid; that no rent is due under Connecticut law because of the plaintiff's "failure to do whatever is necessary to put and keep the premises in a fit and habitable condition"; that the eviction was being brought because the defendant had contacted his landlord and/or public officials to complain about his apartment; and that he should not be evicted because "[there was a] violation of contract and statute regarding entry into the apartment and [the plaintiff] has failed to remedy multiple violations; [there was a] violation of the covenant of quiet enjoyment; the plaintiff and [its] employees engage

[2] See Summary Process (Eviction) Answer to Complaint, Judicial Branch Form JD-HM-5, available at https://www.jud.ct.gov/webforms/forms/hm005.pdf (last visited March 14, 2024).

in or allow harassment and infliction of emotional distress; the plaintiff has submitted fraudulent and/or misrepresented documents in various legal actions of the defendant; the plaintiff's actions are retaliation; [and] the plaintiff has made false statements with respect to material facts, circumstances, and incidents."

On August 7, 2023, the defendant filed a motion to dismiss the summary process action for, inter alia, insufficiency of process and insufficiency of service of process. On August 21, 2023, the court, *Cirello*, *J.*, denied the defendant's motion on the basis that "[t]he service of the notice to quit, the quit date, the service of the writ [of] summons and complaint, and the return date on file with the court were all timely made under relevant law."

On September 1, 2023, the defendant proceeded to file a special motion to dismiss pursuant to § 52-196a in which he argued that the plaintiff "violated his first amendment rights, right of association, and right to petition the government using the guise of a largely fraudulent and frivolous summary process to evict the defendant from his apartment rented from the plaintiff." He alleged that "[d]ocuments relating directly to the summary process contain false information; and also the motives, purposes, and malice of the summary process action evidence that the action was undertaken with improper, malicious, and retaliatory purposes to intentionally harass, threaten, and disturb the defendant—e.g., [to] upset his right of quiet enjoyment, [to] coerce him to leave the apartment, [and to] create conditions of precarious habitability." The special motion to dismiss also appears to have claimed that the defendant had previously filed a complaint against the plaintiff with Connecticut's Commission on Human Rights and Opportunities (CHRO) alleging age discrimination. He claimed

that the "plaintiff's summary process is not only retaliatory in violation of Connecticut statutes including landlord-tenant statutes, but notably with regard to this special motion to dismiss, a retaliatory, hostile, threatening action against the defendant for petitioning the government—namely, CHRO—by a complaint of age discrimination . . . ."

On September 14, 2023, the plaintiff filed an opposition to the defendant's special motion to dismiss in which it argued that "[t]his was the third motion to dismiss filed by the defendant (who has since filed several more), and is filed under a statute that does not apply to summary process actions alleging nonpayment of rent or lapse of time." The plaintiff argued, inter alia, that the present action has nothing to do with what the defendant said or may have said in public or private and nothing to do with public participation.

On September 20, 2023, a hearing on the special motion to dismiss was held in conjunction with numerous other motions to dismiss that the defendant had filed.[3] The court denied the defendant's motion at the conclusion of arguments. On September 25, 2023, the defendant appealed from the court's denial of that motion.

The question before us is whether the trial court's denial of the defendant's special motion to dismiss under the anti-SLAPP statute is an appealable final judgment. To answer that question, we begin with the relevant statutory provisions. Section 52-196a (b) provides: "In any civil action in which a party files a complaint, counterclaim or cross claim against an opposing party that is based on the opposing party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the

[3] The docket reveals that the defendant had filed a host of court submissions by the September 20, 2023 hearing date, including at least five other motions to dismiss.

United States or the Constitution of the state in connection with a matter of public concern, such opposing party may file a special motion to dismiss the complaint, counterclaim or cross claim."

Section 52-196a (e) (3) instructs that "[t]he court shall grant a special motion to dismiss if the moving party makes an initial showing, by a preponderance of the evidence, that the opposing party's complaint, counterclaim or cross claim is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, unless the party that brought the complaint, counterclaim or cross claim sets forth with particularity the circumstances giving rise to the complaint, counterclaim or cross claim and demonstrates to the court that there is probable cause, considering all valid defenses, that the party will prevail on the merits of the complaint, counterclaim or cross claim."

Our Supreme Court recently decided three companion cases addressing the issue of whether a trial court's denial of a special motion to dismiss under the anti-SLAPP statute constitutes an appealable final judgment. See *Smith* v. *Supple*, supra, 346 Conn. 929; *Pryor* v. *Brignole*, 346 Conn. 534, 536–37, 292 A.3d 701 (2023); *Robinson* v. *V. D.*, 346 Conn. 1002, 1007, 293 A.3d 345 (2023). In *Smith*, the principal case of the three companion cases, our Supreme Court examined the relevant statutory text, legislative history, and analogous laws from other jurisdictions; see *Smith* v. *Supple*, supra, 938–60; and concluded that our "anti-SLAPP statute affords a defendant a substantive right to avoid litigation on the merits . . . ." Id., 949. It further concluded that, in cases in which a defendant can assert a colorable claim that a trial court's denial of a special motion to dismiss under that statute has placed that particular right at

risk, an immediate appeal may be taken pursuant to the second prong of *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983).[4] *Smith* v. *Supple*, supra, 960.

The issue before us, therefore, is limited to whether the defendant in the present case has asserted a *colorable* claim to the protections afforded by our state's anti-SLAPP statute, as required to obtain an immediate review of the trial court's denial of his special motion to dismiss. See, e.g., *Pryor* v. *Brignole*, supra, 346 Conn. 545. To that end, "we must determine whether the defendant has asserted a colorable claim that his actions, as alleged in the [plaintiff's] complaint, are based on his right of free speech, to petition the government, or of association." *Robinson* v. *V. D.*, supra, 346 Conn. 1008.

We conclude that the defendant has failed to assert a colorable claim to the protections afforded by our anti-SLAPP statute because none of the allegations in the plaintiff's complaint is based on the defendant's exercise of his right of free speech, to petition the government, or of association. In particular, a review of the complaint makes clear that the defendant's summary process action was predicated solely on the defendant's alleged failure to pay rent owed to the plaintiff and that the written lease agreement between the parties had lapsed and had not been renewed. The complaint contains no allegations about things the defendant said or communicated or about other actions that would otherwise implicate the defendant's right of free speech, right to petition the government, or right of association,

[4] It is well settled that "[t]he subject matter jurisdiction of our appellate courts is limited by statute to appeals from final judgments . . . ." (Internal quotation marks omitted.) *Blakely* v. *Danbury Hospital*, 323 Conn. 741, 745, 150 A.3d 1109 (2016). In *Curcio*, however, our Supreme Court held that "[a]n otherwise interlocutory order is appealable in two circumstances: (1) [when] the order or action terminates a separate and distinct proceeding, [and] (2) [when] the order or action so concludes the rights of the parties that further proceedings cannot affect them." *State* v. *Curcio*, supra, 191 Conn. 31.

as those terms are understood under the statute.[5] The defendant's allegation that the plaintiff's summary process action was motivated by a prior CHRO complaint that he filed against the plaintiff does not transform the plaintiff's summary process action into a claim that is "based on" the defendant's exercise of his right of free speech, to petition the government, or of association, as required by § 52-196a (b). On the contrary, in determining whether a party has presented a colorable claim that entitles him to the right to avoid litigation under our anti-SLAPP statute, our Supreme Court has confined its analysis to whether the specific allegations made in the complaint were based on the defendant's protected speech or conduct. See *Robinson* v. *V. D.*, supra, 346 Conn. 1008 ("we must determine whether the defendant has asserted a colorable claim that his actions, *as alleged in the plaintiffs' complaint*, are based on his right of free speech, to petition the government, or of association" (emphasis added)); *Smith* v. *Supple*, supra, 346 Conn. 962 ("we conclude that the defendants have asserted a colorable claim that the conduct *alleged in the complaint* falls within the meaning of the phrase 'right of

[5] " 'Right of free speech' means communicating, or conduct furthering communication, in a public forum on a matter of public concern . . . ." General Statutes § 52-196a (a) (2).

" 'Matter of public concern' means an issue related to (A) health or safety, (B) environmental, economic or community well-being, (C) the government, zoning and other regulatory matters, (D) a public official or public figure, or (E) an audiovisual work . . . ." General Statutes § 52-196a (a) (1).

" 'Right to petition the government' means (A) communication in connection with an issue under consideration or review by a legislative, executive, administrative, judicial or other governmental body, (B) communication that is reasonably likely to encourage consideration or review of a matter of public concern by a legislative, executive, administrative, judicial or other governmental body, or (C) communication that is reasonably likely to enlist public participation in an effort to effect consideration of an issue by a legislative, executive, administrative, judicial or other governmental body . . . ." General Statutes § 52-196a (a) (3).

" 'Right of association' means communication among individuals who join together to collectively express, promote, pursue or defend common interests . . . ." General Statutes § 52-196a (a) (4).

association' " (emphasis added)); *Pryor* v. *Brignole*, supra, 346 Conn. 545 ("[t]he existence of the previously cited case law affords the defendants with at least a superficially well founded claim that *the conduct alleged in the plaintiff's complaint*—namely, [the defendant's] sending letters to 'various news outlets and persons' concerning the arrest and prosecution of an attorney—could be considered conduct furthering communication in a public forum on a matter of public concern" (emphasis added)). Our Supreme Court has not sought to determine a plaintiff's motivation for bringing claims that are, on their face, not based on a defendant's protected speech or conduct.[6]

In the present case, none of the allegations in the plaintiff's complaint is based on the defendant's exercise of his right of free speech, to petition the government, or of association. We therefore conclude that the defendant has failed to assert a colorable claim that would entitle him to an immediate review of the trial court's denial of his special motion to dismiss. Consequently, this court lacks subject matter jurisdiction over the defendant's appeal.

The appeal is dismissed.

In this opinion the other judges concurred.

[6] We note that the law affords the defendant a direct mechanism to challenge the summary process action on the basis of retaliation by the plaintiff. General Statutes § 47a-33 provides: "In any action for summary process under this chapter or [General Statutes §] 21-80 it shall be an affirmative defense that the plaintiff brought such action solely because the defendant attempted to remedy, by lawful means, including contacting officials of the state or of any town, city, borough or public agency or filing a complaint with a fair rent commission, any condition constituting a violation of any of the provisions of chapter 368o, or of chapter 412, or of any other state statute or regulation or of the housing or health ordinances of the municipality wherein the premises which are the subject of the complaint lie. The obligation on the part of the defendant to pay rent or the reasonable value of the use and occupancy of the premises which are the subject of any such action shall not be abrogated or diminished by any provision of this section."

PATRICIA A. MCDONNELL *v.* NORMAN A. ROBERTS II ET AL.
(AC 45261)

Bright, C. J., and Cradle and Schuman, Js.

