**CASES ARGUED AND DETERMINED**

IN THE

# APPELLATE COURT

OF THE

# STATE OF CONNECTICUT

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## FRANK CHARLES WHITE *v.* FCW LAW OFFICES ET AL.
## (AC 46709)

Alvord, Elgo and Suarez, Js.

*Syllabus*

The plaintiff appealed from the judgment of the trial court rendered in his favor, following a hearing in damages in connection with his action seeking damages for identity theft pursuant to statute (§ 52-571h) and for a violation of the Connecticut Unfair Trade Practices Act (§ 42-110a et seq.). The plaintiff claimed that the trial court improperly failed to award him treble damages in light of mandatory language in § 52-571h (b) following the default judgment rendered against the defendants. *Held*:

The plaintiff was entitled to an award of treble damages under § 52-571h, but he was not entitled to recover those damages in addition to the damages that the trial court awarded under CUTPA.

The trial court's award of damages under CUTPA was vacated, as that award was based on the same transaction, occurrence or event on which the plaintiff based his action for damages resulting from identity theft under § 52-571h, and, thus, that award violated the principle that the plaintiff is entitled to recover only once for the losses he sustained.

Argued April 10—officially released September 17, 2024

*Procedural History*

Action to recover damages for, inter alia, identity theft, and for other relief, brought to the Superior Court in the judicial district of Middlesex, where the named

defendant was defaulted for failure to appear; thereafter, the court, *Swienton*, *J.*, granted the plaintiff's motion to bifurcate the trial; subsequently, the case was tried to the court, *Swienton*, *J.*; judgment for the plaintiff, from which the plaintiff appealed to this court. *Reversed in part*; *vacated in part*; *judgment directed in part.*

*Frank Charles White*, self-represented, the appellant (plaintiff).

*Opinion*

SUAREZ, J. The plaintiff, Frank Charles White, appeals from the judgment of the trial court rendered in his favor against the defendants, FCW Law Offices and two John Does,[1] following a hearing in damages on his civil action seeking damages for identity theft pursuant to General Statutes § 52-571h (b) and a violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. On appeal, the plaintiff claims that the court failed to comply with § 52-571h (b) when it did not award him treble damages under § 52-571h.[2] We reverse in part the judgment of the trial court.

The following facts, as found by the court in its June 28, 2023 memorandum of decision, and procedural history are relevant to our resolution of the plaintiff's claim. "The plaintiff is a practicing, licensed attorney in the state of Connecticut with a valid juris number. The defendants perpetrated a fraud and identity theft by using the plaintiff's juris number, establishing a website with a Connecticut address, and using the plaintiff's

[1] FCW Law Offices is also known as FCW Law, and Frank Charles White Law Offices.

[2] In his appellate brief, the plaintiff also claims that the trial court erred in denying his motion for additur, a motion that is properly filed following a jury trial. See Practice Book § 16-35. The plaintiff withdrew this claim during oral argument before this court.

name to convince members of the public in the United States and Canada to sell their Mexican time-share[s], and to provide the defendants with money based on the false representations that the funds [would] be refunded at a real estate closing which the defendants never intended to take place.

"The plaintiff became aware of this when his mother received a phone call in February, 2019, after she had been contacted by someone looking for the plaintiff. After learning that this person from Lansing, Michigan, was a potential victim of a scam, the plaintiff immediately contacted the Statewide Grievance Committee. He also called the number on the fraudulent website and spoke to someone who made threats against him, stating 'calm down and you won't get hurt.'

"The plaintiff did whatever he could to prevent the fraud from continuing. He was instrumental in causing the website to be taken down twice—it has since been put back on the Internet. On March 9, 2019, he made complaints to the Office of the Chief State's Attorney . . . to the Department of Consumer Protection, and to the Federal Bureau of Investigation [(FBI)]. He heard nothing from the state's attorney's office nor the Department of Consumer Protection until he was notified on May 14, 2019, by the Office of the Attorney General that a complaint had been filed *against him* regarding a victim of the fraud and scam.

"On May 18, 2019, the plaintiff filed a complaint with the Federal Trade Commission . . . which set forth the agencies he notified. At that point, he had been contacted by four potential victims, and learned of a fifth victim who lost over $10,000. No one from the state's attorney's office, FBI, [Internal Revenue Service], or the Office of the Attorney General had contacted him regarding his notifications." (Emphasis in original.)

The plaintiff commenced this action against the defendants in June, 2020. In his operative complaint, the plaintiff brought four counts against the defendants. In count one, the plaintiff brought a cause of action, sounding in quo warranto,[3] to remove the defendants from public office as officers of the court and as commissioners of the Superior Court. In count two, the plaintiff brought a quo warranto cause of action to remove the defendants from the private office of "an unincorporated, professional corporation and/or partnership practicing law under the names FCW Law Offices, FCW Law, and Frank Charles White Law Offices." In count three, the plaintiff brought a cause of action for identity theft in violation of General Statutes §§ 53a-129a[4] and 52-571h.[5] Specifically, the plaintiff alleged that the defendants intentionally made use of his name and juris number without his authorization, and used that information to obtain or attempt to obtain

[3] "A complaint in the nature of quo warranto may be brought [w]hen any person . . . usurps the exercise of any office . . . [and] the Superior Court may proceed . . . to punish such person . . . for such usurpation, according to the course of the common law and may proceed therein and render judgment according to the course of the common law. General Statutes § 52-491. A quo warranto proceeding under the common law lies only to test the [defendants'] right to hold office de jure. . . . A successful action in quo warranto ousts the wrongful office holder . . . . The . . . [defendants] or respondent[s] in quo warranto proceedings are those charged with exercising the particular office or franchise without lawful right. Stated otherwise, a writ of quo warranto must be directed toward the objectionable person holding an office exercising its functions in his or her individual capacity." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Demarest* v. *Fire Dept.*, 76 Conn. App. 24, 28–29, 817 A.2d 1285 (2003).

[4] General Statutes § 53a-129a (a), which defines identity theft, provides: "A person commits identity theft when such person knowingly uses personal identifying information of another to obtain or attempt to obtain money, credit, goods, services, property or medical information without the consent of such other person."

[5] Section 52-571h authorizes a cause of action for damages resulting from identity theft. References in the plaintiff's complaint to "[General Statutes] § 51-571h" appear to be a scrivener's error. We consider such references to refer to § 52-571h.

money, credit, goods, services, or property without his consent. In count four, the plaintiff alleged a CUTPA violation based upon the same underlying conduct at issue in the previous counts, namely, the theft of his identity. In the plaintiff's prayer for relief, he requested the following remedies: "[w]rit of quo warranto ordering the removal of the defendants from the public offices of officer of the court and commissioner of the Superior Court . . . [w]rit of quo warranto ordering the removal of the defendants from the private office of the practice of law in the state of Connecticut . . . [c]osts of litigation, including attorney's fees as exemplary damages . . . [*d*]*amages pursuant to* . . . [*§*] *42-110*[*a*] *et seq. and* [*§ 52-571h*] . . . [c]osts of litigation . . . [i]nterest; and . . . [s]uch other legal or equitable relief as the court deems proper." (Emphasis altered.)

On February 16, 2021, the plaintiff filed a motion for default for failure to appear, which the clerk granted on March 16, 2021. On August 8, 2022, the plaintiff filed a request for a hearing in damages and thereafter moved to bifurcate the hearing in damages. Specifically, the plaintiff sought to bifurcate the hearing on counts one and two of his complaint, which sought nonmonetary relief, from the hearing on the identity theft and CUTPA counts. The court, *Swienton, J.*, granted those requests.

In November, 2022, the court held the first phase of the hearing in damages on the plaintiff's claim for nonmonetary relief. On November 29, 2022, the plaintiff filed a motion for partial judgment on default, which the court granted that day. On June 27, 2023, the court held the second phase of the hearing in damages on the plaintiff's claim for monetary relief. The court heard testimony from the plaintiff and Garritt Kelly, an investigator for the statewide bar counsel. The plaintiff also submitted multiple exhibits, including an affidavit from

a victim of the defendants' fraud, in support of his request for monetary damages.

On June 30, 2023, the court issued a memorandum of decision with respect to the identity theft and CUTPA counts of the plaintiff's complaint. The court first concluded that the plaintiff proved his entitlement to damages pursuant to § 52-571h based upon his allegation of identity theft under § 53a-129a.[6] The court further concluded that the plaintiff proved his entitlement to damages under CUTPA. In its discussion of damages, the court stated that "[t]he plaintiff is seeking compensatory damages, punitive damages under CUTPA, attorney's fees and costs. Although the plaintiff has not suffered any actual pecuniary loss, there is no question that he has suffered emotional distress due to the actions of these persons behind this fraud. He did not seek any professional medical/psychological diagnosis, treatment, or medication. However, he credibly testified as to the toll it has taken on him." (Footnote omitted.)

The court rendered judgment in favor of the plaintiff on counts three and four of his complaint and awarded damages as follows: "Damages under . . . [§ 52-571h]: (1) Compensatory damages: $150,000, (2) Attorney's fees: $20,000, (3) Costs: $1329.21. Damages under CUTPA: (1) Punitive damages: $300,000. Total damages: $471,329.21." This appeal followed.

On appeal, the plaintiff claims that the court improperly failed to award him treble damages in light of mandatory language in § 52-571h (b), following the default judgment rendered against the named defendant on the third count of the complaint. Specifically, the plaintiff asserts that, pursuant to that statute, he was entitled to the greater of either $1000 or treble the amount

[6] References in the court's June 28, 2023 memorandum of decision to "General Statutes § 51-571h" appear to be a scrivener's error. We consider such references to refer to § 52-571h. See also footnote 5 of this opinion.

of the $150,000 that the court had awarded to him as compensatory damages, which would have resulted in an additional award of $300,000 under § 52-571h (b). The plaintiff thus argues that he was entitled to a total of $471,329.21 in damages, costs, and attorney's fees under § 52-571h on the third count of his complaint.[7] We agree with the plaintiff but we disagree with him to the extent that he claims that he was entitled to these damages under § 52-571h *in addition to* the damages that the court awarded him under CUTPA.[8]

The following standard of review and legal principles are relevant to our resolution of the plaintiff's claim. "Our standard of review applicable to challenges to damage awards is well settled. . . . [T]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous. . . . [If], however, a damages award is challenged on the basis of a question of law, our review [of that question] is plenary." (Internal quotation marks omitted.) *AAA Advantage Carting & Demolition Service, LLC* v.

[7] The plaintiff clarified during oral argument before this court that the calculation of damages that he set forth in his appellate brief was inaccurate, as he was entitled to an additional $300,000 in damages under § 52-571h.

[8] In his principal appellate brief, the plaintiff did not specifically address the issue of whether it was legally appropriate for him to recover under both § 52-571h and CUTPA. On August 8, 2024, following oral argument in this appeal, this court, sua sponte, ordered the plaintiff to file a supplemental brief with this court "addressing whether an award of treble damages under . . . § 52-571h and an award of punitive damages under CUTPA in the present action would violate the rule precluding double recovery because both damage awards would be based upon the same transaction, occurrence or event. See *AAA Advantage Carting & Demolition Service, LLC* v. *Capone*, 221 Conn. App. 256, 288–89, [301 A.3d 1111] cert. denied, 348 Conn. 924 [304 A.3d 442 (2023), and cert. denied, 348 Conn. 924, 304 A.3d 442 (2023)]." On August 19, 2024, the plaintiff filed a supplemental brief with this court in which he argues that a recovery under both causes of action is legally appropriate. We have considered the arguments and authorities set forth in the plaintiff's supplemental brief but conclude, in light of the causes of action at issue in this appeal, that they are not persuasive.

*Capone*, 221 Conn. App. 256, 285, 301 A.3d 1111, cert. denied, 348 Conn. 924, 304 A.3d 442 (2023), and cert. denied, 348 Conn. 924, 304 A.3d 442 (2023).

"The construction of a judgment is a question of law with the determinative factor being the intent of the court as gathered from all parts of the judgment. . . . As a general rule, the court should construe [a] judgment as it would construe any document or written contract in evidence before it. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . If [f]aced with . . . an ambiguity, we construe the court's decision to support, rather than to undermine, its judgment. . . . The judgment should admit of a consistent construction as a whole. . . . To determine the meaning of a judgment, we must ascertain the intent of the court from the language used and, if necessary, the surrounding circumstances. . . . We review such questions of law de novo. . . . Additionally, our appellate courts do not presume error on the part of the trial court. . . . Rather, we presume that the trial court, in rendering its judgment . . . undertook the proper analysis of the law and the facts." (Citations omitted; internal quotation marks omitted.) *Rogan* v. *Rungee*, 165 Conn. App. 209, 223, 140 A.3d 979 (2016).

Section 52-571h (b) provides in relevant part: "In any civil action brought under this section in which the plaintiff prevails, the court shall award the greater of one thousand dollars or treble damages, together with costs and a reasonable attorney's fee. Damages shall include, but need not be limited to, documented lost wages and any financial loss suffered by the plaintiff as a result of identity theft . . . . The court may award other remedies provided by law, including, but not limited to, the costs of providing not less than two years of commercially available identity theft monitoring and

protection for such individual." We agree with the plaintiff that the court violated the mandatory directive of this statute by failing to award him treble damages on the third count of the complaint. We are mindful that, "[f]or a court to properly award treble damages under a statute authorizing such damages, the fact finder must [find] for the [party requesting the treble damages] under the statutory cause of action authorizing these extraordinary damages, and not for any other alleged cause of action." (Internal quotation marks omitted.) *Rogan* v. *Rungee*, supra, 165 Conn. App. 224. In the present case, the court plainly found for the plaintiff on the identity theft count of his complaint, thereby entitling him to treble damages pursuant to § 52-571h (b). At the same time, the plaintiff correctly recognizes that, in addition to the court's award of damages under § 52-571h, the court awarded him $300,000 on the fourth count of his complaint in connection with an alternative theory of liability under CUTPA. In describing the relief sought in connection with this appeal, the plaintiff urges us to reverse the judgment rendered under § 52-571h but asks that we affirm the judgment of the trial court in all other respects. In our evaluation of what remedy, if any, is proper in light of the court's failure to award treble damages under § 52-571h, we are guided by the fundamental principle that a plaintiff is entitled to be compensated only once for his injury.

As this court has observed, "[t]he rule precluding double recovery is a simple and time-honored maxim that [a] plaintiff may be compensated only once for his just damages for the same injury. . . . Connecticut courts consistently have upheld and endorsed the principle that a litigant may recover just damages for the same loss only once. The social policy behind this concept is that it is a waste of society's economic resources to do more than compensate an injured party for a loss and, therefore, that the judicial machinery should not

be engaged in shifting a loss in order to create such an economic waste. . . . Duplicate recoveries must not be awarded for the same underlying loss under different legal theories. . . . Although a plaintiff is entitled to allege alternative theories of liability in separate claims, he is not entitled to recover twice for harm growing out of the same transaction, occurrence or event." (Citations omitted; internal quotation marks omitted.) *AAA Advantage Carting & Demolition Service, LLC* v. *Capone*, supra, 221 Conn. App. 288–89.

In light of the foregoing, we conclude that the proper remedy is to reverse the judgment of the court awarding compensatory damages of $150,000 pursuant to § 52-571h and to direct the court, on remand, to award treble damages, exclusive of its unchallenged award of costs and attorney's fees, in the amount of $450,000 on the third count of the plaintiff's complaint. In light of that relief, we are compelled to further conclude, as a matter of law, that the court's award of damages under CUTPA cannot stand, as that action was based upon the same transaction, occurrence or event on which the plaintiff based his action for damages resulting from identity theft under § 52-571h. The court's award of damages under CUTPA thus violates the principle that the plaintiff is entitled to recover only once for the losses he sustained in connection with that transaction, occurrence or event. We therefore reverse the judgment awarding the plaintiff $300,000 in damages on the CUTPA count of the complaint.[9]

[9] We conclude that the court's award of damages under CUTPA was improper because it violated the rule against double recovery and thus must be vacated as a matter of law on this ground. We nonetheless are troubled by the court's award of damages under CUTPA for other reasons that, although not the basis for our decision, are worth noting to avoid any possible ambiguity that could result from the judgment rendered in this case.

It is well established that, "[t]o prevail on a CUTPA claim, the plaintiff must prove, pursuant to General Statutes § 42-110b (a), that the [defendants] engaged in unfair or deceptive acts or practices in the conduct of any trade or commerce and that as a result of the use of the act or practice prohibited under § 42-110b (a), the plaintiff suffered an ascertainable loss of money

The judgment is reversed with respect to the award of compensatory damages under § 52-571h and the award of damages under CUTPA and the case is remanded with direction to vacate those awards and to award the plaintiff $450,000 in damages under § 52-571h, exclusive of the award of attorney's fees and costs; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* MICHAEL GIANNONE (AC 46008)

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

*Syllabus*

The defendant appealed from the judgments of the trial court following his convictions of several weapons related charges. He claimed that the trial

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or property. . . . The ascertainable loss requirement is a threshold barrier which limits the class of persons who may bring a CUTPA action seeking either actual damages or equitable relief. . . . Thus, to be entitled to any relief under CUTPA, a plaintiff must first prove that he has suffered an ascertainable loss due to a CUTPA violation.

"Our Supreme Court has further defined the ascertainable loss requirement of CUTPA, stating: An ascertainable loss is a loss that is capable of being discovered, observed or established. . . . The term loss necessarily encompasses a broader meaning than the term damage, and has been held synonymous with deprivation, detriment and injury. . . . To establish an ascertainable loss, a plaintiff is not required to prove actual damages of a specific dollar amount. . . . [A] loss is ascertainable if it is measurable even though the precise amount of the loss is not known." (Citations omitted; internal quotation marks omitted.) *Di Teresi* v. *Stamford Health System, Inc.*, 149 Conn. App. 502, 508, 88 A.3d 1280 (2014). This court has stated that "emotional distress does not constitute an ascertainable loss of money or property for purposes of CUTPA." Id., 512.

In the present case, the court appears to have based its award of damages exclusively on a finding that the plaintiff suffered emotional distress, not a finding that he suffered an ascertainable loss of money or property. The court explicitly stated that, "[a]lthough the plaintiff has *not suffered any actual pecuniary loss*, there is no question that he has suffered emotional distress due to the actions of these persons behind this fraud." (Emphasis added.) To be clear, under Connecticut law, a CUTPA violation cannot be predicated on emotional distress alone.

court improperly denied his motions to dismiss and to suppress because it had incorrectly determined that the applicable statutes (§§ 53-202b, 53-202w and 53a-211) did not violate his second amendment right to bear arms. *Held*:

The trial court applied an incorrect legal standard in denying the defendant's motions to dismiss and to suppress; accordingly, this court reversed the judgments and remanded the cases to the trial court for reconsideration of the defendant's motions under the standard announced in *New York State Rifle & Pistol Assn., Inc.* v. *Bruen* (597 U.S. 1).

In adjudicating the defendant's as applied constitutional challenge on remand, the trial court was directed to apply the text and history test set forth in *Bruen*, under which the defendant bears the initial burden to show that the plain text of the second amendment presumptively protects his right to keep and bear the items at issue.

This court directed that, if the trial court finds that the second amendment presumptively protects the defendant's conduct, the state then bears the burden to establish the constitutionality of the statutes at issue through historical analogues of firearm regulation that imposed a comparable burden that is comparably justified.

Argued March 4—officially released September 17, 2024

*Procedural History*

Substitute information, in the first case, charging the defendant with two counts each of the crimes of sale of an assault weapon, possession of an assault weapon and possession of a large capacity magazine, and with one count of the crime of firearms trafficking, and substitute information, in the second case, charging the defendant with sixty-five counts of the crime of possession of a large capacity magazine, nine counts of the crime of possession of an assault weapon, three counts of the crime of possession of a silencer and one count each of the crimes of improper storage of firearms, risk of injury to a child and possession of a weapon on school grounds, brought to the Superior Court in the judicial district of Danbury, where the court, *Pavia, J.*, denied the defendant's motions to dismiss and to suppress certain evidence; thereafter, the defendant was presented to the court, *D'Andrea, J.*, on conditional pleas of nolo contendere to two counts each of sale of

an assault weapon, possession of a silencer and possession of a large capacity magazine; judgments of guilty in accordance with the pleas; subsequently, the state entered a nolle prosequi in each case as to the remaining charges, and the defendant appealed to this court. *Reversed*; *further proceedings*.

*Lisa J. Steele*, assigned counsel, for the appellant (defendant).

*Melissa E. Patterson*, senior assistant state's attorney, with whom, on the brief, were *David R. Applegate*, state's attorney, and *Matthew Knopf*, assistant state's attorney, for the appellee (state).

*Opinion*

BRIGHT, C. J. The defendant, Michael Giannone, appeals from the judgments of conviction rendered by the trial court following his conditional pleas of nolo contendere to two counts each of sale of an assault weapon in violation of General Statutes § 53-202b (a) (1), possession of a silencer in violation of General Statutes § 53a-211, and possession of a large capacity magazine in violation of General Statutes § 53-202w (c) (2). On appeal, the defendant claims that the court improperly denied his motion to dismiss the charges against him and his motion to suppress evidence seized by the police because the statutes under which he was convicted violate his right to bear arms under the second amendment to the United States constitution.[1] In

[1] In his principal brief on appeal, the defendant phrases the sole issue as whether his convictions violate the second amendment. The issue is more properly stated as whether the trial court improperly denied his motion to dismiss and motion to suppress because, pursuant to General Statutes § 54-94a, those are the only issues that this court may consider on appeal. See footnote 10 of this opinion.