Syllabus

The plaintiff sought to recover damages from the defendants for, inter alia, their alleged legal malpractice in connection with their representation of the plaintiff during her prior marital dissolution proceedings. The plaintiff, who initially was self-represented, commenced the action in June, 2020. In September, 2020, the defendants served a set of interrogatories and requests for production on the plaintiff and also filed a request to revise the complaint. In October, 2020, the defendants filed a motion for a judgment of nonsuit based on the plaintiff's failure to respond to their request to revise. In November, 2020, the defendants filed another motion for a judgment of nonsuit on the ground that the plaintiff had failed to respond to their interrogatories and requests for production. In December, 2020, an attorney, M, filed an appearance on behalf of the plaintiff and requested a thirty day continuance to respond to the defendants' requests to revise and for discovery. The trial court granted the request. In February, 2021, the defendants again moved for a judgment of nonsuit in light of the plaintiff's failure to file a revised complaint and to respond to their discovery requests. The plaintiff did not file an objection to that motion. In March, 2021, the trial court issued an order in connection with the February, 2021 motion for a judgment of nonsuit, indicating that the plaintiff had thirty days to file a revised complaint and responses to the defendants' discovery requests or the defendants could file another motion for a judgment of nonsuit that would be granted by the trial court. In April, 2021, the plaintiff filed a revised complaint but did not file a notice of compliance with discovery. In May, 2021, the defendants filed another motion for a judgment of nonsuit, as the plaintiff had failed to respond to discovery pursuant to the trial court's March, 2021 order. The plaintiff filed a notice of compliance with discovery in June, 2021, which the defendants asserted was deficient. The following month, the defendants again filed a motion for a judgment of nonsuit on the ground that the plaintiff had failed to fully respond to discovery pursuant to the trial court's March, 2021 order. The plaintiff did not file an objection to the motion, which the trial court granted, and the court rendered a judgment of nonsuit against the plaintiff. In September, 2021, the plaintiff filed a motion to open and set aside the judgment of nonsuit, claiming that there was a bona fide reason for her failure to respond to the defendants' discovery requests. After the defendants filed an objection, arguing that the plaintiff could not establish that a good cause of action existed at the time the

nonsuit was rendered or that she was prevented from prosecuting the action due to mistake, accident or other reasonable cause as required by the applicable statute (§ 52-212), M filed an affidavit in support of the plaintiff's motion to open the judgment of nonsuit, in which he asserted that the plaintiff did have good cause under multiple counts and that he had had various medical and veterinary appointments. The trial court denied the plaintiff's motion to open, and the plaintiff appealed to this court. *Held* that the trial court did not abuse its discretion in denying the plaintiff's motion to open and set aside the judgment of nonsuit: the trial court did not err in concluding that the plaintiff failed to establish reasonable cause for her noncompliance with discovery under the second prong of the test set forth in § 52-212 because, contrary to the plaintiff's assertion, the trial court did not find that her reasons for failing to prosecute were insufficient to constitute reasonable cause but, rather, concluded that she had not adequately substantiated her proffered reasons, as the affidavit she submitted in connection with her motion offered only general references to M's various medical and other issues, without any specific dates, circumstances or other substantiation as to what prevented him from fully complying with the trial court's March, 2021 order; moreover, although the plaintiff claimed that the trial court improperly applied the law because the rule of practice (§ 17-43) requires an affidavit to set forth particularized circumstances only if a plaintiff is nonsuited for failure to appear, not for failure to comply with discovery, she did not provide any legal authority for that proposition, and a specific explanation was required to sustain her burden of demonstrating reasonable cause for noncompliance.

Argued December 5, 2023—officially released March 26, 2024

Procedural History

Action to recover damages for, inter alia, the defendants' alleged legal malpractice, and for other relief, brought to the Superior Court in the judicial district of Windham, where the court, *Lynch*, *J.*, granted the defendants' motion for a judgment of nonsuit and rendered judgment thereon; thereafter, the court, *J. Fischer*, *J.*, denied the plaintiff's motion to open and set aside the judgment of nonsuit, and the plaintiff appealed to this court. *Affirmed.*

Brian S. Mead, with whom was *Curran R. Mead*, for the appellant (plaintiff).

Karen L. Allison, with whom, on the brief, was *Ryan V. Nobile*, for the appellees (defendants).

Opinion

CRADLE, J. In this action, the plaintiff, Patricia A. McDonnell, appeals from the trial court's denial of her motion to open and set aside the judgment of nonsuit rendered in favor of the defendants, Norman A. Roberts II, the Law Offices of Norman A. Roberts, LLC, and GraberRoberts, LLC. The plaintiff claims that the court abused its discretion in denying her motion to open and set aside the judgment of nonsuit on the grounds that the court erred in finding that she failed to show that a good cause of action existed at the time of the judgment of nonsuit and that she was prevented by mistake, accident or other reasonable cause from prosecuting the action. We affirm the judgment of the court.

The following undisputed factual and procedural history is relevant to our review of the plaintiff's claims on appeal. On June 1, 2020, the plaintiff, who was then self-represented, commenced this action against the defendants, alleging legal malpractice, reckless misrepresentation, intentional infliction of emotional distress, negligent infliction of emotional distress, and violation of the Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., stemming from the defendants' representation of her in her prior marital dissolution action. On September 8, 2020, the defendants served on the plaintiff a set of interrogatories and requests for production. On September 15, 2020, the defendants filed a request to revise, to which the plaintiff did not respond. On October 19, 2020, the defendants filed a motion for nonsuit based on the plaintiff's failure to respond to their request to revise. On November 12, 2020, the defendants filed another motion for nonsuit on the ground that the plaintiff failed to respond to the defendants' September 8, 2020 interrogatories and requests for production. The defendants' motions were scheduled for a hearing on December 23, 2020. On December 21, 2020, Attorney Brian Mead filed an

appearance on behalf of the plaintiff, and, on December 22, 2020, the plaintiff, through Mead, requested a thirty day continuance, until January 23, 2021, to respond to the defendants' request to revise and outstanding discovery requests. The court, *Auger*, *J.*, granted the plaintiff's request.

On February 23, 2021, the defendants again moved for a judgment of nonsuit against the plaintiff for "her failure to file a revised complaint within the time permitted by Practice Book § 10-37 and for her failure to respond to discovery within the requirements of Practice Book § 13-6 et seq." The plaintiff did not file an objection. On March 12, 2021, the defendants filed a proposed scheduling order, noting that the defendants' counsel could not reach the plaintiff's counsel. On March 25, 2021, the court, *Lynch*, *J.*, issued an order in response to the February 23, 2021 motion for nonsuit, providing that, "[w]ithin thirty days after the issuance of this order, the plaintiff shall file a revised complaint and responses to the defendants' interrogatories and requests for production. If the defendants do not receive compliance by that date, they may file a motion for a judgment of nonsuit referring to this order. Absent the filing of a revised complaint and proof of compliance with outstanding discovery on file before the motion appears on this short calendar, the motion may be granted by the court and judgment may enter."

On April 23, 2021, the plaintiff filed a revised complaint but did not file a notice of compliance with discovery. On May 24, 2021, the defendants filed another motion for a judgment of nonsuit for failure to respond to discovery pursuant to the court's March 25, 2021 order. The defendants attached exhibits and an affidavit in support of the motion. On June 1, 2021, the plaintiff filed a notice of compliance with discovery, which the defendants asserted was deficient.

On July 9, 2021, the defendants filed a motion to strike counts two, three, and four of the revised complaint.[1] The plaintiff did not respond.

On July 22, 2021, the defendants filed yet another motion for a judgment of nonsuit for failure to fully respond to discovery pursuant to the court's March 25, 2021 order. The motion alleged that the responses to the outstanding discovery request, due on April 24, 2021, and sent by the plaintiff on May 25, 2021, were substantially deficient. The plaintiff did not file an objection to the defendants' motion. On August 23, 2021, the court, *Lynch, J.*, granted the defendants' July 22, 2021 motion and rendered a judgment of nonsuit against the plaintiff.

On September 13, 2021, the plaintiff filed a motion to open and set aside the judgment of nonsuit, which is the subject of this appeal, asserting that there was a bona fide reason for her failure to respond to the defendants' discovery requests.[2] On September 22, 2021,

[1] Counts two, three, and four of the revised complaint alleged reckless misrepresentation, intentional infliction of emotional distress, and negligent infliction of emotional distress, respectively.

[2] The motion states in relevant part: "[T]here exists a bona fide reason the plaintiff's counsel was unable to respond to the defendants' requests. . . .

"In support of the plaintiff's request [to set aside the judgment of nonsuit], counsel offers the following information. Over the past two months, the undersigned counsel [has] had numerous medical and dental appointments which have prohibited counsel from responding to the defendants' motion for nonsuit. The appointments have resulted in oral surgery, colonoscopy, and removal of several precancerous lesions and [counsel] is scheduled for an orthopedic appointment on . . . [September] 17, 2021, to address a torn tendon in counsel's left (dominant) hand. In addition to the medical problems, two weeks prior to the motion, counsel discovered that his family's nine and one-half year old German Shepherd had developed degenerative myelopathy and anaplasmosis. The [animal] required several trips to the veterinary and continues to require treatment. Due to [the dog's] size, counsel's wife needs counsel's assistance to transport the animal to the veterinary hospital. In addition . . . the hurricane took out the power . . . for three days immediately prior to the motion being heard . . . .

"The defendant[s] would not be prejudiced by reopening the dismissal due to the fact the [defendants have] recently filed a motion to strike and a second set of interrogatories.

"Wherefore the undersigned counsel respectfully requests that the court set aside the nonsuit and provide counsel with forty-five days to answer or

the defendants filed an objection to the plaintiff's motion to open the judgment of nonsuit, arguing that the plaintiff could not establish that a good cause of action existed at the time the nonsuit was rendered or that she was prevented from prosecuting the action due to mistake, accident or other reasonable cause as required by General Statutes § 52-212. The defendants argued, inter alia, that the plaintiff could not establish a good cause of action because her claims against the defendants were filed beyond the applicable three year statute of limitations. The defendants also noted that the plaintiff continues to be in noncompliance with the court's March 25, 2021 discovery order. The following day, the plaintiff's counsel filed an affidavit in support of the motion to open the judgment of nonsuit. The affidavit substantially mirrored the plaintiff's motion to open the judgment of nonsuit and concluded by stating, "[i]t is counsel's contention that the plaintiff has good cause under multiple counts."