Additionally, we note that, although the defendant filed memoranda of law in support of both motions, his memorandum of law in support of the motion to suppress simply restated the basis for his motion to suppress and adopted the memorandum of law in support of the motion to dismiss. Furthermore, the trial court addressed these motions together, with the heading of the court's memorandum of decision stating that it pertains to

light of the United States Supreme Court's recent decision in *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022), which was issued after the trial court denied the defendant's motions but prior to his sentencing, we conclude that the judgments of the trial court must be reversed and the cases remanded for an evidentiary hearing on the defendant's motions. In addition, we provide guidance to the trial court regarding how it should analyze the claims raised in the defendant's motions under *Bruen*.

The following undisputed facts and procedural history are relevant to the present appeal. In March, 2016, a confidential source informed the state police that the defendant was selling AR-15 style rifles[2] without serial numbers and without proper documentation. An undercover detective subsequently conducted two controlled firearm purchases from the defendant at the defendant's residence in New Fairfield during the weeks of March 13 and 20, 2016. During the first transaction, the detective purchased from the defendant an AR-15 style semiautomatic .223 caliber assault rifle with a pistol grip, collapsible stock, and flash suppressor, bearing no serial number, and a thirty round large capacity magazine in exchange for $800. During the second transaction, the undercover detective purchased from the defendant

the "motion to suppress/dismiss." Because the parties' arguments and the court's analysis of the defendant's second amendment claims are the same as to both motions, we address the defendant's claim on appeal as pertaining to both motions.

[2] The United States Supreme Court has described the AR-15 as "the civilian version of the military's M-16 rifle," noting that, "unless modified, [it is] a semiautomatic weapon." *Staples* v. *United States*, 511 U.S. 600, 603, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994); see also *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 70, 202 A.3d 262 ("the AR-15 assault rifle . . . is substantially similar to the standard issue [M-16] military service rifle . . . but fires only in semiautomatic mode"), cert. denied sub nom. *Remington Arms Co., LLC* v. *Soto*, U.S. , 140 S. Ct. 513, 205 L. Ed. 2d 317 (2019).

another AR-15 style semiautomatic .223 caliber assault rifle with a pistol grip, collapsible stock, flash suppressor, and approximately 10.5 inch barrel, also bearing no serial number, and another thirty round large capacity magazine in exchange for $800. No paperwork was completed or transferred regarding either sale. In connection with these two transactions, in Docket No. CR-16-153002-S, the state charged the defendant in a March 23, 2016 information with, inter alia, two counts of sale of an assault weapon in violation of § 53-202b (a) (1).[3] As a result of the seizure by the police of various firearm related items while executing a search warrant at the defendant's residence, the state also charged the defendant in a June 14, 2016 substitute information in Docket No. CR-16-0153519-S with, inter alia, three counts of possession of a silencer in violation of § 53a-211[4] and sixty-five counts of possession of a large capacity magazine in violation of § 53-202w (c) (2).[5]

On January 2, 2019, the defendant filed a motion to dismiss the charges against him and a motion to suppress the seized evidence. He filed memoranda of law in support of both motions, in which he argued that the statutes under which he was charged violate his

[3] General Statutes § 53-202b (a) (1) provides: "Any person who, within this state, distributes, transports or imports into the state, keeps for sale, or offers or exposes for sale, or who gives any assault weapon, except as provided by sections 53-202a to 53-202k, inclusive, shall be guilty of a class C felony and shall be sentenced to a term of imprisonment of which two years may not be suspended or reduced by the court."

Pursuant to General Statutes § 53-202a (1) (B) (xx), "assault weapon" includes, among others, AR-15 "semiautomatic centerfire rifles, or copies or duplicates thereof with the capability of any such rifles . . . ."

[4] General Statutes § 53a-211 provides in relevant part: "(a) A person is guilty of possession of . . . a silencer when he owns, controls or possesses . . . any silencer designed to muffle the noise of a firearm during discharge. . . ."

[5] General Statutes § 53-202w provides in relevant part: "(c) Except as provided in this section and section 53-202x . . . (2) any person who possesses a large capacity magazine on or after January 1, 2014, that was obtained on or after April 5, 2013, shall be guilty of a class D felony. . . ."

right to bear arms under the second amendment to the United States constitution and article first, § 15, of the Connecticut constitution. The state filed a memorandum of law in opposition to the defendant's motions on February 4, 2019. Without a hearing,[6] the court, *Pavia*, *J.*, subsequently denied the defendant's motions in a June 12, 2019 memorandum of decision,[7] concluding that the statutes at issue did not unconstitutionally infringe on the defendant's right to bear arms as guaranteed by the state and federal constitutions. In reaching that conclusion, the court applied the pre-*Bruen* two step approach that the United States Court of Appeals for the Second Circuit and several other federal circuit courts adopted following the United States Supreme Court's decisions in *District of Columbia* v. *Heller*, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008), and *McDonald* v. *Chicago*, 561 U.S. 742, 130 S. Ct. 3020, 177 L. Ed. 2d 894 (2010). See *New York State Rifle & Pistol Assn., Inc.* v. *Cuomo*, 804 F.3d 242, 253–54 (2d Cir. 2015), cert. denied sub nom. *Shew* v. *Malloy*, 579 U.S. 917, 136 S. Ct. 2486, 195 L. Ed. 2d 822 (2016). That two step framework required a court first to assess whether the challenged statute burdened conduct protected by the second amendment. Id., 254. If the first step was satisfied, the court would move to the second step of

[6] During a court proceeding on January 10, 2019, after setting a deadline for the state to file a response to the defendant's motions, the court noted that it was "probably [going to] need [to hold] a hearing" on those motions. The following colloquy then occurred between the court and the prosecutor:

"[The Prosecutor]: I don't think it's an evidentiary, I think it's just more—

"The Court: More of an argument—

"[The Prosecutor]: —you can take on the papers. Yes.

"The Court: —okay."

Defense counsel did not argue that an evidentiary hearing was necessary. Moreover, there is no indication in the record, including in the court's memorandum of decision, that the court held a hearing at which evidence or argument was presented on the defendant's motions.

[7] Although the court indicated in its memorandum of decision that the motion to suppress "is addressed in a separate ruling," there is no separate ruling in the record. See footnote 1 of this opinion.

the inquiry, at which it would "[evaluate] the law under some form of means-end scrutiny. If the law passe[d] muster under that standard, it [was] constitutional. If it fail[ed], it [was] invalid." (Internal quotation marks omitted.) *State* v. *DeCiccio*, 315 Conn. 79, 111, 105 A.3d 165 (2014). In *DeCiccio*, our Supreme Court concluded that intermediate scrutiny applied in the second amendment context; id., 142; which required the state to "demonstrate that the [firearms regulation at issue] [was] substantially related to an important government objective."[8] (Internal quotation marks omitted.) Id., 143.

In the present cases, the trial court's analysis focused almost exclusively on the second step of the pre-*Bruen* test. Applying the intermediate scrutiny means-end test pursuant to *DeCiccio*, the court stated: "While the defendant enjoys the protection of his second amendment right to bear arms, this right is not unfettered. . . . [T]he constitution does not confer a right to possess any and all weapons unconstrained by restriction. The

[8] The United States Supreme Court acknowledged in *Bruen* that "[s]tep one of the predominant framework [was] broadly consistent with *Heller*"; *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 19; and that its decision in *Bruen* was merely applying the text and history test set forth in *Heller*. See id., 26. Therefore, as other courts have recognized, pre-*Bruen* decisions applying *Heller* have at least some relevance following *Bruen* to the extent that they are consistent with the text and history test established in *Heller* and clarified in *Bruen*. See, e.g., *Hanson* v. *District of Columbia*, 671 F. Supp. 3d 1, 8 (D.D.C. 2023) (*Bruen*'s "first step is consistent with the first step of [c]ourts of [a]ppeals' decisions pre-*Bruen*. In other words, *Bruen* did not disturb the analysis [c]ourts of [a]ppeals conducted under the first step of their framework. . . . The [c]ourt will therefore . . . accord [the step one] analysis [in those pre-*Bruen* cases] persuasive weight to the extent they are instructive." (Citation omitted.)), appeal filed (D.C. Cir. May 17, 2023) (No. 23-7061); see also *United States* v. *Kirby*, Docket No. 3:22-cr-26-TJC-LLL, 2023 WL 1781685, *1 (M.D. Fla. February 6, 2023) ("*Bruen*, despite changing the [s]econd [a]mendment landscape, did not overrule *Heller*"), aff'd, Docket No. 24-10142, 2024 WL 2846679 (11th Cir. June 5, 2024), petition for cert. filed (U.S. September 4, 2024) (No. 24-5453). Accordingly, we rely on pre-*Bruen* case law such as *DeCiccio* in this opinion to the extent that we find that it is consistent with *Bruen*.

government has a critical interest in the protection of its citizens to live freely from the threats of violence and destruction. See *New York State Rifle & Pistol Assn., Inc.* v. *Cuomo*, supra, [804 F.3d 261] (government has substantial, indeed compelling, governmental interests in public safety and crime prevention). This court must therefore evaluate whether the challenged statutes in the present cases bear a substantial relationship to the achievement of this governmental objective. It is important to note that none of the charged offenses bar the defendant from enjoying his constitutionally protected second amendment rights. The defendant has a legal means to avail himself of his right to bear arms. See *Benjamin* v. *Bailey*, 234 Conn. 455, 471, [662 A.2d 1226] (1995) (a statutory ban on assault weapons does not impair the right to bear arms, as it continues to permit access to a wide array of weapons). The government, however, has an interest in the protection of society, and this interest is substantially furthered by reducing access to, and in restricting the transfer of, assault weapons and large capacity magazines. [Id., 467.] (courts have overwhelmingly recognized that the right to bear arms is not infringed by reasonable regulation by the state in the exercise of its police power to protect the health, safety and morals of the citizenry). This stands particularly true in weapons that are void of any traceable and identifying markings. As such, the court finds that the statutes in question in the present matter do not infringe upon the defendant's right to bear arms as guaranteed by the United States and Connecticut constitutions." (Footnote omitted; internal quotation marks omitted.)

Following the court's denial of the defendant's motions to dismiss and to suppress, the state filed a substitute information in Docket No. CR-16-0153002-S on May 3, 2022, charging him with, inter alia, two counts each of sale of an assault weapon and possession of

a large capacity magazine. The defendant thereafter entered pleas of nolo contendere to two counts of sale of an assault weapon, two counts of possession of a silencer,[9] and two counts of possession of a large capacity magazine, conditioned on his right to appeal from the court's rulings on his motion to dismiss and motion to suppress. See General Statutes § 54-94a.[10] After the court ruled on the defendant's motions, but prior to his sentencing, the United States Supreme Court issued its decision in *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 1. In *Bruen*, the Supreme Court expressly rejected the Second Circuit's two step framework, which the trial court applied in the present cases. See id., 19. The Supreme Court, instead, clarified and applied "*Heller*'s text-and-history standard"; id., 39; which the court emphasized did not involve the means-end balancing that the trial court had applied in the present cases. See id., 19.

[9] The trial court record inconsistently describes the silencer charge. For instance, the judgments of the trial court, *D'Andrea*, *J.*, setting forth the defendant's sentences describe the offense both as "possession of sawed off shotgun/silencer in violation of . . . § 53a-211" and "possession of a silencer in violation of . . . § 53a-211," which statute prohibits the possession of both silencers and sawed-off shotguns. We also observe that Judge Pavia's memorandum of decision denying the defendant's motions to dismiss and to suppress notes that "[t]he defendant stands charged with the crimes of firearms trafficking, illegal sale of an assault weapon, illegal possession of an assault weapon, illegal possession of a large capacity magazine, [and] possession of a sawed-off shotgun" but not that the defendant was charged with the crime of possession of a silencer. The substitute information that the state filed in Docket No. CR-16-0153519-S, however, describes the relevant charge as "possession of a silencer (three counts)" in violation of § 53a-211. We rely on the information as an accurate statement of the charges against the defendant.

[10] General Statutes § 54-94a provides in relevant part: "When a defendant, prior to the commencement of trial, enters a plea of nolo contendere conditional on the right to take an appeal from the court's denial of the defendant's motion to suppress or motion to dismiss, the defendant after the imposition of sentence may file an appeal within the time prescribed by law provided a trial court has determined that a ruling on such motion to suppress or motion to dismiss would be dispositive of the case. The issue to be considered in such an appeal shall be limited to whether it was proper for the

Despite the Supreme Court's decision in *Bruen*, the defendant did not ask the trial court to reconsider his motions to suppress and to dismiss. Accordingly, on September 2, 2022, the court, *D'Andrea*, *J.*, sentenced the defendant to a total effective term of ten years of incarceration, execution suspended after three years, with five years of probation.[11] This appeal followed.

I

On appeal, the defendant claims that the Supreme Court's decision in *Bruen* "has revolutionized courts' analysis of firearms laws." The defendant argues that the proper application of the *Bruen* analysis in the present cases leads to the conclusion that the statutes under which the defendant was convicted are unconstitutional as applied to him,[12] and his convictions therefore must be vacated. The state acknowledges that

court to have denied the motion to suppress or the motion to dismiss. . . ." See also Practice Book § 61-6 (a) (2) (A) (same).

[11] Specifically, the trial court sentenced the defendant as follows: (1) on each of the two counts of sale of an assault weapon, ten years of incarceration, execution suspended after three years, with five years of probation with special conditions, and deadly weapon offender registration; (2) on each of the two counts of possession of a silencer, five years of incarceration, execution suspended after three years, with five years of probation with special conditions, and deadly weapon offender registration; and (3) on each of the two counts of illegal possession of a large capacity magazine, five years of incarceration, execution suspended after three years, with five years of probation with special conditions and deadly weapon offender registration. The sentences were to run concurrently with each other for a total effective sentence of ten years of incarceration, execution suspended after three years, two of which were a mandatory minimum. The state entered a nolle prosequi as to all remaining counts.

[12] During oral argument before this court, the state argued that the defendant's claims were facial challenges to the statutes at issue. We do not construe his claims that way. Although, in his principal and reply briefs on appeal, the defendant refers to the regulated firearms generally as "assault weapons" or "semiautomatic rifles," suggesting that his challenge to General Statutes § 53-202a may not be limited to the prohibition on the sale of the particular AR-15 style rifles at issue in the present cases, the defendant does not argue that the statutes at issue are unconstitutional as applied to each of the specific firearms enumerated in those statutes. See General Statutes § 53a-211 (banning, in addition to silencers, sawed-off shotguns) and General

*Bruen* explicitly rejected the means-end analysis that the trial court had applied in the present cases but argues that *Bruen* did not materially alter the manner in which courts apply the second amendment to restrictions on certain types of weapons. Consequently, the state argues that the trial court correctly concluded that the statutes under which the defendant was convicted are constitutional.

To provide context for our analysis of *Bruen*'s impact on the present dispute, we begin with a review of the development of second amendment law, starting with the United States Supreme Court's seminal decision in *District of Columbia* v. *Heller*, supra, 554 U.S. 570. "In *Heller*, the United States Supreme Court was called on to determine the constitutionality of District of Columbia ordinances that broadly prohibited the possession of handguns, in the home and elsewhere; see id., 574–76; and also required citizens to 'keep their lawfully owned

Statutes § 53-202a (enumerating various types of assault weapons, including both semiautomatic *and* fully automatic firearms, including, but not limited to, AR-15s, that fall within statutory definition of "assault weapon"). Such a showing is required to prevail on a facial challenge under *Bruen*. See *United States* v. *Rahimi*, U.S. , 144 S. Ct. 1889, 1898, 219 L. Ed. 2d 351 (2024) (facial challenge "requires a defendant to establish that *no set of circumstances* exists under which the [statute] would be valid" (emphasis added; internal quotation marks omitted)); see also *National Assn. for Gun Rights* v. *Lamont*, 685 F. Supp. 3d 63, 92 (D. Conn. 2023) (plaintiffs raising facial challenge to assault weapon ban on "*specific* firearms of enumerated models and features," as opposed to a complete ban on "all semiautomatic rifles, or . . . semiautomatic handguns," had burden "to present evidence regarding the *specific* assault weapons enumerated in the [c]hallenged [s]tatutes" (emphasis in original)). Moreover, the defendant's counsel indicated during oral argument before this court that each of his claims "could be" and "probably [are]" as applied challenges. Consequently, we construe the defendant's claim as to each statute to be that it is unconstitutional as applied to the particular facts of his cases. We do not, however, intend to preclude the defendant from arguing on remand that the statutes are unconstitutional on their face, in which case he will bear a much heavier burden. See *United States* v. *Rahimi*, supra, 1898 (facial challenge is "most difficult challenge to mount successfully" (internal quotation marks omitted)).

firearms, such as registered long guns, "unloaded and disassembled or bound by a trigger lock or similar device" unless they are located in a place of business or are being used for lawful recreational activities.' Id., 575. In determining whether the second amendment confers an individual right to possess arms and, if so, the scope of such a right, the court conducted an extensive textual and historical analysis of the second amendment, which provides: 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.' U.S. Const., amend. II." (Footnote omitted.) *State* v. *DeCiccio*, supra, 315 Conn. 108–109. As to the meaning of "[a]rms" in the second amendment, the court in *Heller* stated that "[t]he 18th-century meaning is no different from the meaning today." *District of Columbia* v. *Heller*, supra, 581. The court referenced both a 1773 dictionary, which defined "arms" as "[w]eapons of offence, or armour of defence," and a 1771 legal dictionary, which defined that term as "any thing that a man wears for his defence, or takes into his hands, or useth in wrath to cast at or strike another." (Internal quotation marks omitted.) Id.

In *DeCiccio*, our Supreme Court stated: "Upon examining the prefatory and operative clauses of the second amendment; see generally *District of Columbia* v. *Heller*, supra, [554 U.S. 577–600]; the court [in *Heller*] concluded that it 'guarantee[s] the individual right to possess and carry weapons in case of confrontation.'[13]

[13] "The court emphasized that its reading of the operative clause in this manner was consistent with the prefatory clause, observing that: 'It is therefore entirely sensible that the [s]econd [a]mendment's prefatory clause announces the purpose for which the right was codified: to prevent elimination of the militia. The prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important for self-defense and hunting. But the threat that the new [f]ederal [g]overnment would destroy the citizens' militia by taking away their arms was the reason that right—unlike some other English rights—was codified in a written [c]onstitution.' *District of*

Id., 592. The court observed, however, that this right is 'not unlimited, just as the [f]irst [a]mendment's right of free speech [is] not . . . . Thus, [the court] do[es] not read the [s]econd [a]mendment to protect the right of citizens to carry arms for any sort of confrontation, just as [the court] do[es] not read the [f]irst [a]mendment to protect the right of citizens to speak for any purpose.' . . . Id., 595. After considering the parameters of the second amendment right, the court held that it does protect the possession of 'weapons . . . typically possessed by law-abiding citizens for lawful purposes'; id., 625; and does not protect 'dangerous and unusual weapons.' . . . Id., 627. The court further concluded that the District of Columbia's firearms ordinances violated 'the inherent right of self-defense [that] has been central to the [s]econd [a]mendment right. The handgun ban amounts to a prohibition of an entire class of arms that is overwhelmingly chosen by American society for that lawful purpose. The prohibition extends, moreover, to the home, where the need for defense of self, family, and property is most acute. Under any of the standards of scrutiny that we have applied to enumerated constitutional rights, banning from the home the most preferred firearm in the nation to keep and use for protection of one's home and family . . . would fail constitutional muster.' . . . Id., 628–29.

"Two years later, the United States Supreme Court considered whether the second amendment right to keep and bear arms is incorporated in the concept of due process and, therefore, applicable to the states via the fourteenth amendment. See *McDonald* v. *Chicago*, supra, 561 U.S. 750. The court in *McDonald* explained that its 'decision in *Heller* points unmistakably to the answer. Self-defense is a basic right, recognized by many legal systems from ancient times to the present

*Columbia* v. *Heller*, supra, 554 U.S. 599." *State* v. *DeCiccio*, supra, 315 Conn. 109 n.21.

day, and, in *Heller*, [the court] held that individual self-defense is the central component of the [s]econd [a]mendment right.' . . . Id., 767. Following a detailed historical analysis; see generally id., 768–77; the court concluded that the second amendment is applicable to the states because 'the [f]ramers and ratifiers of the [f]ourteenth [a]mendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty.' Id., 778." (Footnote in original.) *State* v. *DeCiccio*, supra, 315 Conn. 109–11.

Then came *Bruen*. Nearly fifteen years after *Heller* was decided, the United States Supreme Court considered a challenge to a New York statute that required a handgun owner to demonstrate " 'proper cause' " to acquire a permit to carry a handgun in public. See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 12. The court began its analysis by summarizing its prior holdings and how those holdings had been applied: "In *Heller* and *McDonald*, we held that the [s]econd and [f]ourteenth [a]mendments protect an individual right to keep and bear arms for self-defense. In doing so, we held unconstitutional two laws that prohibited the possession and use of handguns in the home. In the years since, the [c]ourts of [a]ppeals have coalesced around a two-step framework for analyzing [s]econd [a]mendment challenges that combines history with means-end scrutiny. . . .

"At the first step, the government may justify its regulation by establish[ing] that the challenged law regulates activity falling outside the scope of the right as originally understood. E.g., *Kanter* v. *Barr*, 919 F.3d 437, 441 (7th Cir. 2019) . . . . But see *United States* v. *Boyd*, 999 F.3d 171, 185 (3d Cir. 2021) (requiring claimant to show a burden on conduct falling within the scope of the [s]econd [a]mendment's guarantee). The [c]ourts of [a]ppeals then ascertain the original scope of the right based on its historical meaning. . . . If the government

can prove that the regulated conduct falls beyond the [a]mendment's original scope, then the analysis can stop there; the regulated activity is categorically unprotected. . . . But if the historical evidence at this step is inconclusive or suggests that the regulated activity is not categorically unprotected, the courts generally proceed to step two. . . .