On January 10, 2022, the court, *J. Fischer*, *J.*, held a hearing on the plaintiff's motion to open the judgment of nonsuit. At the hearing, Mead reiterated the reasons stated in the plaintiff's motion to open for her noncompliance with the court's March 25, 2021 order and asserted that the plaintiff "has a viable case and viable claims . . . ." In response to the defendants' contention that the plaintiff's claims were filed beyond the statute of limitations, Mead disagreed, asserting for the first time that Governor Ned Lamont's Executive Order No. 7G, which was issued on March 19, 2020, extended all statutes of limitations.[3] The court, ruling from the bench, denied the plaintiff's motion to open. The court

object to said interrogatories and request for production and respond to the defendants' motion to strike."

[3] Although, at the hearing, Mead referenced "Executive Order No. 8," the plaintiff's appellate brief clarifies that the correct executive order is Executive Order No. 7G.

first noted that the motion to open filed by the plaintiff did not contain an assertion that there was a good cause of action. The court concluded that, "under the totality of the circumstances, there's no good cause here for this. . . . I haven't had one affidavit, one bill, one thing that supports what you've said, Counsel. So, based on the totality of the circumstances, the fact that there's, you know, no argument about—no argument presented to the court until this moment about the good cause of action—and there have been four earlier motions for nonsuit—the court finds that, under the totality of the circumstances, the motion should be denied." This appeal followed.

On March 24, 2022, the plaintiff filed a motion for articulation asking the trial court to articulate the legal and factual basis "of there was no good cause found" and "of the totality of the circumstances which supports the court's decision." The motion was sent in error to Judge Lynch, who issued an articulation on April 14, 2022, that related to her August 23, 2021 order rendering the judgment of nonsuit. The plaintiff subsequently filed a motion for review with this court, asking that the "articulation rendered by Judge Lynch be vacated and removed from both the Appellate and Superior Court records." This court granted review and ordered Judge Fischer to articulate the basis of his decision denying the plaintiff's motion to open[4] but denied the plaintiff's request to vacate the April 14, 2022 articulation issued by Judge Lynch.

[4] Specifically, this court ordered Judge Fischer "to articulate the factual and legal basis of [his] January 20, 2022 decision denying the plaintiff's motion to open and set aside the judgment of nonsuit, with particular reference to: (1) whether the court considered the affidavit filed by the plaintiff's counsel on September 23, 2021, in reaching its decision; and (2) whether the court reached the second prong of the test to open nonsuit judgments, i.e., that the plaintiff's noncompliance with discovery was due to a reasonable cause."

On June 16, 2022, the court, *J. Fischer*, *J.*, issued a written articulation of its decision denying the motion to open. The articulation explained that the court found that "the plaintiff's motion to open the judgment did not set forth any showing that [she] had a good cause of action, which was mentioned only later in the plaintiff's affidavit[5]—*which came after* the defendant[s] raised that issue in [their] objection. It consists only of a bald statement that the plaintiff 'has good cause under multiple counts.' This, considering the pending and unopposed motion to strike, leaves doubt about the existence of said cause of action." (Emphasis in original; footnote added.) The articulation further explained that the "court found no reasonable cause for the plaintiff's noncompliance with discovery because the affidavit sets forth no particularized circumstance as to why there had not been compliance with the court's order. Aside from the period immediately before the court's ruling, the affidavit offers only general references to various medical and other issues of the plaintiff's counsel without any specific dates, circumstances, or any other substantiation as to what kept him from fully complying with the order since March 25, 2021. As such, it lacks any 'particularities' as required by Practice Book § 17-43 and this court found it to be entirely unpersuasive, especially in the context of the history of noncompliance with the court's explicit order."

The plaintiff appeals from the denial of the motion to open the judgment of nonsuit. "In ruling on a motion to open a judgment of nonsuit, the trial court must exercise sound judicial discretion, which will not be disturbed on appeal unless there was an abuse of discretion. . . . In reviewing the trial court's exercise of its discretion, we make every presumption in favor of its action. . . . [When a] plaintiff [does] not appeal from

[5] The court clarified in its articulation that it "review[ed] the plaintiff['s] counsel's affidavit and it was considered in this court's decision."

the [underlying] judgment of nonsuit . . . [he or] she is . . . limited to challenging the court's exercise of discretion in denying the motion to open." (Citation omitted; internal quotation marks omitted.) *Francis* v. *CIT Bank, N.A.*, 219 Conn. App. 139, 146–47, 293 A.3d 984 (2023).

"The power of a court to set aside a judgment of nonsuit is conferred by . . . § 52-212, which provides in relevant part: '(a) Any judgment rendered or decree passed upon a default or nonsuit in the Superior Court may be set aside, within four months following the date on which the notice of judgment or decree was sent, and the case reinstated on the docket, on such terms in respect to costs as the court deems reasonable, upon the complaint or written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of the judgment or the passage of the decree, and that the plaintiff or defendant was prevented by mistake, accident or other reasonable cause from prosecuting the action or making the defense. . . .' " Id., 146. Practice Book § 17-43 substantially mirrors the language of § 52-212 (a).[6] In

[6] Practice Book § 17-43 provides in relevant part: "(a) Any judgment rendered or decree passed upon a default or nonsuit may be set aside within four months succeeding the date on which notice was sent, and the case reinstated on the docket on such terms in respect to costs as the judicial authority deems reasonable, upon the written motion of any party or person prejudiced thereby, showing reasonable cause, or that a good cause of action or defense in whole or in part existed at the time of the rendition of such judgment or the passage of such decree, and that the plaintiff or the defendant was prevented by mistake, accident or other reasonable cause from prosecuting or appearing to make the same. Such written motion shall be verified by the oath of the complainant or the complainant's attorney, shall state in general terms the nature of the claim or defense and shall particularly set forth the reason why the plaintiff or the defendant failed to appear. The judicial authority shall order reasonable notice of the pendency of such written motion to be given to the adverse party, and may enjoin that party against enforcing such judgment or decree until the decision upon such written motion. . . ."

essence, " '[t]here is a two-pronged test for setting aside a judgment rendered after a nonsuit. . . . There must be a showing (1) that a good cause of action, the nature of which must be set forth, existed at the time judgment was rendered, and (2) that the plaintiff was prevented from prosecuting the action because of mistake, accident or other reasonable cause.' . . . 'Since the conjunctive "and" meaning "in addition to" is employed between the parts of the two prong test, both [prongs] must be met.' " (Citations omitted.) *Estela* v. *Bristol Hospital, Inc.*, 165 Conn. App. 100, 108, 138 A.3d 1042, cert. denied, 323 Conn. 904, 150 A.3d 681 (2016). With these principles in mind, we turn to the plaintiff's arguments in support of her claim that Judge Fischer abused his discretion in denying her motion to open the judgment of nonsuit.[7]

[7] The plaintiff, in her appellate brief, also claims (1) that her failure to file timely objections and responses to the defendants' first two motions for nonsuit is moot because Governor Lamont's Executive Order No. 7G suspended statutes of limitations with regard to malpractice actions and court filing deadlines at that time; (2) that this court erred in sending the plaintiff's motion for articulation to Judge Lynch instead of Judge Fischer; and (3) that the court, *Lynch, J.*, abused its discretion in granting the defendants' motion for nonsuit. These claims merit little discussion.

First, as to the effect of Executive Order No. 7G in the present case, the plaintiff argues that her reasons for failing to timely respond to the defendants' first two motions for nonsuit are moot because the governor's Executive Order No. 7G excused her from responding during that period. Even if the plaintiff's failure to respond to the first two motions for nonsuit was excused under Executive Order No. 7G, which expired on March 1, 2021; see Executive Order No. 10A, § 5 (February 8, 2021); the plaintiff still needed to establish reasonable cause for failing to comply with the court's later March 25, 2021 order directing her to file responses to the defendants' interrogatories and requests for production. In other words, whether Executive Order No. 7G excused the plaintiff's failure to respond to the defendants' first two motions for nonsuit has no bearing on the court's denial of her motion to open because the plaintiff does not argue that Executive Order No. 7G excused her failure to comply with the court's March 25, 2021 order.

As to the plaintiff's second claim, that this court erred in sending the plaintiff's motion for articulation to Judge Lynch instead of Judge Fischer, she specifically argues that this court's "decision not to strike Judge Lynch's articulation from the trial court record is in essence [improperly] adding to the record" and "effectively changes [Judge Fischer's] reasoning in the

On appeal, the plaintiff makes several arguments challenging the court's finding, under the second prong of the test of § 52-212 and Practice Book § 17-43, that there was no reasonable cause for her noncompliance with discovery. First, the plaintiff argues that the existence of "circumstances beyond her control" constitutes reasonable cause for her failure to comply with discovery. This argument is unavailing. The court never made a finding that the plaintiff's reasons for failing to prosecute were insufficient to constitute reasonable cause. Instead, it concluded that the plaintiff had not adequately substantiated her proffered reasons, finding that "the affidavit offers only general references to various medical and other issues . . . without any specific dates, circumstances, or any other substantiation . . . .

decision." The plaintiff's argument is belied by a review of Judge Lynch's articulation, which simply sets forth the plaintiff's history of noncompliance with the defendants' discovery requests, a history that is readily gleaned from a review of the trial court file. The plaintiff's argument is further belied by Judge Fischer's articulation, which expressly addresses the articulation request filed by the plaintiff as to Judge Fischer's order denying the motion to open, and the plaintiff's failure to satisfy her burden under § 52-212. Because it is clear from the record that Judge Lynch's articulation had no impact on Judge Fischer's articulation, the plaintiff's contention that this court's failure to strike it from the record constituted an improper addition of information is unavailing.

Finally, we note that the plaintiff's attorney expressly abandoned the plaintiff's third claim, that Judge Lynch abused her discretion in granting the defendants' motion for nonsuit, at oral argument before this court. Specifically, the plaintiff's counsel stated that the plaintiff did not raise a claim on appeal challenging Judge Lynch's ruling. He clarified that the plaintiff "raised . . . strictly the motion to open before Judge Fischer." We therefore decline to consider the plaintiff's briefed arguments in support of this abandoned claim, including her argument that the May 24, 2021 motion for nonsuit was never heard and was thus effectively denied. We also decline to review the plaintiff's contention that this matter should have been resolved by "a discovery dispute hearing" instead of by a judgment of nonsuit. Although she raises this argument in support of her claim that Judge Fischer abused his discretion in denying her motion to open, it instead supports a challenge to the judgment of nonsuit. See *Francis* v. *CIT Bank, N.A.*, supra, 219 Conn. App. 146–47 ("[i]n the present case, the plaintiff did not appeal from the judgment of nonsuit, and, thus, she is presently limited to challenging the court's exercise of discretion in denying the motion to open").