"At the second step, courts often analyze how close the law comes to the core of the [s]econd [a]mendment right and the severity of the law's burden on that right. . . . The [c]ourts of [a]ppeals generally maintain that the core [s]econd [a]mendment right is limited to self-defense *in the home*. . . . If a core [s]econd [a]mendment right is burdened, courts apply strict scrutiny and ask whether the [g]overnment can prove that the law is narrowly tailored to achieve a compelling governmental interest. . . . Otherwise, they apply intermediate scrutiny and consider whether the [g]overnment can show that the regulation is substantially related to the achievement of an important governmental interest." (Citations omitted; emphasis altered; footnote omitted; internal quotation marks omitted.) *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 17–19.

The court in *Bruen* then concluded that "*Heller* and *McDonald* do not support applying means-end scrutiny in the [s]econd [a]mendment context. Instead, the government must affirmatively prove that its firearms regulation is part of the historical tradition that delimits the outer bounds of the right to keep and bear arms." Id., 19. The court held "that when the [s]econd [a]mendment's plain text covers an individual's conduct, the [c]onstitution presumptively protects that conduct. To justify its regulation, the government may not simply posit that the regulation promotes an important interest. Rather, the government must demonstrate that the regulation is consistent with this [n]ation's historical tradition of

firearm regulation. *Only if* a firearm regulation is consistent with this [n]ation's historical tradition may a court conclude that the individual's conduct falls outside the [s]econd [a]mendment's unqualified command." (Emphasis added; internal quotation marks omitted.) Id., 17. In *Bruen*, the court emphasized that it was doing no more than applying *Heller*'s "straightforward historical inquiry" to New York's proper cause requirement. Id., 27. Thus, "[f]ollowing the course charted by *Heller*, [the court] consider[ed] whether historical precedent from before, during, and even after the founding evince[d] a comparable tradition of regulation." (Internal quotation marks omitted.) Id.

The court recognized, though, that before considering whether a particular regulation falls within the nation's historical tradition, it first had to determine whether the second amendment's plain text covered the individual's conduct. The conduct in *Bruen* was "carrying handguns publicly for self-defense." Id., 32. Again, the court relied on *Heller* as its lodestar to guide its analysis: "We have already recognized in *Heller* at least one way in which the [s]econd [a]mendment's historically fixed meaning applies to new circumstances: Its reference to arms does not apply only [to] those arms in existence in the 18th century. [*District of Columbia* v. *Heller*, supra, 554 U.S. 582]. Just as the [f]irst [a]mendment protects modern forms of communications, and the [f]ourth [a]mendment applies to modern forms of search, the [s]econd [a]mendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding. [Id.] . . . Thus, even though the [s]econd [a]mendment's definition of arms is fixed according to its historical understanding, that general definition covers modern instruments that facilitate armed self-defense." (Internal quotation marks omitted.) *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S.

28. The court further explained that, in *Heller*, "[a]fter holding that the [s]econd [a]mendment protected an individual right to armed self-defense, we also relied on the historical understanding of the [a]mendment to demark the limits on the exercise of that right. We noted that, [l]ike most rights, the right secured by the [s]econd [a]mendment is not unlimited. [*District of Columbia* v. *Heller*, supra, 626.] From Blackstone through the 19th-century cases, commentators and courts routinely explained that the right was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose. [Id.] For example, we found it fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons that the [s]econd [a]mendment protects the possession and use of weapons that are in common use at the time. [Id., 627] . . . ." (Internal quotation marks omitted.) *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 21.

In *Heller* and *Bruen*, the court easily concluded that handguns were arms within the meaning of the second amendment. As the court stated in *Heller*, "the inherent right of self-defense has been central to the [s]econd [a]mendment right. The handgun ban amounts to a prohibition of an entire class of 'arms' that is overwhelmingly chosen by American society for that lawful purpose." *District of Columbia* v. *Heller*, supra, 554 U.S. 628; see also *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 31–32 ("[i]t [was] undisputed . . . that handguns are weapons in common use today for self-defense," and court had "little difficulty concluding that" second amendment's plain text protects right to carry handguns publicly for self-defense (internal quotation marks omitted)).

Having concluded in *Heller* and *Bruen* that the plain text of the second amendment protects the right to keep and bear handguns for self-defense, the court then,

in each case, assessed whether there were any analogous historical regulations that justified the handgun regulation at issue. In *Bruen*, in an effort to make "the constitutional standard endorsed in *Heller* more explicit"; *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 31; the court explained the process as follows: "Much like we use history to determine which modern arms are protected by the [s]econd [a]mendment, so too does history guide our consideration of modern regulations that were unimaginable at the founding. When confronting such present-day firearm regulations, this historical inquiry that courts must conduct will often involve reasoning by analogy—a commonplace task for any lawyer or judge. Like all analogical reasoning, determining whether a historical regulation is a proper analogue for a distinctly modern firearm regulation requires a determination of whether the two regulations are relevantly similar. . . . And because [e]verything is similar in infinite ways to everything else . . . one needs some metric enabling the analogizer to assess which similarities are important and which are not . . . . For instance, a green truck and a green hat are relevantly similar if one's metric is things that are green. . . . They are not relevantly similar if the applicable metric is things you can wear.

"While we do not now provide an exhaustive survey of the features that render regulations relevantly similar under the [s]econd [a]mendment, we do think that *Heller* and *McDonald* point toward at least two metrics: how and why the regulations burden a law-abiding citizen's right to armed self-defense." (Citations omitted; internal quotation marks omitted.) Id., 28–29. The court then looked to the history of public carry regulations from the late 1200s to the early 1900s. See id., 34. The court cautioned, however, that "[h]istorical evidence that long predates either [the adoption of the second amendment in 1791 or of the fourteenth amendment in

1868] may not illuminate the scope of the right if linguistic or legal conventions changed in the intervening years. . . . Similarly, we must also guard against giving postenactment history more weight than it can rightly bear. . . . [T]o the extent later history contradicts what the text says, the text controls."[14] (Citations omitted.) Id., 34–36.

After a "long journey through the Anglo-American history of public carry," the court in *Bruen* concluded that the "respondents [had] not met their burden to identify an American tradition justifying the [s]tate's proper-cause requirement. . . . Apart from a few late-19th-century outlier jurisdictions, American governments simply have not broadly prohibited the public carry of commonly used firearms for personal defense. Nor, subject to a few late-in-time outliers, have American governments required law-abiding, responsible citizens to demonstrate a special need for self-protection distinguishable from that of the general community in order to carry arms in public." (Citation omitted; internal quotation marks omitted.) Id., 70. The court consequently held that "New York's proper-cause requirement violates the [f]ourteenth [a]mendment in that it prevents law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms." Id., 71.

Recently, the United States Supreme Court again addressed the scope of the second amendment in *United States* v. *Rahimi*, U.S. , 144 S. Ct. 1889,

[14] The court in *Bruen* "acknowledge[d] that there is an ongoing scholarly debate on whether courts should primarily rely on the prevailing understanding of an individual right when the [f]ourteenth [a]mendment was ratified in 1868 when defining its scope (as well as the scope of the right against the [f]ederal [g]overnment)." *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 37. The court did not settle that issue because "the public understanding of the right to keep and bear arms in both 1791 and 1868 was, for all relevant purposes, the same with respect to public carry." Id., 38.

219 L. Ed. 2d 351 (2024), in which it provided some clarification of the *Bruen* test. *Rahimi* involved a second amendment challenge to "[a] federal statute [that] prohibits an individual subject to a domestic violence restraining order from possessing a firearm if that order includes a finding that he represents a credible threat to the physical safety of [an] intimate partner, or a child of the partner or individual." (Internal quotation marks omitted.) Id., 1894. An eight person majority of the court, after considering regulations on the possession of weapons by those who pose a threat to others "[f]rom the earliest days of the common law"; id., 1899; to the early 1800s, had "no trouble concluding that [the statute] survive[d] [the defendant's] facial challenge. Our tradition of firearm regulation allows the [g]overnment to disarm individuals who present a credible threat to the physical safety of others. [The statute] can be applied lawfully to [the defendant]." Id., 1902. In reaching this conclusion, the court in *Rahimi* explained that, "when a challenged regulation does not precisely match its historical precursors, it still may be analogous enough to pass constitutional muster." (Internal quotation marks omitted.) Id., 1898.

Accordingly, under *Bruen*, a court asks first whether the second amendment's plain text covers the conduct at issue. *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 32. If so, that conduct is presumptively protected, and the court proceeds to the second step, at which it asks whether the government has satisfied its burden to identify a historical tradition justifying its firearm regulation.[15] Id., 33–34.

[15] In *Bruen*, the court stated that the two step analytical framework that many courts applied following *Heller* was "one step too many," implying that the *Bruen* test does not have two separate steps. *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 19. Post-*Bruen*, courts have nonetheless interpreted the text and history test applied in *Bruen* as a two step approach that asks, first, whether the second amendment's plain text protects the proposed conduct and, second, whether the regulation is nonetheless consistent with the historical tradition of firearms regulation. See,

Having set forth the test that the court applied in *Bruen* and having provided historical context for the recent developments in second amendment law, we turn to the test that the trial court applied in the present cases when it decided the defendant's motions to dismiss and to suppress. As previously noted in this opinion, the court applied the then prevailing two step approach adopted by the Second Circuit, following *Heller*, to assess the defendant's second amendment claims and concluded that his claims failed under the type of means-end balancing test that the Supreme Court recently rejected in *Bruen*. The court in the present cases therefore, through no fault of its own, did not apply the correct legal standard when assessing the merits of the second amendment claims raised in the defendant's motions. Additionally, the court did not hold a hearing on the defendant's motions and, therefore, did not make any factual findings that, as we will explain, are necessary to apply the *Bruen* test. See footnote 6 of this opinion. Accordingly, the record is inadequate for our review of the defendant's claim under the standard announced in *Bruen*. Consistent with other state and federal appellate courts,[16] we conclude that it is necessary to remand these cases to the

e.g., *Bevis* v. *Naperville*, 85 F.4th 1175, 1191 (7th Cir. 2023), cert. denied sub nom. *Harrel* v. *Raoul*, U.S. , 144 S. Ct. 2491, L. Ed. 2d (2024); *United States* v. *Alaniz*, 69 F.4th 1124, 1128 (9th Cir. 2023); *United States* v. *Rahimi*, 61 F.4th 443, 453 (5th Cir. 2023), rev'd on other grounds, U.S. , 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024); see also *United States* v. *Rahimi*, supra, 144 S. Ct. 1928 (Jackson, J., concurring) (observing that *Bruen* rejected pre-*Bruen* "two-step approach as having one step too many" but then "subbed in another two step evaluation" (internal quotation marks omitted)). Accordingly, for ease of discussion, we similarly address the *Bruen* test in two separate steps.

[16] See, e.g., *Atkinson* v. *Garland*, 70 F.4th 1018, 1020, 1022 (7th Cir. 2023) ("the best course is to remand to allow the district court to undertake the *Bruen* analysis in the first instance" and to allow "proper, fulsome analysis of the historical tradition"); *Duncan* v. *Bonta*, 49 F.4th 1228, 1231 (9th Cir. 2022) (following remand from United States Supreme Court, remanding case to District Court for further proceedings consistent with *Bruen*); *Oakland Tactical Supply, LLC* v. *Howell Township*, Docket No. 21-1244, 2022 WL 3137711, *2 (6th Cir. August 5, 2022) (remanding case to District Court for

trial court to give the parties the opportunity to develop the evidentiary record and to allow the court to consider the defendant's claim under *Bruen* in the first instance.[17]

further proceedings because appellate court was "unable to apply [the *Bruen*] standard based on the record and arguments currently before [it]"), aff'd, Docket No. 18-cv-13443, 2023 WL 2074298 (E.D. Mich. February 17, 2023), aff'd, 103 F. 4th 1186 (6th Cir. 2024), petition for cert. filed (U.S. August 20, 2024)(No. 24-178); *Sibley* v. *Watches*, Docket No. 21-1986-cv, 2022 WL 2824268, *1 (2d Cir. July 20, 2022) ("[w]e remand the case to the District Court to consider in the first instance the impact, if any, of *Bruen* on [the plaintiff's] claims"), dismissed, Docket No. 19-CV-6517-FPG, 2024 WL 1157047 (W.D.N.Y. March 18, 2024), appeal filed (2d Cir. April 4, 2024) (No. 24-855); *Ward* v. *United States*, 318 A.3d 520, 533 (D.C. 2024) ("whether the methodology laid out in *Bruen* leads to the conclusion that [the defendant's] conviction violated the [s]econd [a]mendment . . . is a question for the trial court to consider in the first instance, after the parties have been allowed to submit evidence and legal arguments"); *People* v. *Olson*, Docket No. D082081, 2024 WL 2122948, *4 (Cal. App. May 13, 2024) ("[u]ltimately, the trial court is best suited to engage in the analysis *Bruen* requires, assisted by a record replete with relevant factual and historical evidence offered by the parties"), review denied, California Supreme Court, Docket No. S285336 (July 29, 2024); *State* v. *Philpotts*, Docket No. 107374, 2023 WL 408984, *1 (Ohio App. January 26, 2023) (remanding case to trial court to allow parties to develop record and to allow trial court to apply "correct burden of proof and standard of review as set forth in *Bruen*"); see also *Matter of State for Fox*, Docket Nos. A-3418-21 and A-3419-21, 2024 WL 2842238, *7 (N.J. App. Div. June 5, 2024) (declining to consider second amendment claims raised for first time on appeal and remanding case to allow parties to develop record and to permit trial court to consider those claims under *Bruen* in first instance).

[17] The present cases are distinguishable from several cases in which appellate courts have decided post-*Bruen* second amendment claims in the first instance on appeal without the benefit of the trial court's application of the *Bruen* test. See, e.g., *Maryland Shall Issue, Inc.* v. *Moore*, 86 F.4th 1038, 1043 (4th Cir. 2023) (there was "little room for debate" as to whether handguns were protected "arms"), aff'd, Docket Nos. 21-2017 and 21-2053, 2024 WL 3908548 (4th Cir. August 23, 2024); *Teter* v. *Lopez*, 76 F.4th 938, 946–47 and n.6 (9th Cir. 2023) (presumption in favor of remand on basis of intervening change in law did not apply because "the historical research required under *Bruen* involves issues of so-called legislative facts . . . rather than adjudicative facts," state "already had a full opportunity to put forward a [factual] record as to why butterfly knives should be considered to be dangerous and unusual" under *Heller*, and, even if presumption in favor of remand applied, court could "confidently decide [the issue] [itself]" because state "ha[d] never cited an on-point historical analogue to [the challenged statute] even after having an opportunity to do so before both motions and merits panels" (internal quotation marks omitted)), vacated and reh'g en banc granted, 93 F.4th 1150 (9th Cir. 2024); *Range* v. *Attorney General*, 69 F.4th 96, 103 (3d Cir. 2023) (conduct of possessing rifle and

During oral argument before this court, both parties' counsel, although preferring that we resolve the merits of the defendant's constitutional claims, acknowledged that a remand might be necessary. In particular, the defendant's counsel argued that we can resolve the present appeal by relying on "legislative facts" relevant to whether the items at issue constitute "arms" under the second amendment, such as the Second Circuit's finding in *New York State Rifle & Pistol Assn., Inc.* v. *Cuomo*, supra, 804 F.3d 255, that "Americans own millions" of assault weapons, and by reviewing legislative history and analogous historical statutes. Counsel stated, however, that, if we find those legislative facts insufficient, then a remand would be appropriate. Similarly, the state's attorney argued that we can resolve this appeal by adopting the factual findings and reasoning of other courts that have concluded that assault weapons, including AR-15 style rifles, large capacity magazines, and silencers are not "arms" protected by the second amendment and that prohibitions similar to those at issue in the present cases are consistent with our country's historical tradition of firearm regulation. Specifically, in its brief to this court, the state asks us to adopt other courts' findings, first, as to the function and purpose of silencers and large capacity magazines, and to conclude that both are "firearm accessories" unnecessary to the use of a firearm, rather than bearable arms protected by the second amendment. The state

shotgun for hunting and self-defense tracked constitutional right defined by *Heller*), vacated sub nom. *Garland* v. *Range*, Docket No. 23-374, 2024 WL 3259661 (U.S. July 2, 2024); *United States* v. *Rahimi*, 61 F.4th 443, 454 (5th Cir. 2023) (possession of pistol and rifle "easily [fell] within the purview of the [s]econd [a]mendment," and it was "undisputed that the types of firearms that [the defendant] possessed [were] in common use, such that they [fell] within the scope of the amendment" (internal quotation marks omitted)), rev'd on other grounds, U.S. , 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024); *Wade* v. *University of Michigan*, Docket No. 330555, 2023 WL 4670440, *8 (Mich. App. July 20, 2023) (court could easily conclude that handgun was "in common use" by citing *Bruen* (internal quotation marks omitted)).

also asks us to adopt other courts' findings as to the commonality, dangerousness, and militaristic character of AR-15 style rifles, large capacity magazines, and silencers, and conclude that they are not protected arms because they are "not commonly used or particularly suitable for [civilian] self-defense" or "have uniquely dangerous properties that are more properly suited for military use." (Internal quotation marks omitted.) Additionally, the state urges us to adopt the historical analyses of other courts and to conclude that the statutes under which the defendant was convicted have relevant historical analogues that support their constitutionality.

Given that each party asks us to accept as true certain proposed facts, we find that the application of *Bruen* to the conduct at issue in the present cases involves disputed factual questions that must be resolved by the trial court, before which the parties can present evidence that "can be explained through expert testimony and tested through cross-examination." *State* v. *Edwards*, 314 Conn. 465, 481, 102 A.3d 52 (2014); see also *Oregon Firearms Federation* v. *Kotek*, 682 F. Supp. 3d 874, 886 n.2 (D. Or. 2023) (declining to consider "legislative fact" exhibits offered by plaintiffs because exhibits addressed adjudicative facts, that is, "factual questions that [the trial court] must answer, including the commonality of [large capacity magazines], their use by ordinary citizens, and the relevancy of certain historical firearms regulations," so that court could "adequately assess issues of credibility or bias"), appeal filed sub nom. *Fitz* v. *Rosenblum* (9th Cir. July 17, 2023) (No. 23-35478), and appeal filed sub nom. *Azzopardi* v. *Rosenblum* (9th Cir. July 17, 2023) (No. 23-35479).[18]

[18] We note that the court in *Kotek* mentioned that "legislative facts are often considered by appellate courts deciding [s]econd [a]mendment challenges, see *Jones* v. *Bonta*, 34 F.4th 704, 726 n.24 (9th Cir. 2022), vacated, 47 F.4th 1124 . . . ." *Oregon Firearms Federation* v. *Kotek*, supra, 682 F. Supp. 3d 886 n.2. In *Bonta*, the United States Court of Appeals for the Ninth Circuit considered legislative facts pertaining to the efficacy of nonsemiautomatic rifles, rimfire rifles, and shotguns for the purpose of self-defense,

Moreover, because the state's brief fails to engage in any historical analysis beyond citing such analyses from other courts, we find that "[t]he parties' briefing on appeal only scratches the surface of the historical analysis now required by *Bruen*." *Atkinson* v. *Garland*, 70 F.4th 1018, 1020 (7th Cir. 2023). *Bruen* instructs that courts "are not obliged to sift the historical materials for evidence to sustain [a] statute"; *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 70; rather, pursuant to the principle of party presentation, courts are "entitled to decide a [second amendment] case based on the historical record compiled by the parties." Id., 26 n.6. Accordingly, we decline to resolve the present appeal by applying other courts' factual findings and sifting through historical materials as a substitute for the development of an evidentiary record compiled by the parties, which we find is necessary to conduct the analysis that *Bruen* requires.[19] We therefore

despite the plaintiffs' failure to submit those facts below. See *Jones* v. *Bonta*, supra, 725–26 and n.24. The court considered those facts, however, to evaluate the severity of the burden on the second amendment right of home self-defense in order to determine the appropriate level of scrutiny to apply under the second step of the pre-*Bruen* test. See id., 726. Moreover, the defendants did not contest the legislative facts presented by the plaintiffs. Id., 726 n.24. Accordingly, *Jones* v. *Bonta*, supra, 725–26, does not support an appellate court's de novo resolution of disputed factual questions pertinent to *Bruen*'s threshold inquiry of whether the conduct at issue is protected by the second amendment.

[19] See, e.g., *Oregon Firearms Federation* v. *Kotek*, supra, 682 F. Supp. 3d 885, 888–89 (court held weeklong bench trial to resolve "disputed issues of fact involving whether [large capacity magazine restrictions] prohibit[ed] conduct covered by the plain text of the [s]econd [a]mendment, such as whether [large capacity magazines] are in common use today for self-defense by law-abiding citizens with ordinary self-defense needs . . . [and] regarding the historical record that required [the trial court] to assess witness credibility and bias," resulting in culmination of "testimony from twenty witnesses" and "more than 100 exhibits" (citation omitted; internal quotation marks omitted)); see also *United States* v. *Daniels*, 77 F.4th 337, 361 (5th Cir. 2023) (Higginson, J., concurring) (reading *Bruen* as requiring "evidentiary inquiry first . . . conducted in courts of original jurisdiction, subject to party presentation principles, aided by discovery and cross-examination and with authority to solicit expert opinion"), vacated, U.S. , 144 S. Ct. 2707, L. Ed. 2d (2024).

remand these cases to the trial court for reconsideration of the defendant's motions to dismiss and to suppress under *Bruen*.

## II

On remand, the trial court must consider evidence presented by the parties and make factual findings consistent with the standard set forth in *Bruen*.[20] We recognize, however, that *Bruen* left several questions unanswered as to how to properly conduct its text and history test, resulting in some confusion and divergent approaches among courts. See, e.g., *United States* v.

But see *Bevis* v. *Naperville*, 85 F.4th 1175, 1195–96 (7th Cir. 2023) (relying, in part, on findings in *Maryland Shall Issue, Inc.* v. *Moore*, 353 F. Supp. 3d 400 (D. Md. 2018), aff'd sub nom. *Maryland Shall Issue, Inc.* v. *Hogan*, 963 F.3d 356 (4th Cir. 2020), cert. denied, U.S. , 141 S. Ct. 2595, 209 L. Ed. 2d 731 (2021), and *Kolbe* v. *Hogan*, 849 F.3d 114 (2017) (overruled in part by *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022)), cert. denied, 583 U.S. 1007, 138 S. Ct. 469, 199 L. Ed. 2d 374 (2017), as to similarities between AR-15 rifle and M-16 rifle for conclusion that AR-15 is not protected by second amendment, and plaintiffs therefore failed to show likelihood of success on merits for purposes of motion for preliminary injunction), cert. denied sub nom. *Harrel* v. *Raoul*, U.S. , 144 S. Ct. 2491, L. Ed. 2d (2024)); *People* v. *Jimenez*, Docket No. B323963, 2023 WL 8904157, *10 (Cal. App. December 27, 2023) (in relation to defendant's second amendment claim raised for first time on appeal, without mention of evidentiary hearing or any evidence presented by parties as to nature of firearm at issue, court relied on facts as stated in *Kolbe* v. *Hogan*, supra, 144, regarding features of semiautomatic centerfire rifle to support its own conclusion that assault weapons prohibited by California statute were "most useful in military service"), review denied, California Supreme Court, Docket No. S283546 (March 12, 2024).

[20] Additionally, the parties agreed, during oral argument before this court, that they would not be opposed to the participation of amici curiae, including the attorney general, on remand so long as both parties have the opportunity to respond to amici briefs. "[T]he fact, extent and manner of an amicus curiae's participation is entirely within the court's discretion and an amicus curiae may ordinarily be heard only by leave of the court." (Internal quotation marks omitted.) *State* v. *Ross*, 272 Conn. 577, 611, 863 A.2d 654 (2005). Accordingly, we leave it to the trial court to decide whether to also seek input from the attorney general, as an amicus or otherwise, and to accept amici briefs generally to assist with its inquiry on remand.

*Daniels*, 77 F.4th 337, 358 (5th Cir. 2023) (Higginson, J., concurring) (It "has become increasingly apparent . . . that courts, operating in good faith, are struggling at every stage of the *Bruen* inquiry. Those struggles encompass numerous, often dispositive, difficult questions . . . ."), vacated, U.S. , 144 S. Ct. 2707, L. Ed. 2d (2024); *Barris* v. *Stroud Township*, 310 A.3d 175, 189 (Pa. 2024) (acknowledging "various areas of uncertainty in *Bruen*'s method" and "difficulty courts are having in applying it consistently").[21]

Understandably, the parties in the present cases take different positions on what is required at several key points of the *Bruen* test, including what showing is required at the initial plain text inquiry and what makes a historical analogue "sufficiently analogous." These are among the numerous questions about *Bruen*'s methodology that Justice Jackson recently observed remain "unresolved" following the Supreme Court's recent decision in *United States* v. *Rahimi*, supra, 144 S. Ct.

[21] The United States Supreme Court's recent decision in *United States* v. *Rahimi*, supra, 144 S. Ct. 1889, illustrates that even the members of that court are having difficulty agreeing on how to apply *Bruen*. Despite the near unanimous decision in *Rahimi*, there were five separate concurring opinions, in addition to a dissenting opinion. Each separate opinion provided either a somewhat different, or more nuanced, understanding of *Bruen* or a criticism of *Bruen*'s analytical approach. And, despite the court's statement in *Bruen* that its test requires a "straightforward historical inquiry" involving "reasoning by analogy—a commonplace task for any lawyer or judge"; *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 27–28; Justice Gorsuch acknowledged in his concurrence in *Rahimi* that "[d]iscerning what the original meaning of the [c]onstitution requires in this or that case may sometimes be difficult" and that "reasonable minds can disagree [on] whether [a statute] is analogous to past practices originally understood to fall outside the [s]econd [a]mendment's scope . . . ." *United States* v. *Rahimi*, supra, 1909 (Gorsuch, J., concurring). In fact, Justice Thomas, the author of the majority opinion in *Bruen*, was the lone dissenter in *Rahimi* because he believed that the majority improperly applied the *Bruen* analysis. See id., 1941 (Thomas, J., dissenting) (majority's "piecemeal approach [to the historical analysis] is not what the [s]econd [a]mendment or our precedents countenance"). Consequently, it is hardly surprising that other courts have struggled with how to properly apply *Bruen*.

1929 (Jackson, J., concurring). Because the resolution of these legal questions will frame the trial court's analysis of the defendant's motions on remand, we provide some guidance on these points based on *Bruen*, *Heller*, and lower court decisions applying those cases. See *Sullivan* v. *Metro-North Commuter Railroad Co.*, 292 Conn. 150, 164, 971 A.2d 676 (2009) ("[b]ecause of our conclusion that this case must be remanded for a new trial, it is appropriate for us to give guidance on issues that are likely to recur on retrial"); see also *Atkinson* v. *Garland*, supra, 70 F.4th 1023–24 (setting forth questions for trial court to consider on remand to focus analysis under *Bruen*); *Ward* v. *United States*, 318 A.3d 520, 533 (D.C. 2024) ("given the novelty of [*Bruen*'s] methodology . . . identify[ing] key steps and considerations" of that methodology "to limit the possibility of a further, avoidable remand").

In short, we conclude that *Bruen* requires the following showing in second amendment cases.[22] The initial step requires that the defendant, as the party challenging the statutes at issue in the present cases, show, by a preponderance of the evidence, that his conduct falls within the plain text of the second amendment, i.e.,

[22] The defendant notes in his principal brief on appeal that he argued before the trial court "that his actions were protected under the second amendment [to the federal constitution] *and* article first, § 15, of the Connecticut constitution." (Emphasis added.) The only further discussion of the state constitution in his brief is limited to recognizing that "this court has not yet interpreted our state constitution as granting broader rights than the second amendment. Instead, Connecticut has traditionally reviewed challenges under this provision through a balancing test . . . . A balancing test was rejected by *Bruen* as inconsistent with the second amendment." (Citation omitted.) "Because the [defendant has] furnished no reason why we should interpret our state constitutional provision differently than its federal counterpart, we construe the provisions identically for the purposes of this case. Cf. *State* v. *Barnes*, 232 Conn. 740, 744 n.4, 657 A.2d 611 (1995) (refusing to entertain state constitutional claim where party failed to provide independent analysis of state constitutional provision at issue) . . . ." (Citations omitted.) *Benjamin* v. *Bailey*, supra, 234 Conn. 481 n.14.

that the items at issue, first, are "arms," and second, are in common use or typically possessed for lawful purposes like self-defense. See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 32 (noting, in relation to whether second amendment's plain text protected carrying handguns publicly for self-defense, that it was undisputed "that handguns are weapons in common use today for self-defense" (internal quotation marks omitted)); *District of Columbia* v. *Heller*, supra, 554 U.S. 625, 627 (second amendment protects weapons "in common use at the time" and "not . . . those weapons not typically possessed by law-abiding citizens for lawful purposes" (internal quotation marks omitted)). If the defendant makes the necessary threshold showing as to any of the firearms or related components at issue, then the plain text of the second amendment "presumptively protects" the defendant's right to keep and bear that firearm or related component. *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 24. The second step then requires the state to affirmatively prove, by presenting "relevantly similar" historical analogues, that its regulation of the protected "arm" is nonetheless "consistent with the [n]ation's historical tradition of firearm regulation" and is, therefore, constitutional. Id., 24, 29. We address each step in greater detail.

A

As to *Bruen*'s first step, although the court in *Heller* initially stated that "the [s]econd [a]mendment extends, prima facie, to *all instruments that constitute bearable arms*"; (emphasis added) *District of Columbia* v. *Heller*, supra, 554 U.S. 582; the court nonetheless made clear that "the [s]econd [a]mendment right, whatever its nature, extends *only to certain types of weapons*." (Emphasis added.) Id., 623. Thus, *Bruen*'s threshold inquiry—whether the individual's conduct falls within the second amendment's plain text—necessarily

requires a court to consider whether the item that the individual seeks to "keep" or "bear" is an "arm" that is entitled to second amendment protection.

The state concedes that an AR-15 style rifle is an "arm," and disputes neither that the defendant is one of "the people" protected by the second amendment nor that the defendant's conduct in relation to the weapons at issue is covered by the second amendment. See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 31–32 (in relation to first step of *Bruen* test, noting that "[i]t is undisputed that [the] petitioners . . . two ordinary, law-abiding, adult citizens—are part of 'the people' whom the [s]econd [a]mendment protects" and considering "whether the plain text of the [s]econd [a]mendment protects [the petitioners'] proposed course of conduct—carrying handguns publicly for self-defense").[23] Moreover, neither party disputes that the defendant bears the burden at step one to show that the silencers and large capacity magazines that he possessed are "arms."[24] Nevertheless, the parties disagree on (1) whether a firearm component such as

[23] See also *United States* v. *Alaniz*, 69 F.4th 1124, 1128 (9th Cir. 2023) ("*Bruen* step one involves a threshold inquiry" into "whether the challenger is part of the people whom the [s]econd [a]mendment protects, whether the weapon at issue is in common use today for self-defense, and whether the proposed course of conduct falls within the [s]econd [a]mendment" (internal quotation marks omitted)). But see *United States* v. *Pierret-Mercedes*, Docket No. CR 22-430 (ADC), 2024 WL 1672034, *5 (D. Puerto Rico April 18, 2024) ("[t]here is a divergence of opinion in the federal courts on whether any analysis on a person's inclusion in 'the people' is necessary to evaluate constitutional challenges under the [s]econd [a]mendment").

[24] The United States Supreme Court was silent on the issue of who carries the burden of making the threshold showing at *Bruen*'s first step. See *Barris* v. *Stroud Township*, supra, 310 A.3d 187 (although *Bruen* left "no room to doubt that the government shoulders the burden once the history-and-tradition test is triggered, the [United States Supreme] Court said nothing about who bears the initial burden to show the plain text covers [the] individual's conduct" (internal quotation marks omitted)). In the present cases, we conclude, and the parties agree, that the defendant, as the party challenging the statutes at issue, bears the burden to make that threshold showing. That approach is consistent with not only a majority of the courts

a silencer or large capacity magazine is an "arm" within the plain text of the second amendment, (2) whether step one of the *Bruen* test requires the defendant to show *only* that the firearms and firearm components at issue are "arms," or that the defendant also must

that have expressly decided the issue or implicitly assigned the burden to one party at step one; see, e.g., *Oakland Tactical Supply, LLC* v. *Howell Township*, 103 F.4th 1186, 1197–98 (6th Cir. 2024), petition for cert. filed (U.S. August 20, 2024) (No. 24-178); *Maryland Shall Issue, Inc.* v. *Moore*, 86 F.4th 1038, 1042 (4th Cir. 2023), aff'd, Docket Nos. 21-2017 and 21-2053, 2024 WL 3908548 (4th Cir. August 23, 2024); *National Assn. for Gun Rights* v. *Lamont*, 685 F. Supp. 3d 63, 89 (D. Conn. 2023); *Oregon Firearms Federation* v. *Kotek*, supra, 682 F. Supp. 3d 888; *Hartford* v. *Ferguson*, 676 F. Supp. 3d 897, 903–904 (W.D. Wn. 2023); *Delaware State Sportsmen's Assn., Inc.* v. *Delaware Dept. of Safety & Homeland Security*, 664 F. Supp. 3d 584, 591 (D. Del. 2023), aff'd, 108 F.4th 194 (3d Cir. 2024); *Ocean State Tactical, LLC* v. *Rhode Island*, 646 F. Supp. 3d 368, 377 (D.R.I. 2022), aff'd, 95 F.4th 38 (1st Cir. 2024), petition for cert. filed (U.S. August 2, 2024) (No. 24-131); *People* v. *Leedy*, Docket No. C098151, 2024 WL 828255, *3 (Cal. App. February 28, 2024), review denied, California Supreme Court, Docket No. S284349 (May 15, 2024); *People* v. *Smith*, Docket No. 2-22-0340, 2023 WL 8436305, *11 (Ill. App. December 5, 2023); but also with *Bruen*'s suggestion that its test involves burden-shifting. In *Bruen*, "[t]he Supreme Court explicitly states that 'when the [s]econd [a]mendment's plain text covers an individual's conduct . . . the government *must then* justify its regulation . . . .' " (Emphasis in original.) *Oregon Firearms Federation* v. *Kotek*, supra, 888 n.4. "This Supreme Court language strongly suggests that the burden shifts to the government only after the [party challenging the regulation has] shown that the [regulated] conduct is covered by the plain text of the [s]econd [a]mendment." Id.; see also *National Assn. for Gun Rights* v. *Lamont*, supra, 88 ("*Bruen*'s mandate provides that *if* the [s]econd [a]mendment's plain text creates the presumption, *then* the government must justify its regulation" (emphasis in original; internal quotation marks omitted)).

Additionally, we find it unlikely that *Bruen* assigns no burden whatsoever to the challenger. But see *Bevis* v. *Naperville*, 85 F.4th 1175, 1209 (7th Cir. 2023) (Brennan, J., dissenting) ("The government parties . . . incorrectly attempt to place a burden on the [party challenging the regulation] to show that the plain text of '[a]rms' includes the banned firearms. *Bruen* does not say that. Instead, *Bruen* states that when the [s]econd [a]mendment's text covers an individual's conduct, the [c]onstitution presumptively protects it."), cert. denied sub nom. *Harrel* v. *Raoul*, U.S. , 144 S. Ct. 2491, L. Ed. 2d (2024); *Teter* v. *Lopez*, 76 F.4th 938, 948–50 (9th Cir. 2023) (considering threshold inquiry under *Bruen* without assigning step one burden to either party, thus placing no burden on challenger), vacated and reh'g en banc granted, 93 F.4th 1150 (2024).

show that those arms are "in common use" or "typically possessed by law-abiding citizens for lawful purposes" and are not "dangerous and unusual" weapons, and (3) how a court determines whether an arm is "in common use" or "dangerous and unusual." Thus, for purposes of applying the first step of the *Bruen* test in the present cases, we provide some guidance to assist the trial court in resolving these difficult questions. In doing so, we note that, because the defendant raises as applied challenges to the statutes at issue, he must satisfy the threshold inquiry only as to the AR-15 style rifles,[25] silencers, and large capacity magazines that he possessed or sold, rather than as to all weapons prohibited by those statutes. See *State* v. *Long*, 268 Conn. 508, 522 n.21, 847 A.2d 862 (facial challenge means claim that law is "incapable of any valid application" and, unlike as applied challenge, "is not dependent on the facts of a particular case" (internal quotation marks omitted)), cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004). As to each of the statutes at issue, if the defendant fails to satisfy his initial burden, then the statute stands because the regulated conduct falls outside of the second amendment's scope.

1

First, the United States Supreme Court has not yet squarely addressed whether firearm components qualify as "arms" within the meaning of the second amendment's plain text. We nonetheless conclude that *Bruen*

[25] The record does not consistently identify the type of firearms that the defendant was convicted of selling. The arrest warrant application identifies the firearms both as "AR-15 style semi-automatic .223 caliber assault rifle[s]" and "AR-15 assault rifles." During oral argument before this court, counsel for the defendant indicated that the defendant had conceded that the rifles at issue were "assault weapons" as that term is defined in General Statutes § 53-202a. Given that the statutory definition of "assault weapon" encompasses numerous specified semiautomatic firearms, including but not limited to the AR-15, counsel for the defendant also acknowledged that additional fact-finding may be necessary on remand to determine the specific type of rifles at issue for the purposes of applying *Bruen*.

and *Heller* support the idea that, like firearms, not all firearm components are protected by the second amendment; rather, the right to keep and bear arms includes the right to keep and bear components that are necessary to effectively use those arms.

*Heller* defined "arms" as "[w]eapons of offence" that can be used to "cast at or strike another." (Internal quotation marks omitted.) *District of Columbia* v. *Heller*, supra, 554 U.S. 581. Some courts have concluded that certain firearm components are not "arms" because they do not independently meet that definition. See, e.g., *Firearms Regulatory Accountability Coalition, Inc.* v. *Garland*, 691 F. Supp. 3d 1043, 1053 (D.N.D. 2023) ("a stabilizing brace, like a silencer, cannot cause harm on its own and is not a bearable arm which would implicate [s]econd [a]mendment protections"), rev'd on other grounds, 112 F.4th 507 (2024); *United States* v. *Cooperman*, Docket No. 22-CR-146, 2023 WL 4762710, *1 (N.D. Ill. July 26, 2023) ("as a firearm accessory, silencers are not weapons and therefore cannot be 'bearable arms' protected by the [s]econd [a]mendment"). Other courts, however, have applied a test that asks whether the firearm component is "necessary" or "essential" to operate a firearm as intended. See, e.g., *United States* v. *Berger*, Docket No. 5:22-cr-00033, 2024 WL 449247, *17 (E.D. Pa. February 6, 2024) ("if there is a line of demarcation between firearm components entitled to [s]econd [a]mendment protection as bearable '[a]rms,' determining which components are necessary to the operation of the firearm appears to constitute a reasonable limitation on the scope of the [s]econd [a]mendment"); *Capen* v. *Campbell*, Docket No. CV 22-11431-FDS, 2023 WL 8851005, *17 (D. Mass. December 21, 2023) ("some accessories, such as silencers, do not affect the essential operation of a weapon and so do not fall within the scope of the [s]econd [a]mendment's protection"), appeal filed, 2023 WL 8851005 (1st Cir.

January 17, 2024) (No. 24-1061); *Duncan* v. *Bonta*, 695 F. Supp. 3d 1206, 1224 (S.D. Cal. 2023) (magazine falls within meaning of "arms" because it "is an essential component without which a semiautomatic firearm is useless for self-defense"), appeal filed (9th Cir. September 25, 2023) (No. 23-55805); *National Assn. for Gun Rights* v. *Lamont*, supra, 685 F. Supp. 3d 93 (D. Conn. 2023) ("components of firearms that are necessary to their operation, such as ammunition, are covered by the [s]econd [a]mendment");[26] *United States* v. *Saleem*, 659 F. Supp. 3d 683, 697–98 (W.D.N.C. 2023) (silencers are not "necessary to render a firearm functional" or to "safely and effectively" use a firearm), appeal filed (4th Cir. November 15, 2023) (No. 23-4693).[27] The "necessary" or "essential" test finds substantial support in *Heller* and *Bruen* and, therefore, is the one that we are compelled to follow.

[26] In *National Assn. for Gun Rights* v. *Lamont*, supra, 685 F. Supp. 3d 94, the court also phrased the relevant inquiry as whether a large capacity magazine is "a modern instrument" that merely "*facilitate*[*s*] armed self-defense." (Emphasis added; internal quotation marks omitted.); see also *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 28 ("general definition [of 'arms'] covers modern instruments that facilitate armed self-defense"). We are not persuaded that this is the proper inquiry because "it would seemingly open the door to significantly broader [s]econd [a]mendment protections for firearm components"; *United States* v. *Berger*, supra, 2024 WL 449247, *17 n.19; and perhaps even other unrelated items, than the court in *Bruen* likely intended by using that phrase in passing. See id. (interpreting "facilitate" to mean "[t]o make the occurrence of (something) easier; to render less difficult" (internal quotation marks omitted)).

[27] See also *Oregon Firearms Federation* v. *Kotek*, supra, 682 F. Supp. 3d 911–13 (although "courts have found that the [s]econd [a]mendment protects ancillary rights necessary to the realization of the core right to possess a firearm for self-defense," and that "magazines are often necessary to render certain firearms operable," large capacity magazines specifically are "never necessary to render firearms operable" and, therefore, "are not bearable arms" (internal quotation marks omitted)); *Hanson* v. *District of Columbia*, 671 F. Supp. 3d 1, 10 (D.D.C. 2023) (following persuasive reasoning of United States Court of Appeals for Third Circuit to conclude that large capacity magazines "are arms under the [s]econd [a]mendment because magazines *feed* ammunition into certain guns, and ammunition is necessary for such a gun to function as intended" (emphasis in original; internal quotation marks omitted)), appeal filed (D.C. Cir. May 17, 2023) (No. 23-7061).

In *Heller*, the court held that the District of Columbia's "requirement (as applied to [the] respondent's handgun) that firearms in the home be rendered and kept inoperable at all times" was unconstitutional because it made "it impossible for citizens to use [those firearms] for the core lawful purpose of self-defense . . . ." *District of Columbia* v. *Heller*, supra, 554 U.S. 630. In other words, *Heller* recognized that the right to keep and bear arms includes a right to use those arms and to keep them in operable condition ready for such use. See id., 617–18 (quoting T. Cooley, Treatise on Constitutional Limitations (1868) p. 271, as example of post-Civil War commentary interpreting second amendment right, for proposition that "to bear arms implies something more than the mere keeping; it implies the learning to handle and use them in a way that makes those who keep them ready for their efficient use" (internal quotation marks omitted)). Similarly, in *Bruen*, the court confirmed that the "[s]econd [a]mendment protects the possession *and use* of weapons . . . ." (Emphasis added.) *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 21. Indeed, "without this right to use the guaranty would have hardly been worth the paper it consumed." (Internal quotation marks omitted.) *District of Columbia* v. *Heller*, supra, 609 (quoting J. Tiffany, A Treatise on the Unconstitutionality of American Slavery (1849) pp. 117–18, to illustrate founding era public understanding of second amendment right). It follows, therefore, that the second amendment, in addition to protecting arms in common use today for lawful purposes like self-defense, also must protect components that are necessary or essential to operate such an arm as intended. See *United States* v. *Miller*, 307 U.S. 174, 180, 59 S. Ct. 816, 83 L. Ed. 1206 (1939) (in New England in 1600s, "[t]he possession of arms also implied the possession of ammunition, and the authorities paid quite as much

attention to the latter as to the former" (internal quotation marks omitted)).