As such, it lacks any 'particularities' as required by Practice Book § 17-43 . . . ." The court's conclusion is consistent with prior decisions of this court. See, e.g., *Farren* v. *Farren*, 162 Conn. App. 51, 63, 131 A.3d 253 (2015) ("[w]e will not require the court to accept an unauthenticated document that . . . may be based entirely on self-reported statements by the party moving to open the default judgment"), cert. denied, 320 Conn. 933, 134 A.3d 622, and cert. denied, 320 Conn. 933, 134 A.3d 623, cert. denied, 580 U.S. 917, 137 S. Ct. 296, 196 L. Ed. 2d 215 (2016); *Searles* v. *Schulman*, 58 Conn. App. 373, 377, 753 A.2d 420 ("[a]lthough the plaintiff in her motion to open . . . stated that she was unable to attend the scheduled . . . conference because of out of state medical 'appointments,' there is nothing in the record verifying the appointments or indicating why these appointments could not be rescheduled"), cert. denied, 254 Conn. 930, 761 A.2d 755 (2000). Because the plaintiff failed to provide sufficient substantiation that her proffered reasons were connected to her repeated failures to meet the court set deadlines, her argument is unavailing.

The plaintiff also challenges the court's finding that she did not adequately substantiate her reasons for noncompliance with discovery as an improper application of the law. In Judge Fischer's articulation, he explained that the "court found no reasonable cause for the plaintiff's noncompliance with discovery because the affidavit sets forth no particularized circumstance as to why there had not been compliance with the court's order." The plaintiff contends that the court's use of the phrase "particularized circumstance" reflects a misapplication of the law because Practice Book § 17-43 requires an affidavit to set forth particularized circumstances only if the plaintiff *failed to appear*.[8] The

[8] General Statutes § 52-212 (c) provides that "[t]he complaint or written motion shall be verified by the oath of the complainant or his attorney, shall state in general terms the nature of the claim or defense and shall particularly

plaintiff contends that, because she was nonsuited for her failure to comply with discovery—not for failure to appear—she was not required to set forth with particularity her reasons for failing to comply with discovery. The plaintiff has cited no legal authority, nor are we aware of any, that stands for the proposition that a court may not, in ruling on a motion to set aside a judgment of nonsuit for failure to comply with discovery, require a specific explanation as to the reason for the delinquent party's noncompliance. Such an explanation is essential to sustaining one's burden of demonstrating reasonable cause for noncompliance. Accordingly, the plaintiff's argument fails. See *Baris* v. *Southbend, Inc.*, 68 Conn. App. 546, 554, 791 A.2d 713 (2002) (affirming trial court's denial of plaintiff's motion to open judgment of nonsuit rendered due to plaintiff's failure to answer discovery request because he had "ignored his obligation to present his reason for the delay with any degree of particularity").

In light of the court's finding that the plaintiff did not meet her burden of showing reasonable cause and the plaintiff's unconvincing arguments to the contrary, the court did not err in concluding that the plaintiff failed to establish reasonable cause for her noncompliance with discovery under the second prong of the test of § 52-212 (a) and Practice Book § 17-43. Because the failure of the plaintiff to meet either prong is fatal to her motion to open; *Karanda* v. *Bradford*, 210 Conn. App. 703, 714, 270 A.3d 743 (2022); we need not address the plaintiff's arguments as to the first prong. For the foregoing reasons, we conclude that the court did not abuse its discretion in denying the plaintiff's motion to open and set aside the judgment of nonsuit.

The judgment is affirmed.

In this opinion the other judges concurred.

set forth the reason why the plaintiff or defendant failed to appear." Practice Book § 17-43 (a) mirrors this language.

LOIS PATRICK *v.* 111 CLEARVIEW DRIVE, LLC, ET AL.
(AC 45450)

Bright, C. J., and Elgo and Cradle, Js.

Syllabus

The plaintiff sought to quiet title to certain real property to which the defendant held title. B Co. had previously commenced a tax foreclosure action involving the property against, inter alia, J and H. During the pendency of the foreclosure action, the plaintiff filed multiple motions with the court attempting to intervene, alleging that she had acquired a two-thirds interest in the property on the death of J by descent as J's heir, and a one-third interest in the property by quitclaim deed from the heirs of H. A judgment of foreclosure by sale was rendered in the foreclosure action. The court thereafter denied the plaintiff's motion to intervene on behalf of her two-thirds interest in the property as untimely and dismissed her motion to open the foreclosure judgment on behalf of her one-third interest in the property as moot. Her additional attempts to litigate her alleged interest in the property were also unsuccessful, including an appeal to this court from the trial court's denial of her motion to reargue and reconsider the order approving the foreclosure sale. The plaintiff then commenced the present quiet title action. The defendant filed a motion to strike the plaintiff's complaint as legally insufficient. The trial court granted the motion to strike and rendered judgment dismissing the action for lack of subject matter jurisdiction after determining, sua sponte, that the plaintiff was collaterally attacking the foreclosure judgment. *Held:*

1. The trial court properly dismissed the plaintiff's action on the ground that it lacked subject matter jurisdiction to adjudicate her claims because they constituted an attempt to collaterally attack a prior judgment and were, therefore, moot and nonjusticiable:

   a. The plaintiff could not prevail on her claim that, because she was unsuccessful in intervening in the foreclosure action on behalf of her two-thirds interest in the property, she was denied a constitutionally protected right to be heard prior to the deprivation of that property, which would entitle her to challenge the validity of the foreclosure judgment: in the foreclosure action, the plaintiff did not appeal from the denial of her motion to intervene and did not appeal from that decision when she appealed from the court's order denying her motion to reconsider its approval of the foreclosure sale, and, even if she had appealed after the foreclosure judgment had been rendered, her appeal likely would have been dismissed as moot, as allowing the plaintiff to challenge the foreclosure judgment in a new action when she failed to appeal from the denial of her motion to intervene in the foreclosure action was

what made her collateral attack improper; accordingly, the trial court's decision to not allow the plaintiff to collaterally attack the foreclosure judgment did not deprive the plaintiff of her due process rights, as she had sufficient process available in the form of an appeal from the denial of her motion to intervene in the foreclosure action.

b. The plaintiff could not prevail on her claim that, because H never received proper notice of the foreclosure action, the foreclosure judgment did not have preclusive effect against a collateral attack as to H's one-third interest in the property because that judgment was null against a party who was not properly served: even if it is assumed that H was not properly served in the foreclosure action, the plaintiff already sought to advance her claim relating to the alleged lack of personal jurisdiction over H in that action in her motion to open the foreclosure judgment and subsequent motion to reconsider, and, although a judgment rendered without jurisdiction is subject to direct or collateral attack, a litigant cannot utilize both processes; moreover, in the present case, the court denied the plaintiff's motion to open the foreclosure judgment, the plaintiff did not seek to intervene based on her one-third interest in the property, and she did not appeal from the dismissal of her motion to open in the foreclosure action; accordingly, because the plaintiff had an opportunity to challenge the foreclosure judgment directly by way of an appeal from the judgment dismissing her motion to open, her attempt to utilize the present action as a substitute for such an appeal was procedurally impermissible.

2. The plaintiff could not prevail on her claim that the trial court improperly failed to adjudicate whether she was an omitted party from the foreclosure action pursuant to statute (§ 49-30); there was no need for B Co. to bring an omitted party action pursuant to § 49-30 to foreclose the plaintiff's purported interests in the property because the plaintiff, albeit unsuccessfully, had already attempted to challenge the foreclosure judgment on the basis of those interests, and, once those attempts failed and the plaintiff did not timely appeal from the court's orders rejecting her claims, she became bound by the foreclosure judgment, and, therefore, there was no reason to resort to § 49-30.

Argued September 14, 2023—officially released March 26, 2024

Procedural History

Action seeking to quiet title to certain real property owned by the named defendant, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Welch*, *J.*, granted the named defendant's motion to strike the complaint and rendered judgment dismissing the action, from which the plaintiff appealed to this court. *Affirmed.*

Earle Giovanniello, for the appellant (plaintiff).

Jason P. Gladstone, for the appellee (named defendant).

Opinion

ELGO, J. This appeal arises from the dismissal of a quiet title action. The plaintiff, Lois Patrick, initiated the action against the defendant 111 Clearview Drive, LLC,[1] alleging that she has an interest in certain real property located in Bridgeport, as to which the defendant holds title. After a hearing on the defendant's motion to strike the plaintiff's amended complaint, the trial court dismissed the action for lack of subject matter jurisdiction after determining, sua sponte, that the plaintiff was making an improper collateral attack on a prior judgment. On appeal, the plaintiff claims that the court (1) improperly concluded that it lacked subject matter jurisdiction to adjudicate the quiet title action because the plaintiff was collaterally attacking an underlying foreclosure action, and (2) failed to adjudicate whether the plaintiff may be considered an omitted party under General Statutes § 49-30. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. On August 29, 2016, Benchmark Municipal Tax Services, Ltd. (Benchmark), recorded a notice of lis pendens on the Bridgeport land

[1] Also named as defendants in the operative complaint were Khurram Ali; Benchmark Municipal Tax Services, Ltd.; city of Bridgeport; Water Pollution Control Authority for the City of Bridgeport; Department of Social Services; and Aquarion Water Company of Connecticut. A motion for default for failure to appear was granted against the defendants Department of Social Services and Aquarion Water Company of Connecticut. A motion for default for failure to plead was granted against the defendants Benchmark Municipal Tax Services, Ltd., city of Bridgeport, and Water Pollution Control Authority for the City of Bridgeport. Khurram Ali did not file an appellate brief or otherwise participate in this appeal. Accordingly, we refer to 111 Clearview Drive, LLC, as the defendant in this opinion.

records for the property known as 44 Wentworth Street (property).[2] On September 26, 2016, Benchmark commenced a tax foreclosure action involving the property against Erma Jean Roundtree (Erma Jean), Eunice H. Roundtree (Eunice), and others not relevant to this quiet title action. See *Benchmark Municipal Tax Services, Ltd.* v. *Roundtree*, Superior Court, judicial district of Fairfield, Docket No. CV-16-6059553-S (*Benchmark* action and/or *Benchmark* judgment). The plaintiff was not a named party in the *Benchmark* action. A judgment of foreclosure by sale was rendered in the *Benchmark* action on December 12, 2016. After the judgment was opened, a second judgment of foreclosure by sale was rendered on December 4, 2017, and the court ordered a sale date of May 5, 2018. The sale of the property proceeded as scheduled, with Khurram Ali emerging as the successful bidder. The court approved the sale on August 28, 2020, and Ali conveyed the property to the defendant on February 6, 2021, by quitclaim deed. During and after the pendency of the *Benchmark* action, the plaintiff filed multiple motions with the court in an attempt to intervene, asserting an ownership interest in the property. The plaintiff claimed that she had acquired a two-thirds interest in the property on October 29, 2017, upon the death of Erma Jean by descent as Erma Jean's only heir, and a one-third interest in the property by quitclaim deed on April 17, 2021, from the heirs of Eunice, who died on June 5, 2020. The court denied the plaintiff's motion to intervene on behalf of the two-thirds interest in the property as untimely and dismissed the plaintiff's May 10, 2021 motion to open and vacate the *Benchmark* judgment on behalf of the one-third interest in the property as moot.[3] The plaintiff

[2] We note the well established principle that a court "may take judicial notice of the file in another case, whether or not the other case is between the same parties . . . ." (Citation omitted; internal quotation marks omitted.) *Rogalis, LLC* v. *Vazquez*, 210 Conn. App. 548, 556, 270 A.3d 120 (2022).