Consequently, on remand, the defendant, as a predicate to his constitutional challenges to §§ 53a-211 and 53-202w (c) (2), must prove that the silencers and large capacity magazines, even if they are not independently "[w]eapons of offence" that can be used to "cast at or strike another"; (internal quotation marks omitted) *District of Columbia* v. *Heller*, supra, 554 U.S. 581; nonetheless fall within the term "arms" because they are necessary or essential to effectively operate a constitutionally protected firearm as intended. If the defendant fails to demonstrate that the silencers and large capacity magazines are necessary or essential to the effective use of a protected arm, the court's analysis as to those instruments ends there and the defendant's constitutional challenge fails. If those firearm components do meet that criterion, however, then the court, for the reasons set forth in part II A 2 of this opinion, must proceed to consider whether the defendant has shown that the silencers and large capacity magazines, as well as the AR-15 style rifles, are in common use within the meaning of *Heller* and *Bruen*.

2

The defendant does not dispute that he has the burden of proving that his conduct is covered by the second amendment's plain text. The parties do not agree, however, as to whether the defendant must show only that the firearms and firearm components at issue are "arms," or whether he instead bears the additional burden of demonstrating that they are arms in common use or typically possessed for lawful purposes like self-defense. In other words, "[d]oes the challenging party have the burden at step one to show a regulated weapon is in common use for lawful purposes? Or does the government have the burden at step two to prove a

negative—the regulated weapon is not in common use for lawful purposes?" (Emphasis omitted.) *People* v. *Leedy*, Docket No. C098151, 2024 WL 828255, *2 (Cal. App. February 28, 2024), review denied, California Supreme Court, Docket No. S284349 (May 15, 2024). As the United States Court of Appeals for the Seventh Circuit has recognized, "[t]here is no consensus" among courts on this issue. *Bevis* v. *Naperville*, 85 F.4th 1175, 1198 (7th Cir. 2023), cert. denied sub nom. *Harrel* v. *Raoul*, U.S. , 144 S. Ct. 2491, L. Ed. 2d (2024).

In the present cases, the state, acknowledging that courts take different positions on whether the common use and dangerous and unusual analyses inform the threshold plain text inquiry or the historical inquiry under *Bruen*, addresses those issues at both steps of the analysis in its appellate brief. The defendant asserts, however, that he does not have a burden to show that the items at issue are commonly used for self-defense, typically possessed by law-abiding citizens, or not "dangerous and unusual." According to the defendant, his burden at step one is merely to "assert that his conduct falls within the plain text of the second amendment," meaning, in the context of these cases, that the items at issue are "arms" or are "necessary" or "essential" to the functioning of a protected "arm." He argues that, if he satisfies this threshold, the burden then shifts to the state to show that his conduct falls outside of the second amendment's scope. At oral argument before this court, the defendant's counsel further argued that the defendant has the burden at *Bruen*'s first step to prove in "the broadest sense" that the items at issue fall within the scope of the second amendment, and that the state has the burden to justify any exemptions to second amendment protection.[28] For the following

[28] The defendant's counsel also suggested during oral argument before this court, however, that the defendant might have the burden of proving that the items are both commonly owned in the United States and "used in a lawful manner."

reasons, we conclude that "common use," along with the related "typical possession" and "dangerous and unusual" considerations, are part of *Bruen*'s first step, where the party challenging a firearm statute bears the burden of proof.

One reason that courts frequently cite for placing the common use inquiry at step one is that the United States Supreme Court seemingly did so in *Bruen*. Specifically, the Supreme Court began its analysis in *Bruen* by stating: "It is undisputed that [the] petitioners . . . two ordinary, law-abiding, adult citizens—are part of 'the people' whom the [s]econd [a]mendment protects. . . . *Nor does any party dispute that handguns are weapons 'in common use' today for self-defense*. . . . We therefore turn to whether the plain text of the [s]econd [a]mendment protects [the petitioners'] proposed course of conduct—carrying handguns publicly for self-defense." (Citations omitted; emphasis added.) *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 31–32. Several courts view that language as a command from the Supreme Court to consider common use in relation to whether the second amendment protects the conduct at issue, rather than in relation to whether the regulation is consistent with this country's history and tradition of firearms regulation. See, e.g., *United States* v. *Teston*, Docket No. CR-22-1400 JB, 2024 WL 1621512, *19, 21 (D.N.M. April 15, 2024) ("most federal cases post-*Bruen* have taken this language as a command that [the] 'in common use' analysis should be undertaken as part of a court's step-one, plain-text analysis under *Bruen*," and District Court would "not presume that the Supreme Court's approach to the *Bruen* analysis . . . [was] careless or casual").[29] Given

[29] See also *United States* v. *Berger*, supra, 2024 WL 449247, *3, 6 ("the [United States Supreme] Court seemingly included the common-use issue at step one of its clarified [s]econd [a]mendment analysis," and there was "no reason to believe that this happened accidentally"); *National Assn. for Gun Rights* v. *Lamont*, supra, 685 F. Supp. 3d 88 (clear that challengers had burden to make initial showing because Supreme Court "considered

that *Bruen* also referenced the popularity of handguns for self-defense in relation to the second step of its analysis, however, the court's passing reference to " 'common use' " in relation to the plain text inquiry is not dispositive. *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 32; see also id., 47 ("colonial laws prohibit[ing] the carrying of handguns because they were considered dangerous and unusual weapons in the 1690s . . . provide no justification for laws restricting the public carry of weapons that are unquestionably in common use today") (internal quotation marks omitted)).

Nevertheless, in *Heller*, the Supreme Court used the phrase "in common use at the time" to define "the sorts of weapons protected" by the second amendment. (Internal quotation marks omitted.) *District of Columbia* v. *Heller*, supra, 554 U.S. 627. Indeed, in both *Heller* and *Bruen*, the court explained that not all "[w]eapons of offence" that can be used "to cast at or strike another"; (internal quotation marks omitted) id., 581; constitute protected "arms." Although the court in *Heller* initially stated that "the [s]econd [a]mendment extends, prima facie, to *all instruments that constitute bearable arms*"; (emphasis added) id., 582; the court, in rejecting Justice Stevens' argument in his dissenting opinion that the court's interpretation of the second amendment in *Heller* was inconsistent with the court's prior decision in *United States* v. *Miller*, supra, 307 U.S. 174, also stated that "*Miller* stands only for the

whether handguns were arms that were in common use today for self-defense and whether the plain text of the [s]econd [a]mendment covered the petitioner's proposed course of conduct of carrying handguns publicly for self-defense before shifting the burden to [the] respondents to justify the regulation" (emphasis omitted; internal quotation marks omitted)); *People* v. *Leedy*, supra, 2024 WL 828255, *3 ("the *Bruen* court covered common use when discussing the applicability of the [s]econd [a]mendment's plain text, not when discussing the historical tradition of firearm regulation").

proposition that the [s]econd [a]mendment right, whatever its nature, extends *only to certain types of weapons*." (Emphasis added.) *District of Columbia* v. *Heller*, supra, 623. In *Miller*, the Supreme Court upheld a federal prohibition on transporting an unregistered, short-barreled shotgun in interstate commerce, reasoning that, "[i]n the absence of any evidence tending to show that possession or use of a shotgun having a barrel of less than eighteen inches in length at this time has some reasonable relationship to the preservation or efficiency of a well regulated militia, we cannot say that the [s]econd [a]mendment guarantees the right to keep and bear such an instrument. Certainly, it is not within judicial notice that this weapon is any part of the ordinary military equipment or that its use could contribute to the common defense." (Internal quotation marks omitted.) *United States* v. *Miller*, supra, 175, 178.

In *Heller*, the court rejected Justice Stevens' argument in his dissenting opinion that *Miller*'s " 'ordinary military equipment' " language meant that "only those weapons useful in warfare are protected. That would be a startling reading of the opinion, since it would mean that . . . restrictions on machineguns . . . might be unconstitutional, machineguns being useful in warfare in 1939." *District of Columbia* v. *Heller*, supra, 554 U.S. 624. Instead, the court stated that "*Miller*'s ordinary military equipment language must be read in tandem with what comes after: [O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind in common use at the time. . . . The traditional militia was formed from a pool of men bringing arms in common use at the time for lawful purposes like self-defense. In the colonial and revolutionary war era, [small-arms] weapons used by militiamen and weapons used in defense of person and home were one and the same. . . . We therefore read *Miller* to say only that

*the* [*s*]*econd* [*a*]*mendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns. That accords with the historical understanding of the scope of the right* . . . ." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 624–25. In other words, the court concluded that, under *Miller*, the second amendment protects "the sorts of weapons . . . in common use at the time" and explained that this is an "important limitation on the right to keep and carry arms . . . that . . . is fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons." (Citation omitted; internal quotation marks omitted.) Id., 627. In *Bruen*, the court reiterated *Heller*'s point that "the [s]econd [a]mendment protects the possession and use of weapons that are in common use at the time." (Internal quotation marks omitted.) *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 21.

Further, the court in *Heller* strongly suggested, consistent with the common use limitation, that weapons that are "most useful in military service—M-16 rifles[30] and the like—may be banned"; (footnote added) *District of Columbia* v. *Heller*, supra, 554 U.S. 627; without violating the second amendment. See id. (immediately following discussion of common use limitation, court rejected argument "that if weapons that are most useful in military service—M-16 rifles and the like—may be banned, then the [s]econd [a]mendment right is completely detached from the prefatory clause"). As the

[30] The United States Supreme Court has described the M-16 as "a selective fire rifle that allows the operator, by rotating a selector switch, to choose semiautomatic or automatic fire." *Staples* v. *United States*, 511 U.S. 600, 603, 114 S. Ct. 1793, 128 L. Ed. 2d 608 (1994). It is a "standard issue . . . military service rifle used by the United States Army and other nations' armed forces . . . ." *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 70, 202 A.3d 262 (2019), cert. denied sub nom. *Remington Arms Co., LLC* v. *Soto*, U.S. , 140 S. Ct. 513, 205 L. Ed. 2d 317 (2019).

court reiterated, "the conception of the militia at the time of the [s]econd [a]mendment's ratification was the body of all citizens capable of military service, who would bring *the sorts of lawful weapons that they possessed at home* to militia duty." (Emphasis added.) Id. Although recognizing that, today, "a militia, to be as effective as militias in the 18th century, [may] require sophisticated arms that are highly unusual in society at large," the court declined to alter its interpretation of the second amendment right to account for "modern developments [that] have limited the degree of fit between the prefatory clause and the protected right . . . ." Id., 627–28.

Consequently, the common use analysis informs whether the conduct at issue is covered by the second amendment's plain text and asks whether an instrument, even if it is an "arm," is the type of arm that is protected by the second amendment—that is, as *Bruen* and *Heller* instruct, an arm that is commonly used or typically possessed for lawful purposes like self-defense—or is instead a dangerous and unusual weapon that falls outside of the second amendment's scope. See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 21; *District of Columbia* v. *Heller*, supra, 554 U.S. 624–27. In other words, because *Bruen*'s threshold inquiry as to whether the plain text protects the conduct at issue necessarily requires courts to interpret the meaning of "arms" in the second amendment, and because *Bruen* and *Heller* make clear that the second amendment protects arms "in common use at the time"; (internal quotation marks omitted) *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 21; *District of Columbia* v. *Heller*, supra, 624; it is sensible to consider common use at *Bruen*'s first step. See, e.g., *United States* v. *Lane*, 689 F. Supp. 3d 232, 252 n.22 (E.D. Va. 2023) ("[b]ecause determining which 'arms' the amendment covers is a textual matter," and *Heller*

"explained that the 'in common use' label limits 'the sorts of weapons protected' " by the [s]econd [amendment], the " 'common use' " and " 'dangerous and unusual' " issues are "part of the textual analysis at *Bruen*'s step one"), appeal filed (4th Cir. February 7, 2024) (No. 24-4083).[31]

Our conclusion finds further support in *Heller*'s apparent exclusion of machine guns and short-barreled shotguns from the class of constitutionally protected arms. In stating that it would be "startling" if *Miller* stood for the proposition that "only those weapons useful in warfare are protected . . . since it would mean that . . . restrictions on machineguns . . . might be unconstitutional, machineguns being useful in warfare in 1939," the court suggested that restrictions on machine guns are constitutional. *District of Columbia* v. *Heller*, supra, 554 U.S. 624. The court further explained, "*Miller*'s ordinary military equipment language must be read in tandem with what comes after: [O]rdinarily when called for [militia] service [able-bodied] men were expected to appear bearing arms supplied by themselves and of the kind *in common use at the time*. . . . We therefore read *Miller* to say only that *the* [*s*]*econd* [*a*]*mendment does not protect those*

[31] See also *Delaware State Sportsmen's Assn., Inc.* v. *Delaware Dept. of Safety and Homeland Security*, 664 F. Supp. 3d 584, 591 (D. Del. 2023) (textual analysis at step one of *Bruen* is driven by several key limitations to scope of second amendment coverage, including that second amendment extends only to bearable arms in common use today for self-defense and does not extend to dangerous and unusual weapons), aff'd, 108 F.4th 194 (3d Cir. 2024); *People* v. *Leedy*, supra, 2024 WL 828255, *3 ("consistent with *Bruen*, *Heller* suggests that common use is critical to understanding the types of weapons considered to be bearable '[a]rms,' a textual issue"); see also *Bevis* v. *Naperville*, supra, 85 F.4th 1193, 1198 (although assuming, without deciding, that "common use" belongs at step two, considering at first step of *Bruen* analysis "what exactly falls within the scope of 'bearable' [a]rms" that the court in *Heller* indicated were, prima facie, "protected by the second amendment" and concluding that "the definition of 'bearable [a]rms' extends only to weapons in common use for a lawful purpose").

*weapons not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns.*" (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 624–25. The court thus suggested that certain weapons, such as machine guns and short-barreled shotguns, are categorically excluded from the second amendment right and that the state therefore may regulate such weapons, solely on the ground that they are not in common use or are not typically possessed by law-abiding citizens for lawful purposes, rather than on the ground that there are relevantly similar historical analogues restricting the possession of those weapons. Such reasoning supports our conclusion that the common use analysis informs the scope of the second amendment right.

Moreover, our conclusion is consistent with that of a majority of other courts that have decided the issue.[32]

[32] See, e.g., *United States* v. *Veasley*, 98 F.4th 906, 910 (8th Cir. 2024), petition for cert. filed (U.S. July 12, 2024) (No. 24-5089); *Antonyuk* v. *Chiumento*, 89 F.4th 271, 304–305 (2d Cir. 2023), vacated sub nom. *Antonyuk* v. *James*, Docket No. 23-910, 2024 WL 3259671 (U.S. July 2, 2024); *United States* v. *Alaniz*, 69 F.4th 1124, 1128 (9th Cir. 2023); *United States* v. *Rahimi*, 61 F.4th 443, 454 (5th Cir. 2023), rev'd, U.S. , 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024); *United States* v. *Lightner*, Docket No. 8:24-cr-21-WFJ-CPT, 2024 WL 2882237, *2 (M.D. Fla. June 7, 2024); *United States* v. *Mitchell*, Docket No. 1:24-cr-9, 2024 WL 2272275, *3 (N.D. Ohio May 20, 2024); *United States* v. *Teston*, Docket No. CR 22-1400 JB, 2024 WL 1621512, *18 (D.N.M. April 15, 2024); *Hanson* v. *District of Columbia*, 671 F. Supp. 3d 1, 10–11 (D.D.C. 2023), appeal filed (D.C. Cir. May 17, 2023) (No. 23-7061); *Delaware State Sportsmen's Assn., Inc.* v. *Delaware Dept. of Safety & Homeland Security*, 664 F. Supp. 3d 584, 591 (D. Del. 2023), aff'd, 108 F.4th 194 (3d Cir. 2024); *United States* v. *Saleem*, supra, 659 F. Supp. 3d 690; *People* v. *Leedy*, supra, 2024 WL 828255, *2.

At least one court, however, has concluded that the issue of whether a weapon is in common use or is dangerous and unusual is properly considered at step two, at which the state bears the burden of proof. See *Teter* v. *Lopez*, 76 F.4th 938, 949–50 (9th Cir. 2023) ("*Heller* itself stated that the relevance of a weapon's dangerous and unusual character lies in the historical tradition of prohibiting the carrying of dangerous and unusual weapons. . . . It did not say that dangerous and unusual weapons are not arms. Thus, whether butterfly knives are dangerous and unusual is a contention as to which Hawaii bears the burden of proof in the second prong of the *Bruen* analysis."

Although not all of those courts decided which party bears the burden of proof on the common use issue,[33] a majority of courts that have considered common use at the first step have placed the burden of proof on that issue on the party challenging the statute at issue.[34]

It may be argued that *Bruen*'s first step is purely a textual inquiry and that the common use limitation, which is drawn from history and is not expressly contained in the amendment's plain text, has no place in

(Citation omitted; emphasis omitted; internal quotation marks omitted.)), vacated and reh'g en banc granted, 93 F.4th 1150 (9th Cir. 2024).

Other courts have declined to decide the issue of the placement of the "common use" inquiry altogether. For instance, in *Bevis*, the Seventh Circuit defined the step one inquiry as whether the weapons at issue are "[a]rms that individual persons are entitled to keep and bear," which, it concluded, "extend[ed] only to weapons in common use for a lawful purpose." (Internal quotation marks omitted.) *Bevis* v. *Naperville*, supra, 85 F.4th 1192, 1193. After resolving the appeal at step one of the analysis, however, the court, turning to the second step "for the sake of completeness," acknowledged the lack of consensus on the placement of the "common use" factor and, despite its initial placement of that factor at the first step, "assume[d] (without deciding the question) that this is a step two inquiry, where the state bears the burden of proof." Id., 1197–98.

[33] See, e.g., *United States* v. *Alaniz*, 69 F.4th 1124, 1129 (9th Cir. 2023) (court "assume[d], without deciding, that step one of the *Bruen* test [was] met"); *United States* v. *Rahimi*, 61 F.4th 443, 454 (5th Cir. 2023) (noting that it was undisputed that pistol and rifle were in common use), rev'd on other grounds, U.S. , 144 S. Ct. 1889, 219 L. Ed. 2d 351 (2024); *Hanson* v. *District of Columbia*, 671 F. Supp. 3d 1, 10–16 (D.D.C. 2023) (assessing whether second amendment protects large capacity magazines, including whether they are "in common use," without assigning burden of proof on threshold inquiry to either party), appeal filed (D.C. Cir. May 17, 2023) (No. 23-7061).

[34] See, e.g., *Vermont Federation of Sportsmen's Clubs* v. *Birmingham*, Docket No. 2:23-cv-710, 2024 WL 3466482, *5 (D. Vt. July 18, 2024), appeal filed, 2024 WL 3466482 (2d Cir. July 31, 2024) (No. 24-2026); *United States* v. *Myers*, Docket No. 3:22-CR-00067-ART-CSD-1, 2024 WL 2924081, *4 (D. Nev. June 10, 2024); *National Assn. for Gun Rights* v. *Lamont*, supra, 685 F. Supp. 3d 88 (D. Conn. 2023); *Delaware State Sportsmen's Assn., Inc.* v. *Delaware Dept. of Safety & Homeland Security*, 664 F. Supp. 3d 584, 591 (D. Del. 2023), aff'd, 108 F.4th 194 (3d Cir. 2024); *Oregon Firearms Federation, Inc.* v. *Brown*, 644 F. Supp. 3d 782, 799 (D. Or. 2022), appeal dismissed, Docket No. 22-36011, 2022 WL 18956023 (9th Cir. December 12, 2022); *People* v. *Leedy*, supra, 2024 WL 828255, *3.

that inquiry but, rather, is properly addressed as part of *Bruen*'s second step.[35] For instance, in a dissenting opinion in *Bevis* v. *Naperville*, supra, 85 F.4th 1175, Circuit Judge Brennan asserted that common use is properly considered at step two because "the broader definition of [a]rms . . . should be read as [a]rms—not [a]rms in common use at the time. . . . The [Supreme] Court did not say that dangerous and unusual weapons are not *arms*. . . . [I]mporting the phrase in common use to assess whether firearms are [a]rms . . . improperly restricts the constitutional right. . . . [I]n common use is a sufficient condition for finding arms protected under the history and tradition test in *Bruen*, not a necessary condition to find them [a]rms." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 1209 (Brennan, J., dissenting). Judge Brennan further reasoned that the common use limitation is drawn "not . . . from a historical understanding of what an [a]rm is" but instead from "the historical tradition of prohibiting the carrying of dangerous and unusual weapons." (Internal quotation marks omitted.) Id.

We acknowledge that there is a logical argument to be made that the common use limitation is part of the state's burden at step two. Until the United States Supreme Court clarifies the *Bruen* test, however, our responsibility as a lower court is to apply the Supreme Court's precedent as we are best able to understand it. Our reading of that precedent dictates that the second amendment's "plain text" must not be considered in a vacuum. As the Supreme Court stated in *Bruen*, "the [s]econd [a]mendment's definition of 'arms' is fixed according to its historical understanding . . . ." *New*

[35] See, e.g., *United States* v. *Teston*, Docket No. CR 22-1400 JB, 2024 WL 1621512, *20 (D.N.M. April 15, 2024) (acknowledging criticisms that "the 'in common use' question is, itself, rooted in historical inquiry—which makes step two of the *Bruen* analysis a better fit for its consideration").

*York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 28. This is consistent with the idea "that the [s]econd [a]mendment . . . codified a pre-existing right" and that its "very text . . . implicitly recognizes the pre-existence of the right and declares only that it 'shall not be infringed.' " (Emphasis omitted.) *District of Columbia* v. *Heller*, supra, 554 U.S. 592; see also id., 599, 605 ("the [s]econd [a]mendment was not intended to lay down a novel principl[e] but rather codified a right inherited from our English ancestors" or, in other words, "codified venerable, widely understood liberties" (internal quotation marks omitted)). Consequently, the second amendment is "enshrined with the scope [it was] understood to have when the people adopted [it]." (Internal quotation marks omitted.) *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 34; *District of Columbia* v. *Heller*, supra, 634–35. Therefore, although history has a principal role in *Bruen*'s second step, the Supreme Court instructs that "the historical understanding of the scope of the right"; *District of Columbia* v. *Heller*, supra, 625; also informs the meaning of the second amendment's text. That historical understanding, as the Supreme Court explained, was that the right was not an unlimited one "to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose"; *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 21; but, rather, that "the sorts of weapons protected were those in common use at the time"; id., 81 (Kavanaugh, J., concurring); and not those that were "dangerous and unusual"; (internal quotation marks omitted) id., 21; nor those "not typically possessed by law-abiding citizens for lawful purposes, such as short-barreled shotguns." *District of Columbia* v. *Heller*, supra, 625.

Last, we also conclude that the common use analysis at *Bruen*'s first step incorporates both the "typical possession" and "dangerous and unusual" considerations.

In *Heller*, the court used those three phrases together to define the limits on the types of "arms" to which the second amendment extends. See id., 624–27. Specifically, the court equated "in common use" with "typically possessed" when it interpreted *Miller*'s discussion of the types of weapons that citizens were historically expected to bear when they appeared for militia service—namely, those "of the kind in common use at the time"—as saying "only that the [s]econd [a]mendment does not protect those weapons not typically possessed by law-abiding citizens for lawful purposes . . . ." (Internal quotation marks omitted.) Id., 624–25. The court confirmed that its interpretation of *Miller* was in "[accord] with the historical understanding of the scope of the right," which was that it "was not a right to keep and carry any weapon whatsoever in any manner whatsoever and for whatever purpose" but, rather, was limited to weapons "in common use at the time," which, in turn, the court found "fairly supported by the historical tradition of prohibiting the carrying of dangerous and unusual weapons." (Internal quotation marks omitted.) Id., 626–27. Further, in its summary of that language in *Bruen*, the court juxtaposed weapons "in common use at the time" with "dangerous and unusual" weapons, suggesting that those phrases are opposite sides of the same coin: "[T]he [s]econd [a]mendment protects only the carrying of weapons that are those in common use at the time, as opposed to those that are highly unusual in society at large. . . . Whatever the likelihood that handguns were considered dangerous and unusual during the colonial period, they are indisputably in common use for self-defense today." (Citation omitted; internal quotation marks omitted.) *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 47. Thus, *Bruen* and *Heller* suggest that the "common use," "typical possession," and "dangerous and unusual" issues are inextricably intertwined

when assessing whether a weapon is protected under the second amendment.[36] For that reason, we view all three of those phrases as bearing upon the common use inquiry at *Bruen*'s first step. Indeed, the considerations that other courts find relevant to whether a weapon is in common use often overlap with those that courts find relevant to whether a weapon is typically possessed by law-abiding citizens for lawful purposes or is dangerous and unusual. See, e.g., *National Assn. for Gun Rights* v. *Lamont*, supra, 685 F. Supp. 3d 85, 87 ("court [read] *Bruen* to abrogate *Cuomo* to the extent it treated common use" and "typical possession" as distinct inquiries, and noting that "there is a degree of overlap between the analyses for 'common use,' 'typical possession,' and 'dangerous and unusual' in the context of the [s]econd [a]mendment")).[37]

Therefore, we conclude that, on remand, the defendant bears the burden in the first instance to establish

[36] We acknowledge that *Heller* and *Bruen* do not explicitly state that the second amendment does not protect dangerous and unusual weapons but, rather, recognize only that there is a "historical tradition of prohibiting the carrying" of such weapons. *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 21; *District of Columbia* v. *Heller*, supra, 554 U.S. 627. The Supreme Court, however, references that historical tradition only in an effort to define the types of weapons to which the second amendment extends. See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 21; *District of Columbia* v. *Heller*, supra, 625. Accordingly, since before *Bruen*, courts, including our Supreme Court, have interpreted the "dangerous and unusual" language in *Heller* as creating an exception to second amendment protection for dangerous and unusual weapons. See *State* v. *DeCiccio*, supra, 315 Conn. 110 (*Heller* "held that [the second amendment] does protect the possession of weapons . . . typically possessed by law-abiding citizens for lawful purposes . . . and does not protect dangerous and unusual weapons" (citation omitted; internal quotation marks omitted)); *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 133, 202 A.3d 262 (2019) (noting in passing that *Heller* indicated that M-16s and related military grade weaponry can be banned because second amendment's protection does not extend to dangerous and unusual weapons), cert. denied sub nom. *Remington Arms Co., LLC* v. *Soto*, U.S. , 140 S. Ct. 513, 205 L. Ed. 2d 317 (2019).

[37] See also *Oregon Firearms Federation* v. *Kotek*, supra, 682 F. Supp. 3d 922 (determining whether firearm is " 'dangerous and unusual' " involves

that the items at issue are arms in common use or typically possessed for lawful purposes like self-defense and, by implication, are not dangerous and unusual weapons. If he satisfies that burden, the state can then present evidence that the weapons are not, in fact, in common use or typically possessed for lawful purposes like self-defense, or are dangerous and unusual, and thus fall outside of the second amendment's scope. To be clear, the initial burden is on the party challenging the statute at issue to demonstrate that the second amendment presumptively protects the regulated weapon, and not on the state to prove that the weapon is not protected. In weighing the evidence presented by the parties, the court must decide whether the defendant has proved by a preponderance of evidence that the item at issue is (1) in fact an "arm" or an accessory that is necessary or essential to render a protected arm operable and (2) in common use or typically possessed for lawful purposes like self-defense.

3

Having concluded that the defendant bears the burden of proof on the common use issue, we now turn to what that inquiry might entail. The defendant argues that the relevant inquiry is only whether the arm is "typically possessed for lawful purposes," rather than whether it is commonly used—i.e., fired—for a lawful purpose. In other words, the defendant asserts that he

inquiry into whether it is "commonly possessed by law-abiding citizens for lawful purposes"); id. (considering "objective evidence regarding the ordinary self-defense needs of law-abiding citizens" in relation to both "dangerous and unusual" and "common use" inquiries); *Hanson* v. *District of Columbia*, 671 F. Supp. 3d 1, 10, 11, 16 (D.D.C. 2023) (using phrase "typically possessed by law-abiding citizens for lawful purposes" interchangeably with "commonly used for self-defense"), appeal filed (D.C. Cir. May 17, 2023) (No. 23-7061); *Delaware State Sportsmen's Assn., Inc.* v. *Delaware Dept. of Safety & Homeland Security*, 664 F. Supp. 3d 584, 591 (D. Del. 2023) ("[w]hether a weapon is 'in common use' depends on whether it is dangerous and unusual"), aff'd, 108 F.4th 194 (3d Cir. 2024).

can satisfy his burden simply by presenting statistical evidence that the firearms and firearm components at issue are commonly owned in this country. The defendant's counsel suggested at oral argument before this court, however, that the defendant may have to show that those items, in addition to being commonly owned, are "used in a lawful manner." Although, in his principal appellate brief, the defendant does not clearly define the "lawful purpose" for which he asserts AR-15 style rifles and large capacity magazines are commonly used or owned,[38] he argues in his reply brief that those items are commonly used for self-defense. The defendant also asserts for the first time in his reply brief that "[h]unting rifles with semiautomatic action are ubiquitous," suggesting that hunting may be another lawful purpose for which semiautomatic rifles like an AR-15 style rifle are commonly used. As to silencers, the defendant argues that they "have legitimate uses in hunting, target shooting, and self-defense" because they protect the user's hearing. The defendant further argues, emphasizing the "conjunctive" nature of the "dangerous and unusual" inquiry, that a weapon cannot be considered "dangerous and unusual," and therefore outside of the second amendment's scope, if it is commonly owned. He also suggests, however, that it may be relevant to whether a weapon is dangerous and unusual to consider its "inherent risk" and use in crime.

The state asserts, on the other hand, that we should adopt the formulation of the common use inquiry applied in *National Assn. for Gun Rights* v. *Lamont*, supra, 685 F. Supp. 3d 63. In that case, the court asked whether the weapon at issue was commonly used for

[38] For instance, the defendant asserts generally that both large capacity magazines and "[t]he semiautomatic rifles Connecticut defines as assault weapons are typically possessed by law-abiding citizens for lawful purposes . . . ." He also notes in passing that, although "[a] self-defense situation is . . . rare," large capacity magazines "are used for lawful self-defense purposes."

self-defense *and* typically possessed for that purpose or, instead, was dangerous *or* unusual, meaning that the weapon was used in a way that made it particularly dangerous or it was unusual for the weapon to be possessed for self-defense. See id., 90–91. Thus, according to the state, a weapon is protected by the second amendment only if it is both commonly used and typically possessed *for self-defense* and is therefore neither unusual nor dangerous.

a

Initially, we seek to clarify the "lawful purpose" for which the items at issue must be "in common use." In *Heller*, the Supreme Court emphasized that individual self-defense is the "core lawful purpose" protected by the second amendment; *District of Columbia* v. *Heller*, supra, 554 U.S. 630; as well as "the *central component*" of the second amendment right; (emphasis in original) id., 599; a point that the court later reiterated in *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 29. Nevertheless, the Supreme Court also stated in *Heller* that the second amendment protects weapons that are "typically possessed by law-abiding citizens for lawful purposes" generally. *District of Columbia* v. *Heller*, supra, 625.[39] Thus, we conclude that self-defense,

[39] Although *Bruen* focuses on self-defense and does not use the same "lawful purposes" language as *Heller*; see *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 32, 47 (undisputed that handguns were in common use for self-defense); we do not view *Bruen* as holding that self-defense is the sole lawful purpose protected by the second amendment. In *Bruen*, the court had no reason to discuss other lawful purposes because the parties argued that their proposed conduct involved self-defense. Id., 32. Moreover, the absence of such discussion from the court's opinion does not mean that *Heller*'s "lawful purposes" language is no longer relevant. Indeed, in *Bruen*, the court indicated that it was clarifying and applying *Heller*, not overruling it. See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 31 ("[h]aving made the constitutional standard endorsed in *Heller* more explicit, we now apply that standard to New York's proper-cause requirement").

although the core lawful purpose protected by the second amendment, is not necessarily the only lawful purpose that receives such protection.[40]

Hunting and target shooting, the additional lawful purposes suggested by the defendant, might qualify as other protected lawful purposes. Indeed, the Supreme Court explained that "[t]he prefatory clause does not suggest that preserving the militia was the only reason Americans valued the ancient right; most undoubtedly thought it even more important *for self-defense and hunting*." (Emphasis added.) Id., 599; see also *Heller* v. *District of Columbia*, 670 F.3d 1244, 1260 (D.C. Cir. 2011) (interpreting *Heller*'s statement that individual self-defense is second amendment's "central component" as recognizing that "the [s]econd [a]mendment protects the right to keep and bear arms for other lawful purposes, such as hunting" (internal quotation marks omitted)). Furthermore, that target shooting for the purpose of training also may be a protected lawful purpose finds support in the court's conclusion that "the adjective 'well-regulated' [in the second amendment] implies . . . the imposition of proper discipline and training." *District of Columbia* v. *Heller*, supra, 554 U.S.

[40] But see, e.g., *Bevis* v. *Naperville*, supra, 85 F.4th 1192 ("Both Supreme Court decisions and historical sources indicate that the [a]rms the [s]econd [a]mendment is talking about are weapons in common use for self-defense. That is not to say that there are no other lawful uses for weapons—sporting uses, collection, and competitions come to mind as examples. But the constitutional protection exists to protect the individual right to self-defense, and so that will be our focus."); *Oregon Firearms Federation* v. *Kotek*, supra, 682 F. Supp. 3d 917 ("[T]here may be lawful purposes other than self-defense for which an individual can use a firearm . . . [such as hunting and sport or target shooting]. . . . While these uses may be lawful, they have never been explicitly recognized as being the *central component* of the [s]econd [a]mendment right; only self-defense enjoys that kind of unique focus within the Supreme Court's caselaw. . . . Accordingly, this [c]ourt finds that the [s]econd [a]mendment protects an individual right to commonly used firearms for the central purpose of self-defense." (Citations omitted; emphasis in original; internal quotation marks omitted.)).

597; see also id., 618–19 (citing historical commentary stating that second amendment right "implies the learning to handle and use [arms]" and that "citizen[s] who . . . practi[c]e in safe places the use of [a gun or pistol], and in due time [teach] [their children] to do the same, [exercise] [their] individual right[s]" (internal quotation marks omitted)); *Oakland Tactical Supply, LLC* v. *Howell Township*, 103 F.4th 1186, 1197 (6th Cir. 2024) ("the [s]econd [a]mendment protects the right to engage in . . . firearms training as necessary to protect the right to effectively bear arms in case of confrontation" (footnote omitted)), petition for cert. filed (U.S. August 20, 2024) (No. 24-178).[41] At least one court, however, has called into question whether hunting and other recreational uses of arms are protected by the second amendment. See, e.g., *Oregon Firearms Federation* v. *Kotek*, supra, 682 F. Supp. 3d 917 ("[h]unting and other recreational uses of guns have no explicit or otherwise direct protection in the text of the [c]onstitution or under existing doctrine, nor does the historical evidence support such a conclusion" (internal quotation marks omitted)). In the present cases, neither party has fully addressed, either before the trial court or this court, what lawful purposes are protected by the second amendment. Thus, to the extent that the defendant seeks to argue on remand that AR-15 style rifles, large capacity magazines, and silencers are in common use for a lawful purpose other than self-defense, we leave it to the trial court to decide, on the basis of the record developed by the parties, whether the proposed lawful purpose is one protected by the second amendment.

b

We now consider how the trial court is to assess whether a weapon is in common use today for lawful

[41] See also *Friedman* v. *Highland Park*, 577 U.S. 1039, 1039, 136 S. Ct. 447, 193 L. Ed. 2d 483 (2015) (Thomas, J., dissenting from denial of certiorari) (noting that "many Americans own [modern sporting rifles (e.g., AR-style semiautomatic rifles)] for lawful purposes like self-defense, hunting, and target shooting").

purposes. Although the Supreme Court made clear in *Bruen* that "the [s]econd [a]mendment protects the possession and use of weapons that are in common use at the time"; (internal quotation marks omitted) *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 21; it did not set forth any sort of analytical framework for evaluating whether a weapon satisfies that criteria. Because it was undisputed in *Bruen* "that handguns are weapons in common use today for self-defense," it was unnecessary for the court to analyze the issue. (Internal quotation marks omitted.) Id., 32. In an effort to provide guidance to the trial court and the parties, we briefly discuss evidence other courts have considered when assessing whether a weapon is commonly used or typically possessed today for lawful purposes or whether the weapon is, by contrast, dangerous and unusual. We do not endeavor to define precisely all of the evidence that the court should consider or how it should weigh such evidence; rather, we simply observe that there are several considerations that may inform a court's analysis of those issues.[42]

[42] Given our conclusion that the "dangerous and unusual" issue is encompassed within the "common use" inquiry rather than is itself a distinct inquiry, we do not find it necessary to separately define "dangerous and unusual." We do find it necessary, however, to address the state's argument that the proper formulation of the phrase is "dangerous *or* unusual." The state relies on *National Assn. for Gun Rights* v. *Lamont*, supra, 685 F. Supp. 3d 90, in which the court rejected that "dangerous and unusual" was a conjunctive test because "*Heller*'s use of [that] phrase . . . does not state that it must be conjunctive, but instead cites to several sources . . . [that] use the phrase 'dangerous or unusual weapons' . . . ." (Citations omitted; emphasis omitted.) We are not persuaded.

In *Bruen*, the Supreme Court carefully used the phrase "dangerous and unusual" five times to describe the tradition of prohibiting the carrying of dangerous and unusual weapons, and it used the phrase "dangerous or unusual" only once when quoting from the brief submitted by the government's amici. *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 21, 46–47, 51; see also *Caetano* v. *Massachusetts*, 577 U.S. 411, 417–18, 136 S. Ct. 1027, 194 L. Ed. 2d 99 (2016) (Alito, J., concurring in the judgment) (Whether a weapon is dangerous and unusual "is a conjunctive test: A weapon may not be banned unless it is both dangerous and unusual. . . . [T]he relative dangerousness of a weapon is irrelevant when the weapon

First, to address the defendant's argument on statistical numerosity, by contrasting weapons "in common use at the time" with "those that are highly unusual in society at large"; (internal quotation marks omitted) id., 47; *Bruen* suggests that statistics on possession, ownership, or circulation of the weapon at issue, "when contextualized by a denominator"; *Rupp* v. *Bonta*, Docket No. 8:17-cv-00746-JLS-JDE, 2024 WL 1142061, *18 (C.D. Cal. March 15, 2024), appeal filed (9th Cir. April 24, 2024) (No. 24-2583); may indeed be one relevant consideration. For example, the United States District Court for the District of New Jersey, in concluding that the plaintiff had proved that AR-15s were in common use for lawful purposes, relied on evidence that "AR-15 firearms are produced by a multitude of manufacturers and are commonly owned throughout the United States—it is estimated that as of 2022, AR-15s and similar sporting rifles had around 24 million owners; this ownership number was exceeded only by the number of registered handgun owners within our [n]ation. As of 2022, it was estimated that there were around 24 million AR-15s and similar sports weapons in circulation; this number was exceeded only by the number of registered handgun owners within the United States." (Footnote omitted.) *Assn. of New Jersey Rifle & Pistol Clubs, Inc.* v. *Platkin*, Docket Nos. 18-10507-PGS-JBD, 22-04360-PGS-JBD and 22-04397-PGS-JBD, 2024 WL 3585580, *18 (D.N.J. July 30, 2024), appeal

belongs to a class of arms commonly used for lawful purposes. . . . If *Heller* tells us anything, it is that firearms cannot be categorically prohibited just because they are dangerous." (Citations omitted; emphasis omitted; internal quotation marks omitted.)). Thus, the Supreme Court has made it fairly clear that a weapon does not fall outside of the second amendment's scope merely because it is relatively dangerous. We reiterate that the "common use" inquiry asks whether the weapons are commonly used or typically possessed for lawful purposes like self-defense. Accordingly, to the extent that the state seeks to demonstrate on remand that the weapons at issue are dangerous, evidence of the weapon's dangerousness informs the "common use" inquiry only insofar as it tends to show that the weapon is not in fact commonly used or owned by American citizens for such lawful purposes.

filed sub nom. *Assn. of New Jersey Rifle & Pistol Clubs, Inc.* v. *Attorney General* (3d Cir. August 6, 2024) (No. 24-2415), and appeal filed sub nom. *Assn. of New Jersey Rifle & Pistol Clubs, Inc.* v. *Attorney General* (3d Cir. August 9, 2024) (No. 24-2450). We nevertheless agree with the courts that have concluded that such statistics are not dispositive.[43] Because, as we have already stated in this opinion, the full inquiry is whether the weapon is in common use today "*for lawful purposes* like self-defense"; (emphasis added) *District of Columbia* v. *Heller*, supra, 554 U.S. 624; see also *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 47 (handguns "are indisputably in common use *for self-defense* today" (emphasis added; internal quotation marks omitted)); the court must also consider how and why a particular weapon is used. See, e.g., *National*

[43] See, e.g., *Vermont Federation of Sportsmen's Clubs* v. *Birmingham*, Docket No. 2:23-CV-710, 2024 WL 3466482, *8 (D. Vt. July 18, 2024) (" 'common ownership' is different from 'common use for self-defense,' which is what *Bruen* mandates"), appeal filed, 2024 WL 3466482 (2d Cir. July 31, 2024) (No. 24-2026); *National Assn. for Gun Rights* v. *Lamont*, supra, 685 F. Supp. 3d 86–87 (noting circularity concerns with "solely statistical" inquiry and that relevant inquiry is "whether the weapons are in common use today *for self-defense*" (emphasis in original; internal quotation marks omitted)); *Hanson* v. *District of Columbia*, 671 F. Supp. 3d 1, 11 (D.D.C. 2023) ("Whether [large capacity magazines] are in common use is merely the beginning of the analysis. The full inquiry is whether the prohibited weapons are typically possessed . . . for lawful purposes." (Emphasis omitted; internal quotation marks omitted.)), appeal filed (D.C. Cir. May 17, 2023) (No. 23-7061).

But see, e.g., *United States* v. *Mitchell*, Docket No. 1:24-cr-9, 2024 WL 2272275, *3 (N.D. Ohio May 20, 2024) (viewing "common use" as purely statistical inquiry and finding that, "[a]lthough the number of civilian-owned machineguns has increased to about 740,000, this amount—which is less than .2 [percent] of total firearms in the United States—remains too insignificant for machineguns to be considered in common use" (internal quotation marks omitted)); *Mock* v. *Garland*, 697 F. Supp. 3d 564, 581 (N.D. Tex. 2023) ("[t]he relevant inquiry under this standard is the current total number of a particular weapon that is in lawful possession, ownership, and circulation throughout the United States"), appeals dismissed sub nom. *Watterson* v. *Bureau of Alcohol, Tobacco, Firearms & Explosives*, Docket Nos. 23-40556, 23-11157, 23-11199, 23-11203, 23-11204 and 23-40685, 2024 WL 3935446 (5th Cir. August 26, 2024); *United States* v. *Lane*, supra, 689 F. Supp. 3d 251 ("the question of whether machineguns are 'unusual' can be answered by simply comparing the number of the machineguns in this country to the total number of guns overall").