[3] On April 6, 2018, after acquiring the two-thirds interest in the property from Erma Jean, the plaintiff filed motions to intervene and to open and

made additional attempts to litigate her alleged interest in the property, all of which were unsuccessful.[4]

The plaintiff commenced this quiet title action in May, 2021, and, in July, 2021, filed a revised complaint in accordance with General Statutes § 47-31[5] regarding her alleged interests in the property. The defendant filed a motion to strike,[6] alleging that "the plaintiff has failed to state a legally sufficient revised complaint and [was]

vacate the *Benchmark* judgment. Those motions were denied as untimely under General Statutes § 52-325 (a) on May 1, 2018, and the plaintiff did not appeal those determinations. On May 10, 2021, after obtaining Eunice's one-third interest in the property by quitclaim deed, the plaintiff filed a motion to open and vacate the *Benchmark* judgment. That motion was dismissed as moot "[p]er oral record" on June 2, 2021. On June 16, 2021, the plaintiff filed a motion to reconsider the court's dismissal of the motion to open and vacate the judgment. The court issued an order on June 16, 2021, stating that it had "reviewed this motion for reconsideration and [was] not changing its ruling on the underlying motion." The plaintiff did not appeal that order.

[4] The plaintiff's additional attempts to challenge the *Benchmark* judgment included the following. On August 31, 2020, the plaintiff filed a request to stay the proceedings until a legal representative could be appointed to represent the interests of Eunice, who died on June 5, 2020. That request was dismissed on September 16, 2020. The plaintiff filed another motion to open the judgment and vacate orders on September 8, 2020, which was dismissed on September 16, 2020, because the plaintiff was not a party to the underlying action. On September 16, 2020, the plaintiff filed a motion to reargue and reconsider the order approving the sale of the property, which was denied on September 30, 2020. From that decision, the plaintiff filed an appeal with this court, which was dismissed on January 13, 2021, for lack of standing as the plaintiff was not a party to the underlying action.

[5] General Statutes § 47-31 (a) provides in relevant part: "An action [to settle title or claim an interest in real property] may be brought by any person claiming title to, or any interest in, real . . . property . . . against any person who may claim to own the property . . . or to have any interest in the property . . . for the purpose of determining such . . . interest or claim, and to clear up all doubts and disputes and to quiet and settle the title to the property. Such action may be brought whether or not the plaintiff is entitled to the immediate or exclusive possession of the property."

[6] A motion to strike is governed by Practice Book § 10-39, which provides in relevant part that it is to "be used whenever any party wishes to contest: (1) the legal sufficiency of the allegations of any complaint . . . to state a claim upon which relief can be granted; or (2) the legal sufficiency of any prayer for relief in any such complaint . . . ."

barred'' from pursuing her claim on five grounds.[7] The accompanying memorandum of law in support of the motion to strike argued, inter alia, that the plaintiff's two-thirds interest in the property, purportedly acquired as Erma Jean's heir, was "moot" due to a failure to "successfully appeal the [*Benchmark*] judgment . . . ."The plaintiff filed a memorandum of law in opposition to the motion to strike, in which she rebutted each of the five grounds alleged in the defendant's motion to strike. The plaintiff also proffered that the prior foreclosure judgment in the *Benchmark* action had not foreclosed the one-third interest in the property that she received by quitclaim deed because the predecessor in interest, Eunice, had "not been properly served" in that action and, thus, was an omitted party.

On January 18, 2022, the court held a hearing on the motion to strike. During that hearing, the court inquired if the defendant's allegation that the court no longer had subject matter jurisdiction over the property due to the transfer of title following the approval of the foreclosure sale was, in fact, an argument that the plaintiff's quiet title action was a collateral attack on the judgment. The defendant's counsel answered affirmatively. The plaintiff's counsel responded by stating that the present quiet title action was not a collateral attack "because [the *Benchmark* judgment is not] effective against somebody who wasn't properly served."

In a memorandum of decision issued on March 7, 2022, the court dismissed this action as "an improper

[7] In its motion to strike, the defendant enumerated five grounds that allegedly defeated, as a matter of law, the plaintiff's quiet title action: "(1) [General Statutes] § 49-15; (2) the failure to redeem the real property; (3) . . . the death of a mortgagor subsequent to the service of process is of no moment in resetting law days . . . (4) the heirs and devisees do not need to be substituted as parties after good service on the original mortgagor; [and] (5) . . . the plaintiff's failure to open or set aside the judgment within the statutorily allotted time."

collateral attack on the foreclosure judgment." Citing to *Rider* v. *Rider*, 200 Conn. App. 466, 479, 239 A.3d 357 (2020), the court stated that the plaintiff " 'must resort to direct proceedings to correct perceived wrongs. . . . A collateral attack on a judgment is a procedurally impermissible substitute for an appeal.' " The court also raised concerns regarding subject matter jurisdiction, citing *Ajadi* v. *Commissioner of Correction*, 280 Conn. 514, 911 A.2d 712 (2006), for the proposition that "[a] court lacks discretion to consider the merits of a case over which it is without [subject matter] jurisdiction . . . ." (Internal quotation marks omitted.) Id., 533. In response, the plaintiff filed a motion to reargue the dismissal of the quiet title action, which the court denied, and this appeal followed.

"A determination regarding a trial court's subject matter jurisdiction is a question of law. When . . . the trial court draws conclusions of law, our review is plenary and we must decide whether its conclusions are legally and logically correct and find support in the facts that appear in the record." (Internal quotation marks omitted.) *Stones Trail, LLC* v. *Weston*, 174 Conn. App. 715, 735, 166 A.3d 832, cert. dismissed, 327 Conn. 926, 171 A.3d 59 (2017), and cert. denied, 327 Conn. 926, 171 A.3d 60 (2017).

The court characterized the quiet title action as "an improper collateral attack on the [*Benchmark*] judgment" and justified its dismissal by citing *Peck* v. *Statewide Grievance Committee*, 198 Conn. App. 233, 248, 232 A.3d 1279 (2020), stating: "A court properly may dismiss a case that constitutes an improper collateral attack on a judgment. . . . The reason for this is that the court can offer no practical relief to the party collaterally attacking the prior judgment, rendering the action nonjusticiable." (Citation omitted.) Accordingly, the

court concluded that it lacked subject matter jurisdiction over the quiet title action because the collateral attack rendered the action nonjusticiable.

Our review of the record focuses on whether the court's determination that it lacked subject matter jurisdiction was legally and logically correct. In this regard, we are mindful that "[i]t is well established that this court may rely on any grounds supported by the record in affirming the judgment of a trial court." *State* v. *Burney*, 288 Conn. 548, 560, 954 A.2d 793 (2008).

On appeal, the plaintiff claims that the court improperly concluded that it lacked subject matter jurisdiction to adjudicate the quiet title action. Before addressing the plaintiff's specific claims, we set forth the relevant legal principles regarding the trial court's subject matter jurisdiction.

"Subject matter jurisdiction involves the authority of a court to adjudicate the type of controversy presented by the action before it. . . . A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Once it is determined that a tribunal has authority or competence to decide the class of cases to which the action belongs, the issue of subject matter jurisdiction is resolved in favor of entertaining the action. . . . It is well established that, in determining whether a court has subject matter jurisdiction, every presumption favoring jurisdiction should be indulged." (Internal quotation marks omitted.) *CHFA-Small Properties, Inc.* v. *Elazazy*, 157 Conn. App. 1, 14, 116 A.3d 814 (2015).

As a court of general jurisdiction, the Superior Court is competent to entertain quiet title actions. Quiet title actions are governed by § 47-31 (f), which provides in relevant part: "The court shall hear the several claims and determine the rights of the parties . . . and render judgment determining the questions and disputes and

quieting and settling the title to the property." See also, e.g., *CHFA-Small Properties, Inc.* v. *Elazazy*, supra, 157 Conn. App. 14 (trial court had subject matter jurisdiction over quiet title action). Accordingly, the Superior Court has subject matter jurisdiction to adjudicate quiet title actions generally.

A court, however, "may have subject matter jurisdiction over certain types of controversies in general, but may not have jurisdiction in any given case because the issue is not justiciable." (Internal quotation marks omitted.) *Peck* v. *Statewide Grievance Committee*, supra, 198 Conn. App. 247. "[J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine." (Internal quotation marks omitted.) Id. With these principles in mind, we consider the plaintiff's claims.

I

The plaintiff challenges the court's propriety in dismissing the quiet title action after determining that the action was an improper collateral attack on the *Benchmark* judgment.[8] The plaintiff argues that, because she

[8] We note the unusual procedural posture of this case, to the extent that the court was presented with a motion to strike that raised an argument that the court lacked subject matter jurisdiction. Jurisdictional issues are more properly raised in a motion to dismiss. Nevertheless, a party may raise an issue of subject matter jurisdiction at any time. Further, although the defendant's motion to strike questioned whether the court had subject matter jurisdiction to consider the plaintiff's quiet title action, the motion did not explicitly argue that the quiet title action constituted a collateral attack on the *Benchmark* judgment. During the hearing on that motion, the court sua sponte raised that question, and it did not thereafter request that the parties brief the issue before ultimately dismissing the case. However, the plaintiff has not raised on appeal a claim of procedural error as a basis for reversal. Further, the defendant did raise the issue of mootness in its memorandum of law in support of the motion to strike, arguing that the plaintiff's two-thirds interest in the property was moot due to her failure to successfully appeal from the *Benchmark* judgment. Although the defendant's framing of the issue did not mention the phrase "collateral attack," the defendant's argument was substantively the same as the court's analysis.

As was discussed in *Peck* v. *Statewide Grievance Committee*, supra, 198 Conn. App. 247, mootness implicates justiciability. For a case to be justicia-

was unsuccessful in intervening in the *Benchmark* action on behalf of her two-thirds interest in the property from Erma Jean, she was denied a constitutionally protected right to be heard prior to the deprivation of property, which would entitle her to now challenge the validity of that judgment. The plaintiff also argues that there is no collateral attack on the prior judgment regarding the one-third interest in the property that she acquired from Eunice's heirs because a judgment cannot be effective if it is rendered against a party who was never properly served. Because the plaintiff had opportunities to challenge the *foreclosure* judgment directly by way of an appeal in the *Benchmark* action, her quiet title action that was premised on her claimed interests in the property constitutes an impermissible collateral attack on the *Benchmark* judgment.

As an initial matter, we examine whether the court properly categorized the plaintiff's quiet title action as a collateral attack. "A collateral attack is an attack upon a judgment, decree or order offered in an action or proceeding other than that in which it was obtained, in support of the contentions of an adversary in the action or proceeding . . . ." (Emphasis omitted; internal quotation marks omitted.) *Stones Trail, LLC* v. *Weston*, supra, 174 Conn. App. 737.

Here, the second prayer for relief in the plaintiff's amended complaint in the quiet title action specifically

ble, "practical relief to the complainant" must be available as the result of an adjudication. (Internal quotation marks omitted.) Id. In *Peck*, this court affirmed the trial court's dismissal as nonjusticiable because the plaintiff failed to appeal a prior order; id., 252; and, as a result, "the court [could] offer no practical relief to the party collaterally attacking the prior judgment, rendering the action nonjusticiable." Id., 248. As a result, "[a] court properly may dismiss a case that constitutes an improper collateral attack on a judgment"; id., 247; if "the court . . . [can] afford no remedy," which renders the matter moot and nonjusticiable. Id., 252. Here, the issue of mootness was raised by the defendant, and, because mootness and justiciability are questions of law, and the plaintiff failed to raise an argument on appeal of procedural error, we proceed to the merits of the claim.

asks the court to "[vacate] the foreclosure judgment in [the *Benchmark* action] . . . ." Initiating a new action with the goal of vacating a prior judgment from a different action is, by definition, a collateral attack on a judgment.[9]

Our Supreme Court has noted that "collateral attacks on [final judgments] are disfavored . . . [because the] law aims to invest judicial transactions with the utmost permanency consistent with justice. . . . [A] litigant . . . must resort to direct proceedings to correct perceived wrongs . . . . A collateral attack on a judgment is a procedurally impermissible substitute for an appeal." (Citations omitted; internal quotation marks omitted.) *Sousa* v. *Sousa*, 322 Conn. 757, 771–72, 143 A.3d 578 (2016). The court further explained that "collateral attacks are strongly disfavored . . . because such belated litigation undermines the important principle of finality." (Internal quotation marks omitted.) Id., 786.

Although collateral attacks are strongly disfavored, the fact that an action constitutes a collateral attack does not warrant automatic dismissal of the action. Exceptions exist in rare cases in which "a litigant can show an absence of subject matter jurisdiction that makes the prior judgment of a tribunal entirely invalid . . . ." (Emphasis omitted; internal quotation marks omitted.) Id., 771. Additionally, "[i]f a court has never acquired jurisdiction over a defendant [by proper service of process] . . . any judgment ultimately entered is void and subject to vacation or collateral attack." (Internal quotation marks omitted.) *Angiolillo* v. *Buckmiller*, 102 Conn. App. 697, 713, 927 A.2d 312, cert.

[9] Black's Law Dictionary defines the phrase "collateral attack" as, inter alia, "[a]n attack on a judgment in a proceeding other than a direct appeal; esp., an attempt to undermine a judgment through a judicial proceeding in which the ground of the proceeding (or a defense in the proceeding) is that the judgment is ineffective." Black's Law Dictionary (11th Ed. 2019) p. 329.

denied, 284 Conn. 927, 934 A.2d 243 (2007). Furthermore, "[a] court properly may dismiss a case that constitutes an improper collateral attack on a judgment"; *Peck* v. *Statewide Grievance Committee*, supra, 198 Conn. App. 248; if "the court . . . [can] afford no remedy," which renders the matter moot and nonjusticiable. Id., 252. The issue thus becomes whether the plaintiff's collateral attack on the *Benchmark* judgment is permitted as one of the rare exceptions, or if the dismissal of this quiet title action was appropriate because the court could not afford a remedy, because the plaintiff failed to "resort to direct proceedings to correct perceived wrongs . . . ." (Internal quotation marks omitted.) *Sousa* v. *Sousa*, supra, 322 Conn. 771.

Our review of that question of law is plenary. We therefore examine the record to determine whether the court's dismissal of the quiet title action as an improper collateral attack was legally and logically correct. We address separately each of the plaintiff's claimed interests in the property.

A

We first address the plaintiff's claim with respect to her two-thirds interest in the property that she purportedly acquired by descent from Erma Jean.

In support of her quiet title action, the plaintiff filed a revised complaint as is required by § 47-31 (b). The revised complaint asserts that Erma Jean's two-thirds interest in the property passed to the plaintiff on October 29, 2017, as the sole heir and equitable owner of the interest upon Erma Jean's death. By the time that the plaintiff received this interest, a judgment of foreclosure by sale had already been rendered on December 12, 2016. A second judgment of foreclosure by sale was then rendered on December 4, 2017. The plaintiff first moved to intervene in the *Benchmark* action on April 6, 2018, and simultaneously filed a motion to open and

vacate the *Benchmark* judgment. The court denied those motions and noted in the denial of the motion to intervene that the "petition is not timely under [General Statutes] § 52-325 (a), which authorizes intervention after a notice of lis pendens is filed (in this case, filed on August 29, 2016, in the Bridgeport land records) and the application to intervene is filed 'prior to the date when the judgment or decree in such action is rendered.' This motion to intervene was filed on April 5, 2018, more than fifteen months after the entry of judgment of foreclosure by sale." The plaintiff did not appeal from the judgment of dismissal of her motion to intervene. Instead, the plaintiff filed another motion to open the judgment and vacate orders on September 8, 2020, which was dismissed on September 16, 2020, because the plaintiff was not a party to the underlying *Benchmark* action. On September 16, 2020, the plaintiff filed a motion to reargue and reconsider the order approving the sale of the property, which was denied on September 30, 2020. From that decision, the plaintiff filed an appeal with this court, which dismissed the appeal on January 13, 2021, for lack of standing as the plaintiff was not a party to the underlying *Benchmark* action.

The plaintiff now argues that, by denying the motion to intervene in the *Benchmark* action, the "court denied [her] the right to protect her interest in the property," amounting to a fundamental denial of due process under the fourteenth amendment to the United States constitution. The plaintiff states that she "was not a party to the underlying foreclosure action, was not allowed to intervene and was not allowed to appeal." The plaintiff further argues that, "[b]ecause [she] was not allowed to intervene in the [*Benchmark*] action, she should be allowed to question the validity of the [*Benchmark*] judgment" through this quiet title action. We are not persuaded.

"[T]he law has established appropriate proceedings to which a judgment party may always resort when he deems himself wronged by the court's decision. . . . If he omits or neglects to test the soundness of the judgment by these or other direct methods available for that purpose, he is in no position to urge its defective or erroneous character when it is pleaded or produced in evidence against him in subsequent proceedings." (Internal quotation marks omitted.) *Sousa* v. *Sousa*, supra, 322 Conn. 771. Here, a direct appeal was the proper channel to test the validity of the court's May 1, 2018 denial of the plaintiff's motion to intervene in the *Benchmark* action. Contrary to the plaintiff's assertion, nothing prevented her from appealing that decision. The law is clear that, if "[a]n unsuccessful applicant for intervention . . . can make a colorable claim to intervention as a matter of right [then] on appeal the court has jurisdiction to adjudicate both his claim to intervention as a matter of right and to permissive intervention." (Internal quotation marks omitted.) *BNY Western Trust* v. *Roman*, 295 Conn. 194, 204, 990 A.2d 853 (2010). This court also has stated that "[m]ost post-judgment appeals filed by would-be intervenors will be moot because the relief sought, i.e., intervention into the underlying action, cannot be granted once the action has gone to judgment. . . . [T]o avoid potential mootness problems, would-be intervenors who have a colorable claim to intervention as a matter of right should appeal immediately from the denial of their motion to intervene." *Wallingford Center Associates* v. *Board of Tax Review*, 68 Conn. App. 803, 806 n.3, 793 A.2d 260 (2002).

In the *Benchmark* action, the plaintiff did not timely appeal from the denial of her motion to intervene. Nor did she appeal from that decision when she appealed from the court's order denying her motion to reconsider its approval of the sale of the property. Even if she had

appealed after the judgment of foreclosure had been rendered, her appeal likely would have been dismissed as moot for the reasons we articulated in *Wallingford Center Associates*. See id. That being the case, allowing the plaintiff to now "question the validity" of the *Benchmark* judgment in a new action, when the plaintiff failed to appeal from the denial of her motion to intervene, is precisely what makes this collateral attack improper. "A collateral attack on a judgment is a procedurally impermissible substitute for an appeal. . . . The recurrent theme in our collateral attack cases is that the availability of an appeal is a significant aspect of the conclusiveness of a judgment. . . . Consequently, a party who fails to appeal from [a] . . . decision may not use a different action as a substitute for that appeal to achieve a de novo determination of a matter upon which they failed to take a timely appeal. . . . A court properly may dismiss a case that constitutes an improper collateral attack on a judgment. . . . The reason for this is that the court can offer no practical relief to the party collaterally attacking the prior judgment, rendering the action nonjusticiable." (Citations omitted; internal quotation marks omitted.) *Peck* v. *Statewide Grievance Committee*, supra, 198 Conn. App. 247–48.

For these reasons, the trial court's decision to not allow the plaintiff to collaterally attack the *Benchmark* judgment in this action on the basis of Erma Jean's two-thirds interest in the property does not deprive the plaintiff of her due process rights. The plaintiff had sufficient process available to her in the form of an appeal from the denial of her motion to intervene in the *Benchmark* action. Similarly, the availability of that appeal, which she did not pursue, means that the limited exceptions to the prohibitions on collateral attacks do not apply to any challenge to the judgment based on Erma Jean's two-thirds interest in the property. The trial court's dismissal for lack of subject matter jurisdiction

based on the two-thirds interest in the property that the plaintiff acquired from Erma Jean was appropriate because the matter was moot, and thus nonjusticiable, as "the court can offer no practical relief to the party collaterally attacking the prior judgment . . . ." *Peck* v. *Statewide Grievance Committee*, supra, 198 Conn. App. 248.

B

The plaintiff also asserts that she acquired a one-third interest in the property via a quitclaim deed on April 17, 2021, from Eunice's heirs. She further alleges that Eunice never received proper notice of the foreclosure action. The plaintiff thus argues that the *Benchmark* judgment does not have preclusive effect against a collateral attack as to Eunice's one-third interest in the property because a prior judgment is null against a party who was not properly served.

The plaintiff's argument is not without merit. Although strongly disfavored, not all collateral attacks are impermissible. This court has noted that "[s]ervice of process on a party in accordance with the statutory requirements is a prerequisite to a court's exercise of in personam jurisdiction over that party. . . . If a court has never acquired jurisdiction over a defendant or the subject matter . . . any judgment ultimately entered is void and subject to vacation or collateral attack." (Internal quotation marks omitted.) *Angiolillo* v. *Buckmiller*, supra, 102 Conn. App. 713.