*Assn. for Gun Rights* v. *Lamont*, supra, 685 F. Supp. 3d 87–88 ("the three phrases—common use, typical possession, and dangerous and unusual—[are] meant to get at both . . . how and why the firearms are commonly used and possessed, whether it be for self-defense or for some unlawful end");[44] see also *Oregon Firearms Federation* v. *Kotek*, supra, 682 F. Supp. 3d 916 (common use is not dispositive of inquiry but must be considered in conjunction with how firearm or firearm accessory is used).

Several considerations may inform a court's inquiry into how and why a weapon is used. For example, a court may find it relevant to assess how frequently the weapon is in fact used for lawful purposes like self-defense. See, e.g., *Hanson* v. *District of Columbia*, 671 F. Supp. 3d 1, 14, 16 (D.D.C. 2023) (magazines with capacity of more than ten rounds are "not in fact commonly used for self-defense" because civilians fire average of 2.2 shots in self-defense incidents), appeal filed (D.C. Cir. May 17, 2023) (No. 23-7061). A court may weigh that evidence against other evidence tending to show that the weapon is instead disproportionately used for unlawful purposes. See, e.g., *National Assn. for Gun Rights* v. *Lamont*, supra, 685 F. Supp. 3d 99 (although "mindful of the fact that the commonality of a particular firearm or weapon's use in crime was not enough to find in either *Heller* or *Cuomo* that the firearms at issue were not typically used for law-abiding

[44] We note that, although our proposed analysis is similar, we do not adopt the same analytical framework that the court applied in *National Assn. for Gun Rights* v. *Lamont*, supra, 685 F. Supp. 3d 63. We are persuaded by certain aspects of the court's analysis in that case but remain unconvinced by others. In particular, we do not agree that "a weapon must be both possessed for the purpose of *and* actually used for self-defense in order to fall within the [s]econd [a]mendment's protection . . . ." (Emphasis added.) Id., 90–91. As discussed further in this opinion, although how a weapon is used is relevant to the analysis, we do not believe that it is necessary that a weapon is frequently fired or deployed to receive second amendment protection.

purposes," and thus not treating such evidence as dispositive, court found that evidence as to suitability of assault weapons for crime outweighed limited evidence presented on their use for self-defense); *Oregon Firearms Federation, Inc.* v. *Brown*, 644 F. Supp. 3d 782, 801 (D. Or. 2022) (large capacity magazines are not in common use for lawful purposes like self-defense because, while "rarely used by civilians for self-defense," they are "disproportionately used in crimes involving mass shootings"), appeal dismissed, Docket No. 22-36011, 2022 WL 18956023 (9th Cir. December 12, 2022).

Additionally, a court may find it relevant to consider whether the firearm is predominantly used by the military or law enforcement;[45] has features that make it more suitable for self-defense,[46] perhaps as opposed to military purposes;[47] or has features that resemble those

[45] See, e.g., *Oregon Firearms Federation, Inc.* v. *Brown*, supra, 644 F. Supp. 3d 801 (large capacity magazines are not in common use for lawful purposes like self-defense because, while "rarely used by civilians for self-defense, [large capacity magazines] are often used in law enforcement and military situations").

[46] See, e.g., *Assn. of New Jersey Rifle & Pistol Clubs, Inc.* v. *Platkin*, supra, 2024 WL 3585580, *18 ("[T]he build of the AR-15 makes it well-suited to self-defense because it is light weight, [has] very mild recoil, and [has] good ergonomics . . . [and] it is a weapon which is well suited to younger shooters, female shooters, and other shooters of smaller stature . . . . Further, the AR-15's design features—including the effectiveness of its cartridge for self-defense use and its better continuity of fire when used with available magazines—make the AR-15 a good choice for self-defense." (Citation omitted; internal quotation marks omitted.)).

[47] See, e.g., *United States* v. *Alsenat*, Docket No. 0:23-cr-60209-Leibowitz, 2024 WL 2270209, *6 (S.D. Fla. May 20, 2024) (although not deciding whether "unusual" involves determining whether weapon is common in society or its essential purpose is self-defense, court concluded that "machineguns are unusual . . . [because they] are both absolutely and relatively uncommon in the United States [and] . . . are unsuitable as a weapon for self-defense" (internal quotation marks omitted)); *National Assn. for Gun Rights* v. *Lamont*, supra, 685 F. Supp. 3d 103 (evidence in record that "assault weapons and [large capacity magazines] are more suitable for military use than civilian self-defense . . . support[ed] [the court's] conclusion that the militaristic character of assault weapons weighs in favor of finding that they are not typically possessed by the average citizen for self-defense"); *Hanson* v. *District of Columbia*, supra, 671 F. Supp. 3d 11–14 (considering whether

of a military grade weapon or are distinguishable from those of a handgun,[48] the latter of which the United States Supreme Court has deemed "the quintessential self-defense weapon." *District of Columbia* v. *Heller*, supra, 554 U.S. 629. For example, in *Bevis* v. *Naperville*, supra, 85 F.4th 1197, the Seventh Circuit focused its inquiry at *Bruen*'s first step regarding whether the weapons at issue "[fell] on the military or civilian side of the line." The court explained that "what distinguishes AR-15s from M-16s . . . is important precisely because *Heller* itself stated that [M-16s] are not among the [a]rms covered by the [s]econd [a]mendment; they are instead a military weapon." Id., 1195. On the basis of the limited evidence presented during proceedings on the plaintiffs' motion for a preliminary injunction, the court in *Bevis* concluded that AR-15s and large capacity magazines "are much more like machineguns and military-grade weaponry than they are like the many different types of firearms that are used for individual self-defense (or so the legislature was entitled to conclude). Indeed, the AR-15 is almost the same gun as the

benefits of large capacity magazines are "most useful in military service"); *Oregon Firearms Federation, Inc.* v. *Brown*, supra, 644 F. Supp. 3d 801 (observing that large capacity magazines are "particularly designed and most suitable for military and law enforcement applications rather than the core [s]econd [a]mendment right of self-defense" (internal quotation marks omitted)). But see *Delaware State Sportsmen's Assn., Inc.* v. *Delaware Dept. of Safety & Homeland Security*, 664 F. Supp. 3d 584, 594 (D. Del. 2023) ("the relevant question . . . is 'what the people choose' for lawful purposes, rather than a weapon's objective suitability for those purposes"), aff'd, 108 F.4th 194 (3d Cir. 2024); see also *District of Columbia* v. *Heller*, supra, 554 U.S. 629 ("[*w*]*hatever the reason*, handguns are the most popular weapon chosen by Americans for self-defense in the home" (emphasis added)).

[48] See, e.g., *Bevis* v. *Naperville*, supra, 85 F.4th 1195 (AR-15s and large capacity magazines "are much more like machineguns and military-grade weaponry than they are like the many different types of firearms that are used for individual self-defense (or so the legislature was entitled to conclude)"); see also *State* v. *DeCiccio*, supra, 315 Conn. 122, 133 (in assessing whether dirk knives and police batons are "dangerous and unusual weapons," court relied on, inter alia, findings that police batons and dirk knives were "inherently less lethal" or had "more limited lethality relative" to handguns).

[M-16] . . . . The only meaningful distinction (unless the user takes advantage of some simple modifications that essentially make it fully automatic) is that the AR-15 has only semiautomatic capability . . . while the [M-16] operates both ways. Both weapons share the same core design, and both rely on the same patented operating system." (Footnote omitted.) Id., 1195–96; see also footnote 30 of this opinion. The court also compared the firing rates of the AR-15 and M-16 but noted that "[b]etter data on firing rates might change the analysis . . . ." *Bevis* v. *Naperville*, supra, 1197. Given that "this [was] just a preliminary look at the subject," however, the court did "not rule out the possibility that the plaintiffs [would] find other evidence that shows a sharper distinction between AR-15s and [M-16s] . . . than the . . . record reveal[ed]." Id.

The defendant rejects, as unsupported by *Bruen*, *McDonald*, or *Heller*, the line that the court in *Bevis* drew between military and civilian weapons. We do not agree that such a distinction has no basis in the Supreme Court's precedent. Assessing a firearm's militaristic character as part of the common use inquiry finds support in *Heller*'s indication that weapons that are "most useful in military service—M-16 rifles and the like"—are not the types of weapons typically possessed by law-abiding citizens for lawful purposes. *District of Columbia* v. *Heller*, supra, 554 U.S. 627. Similar to the court in *Bevis*, we view *Heller*'s recognition of the handgun as "the quintessential self-defense weapon"; id., 629; and suggestion that military grade weapons like M-16s are not protected arms; see id., 624–25, 627; as establishing two "arms" at opposite ends of a spectrum. As the court in *Bevis* explained, determining "the types of '[a]rms' that are covered by the [s]econd [a]mendment . . . presents a line-drawing problem. Everyone can agree that a personal handgun, used for self-defense, is one of those [a]rms that law-abiding citizens

must be free to 'keep and bear.' Everyone can also agree, we hope, that a nuclear weapon such as the now-retired M388 Davy Crockett system, with its 51-pound W54 warhead, can be reserved for the military . . . . Many weapons, however, lie between these extremes." (Footnotes omitted.) *Bevis* v. *Naperville*, supra, 85 F.4th 1182–83. The common use inquiry aims to determine exactly where the weapons at issue fall on that spectrum.

The defendant also argues that common use does not require "the actual firing of a weapon" because, if it did, "the *Heller* court would have looked at statistical averages about how often handguns were fired for self-defense. The statistic was never mentioned." (Internal quotation marks omitted.) In support of this position, the defendant cites two pre-*Bruen* cases that applied *Heller*. See footnote 8 of this opinion. First, the defendant cites Justice Alito's concurring opinion in *Caetano* v. *Massachusetts*, 577 U.S. 411, 136 S. Ct. 1027, 194 L. Ed. 2d 99 (2016), in which the United States Supreme Court vacated the lower court's judgment and remanded the case to that court because it had failed to properly apply *Heller* to a challenge to a Massachusetts prohibition on the possession of stun guns. The defendant asserts that, in considering "whether stun guns are commonly possessed by law-abiding citizens for lawful purposes today"; (emphasis omitted) id., 420 (Alito, J., concurring in the judgment); Justice Alito considered only the number of Tasers and stun guns that were sold to private citizens, not how often those weapons were used. Id. Second, the defendant asserts that, in *State* v. *DeCiccio*, supra, 315 Conn. 108, in which our Supreme Court considered whether dirk knives and police batons are "arms" for purposes of the second amendment, the court did not "consider how often [those weapons] were used for self-defense . . . .

Instead, it concluded that both are typically possessed by law-abiding citizens for lawful purposes."

We agree with the defendant that a firearm does not have to be fired regularly to constitute a weapon in common use for lawful purposes like self-defense. As the defendant argues, a firearm can be " 'used' " for self-defense even if it is never actually fired. See, e.g., *Duncan* v. *Bonta*, supra, 695 F. Supp. 3d 1227 ("[A] firearm kept on one's nightstand is used for self-defense even when the night is quiet. It is kept and used in case of confrontation. A person may happily live a lifetime without needing to fire their gun in self-defense. But that is not to say that such a person does not use their gun for self-defense when he or she keeps it under the bed with a hope and a prayer that it never has to be fired." (Emphasis omitted.)); *Oregon Firearms Federation* v. *Kotek*, supra, 682 F. Supp. 3d 921 ("[A]n individual need not fire a gun to use it for self-defense. . . . [I]n brandishing a firearm to intimidate an attacker, for instance, the individual uses the firearm for self-defense." (Footnote omitted.)). To be sure, the Supreme Court focused on the handgun being "the most popular weapon *chosen* by Americans for self-defense in the home," rather than whether it was in fact commonly deployed for that lawful purpose. (Emphasis added; internal quotation marks omitted.) *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 22; see also *District of Columbia* v. *Heller*, supra, 554 U.S. 629 (same). Moreover, in *Heller*, the court did not limit the second amendment right to only "using" or "carrying" weapons but, instead, stated that the ordinary meaning of the phrase "keep [a]rms" in the second amendment is "have weapons." (Internal quotation marks omitted.) *District of Columbia* v. *Heller*, supra, 582; id., 583 (" '[k]eep arms' was simply a common way of referring to possessing arms, for militiamen and everyone else" (emphasis omitted)). Accordingly, we

do not view the common use limitation as requiring the actual use of a weapon. Therefore, a court may find it relevant to *Bruen*'s threshold inquiry to consider, in addition to or in place of evidence of how frequently a firearm is actually fired, evidence that demonstrates that a weapon is typically possessed or owned for lawful purposes, including, but not limited to, gun owners' subjective reasons for owning the firearm at issue in conjunction with rates of gun ownership.[49]

Nonetheless, neither Justice Alito's concurring opinion in *Caetano*, aside from the fact that it is not binding on this court, nor our Supreme Court's decision in *DeCiccio* suggest that how frequently a weapon is actually deployed for lawful purposes is irrelevant to the common use inquiry. Indeed, just as evidence that a weapon is commonly owned or kept in the home for the purpose of self-defense may inform a court's assessment of whether Americans commonly choose a given weapon for lawful purposes, so too may evidence of how often Americans actually deploy that weapon for such purposes be relevant to that question. See *Vermont Federation of Sportsmen's Clubs* v. *Birmingham*,

[49] Compare *Delaware State Sportsmen's Assn., Inc.* v. *Delaware Dept. of Safety & Homeland Security*, 664 F. Supp. 3d 584, 594–96 (D. Del. 2023) (considering statistics on ownership and circulation of AR-15s and consumer report showing reasons gun owners seek to own AR-15s but declining to consider actual use statistics), aff'd, 108 F.4th 194 (3d Cir. 2024), with *Oregon Firearms Federation* v. *Kotek*, supra, 682 F. Supp. 3d 897, 918 (stating that "an individual's subjective intent in purchasing a firearm or firearm accessory for self-defense, while relevant, also cannot be dispositive in assessing whether a firearm or firearm accessory is in common use for self-defense" and concluding that large capacity magazines are not commonly used for self-defense because, although "many Americans purchase [them] with the intent to use them for self-defense . . . it is exceedingly rare . . . for an individual to fire more than ten shots in self-defense"), and *National Assn. for Gun Rights* v. *Lamont*, supra, 685 F. Supp. 3d 87–88 (asking whether "law-abiding citizens *buy the weapons at issue for the purpose of defending themselves*, or because the weapons' characteristics are well-suited for some unlawful purpose," and, once purchased, whether those firearms are "*actually used* for self-defense, or are . . . more often utilized to achieve unlawful ends" (emphasis added)).

Docket No. 2:23-cv-710, 2024 WL 2150522, *2 n.5 (D. Vt. May 14, 2024) (although relevant question may be "what weapons are *chosen* [by] Americans for self-defense, not what weapons are *deployed or fired* in self-defense . . . the frequency at which weapons are fired in self-defense is still relevant to the question of which weapons are used in self-defense" (citation omitted; emphasis in original; internal quotation marks omitted)), appeal filed, 2024 WL 3466482 (2d Cir. July 31, 2024) (No. 24-2026). To the extent that the defendant argues that the former type of evidence is entitled to greater weight than the latter, "[i]t is the exclusive province of the [trial court on remand] to weigh the conflicting evidence, determine the credibility of witnesses and determine whether to accept some, all or none of a witness' testimony." (Internal quotation marks omitted.) *Delena* v. *Grachitorena*, 216 Conn. App. 225, 231, 283 A.3d 1090 (2022); see also *Vermont Federation of Sportsmen's Clubs* v. *Birmingham*, supra, *2 n.5 ("[p]laintiffs may seek to admit [evidence] on how frequently individuals keep [large capacity magazines] for self-defense, or the magnitude of their deterrent effect . . . but relevance of other considerations to the ultimate inquiry creates a question of weight, not relevance" (citation omitted; emphasis omitted; internal quotation marks omitted)).

In sum, courts have considered a number of factors to determine whether the weapons at issue were in common use for lawful purposes like self-defense, which factors tend to show both "how" and "why" a particular weapon is used or possessed, including, but not limited to, evidence demonstrating whether American citizens typically possess, or own, the weapon and the subjective reasons for such ownership. We agree that such evidence can be helpful in making the factual determination as to whether the weapon is in common use for a lawful purpose. At the same time, we do not

believe that this constitutes an exhaustive list of the factors that the court can consider; nor is any combination of these factors dispositive of the common use question. Ultimately, it is the function of the trial court on remand, applying the rules of evidence, to decide whether the evidence presented by the parties is relevant to the common use inquiry and to credit the evidence that it finds most persuasive.

The defendant's burden on remand, then, is to demonstrate as a threshold matter that (1) the silencers and large capacity magazines that he possessed are "arms" as *Heller* defined that term or, alternatively, are necessary or essential to use a constitutionally protected firearm, and (2) the silencers, large capacity magazines, and AR-15 style rifles that he possessed or sold are in common use or typically possessed today for lawful purposes. The state may then present evidence to rebut that showing. The court must weigh the evidence presented by the parties to determine whether it weighs in favor of second amendment protection. If the court concludes at step one that the second amendment does not apply, the analysis ends there. Alternatively, if the court concludes that any of the firearms or related components at issue are "arms" in common use or typically possessed for lawful purposes, then the second amendment presumptively protects those items, and the court must proceed to *Bruen*'s second step, to which we now turn briefly.

B

As clearly set forth in *Bruen*, if the second amendment presumptively protects the defendant's conduct, the burden then shifts to the state to demonstrate that its regulation of that conduct "is consistent with the [n]ation's historical tradition of firearm regulation." *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 24. On remand, the parties will have an

opportunity to develop the historical record for the purpose of collecting historical analogues to the challenged statutes. In assessing these analogues, the court must consider "whether the challenged regulation is consistent with the principles that underpin our regulatory tradition," or, in other words, "is relevantly similar to laws that our tradition is understood to permit . . . ." (Internal quotation marks omitted.) *United States* v. *Rahimi*, supra, 144 S. Ct. 1898. Central to that inquiry is "how and why the regulations burden a law-abiding citizen's right to armed self-defense"; that is, "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified . . . ." *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 29. If the court is satisfied that the state has carried its burden, it must uphold the regulation as constitutional.[50]

The parties do not dispute the nature of the inquiry at *Bruen*'s second step to the same extent that they dispute the nature of the step one inquiry. We find it necessary, however, to briefly address two of the defendant's arguments about the minimal historical analysis that the state sets forth in its appellate brief. We will address each argument in turn.

[50] Although we have greatly simplified our explanation of *Bruen*'s second step, we acknowledge that the practical application of the history and tradition test is not, by any means, a simple task for a trial court. We echo Justice Jackson's sentiment, expressed in her concurring opinion in *Rahimi*, that "courts, which are currently at sea when it comes to evaluating firearms legislation, need a solid anchor for grounding their constitutional pronouncements." *United States* v. *Rahimi*, supra, 144 S. Ct. 1930. Until the United States Supreme Court issues clearer guidance on how to conduct *Bruen*'s test, however, it is our job, and the job of the trial court, to apply that test as we are best able to understand it. We do not underestimate the difficult burden confronting the trial court on remand. And, although we do not expect that we have addressed in this opinion every issue that will arise on remand, we hope that our guidance eases at least some of the heavy burden the *Bruen* test imposes.

First, the defendant argues that the state cannot carry its burden by presenting historical regulations of nonfirearm weapons such as knives. We do not read *Bruen*'s test so rigidly. The Supreme Court emphasized in *Bruen* that the state must only "identify a well-established and representative historical *analogue*" to a modern-day regulation, not "a historical *twin*" or "a dead ringer . . . ." (Emphasis in original.) Id., 30. As the court recently reiterated in *Rahimi*, "when a challenged regulation does not precisely match its historical precursors, it still may be analogous enough to pass constitutional muster." (Internal quotation marks omitted.) *United States* v. *Rahimi*, supra, 144 S. Ct. 1898. Indeed, in *Bruen*, the Supreme Court suggested that a historical regulation of nonfirearm weapons may be a sufficiently comparable analogue to a modern firearm regulation. See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 40–42. Specifically, the court concluded that a medieval English statute prohibiting "rid[ing] or go[ing] . . . armed" was "not sufficiently probative to defend New York's proper-cause requirement." (Internal quotation marks omitted.) Id., 40. Aside from the fact that the statute was enacted more than 450 years before the constitution's ratification and thus "ha[d] little bearing on the [s]econd [a]mendment," the court reasoned that the medieval prohibition appeared to "focus on armor and, perhaps, weapons like launcegays," both of which, unlike handguns, "were generally worn or carried only when one intended to engage in lawful combat or . . . to breach the peace." Id., 41. The court noted that the government had presented "no evidence suggesting the [medieval] [s]tatute applied to the smaller medieval weapons"—namely, a knife or dagger, which almost everyone during medieval times carried in their belts and were often worn by civilians for self-protection—"that str[uck] [the court] as most analogous to modern handguns," which were not in existence

during the medieval period. Id., 41–42. Thus, the court implied that, if the historical regulation had applied to the types of medieval weapons that the court viewed as "most analogous to modern handguns," it may have been a more persuasive historical analogue for the modern-day handgun regulation. Id., 42.

Accordingly, to prevail on remand, it is not necessary for the state to present a "historical twin" that regulates the same type of weapon as does the challenged regulation. The central considerations, rather, are "whether modern and historical regulations impose a comparable burden on the right of armed self-defense and whether that burden is comparably justified . . . ." Id., 29. If a court concludes that a historical knife regulation and a modern firearm regulation comparably burden that right, and that the burden is comparably justified, then that historical regulation may be sufficiently analogous to the modern regulation to pass *Bruen*'s test. Indeed, if the regulated firearm was not in existence at the time of the second amendment's ratification, resorting to historical analogues of nonfirearm weapons may be the only way in which the state can satisfy its burden.