If we take the facts alleged in the complaint as true, it follows that, if Eunice never received proper service of the foreclosure action, any judgment rendered in that action would be null as to her. The plaintiff's implied argument follows that, as the holder of Eunice's one-third interest in the property acquired by quitclaim deed from Eunice's heirs, she stands in Eunice's shoes and can assert that the judgment is null as to her also, and,

thus, properly may collaterally attack the *Benchmark* judgment. We are not persuaded.

The problem with the plaintiff's argument is that she already sought to advance her claim based on the alleged lack of personal jurisdiction over Eunice in the *Benchmark* action in her May, 2021 motion to open and subsequent motion to reconsider. Thus, although a judgment rendered without jurisdiction is subject to direct or collateral attack, a litigant cannot utilize both processes. Indeed, when, as in the present case, "the lack of jurisdiction is not entirely obvious, the critical considerations are whether the complaining party had the opportunity to litigate the question of jurisdiction in the original action, and, if [she] did have such an opportunity, whether there are strong policy reasons for giving [her] a second opportunity to do so." (Emphasis omitted; internal quotation marks omitted.) *Sousa* v. *Sousa*, supra, 322 Conn. 772.

The court in the *Benchmark* action approved the sale on August 28, 2020, and the plaintiff acquired her one-third interest in the property from Eunice's heirs on April 17, 2021. On May 10, 2021, although the plaintiff had not been made a party to the foreclosure action, the plaintiff's counsel filed a motion to open and vacate the judgment of foreclosure by sale, asserting that Eunice was never served. In support of her motion to open, the plaintiff included an affidavit from Bernice Roundtree, the sister of Eunice, averring that Eunice was living in a nursing facility in Bridgeport in August, 2016, and that Eunice had not lived at the property after 2014. On June 2, 2021, the motion was dismissed as moot "[p]er oral record . . . ." On June 16, 2021, the plaintiff's counsel filed a motion to reconsider that dismissal, and on the same day the court entered an order stating that the court "reviewed this motion for reconsideration and is not changing its ruling on the underlying motion." The plaintiff neither sought to intervene

based on her one-third interest in the property from Eunice, nor appealed from the dismissal of her motion to open in the *Benchmark* action. Accordingly, because the plaintiff had an opportunity to challenge the foreclosure judgment directly by way of an appeal from the judgment dismissing her motion to open in the *Benchmark* action, her attempt to use the underlying quiet title action as a substitute for that appeal is procedurally impermissible. See *Peck* v. *Statewide Grievance Committee*, supra, 198 Conn. App. 248 ("a party who fails to appeal from [a] . . . decision may not use a different action as a substitute for that appeal to achieve a de novo determination of a matter upon which they failed to take a timely appeal" (internal quotation marks omitted)).

We therefore conclude that the court properly dismissed the quiet title action because the plaintiff's claims based on both her two-thirds interest and her one-third interest in the property constitute impermissible collateral attacks on the *Benchmark* judgment and are, therefore, moot and nonjusticiable.

II

The plaintiff's final argument is that the court's sua sponte dismissal denied her an opportunity to advance an omitted party argument pursuant to § 49-30, which could offer relief without disturbing the *Benchmark* judgment. The plaintiff argues that § 49-30 applies because "[n]o omitted party action has been brought to foreclose out [her] interest in the property," which was acquired "as heir to [Erma Jean's] estate and as the successor in interest to [Eunice's] interest . . . ." The plaintiff's claim warrants little discussion.

Section 49-30 provides in relevant part: "When a mortgage or lien on real estate has been foreclosed and one or more parties owning any interest in . . . such real

estate . . . has been omitted or has not been foreclosed . . . because of improper service of process or for any other reason . . . [s]uch omission or failure to properly foreclose such party or parties may be completely cured and cleared by deed or foreclosure or other proper legal proceedings to which the only necessary parties shall be the party acquiring such foreclosure title, or his successor in title, and the party or parties thus not foreclosed, or their respective successors in title."

There was no need for Benchmark to bring an omitted party action to foreclose the plaintiff's purported interests in the property because the plaintiff, albeit unsuccessfully, had already attempted to challenge the *Benchmark* judgment on the basis of those interests. Once those attempts failed and the plaintiff did not timely and properly appeal from the court's orders rejecting her claims, she became bound by the *Benchmark* judgment. Thus, there is no reason to resort to § 49-30.

The judgment is affirmed.

In this opinion the other judges concurred.

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111 CLEARVIEW DRIVE, LLC *v.* LOIS PATRICK ET AL.
(AC 45702)

Bright, C. J., and Elgo and Cradle, Js.

Syllabus

The plaintiff property owner sought, by way of a summary process action, to recover possession of certain real property occupied by the defendants. A tax foreclosure action related to the property had previously been brought against, inter alia, J and H. The defendants were not named in the foreclosure action. The defendant L filed multiple motions in the foreclosure action attempting to intervene, claiming that she had acquired a two-thirds interest in the property upon J's death and that, after the court rendered a judgment of foreclosure by sale, she had acquired the remaining one-third interest in the property from the heirs

of H. The court in the foreclosure action denied L's motion to intervene on behalf of the two-thirds interest in the property as untimely and dismissed L's motion to open and vacate the foreclosure judgment on behalf of the one-third interest in the property as moot. The property was subsequently sold and, after the sale was approved by the court in the foreclosure action, the buyer conveyed the property to the plaintiff. L subsequently commenced a quiet title action regarding the property, which was dismissed by the court as an improper collateral attack on the foreclosure judgment. The plaintiff initiated the present summary process action while the quiet title action was pending before the trial court, seeking immediate possession of the property. After the trial court dismissed the quiet title action for lack of subject matter jurisdiction, and while the appeal from that dismissal was pending before this court, the plaintiff filed a motion in limine in the present action seeking to exclude from the trial of the summary process action any evidence that contradicted or collaterally attacked the foreclosure judgment or the quiet title action. The court granted the motion in limine, and, during the subsequent trial in the summary process action, the court sustained the objections of the plaintiff's counsel to exhibits and evidence associated with the foreclosure action. The court subsequently rendered judgment for possession of the property for the plaintiff, and the defendants appealed to this court. *Held* that the defendants could not prevail on their claim that the trial court improperly granted the plaintiff's motion in limine, this court having concluded that it was legally and logically correct for the trial court to grant the motion in limine because the record dispositively established that the defendants' evidence of an ownership interest in the property was irrelevant as a matter of law: although the defendants claimed that the trial court improperly relied on the doctrine of collateral estoppel when it granted the motion in limine, the record did not support that assertion, as the trial court stated several times during the trial that the motion in limine was related to a collateral attack on a prior judgment; moreover, as explained further in the companion case of *Patrick* v. *111 Clearview Drive, LLC* (224 Conn. App. 401), the trial court correctly determined that the only purpose of the evidence was to support nonjusticiable claims and, therefore, the defendants' challenge to the foreclosure judgment was improper because the court could offer no practical relief to the defendants; furthermore, for the reasons discussed in *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 418–19, the defendants' claim that L retained an ownership interest in the property as an omitted party from the foreclosure action pursuant to statute (§ 49-30) was without merit, as § 49-30 was not relevant given that L attempted to directly attack the foreclosure judgment in the foreclosure action but was unsuccessful in those efforts.

Argued September 14, 2023—officially released March 26, 2024

Procedural History

Summary process action, brought to the Superior Court in the judicial district of Fairfield, Housing Session, where the court, *Hon. William Holden*, judge trial referee, granted the plaintiff's motion in limine to preclude certain evidence; thereafter, Justin Patrick and Julian Patrick were substituted for the defendants John Doe and John Doe; subsequently, the matter was tried to the court, *Hon. William Holden*, judge trial referee; judgment for the plaintiff, from which the named defendant et al. appealed to this court. *Affirmed.*

Earle Giovanniello, for the appellants (named defendant et al.).

James R. Winkel, for the appellee (plaintiff).

Opinion

ELGO, J. In this summary process action, the defendants Lois Patrick, Justin Patrick, and Julian Patrick[1] appeal from the judgment of possession rendered by the trial court in favor of the plaintiff, 111 Clearview Drive, LLC. On appeal, the defendants claim that the trial court improperly granted the plaintiff's motion in limine, which precluded them from presenting certain evidence to support their claim that Lois was an omitted party in the related foreclosure action of *Benchmark Municipal Tax Services, Ltd.* v. *Roundtree*, Superior Court, judicial district of Fairfield, Docket No. CV-16-6059553-S (*Benchmark* action and/or *Benchmark* judgment), and thus maintained a legitimate and legally

[1] The operative complaint named Lois Patrick, John Doe, John Doe, Jane Doe, and Jane Doe as defendants. The court subsequently granted motions to substitute Justin Patrick and Julian Patrick as defendants for John Doe and John Doe. A motion for default for failure to appear was granted against defendants Jane Doe and Jane Doe. For purposes of clarity, we refer to the defendants individually by first name and collectively refer to Lois Patrick, Justin Patrick, and Julian Patrick as the defendants.

viable interest in the property in question. We affirm the judgment of the trial court.

Patrick v. *111 Clearview Drive, LLC*, 224 Conn. App. 401, A.3d (2024), is a companion case that we also release today. The facts, procedural history, and legal analysis relevant to resolving the two cases are substantially similar. The relevant facts and procedural history are as follows: "On August 29, 2016, Benchmark Municipal Tax Services, Ltd. (Benchmark), recorded a notice of lis pendens on the Bridgeport land records for the property known as 44 Wentworth Street (property).[2] On September 26, 2016, Benchmark commenced a tax foreclosure action involving the property against Erma Jean Roundtree (Erma Jean), Eunice H. Roundtree (Eunice), and others not relevant to this [summary process] action. See *Benchmark Municipal Tax Services, Ltd.* v. *Roundtree*, [supra, Superior Court, Docket No. CV-16-6059553-S]. The [defendants were not] named . . . in the *Benchmark* action. A judgment of foreclosure by sale was rendered in the *Benchmark* action on December 12, 2016. After the judgment was opened, a second judgment of foreclosure by sale was rendered on December 4, 2017, and the court ordered a sale date of May 5, 2018. The sale of the property proceeded as scheduled, with Khurram Ali emerging as the successful bidder. The court approved the sale on August 28, 2020, and Ali conveyed the property to [the plaintiff] on February 6, 2021, by quitclaim deed. During and after the pendency of the *Benchmark* action, [Lois] filed multiple motions with the court in an attempt to intervene, asserting an ownership interest in the property. [Lois] claimed that she had acquired a two-thirds

[2] "We note the well established principle that a court 'may take judicial notice of the file in another case, whether or not the other case is between the same parties . . . .' . . . *Rogalis, LLC* v. *Vazquez*, 210 Conn. App. 548, 556, 270 A.3d 120 (2022)." *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 404 n.2.

interest in the property on October 29, 2017, upon the death of Erma Jean by descent as Erma Jean's only heir, and a one-third interest in the property by quitclaim deed on April 17, 2021, from the heirs of Eunice, who died on June 5, 2020. The court denied [Lois'] motion to intervene on behalf of the two-thirds interest in the property as untimely and dismissed [her] motion to open and vacate the *Benchmark* judgment on behalf of the one-third interest in the property as moot.[3] [Lois] made additional attempts to litigate her alleged interest in the property, all of which were unsuccessful.[4]

"[Lois] commenced [a] quiet title action in May, 2021, and, in July, 2021, filed a revised complaint in accordance with General Statutes § 47-31[5] regarding her

[3] "On April 6, 2018, after acquiring the two-thirds interest in the property from Erma Jean, [Lois] filed motions to intervene and to open and vacate the *Benchmark* judgment. Those motions were denied as untimely under General Statutes § 52-325 (a) on May 1, 2018, and [Lois] did not appeal those determinations. On May 10, 2021, after obtaining Eunice's one-third interest in the property by quitclaim deed, [Lois] filed a motion to open and vacate the *Benchmark* judgment. That motion was dismissed as moot '[p]er oral record' on June 2, 2021. On June 16, 2021, [Lois] filed a motion to reconsider the court's dismissal of the motion to open and vacate the judgment. The court issued an order on June 16, 2021, stating that it had 'reviewed this motion for reconsideration and [was] not changing its ruling on the underlying motion.' [Lois] did not appeal that order." *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 404–405 n.3.

[4] "[Lois'] additional attempts to challenge the *Benchmark* judgment included the following. On August 31, 2020, [Lois] filed a request to stay the proceedings until a legal representative could be appointed to represent the interests of Eunice, who died on June 5, 2020. That request was dismissed on September 16, 2020. [Lois] filed another motion to open the judgment and vacate orders on September 8, 2020, which was dismissed on September 16, 2020, because [she] was not a party to the underlying action. On September 16, 2020, [Lois] filed a motion to reargue and reconsider the order approving the sale of the property, which was denied on September 30, 2020. From that decision, [Lois] filed an appeal with this court, which was dismissed on January 13, 2021, for lack of standing as [she] was not a party to the underlying action." *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 405 n.4.

[5] "General Statutes § 47-31 (a) provides in relevant part: 'An action [to settle title or claim an interest in real property] may be brought by any person claiming title to, or any interest in, real . . . property . . . against

alleged interests in the property." (Footnotes in original.) *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 403–405. "In a memorandum of decision issued on March 7, 2022, the court dismissed [the quiet title] action as 'an improper collateral attack on the foreclosure judgment.' " Id., 406–407. Lois appealed from that decision, and the resulting opinion by this court is substantially related to the resolution of the defendants' motion in limine claim in this appeal. See id., 407.

The present action was initiated in September, 2021, while the quiet title action was pending before the trial court. The plaintiff initiated a summary process action against the defendants and others living at the property, seeking immediate possession of the property. Lois filed an answer to the complaint, along with special defenses alleging that (1) "[t]he plaintiff does not have good title to the property" and (2) "[t]he defendant [Lois] is the owner of the property." The plaintiff denied the allegations made in the special defenses. After the trial court dismissed the quiet title action for lack of subject matter jurisdiction because it constituted an improper collateral attack on a final judgment, and while the appeal from that dismissal was pending before this court, the plaintiff filed the motion in limine at issue. The motion in limine sought "to exclude certain evidence at the trial of this summary process action . . . [s]pecifically . . . to preclude any evidence . . . that contradicts or collaterally attacks the . . . [*Benchmark* judgment], as well as the . . . [quiet title action]." The court granted the motion on May 25, 2022.

any person who may claim to own the property . . . or to have any interest in the property . . . for the purpose of determining such . . . interest or claim, and to clear up all doubts and disputes and to quiet and settle the title to the property. Such action may be brought whether or not the plaintiff is entitled to the immediate or exclusive possession of the property.' " *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 405 n.5.

The court held a trial on the summary process action over the course of two days. During the first day of that trial, on June 15, 2022, Lois' counsel asked the court to respond to her motion for clarification regarding the grant of the plaintiff's motion in limine, specifically, to articulate the scope of what was to be precluded as well as the basis for the exclusion. The court stated that Lois was precluded from presenting evidence attacking the *Benchmark* judgment, the *Benchmark* foreclosure proceedings, "[t]he committee deed by which Ali took title, [and] the quiet title action, as such would constitute an impermissible collateral attack on a final judgment . . . ." The court stated that "the motion in limine stands" over the objection that Lois was an omitted party to the *Benchmark* action.[6]

Accordingly, at the trial on both June 15 and August 3, 2022, the court sustained the objections of the plaintiff's counsel to exhibits and evidence associated with the *Benchmark* action. At the conclusion of the summary process trial, the court rendered judgment for possession of the property in favor of the plaintiff. From that judgment, the defendants now appeal.

As a preliminary matter, we note that the applicable standard of review is dependent upon the characterization of the trial court's ruling. "Evidentiary claims ordinarily are governed by the abuse of discretion standard. . . . That deferential standard, however, does not apply when the trial court's ruling on the motion in limine . . . was based on [a] legal determination . . . ." (Citation omitted; internal quotation marks omitted.)

[6] Upon request of the plaintiff and over the objection of the defendants, the court applied that ruling to Justin and Julian on August 3, 2022. During oral argument before this court, the defendants' counsel acknowledged that Justin and Julian are in privity with Lois and may only have an interest in the property if she has a viable ownership interest. Accordingly, any holding relating to Lois' ownership interest in the property extends to Justin and Julian as well.

Grovenburg v. *Rustle Meadow Associates, LLC*, 174 Conn. App. 18, 68, 165 A.3d 193 (2017). At the trial on June 15, 2022, in response to the defendants' request to clarify the basis of the court's ruling on the motion in limine, the court stated, "what we have here [is] a collateral attack on the judgment of the court." The court's reasoning for granting the motion in limine was thus based on a legal determination that the admission of the proffered evidence would ultimately permit a collateral attack on a final judgment. "Accordingly, the applicable standard of review requires this court to determine whether the trial court was legally and logically correct when it decided, under the facts of the case, to exclude evidence of [the *Benchmark* action and the quiet title action]. . . . Our review, therefore, is plenary." (Citation omitted; internal quotation marks omitted.) *Grovenburg* v. *Rustle Meadow Associates, LLC*, supra, 68.

On appeal, the defendants claim that the court improperly based its decision to grant the motion in limine on the doctrine of collateral estoppel, which the defendants argue does not apply to this case because (1) they were not parties to the underlying *Benchmark* action, and (2) the quiet title action was on appeal at that time. The defendants thus ask this court to remand the case for further proceedings to allow them to "present evidence supporting their claim that [Lois] was an omitted party in the [*Benchmark*] action . . . ."

Although the defendants assert that the court improperly relied on the doctrine of collateral estoppel when granting the motion in limine, that assertion is not supported by the record. During the June 15, 2022 proceedings, the court stated five separate times that the motion in limine was related to a collateral attack on a prior judgment.[7] Therefore, the record demonstrates that the

[7] The court mentioned collateral estoppel one time during the June 15, 2022 proceedings. The record indicates that this mention was in the context of quoting language from the plaintiff's motion in limine and not as the basis

court's basis for granting the motion in limine was to exclude evidence that would result in an improper collateral attack on the *Benchmark* judgment.

Next, we must determine if the court's decision to grant the motion in limine was legally and logically correct. "The purpose of a motion in limine is to exclude irrelevant, inadmissible and prejudicial evidence from trial . . . ." (Internal quotation marks omitted.) *State* v. *Lo Sacco*, 26 Conn. App. 439, 444, 602 A.2d 589 (1992). It follows that a court properly may determine that evidence proffered by a party is irrelevant when its only purpose is to support a claim that is nonjusticiable. "Because courts are established to resolve actual controversies, before a claimed controversy is entitled to a resolution on the merits it must be justiciable. . . . Justiciability requires . . . that the determination of the controversy will result in practical relief to the complainant. . . . [J]usticiability comprises several related doctrines, namely, standing, ripeness, mootness and the political question doctrine." (Internal quotation marks omitted.) *Peck* v. *Statewide Grievance Committee*, 198 Conn. App. 233, 247, 232 A.3d 1279 (2020).

The legal analysis contained in parts I and II of the companion case, *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 409–19, is dispositive of the claim presented in this appeal. There is no useful purpose to repeat that legal analysis here. For the reasons explained in that opinion; see id., 409–18; we conclude

for granting that motion. Specifically, the court stated: "I'm reading from the request of the plaintiff: 'introducing testimony seeking to attack the foreclosure judgment or the foreclosure action proceedings, the committee deed by which Ali took title, or the quiet title action as such would constitute an impermissible collateral attack on a final judgment, and it's precluded, and the collateral estoppel . . . would be inequitable given the actions.' " Read in context, it appears that the court was merely quoting and/or paraphrasing the plaintiff's motion in limine, which had included collateral estoppel as an alternative ground on which evidence related to the *Benchmark* action should be excluded.

that the court correctly granted the motion in limine because the only purpose of the evidence was to support nonjusticiable claims. As we explained in that companion opinion, the defendants' challenge to the *Benchmark* judgment was improper because "the court can offer no practical relief to the party collaterally attacking the prior judgment, rendering the action nonjusticiable." *Peck* v. *Statewide Grievance Committee*, supra, 198 Conn. App. 248.

Furthermore, for the reasons discussed in the companion case, the defendants' claim that Lois retains an ownership interest in the property as an omitted party[8] from the *Benchmark* judgment is without merit. See *Patrick* v. *111 Clearview Drive, LLC*, supra, 224 Conn. App. 418–19. As we discussed in that opinion, General Statutes § 49-30 is not relevant given that Lois attempted to directly attack the *Benchmark* judgment in the underlying action but was unsuccessful in those efforts. Id. We therefore conclude that it was legally and logically correct for the court to grant the motion in limine because the record dispositively establishes that the defendants' evidence of an ownership interest in the property was irrelevant as a matter of law.

The judgment is affirmed.

In this opinion the other judges concurred.

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[8] General Statutes § 49-30 is titled "Omission of parties in foreclosure actions" and provides in relevant part: "When a mortgage or lien on real estate has been foreclosed and one or more parties owning any interest in . . . such real estate . . . has been omitted or has not been foreclosed . . . because of improper service of process or for any other reason . . . [s]uch omission or failure to properly foreclose such party or parties may be completely cured and cleared by deed or foreclosure or other proper legal proceedings to which the only necessary parties shall be the party acquiring such foreclosure title, or his successor in title, and the party or parties thus not foreclosed, or their respective successors in title."