Second, the defendant claims that the state's arguments about technological developments and using a " 'nuanced approach' " to analytical reasoning in effect ask this court to adopt the type of means-end scrutiny that *Bruen* prohibits. We disagree. To be sure, other courts have recognized that *Bruen*'s instruction to look for a historical analogue that imposes a comparable burden that is comparably justified in relation to the challenged regulation resembles a means-end balancing test despite the court's express rejection of such means-end balancing in the second amendment context. See, e.g., *Bevis* v. *Naperville*, supra, 85 F.4th 1199 ("[f]or all its disclaiming of balancing approaches, *Bruen* appears to call for just that: a broader restriction burdens the [s]econd [a]mendment right more, and thus requires a

closer analogical fit between the modern regulation and traditional ones; a narrower restriction with less impact on the constitutional right might survive with a looser fit"). Nevertheless, the Supreme Court expressly provided for "a more nuanced approach" for cases that, unlike *Bruen* and *Heller*, do not involve analogies that are "relatively simple to draw" but, rather, "implicat[e] unprecedented societal concerns or dramatic technological changes . . . ." *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 27. The court cautioned, however, that "[t]his does not mean that courts may engage in independent means-end scrutiny under the guise of an analogical inquiry. . . . Analogical reasoning requires judges to apply faithfully the balance struck by the founding generation to modern circumstances . . . . It is not an invitation to revise that balance through means-end scrutiny." (Citations omitted.) Id., 29 n.7.

Finally, we note that, although "common use," "typical possession," and "dangerous and unusual" must be addressed at *Bruen*'s first step, they also may be relevant to *Bruen*'s second step for the purposes of identifying historical analogues that impose a comparable burden on the second amendment right and are comparably justified. For instance, even if a weapon is "in common use," a court may nonetheless consider the unusually dangerous character of a weapon, or its militaristic features, at *Bruen*'s second step. Although the United States Supreme Court recognized a historical tradition of prohibiting the carrying of dangerous *and* unusual weapons, neither *Bruen* nor *Heller* precludes the state from meeting its burden by demonstrating through historical analogues that this country also has a historical tradition of regulating particularly dangerous weapons or of reserving certain weapons for military or law enforcement use. See, e.g., *Bevis* v. *Naperville*, supra, 85 F.4th 1199, 1201 (considering common use at

both steps of analysis without deciding where it belongs, and concluding at step two that there are longstanding traditions of regulating especially dangerous weapons and of distinguishing between military or law enforcement access to and civilian ownership of such weapons); *National Assn. for Gun Rights* v. *Lamont*, supra, 685 F. Supp. 3d 90 n.11 ("even if a weapon must be dangerous and unusual to fall under the already enumerated [s]econd [a]mendment exception from *Heller*," as opposed to dangerous *or* unusual, "it is consistent with the nation's tradition and history of firearm regulation to regulate narrow and specific categories of unusually dangerous weapons resulting from developments in firearm technology" (emphasis omitted)). Additionally, to satisfy its burden of identifying a historical analogue that imposes a comparable burden on the right to keep and bear arms, it may be necessary to assess whether the historically regulated arms were, like the modern regulated arms, in common use for lawful purposes at the time of the historical regulation. See *New York State Rifle & Pistol Assn., Inc.* v. *Bruen*, supra, 597 U.S. 42 (rejecting historical analogue where there was no evidence that it applied to "the smaller medieval weapons that str[uck] [the court] as most analogous to modern handguns").

The judgments are reversed and the cases are remanded for further proceedings consistent with this opinion.

In this opinion the other judges concurred.

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TIMOTHY J. HALLOCK *v.*
JENNIFER L. HALLOCK
(AC 46014)

Seeley, Westbrook and Pellegrino, Js.

*Syllabus*

The defendant appealed from the judgment of the trial court dissolving her marriage to the plaintiff and issuing various orders. The defendant claimed,

inter alia, that the trial court failed to address her pendente lite motions for alimony and counsel fees in a separate and distinct manner prior to considering the final financial orders. *Held*:

The trial court properly considered all of the plaintiff's pendente lite motions for alimony and counsel fees, independently adjudicated those motions, and incorporated its ruling on those motions in its final financial orders as part of the dissolution of the parties' marriage, and it declined to award alimony or attorney's fees pendente lite.

This court concluded that the defendant's claim that the trial court applied an improper legal standard to her claim for alimony and the division of the marital property was without merit, as the trial court properly cited to and applied the relevant statutes (§§ 46b-81 and 46b-82) in issuing its financial orders.

The trial court did not abuse its discretion in declining to award attorney's fees to the defendant.

Contrary to the defendant's assertion, the trial court did not take judicial notice of facts regarding the defendant's employment opportunities and future earnings as part of its determination that the defendant had the ability to support herself following the dissolution judgment and financial orders. The trial court rejected the defendant's testimony regarding the cause of the dissolution of the marriage as not credible, and, contrary to the defendant's claim, it did not discredit that testimony due to a lack of corroborating evidence.

Argued May 14—officially released September 17, 2024

*Procedural History*

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk and tried to the court, *Moukawsher, J.*; judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *Affirmed.*

*Alexander J. Cuda*, for the appellant (defendant).

*Dyan M. Kozaczka*, for the appellee (plaintiff).

*Opinion*

PELLEGRINO, J. The defendant, Jennifer L. Hallock, appeals from the judgment of the trial court dissolving her marriage to the plaintiff, Timothy J. Hallock, and

entering certain financial orders. On appeal, the defendant claims that the court (1) failed to properly consider her pendente lite motions for alimony and counsel fees, (2) applied an improper legal standard to her claim for alimony and the division of the marital property, (3) applied an improper legal standard to deny her claim for attorney's fees, (4) improperly took judicial notice of facts regarding her employment prospects and earning capacity, and (5) improperly discredited her testimony that the plaintiff's consumption of alcohol caused the marriage to end. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to our consideration of the issues raised in this appeal. The parties were married on June 17, 2017, in Greenwich and do not have any children together. The plaintiff has two adult children from his prior marriage, and the defendant has three children from her prior marriage, two of whom were adults and one of whom was age sixteen at the time of the dissolution judgment. The plaintiff commenced this dissolution action in March, 2020, alleging that the marriage had broken down irretrievably. During the pendency of the action, the defendant filed pendente lite motions for attorney's fees and alimony, which were not acted on prior to the dissolution trial.

The court, *Moukawsher*, *J.*, held a trial on October 24, 2022, and, three days later, issued a memorandum of decision. At the outset, the court noted that, during the parties' marriage of approximately three years, their lives did not "intertwine enough to merit seismic shifts in the parties' finances." It then found that the plaintiff had purchased a home for the merged family to live in. The plaintiff's income exceeded $500,000 per year, while the defendant earned "very little" and did not contribute to the purchase or upkeep of the marital home.

The court next rejected the defendant's claim that she had an "automatic claim on at least the assets [the plaintiff] realized during the marriage." Specifically, the court stated: "The real question here is whether [the defendant] contributed to acquiring, preserving, or adding to any of the property in [the plaintiff's] possession. The problem for her is that she didn't. By moving her family in with [the plaintiff, the defendant] improved her financial situation and her children's lifestyle. She did make nonmonetary contributions, but nothing about them can be seen as enabling the financial successes [the plaintiff] enjoyed during the period."

The court declined to award alimony to the defendant. It also rejected the defendant's assertion that the plaintiff's drinking was the cause of the breakdown of the marriage. It ordered the plaintiff to make a single payment of $40,000 and to transfer $60,000 from his 401 (k) account to the defendant. The parties otherwise retained their respective bank and retirement accounts. The court awarded the plaintiff sole ownership of the marital home. The court further ordered each party to be responsible for their respective attorney's fees. Finally, the court stated that it "has considered all pending motions in making this decision. It resolves all of them." This appeal followed.

On March 14, 2023, the defendant filed a motion for articulation, requesting the court to provide further details regarding (1) the nonmonetary contributions she made, (2) how the court arrived at the amounts of the cash payment and retirement account transfer, (3) the reasoning for its denial of an award of counsel fees, and (4) the specific pending motions it had resolved, as well as the reasoning and outcome of these motions.

On July 11, 2023, the court granted the defendant's motion and issued its articulation. As to the first request, the court explained that the defendant's nonmonetary

contributions "included caring for the children including [the plaintiff's] from a prior marriage and for the household in general. Making meals and shopping. She contributed by supporting [the plaintiff] by participating in social occasions that might benefit his career such as fundraisers and dinners with friends and acquaintances." As to the second request, the court stated that the basis for the single cash payment and transfer from the retirement account was its consideration of her contributions to the household, her age, her employment prospects, and her time when she was not employed. "The court's overall purpose was to provide a way forward for [the defendant] without granting her a windfall based solely on being married to [the plaintiff]. The decision was a matter of the court's judgment of the case overall and what would be needed to carry out its views." As to the third request for articulation, the court explained that it "saw no reason under the applicable statutes to award [the defendant] attorney's fees or to award them outside of the statutes for bad faith. . . . Having reviewed all the factors in General Statutes § 46b-82, the court believed that [an attorney's] fee award to [the defendant] was not appropriate considering its financial orders, nor would those orders be frustrated by a failure to grant it." As to the fourth request, it stated: "The court resolved pending motions not by independently resolving them but by rolling all issues into the trial. The phrasing used was intended to indicate this. It was not a way of indicating that it had separately adjudicated any particular motions."

Before considering the specific claims raised by the defendant in this appeal, we recite the relevant legal principles with respect to the financial orders in a dissolution action. "We review financial awards in dissolution actions under an abuse of discretion standard. . . . In order to conclude that the trial court abused its discretion, we must find that the court either incorrectly

applied the law or could not reasonably conclude as it did. . . . In determining whether the trial court's broad legal discretion is abused, great weight is due to the action of the trial court and every reasonable presumption should be given in favor of its correctness. . . . We apply that standard of review because it reflects the sound policy that the trial court has the unique opportunity to view the parties and their testimony, and is therefore in the best position to assess all of the circumstances surrounding a dissolution action, including such factors as the demeanor and the attitude of the parties." (Internal quotation marks omitted.) *Anderson-Harris* v. *Harris*, 221 Conn. App. 222, 246–47, 301 A.3d 1090 (2023); see also *Varoglu* v. *Sciarrino*, 185 Conn. App. 84, 91–92, 196 A.3d 856 (2018).

I

The defendant first claims that the court failed to properly consider her pendente lite motions for alimony and counsel fees. Specifically, she argues that the court did not address these motions in a separate and distinct manner prior to considering the final financial orders contrary to controlling precedent. We disagree.[1]

[1] We note that "[p]endente lite orders are temporary orders of the court that are necessarily extinguished once a final judgment has been rendered. . . . Once a final judgment has been rendered, an issue with respect to a pendente lite order is moot because an appellate court can provide no practical relief. . . . As a result, an appellate court lacks subject matter jurisdiction over a pendente lite order after the trial court has rendered a final judgment." (Internal quotation marks omitted.) *Netter* v. *Netter*, 220 Conn. App. 491, 494–95, 298 A.3d 653 (2023); *R. S.* v. *E. S.*, 210 Conn. App. 327, 330, 269 A.3d 970 (2022). This rule, however, does not apply under the facts and circumstances of the present case.

In the present case, the trial court addressed and denied the defendant's pendente lite motions seeking attorney's fees and alimony at the time it rendered the final judgment of dissolution. As a result, the defendant did not have an opportunity to challenge the court's denial of her pendente lite motions until the rendering of the final dissolution judgment. We also are mindful that the court could have, but did not, order pendente lite attorney's fees or alimony, and, if it had done so, such unpaid obligations would be, in effect, debts that became vested rights of property that the court cannot take away, regardless of the final financial orders. See *Papa* v. *Papa*, 55

The following additional facts and procedural history are necessary for the resolution of this claim. On March 6, 2020, the defendant filed a motion for attorney's fees pendente lite in which she asserted that the plaintiff controlled all the marital assets and that she lacked sufficient income and funds to defend this action. On July 2, 2020, the defendant filed a motion for alimony pendente lite,[2] and this motion was served on the plaintiff six days later. On November 6, 2020, the defendant filed a request for the court to hold a hearing on, inter alia, her pendente lite motions. In this request, the defendant claimed that the plaintiff had removed her access to the marital credit cards and had not provided her with any financial support following the commencement of this action, resulting in an immediate need for such support. The court issued an order granting the defendant's request on December 2, 2020.

On December 22, 2020, the plaintiff filed a motion for a continuance of the next hearing date, which was granted that same day. On February 4, 2021, the plaintiff filed a motion for a second continuance. The defendant objected, arguing that her motion for alimony pendente lite had been pending for more than seven months,[3]

Conn. App. 47, 53, 737 A.2d 953 (1999); *Elliott* v. *Elliott*, 14 Conn. App. 541, 545, 541 A.2d 905 (1988). For these reasons, we conclude that this claim is not moot.

[2] "The purpose of alimony pendente lite is to provide support to a spouse [whom] the court determines requires financial assistance pending the dissolution litigation and the ultimate determination of whether that spouse is entitled to an award of permanent alimony. . . . [T]he fundamental purpose of alimony pendente lite is to provide the [recipient spouse], during the pendency of the divorce action, with current support in accordance with [the recipient spouse's] needs and the [obligor spouse's] ability to meet them. . . . [A]limony is not designed to punish, but to ensure that the former spouse receives adequate support." (Citations omitted; internal quotation marks omitted.) *Dumbauld* v. *Dumbauld*, 163 Conn. App. 517, 525–26, 136 A.3d 669 (2016).

[3] In her objection, the defendant represented that her motion for alimony pendente lite had been scheduled to be heard on September 29, 2020, but was continued to February 9, 2021, at the request of the plaintiff.

during which time "the plaintiff has provided no support and the defendant has had no access to marital funds, except for her very limited self-employment income." The court denied the plaintiff's second motion for a continuance.

On February 8, 2021, the defendant filed updated proposed orders for alimony pendente lite, in which she requested $11,000 per month, retroactive to July 8, 2020, the date of service of her motion for alimony pendente lite. As to the issue of attorney's fee pendente lite, the defendant requested the court to order the plaintiff to pay $32,714.78. On July 6, 2021, the court referred the case to the Stamford Special Masters Program.[4] Following further discovery, the court, *Moukawsher, J.*, issued a trial management order on August 22, 2022. The parties then submitted proposed orders,[5] financial affidavits, witness lists, exhibits and a statement of facts. The court did not hold a pretrial hearing on the defendant's pendente lite motions.

The court conducted the dissolution trial on October 24, 2022. At the outset, the defendant's counsel informed the court that there were some outstanding pendente lite motions regarding alimony and attorney's fees. In its memorandum of decision, the court declined to award alimony to either party and stated that each

[4] Special Masters are part of the Judicial Branch's alternative dispute resolution program and may be used to settle limited contested and contested family cases. See State of Connecticut, Judicial Branch, Alternative Dispute Resolution, available at https://www.jud.ct.gov/external/super/altdisp.htm (last visited September 6, 2024).

[5] In the defendant's proposed orders filed on October 19, 2022, she requested the court to order the plaintiff to pay her pendente lite alimony of $9500 per month retroactive to July 8, 2020, for a total of $256,500. She further requested that neither party pay permanent alimony and she sought an order requiring the plaintiff to pay all of her outstanding attorney's fees. In the plaintiff's proposed orders, also filed on October 19, 2022, he requested that alimony not be awarded to either party and that each party be solely responsible for his or her attorney's fees.

party would be responsible for their own attorney's fees. It also noted: "The court has considered all pending motions in making this decision. It resolves all of them." In the articulation as to its resolution of the pendente lite motions, the court explained that it had "resolved pending motions not by independently resolving them but by rolling all issues into the trial. The phrasing used was intended to indicate this. It was not a way of indicating that it had separately adjudicated any particular motions."

On appeal, the defendant contends that the court failed to make an independent determination of her pendente lite claims for alimony and attorney's fees before entering the final financial orders as part of the dissolution judgment. We disagree that the approach utilized by the court in the present case constituted reversible error.

In support of her claim, the defendant argues that, pursuant to our Supreme Court's decision *Ahneman* v. *Ahneman*, 243 Conn. 471, 482, 706 A.2d 960 (1998), the trial court lacked authority to refuse to consider her pendente lite motions. She also directs our attention to *Milbauer* v. *Milbauer*, 54 Conn. App. 304, 309–10, 733 A.2d 907 (1999), in which this court approved the process used by the trial court to first resolve the issues raised in a pendente lite motion and then, at the same proceeding, moved on to the final hearing and ultimate dissolution of the marriage. Specifically, we noted that "[i]t is clear from an examination of the record . . . that two separate hearings were held and that those hearings were conducted by the same judge sitting as two separate courts. The trial court initially took evidence regarding the defendant's motion to modify the pendente lite award and then moved on to the final hearing concerning the ultimate dissolution of the parties' marriage. So . . . it is clear that the trial court in this case sat both as a pendente lite court and as a final

court of dissolution and was not precluded, therefore, from entering orders as to both the alimony pendente lite award and the final dissolution." (Emphasis omitted; footnote omitted.) Id. Although we agree that the procedure used in *Milbauer* was proper, there is no requirement that the trial court conduct separate hearings to address the pendente lite claims first before moving on to deciding those issues in its permanent orders.

On appeal, the defendant argues that the court failed to independently adjudicate her pendente lite motions, contrary to *Ahneman* and *Milbauer*. Underlying the defendant's argument is her view that the court did not consider her pendente lite motions independently and distinctly from the final financial orders made in conjunction with the dissolution judgment. On the basis of our interpretation of the court's memorandum of decision and articulation, we disagree with the defendant's interpretation of the court's actions. In our view, the court, during the course of a single hearing, separately and distinctly considered all of the requests for pendente lite orders of attorney's fees and alimony and declined to make such an award in issuing its final financial orders as part of the dissolution judgment. We further conclude that the court's actions were not improper.

"The interpretation of a trial court's judgment presents a question of law over which our review is plenary. . . . As a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment. . . . Effect must be given to that which is clearly implied as well as to that which is expressed. . . . The judgment should admit of a consistent construction as a whole. . . . [W]e are mindful that an opinion must be read as a whole, without particular portions read in isolation,

to discern the parameters of its holding." (Internal quotation marks omitted.) *Buchenholz* v. *Buchenholz*, 221 Conn. App. 132, 138, 300 A.3d 1233, cert. denied, 348 Conn. 928, 304 A.3d 860 (2023); see also *In re Paulo T.*, 213 Conn. App. 858, 878, 279 A.3d 766 (2022) (opinion of trial court must be read in its entirety and it is presumed to have acted properly in performance of its duties), aff'd, 347 Conn. 311, 297 A.3d 194 (2023).

After reviewing the record before us, including the trial transcript, the court's memorandum of decision and its subsequent articulation, we conclude that the court independently considered the claims made in the pendente lite motions filed by the defendant and incorporated its ruling on those motions in its final financial orders as part of the ultimate dissolution of the parties' marriage following the trial held on October 24, 2022. At the outset of the trial, the court was aware of the pending pendente lite motions. In its memorandum of decision, the court specifically stated that it had considered and resolved all of the pending motions. Although the court did not expressly set forth its reasoning for doing so, the court declined to award alimony or attorney's fees pendente lite. In its articulation, the court explained that it did not address the pendente lite motions in a separate hearing, but rather considered them during the trial itself.[6] This approach differs from the procedure used in *Milbauer* v. *Milbauer*, supra, 54 Conn. App. 309–10, but is not improper. We iterate that *Milbauer* does not require a court to conduct separate hearings with respect to pendente lite issues if it considers these issues in deciding the permanent orders as was done in this case. In light of the totality of the

[6] We note that the trial court has broad discretion in managing its docket, but still is required to consider and decide all motions properly placed before it. See *Kammili* v. *Kammili*, 197 Conn. App. 656, 661, 232 A.3d 102, cert. denied, 335 Conn. 947, 238 A.3d 18 (2020).

memorandum of decision and the court's articulation,[7] and our presumption that the court acted properly in the performance of its duties, we conclude, contrary to the argument of the defendant, that it independently adjudicated the pendente lite motions, albeit as part of its final financial orders. Although our law provides a process to order temporary or pendente lite orders of alimony and support, it does not require that the court consider these motions as a condition precedent to making final orders. In this matter, the court did not refuse to consider the defendant's pendente lite motions nor did the defendant object to the court addressing the final requests for support and alimony before it considered her pendente lite motions. Moreover, the defendant has not presented us with any persuasive argument that the consideration of these motions at the dissolution trial was improper. Accordingly, we conclude that this claim is without merit.

## II

The defendant next claims that the court applied an improper legal standard to her claim for alimony and the division of the marital property. Specifically, she argues that the court failed to consider the plaintiff's duty to support the defendant as part of the dissolution proceeding. We disagree that the court utilized an improper legal standard.

[7] To the extent that the defendant now suggests that the court's response to her motion for articulation was incomplete or nonresponsive, we note that she failed to request further articulation or to file a motion for review with this court pursuant to Practice Book § 66-7. "[W]here a party is dissatisfied with the trial court's response to a motion for articulation, he may, and indeed under appropriate circumstances he must, seek immediate appeal . . . to this court via the motion for review." (Internal quotation marks omitted.) *Emrich* v. *Emrich*, 127 Conn. App. 691, 706, 15 A.3d 1104 (2011); see, e.g., *Trumbull* v. *Palmer*, 123 Conn. App. 244, 251 n.8, 1 A.3d 1121, cert. denied, 299 Conn. 907, 10 A.3d 526 (2010), and cert. denied, 299 Conn. 907, 10 A.3d 526 (2010).

The following additional facts are necessary for the resolution of this claim. In the defendant's proposed financial orders, dated October 19, 2022, she requested that the court grant her motion for retroactive pendente lite alimony, which had been served on the plaintiff on July 8, 2020, in the amount of $9500 per month for a total of $256,500. This payment was to be in the form of a lump sum transfer from the plaintiff's retirement account. She further requested that neither party receive any further alimony payments. The defendant also proposed that the plaintiff pay her $500,000 as a lump sum property distribution. In his proposed financial orders, also dated October 19, 2022, the plaintiff indicated that no alimony should be awarded to either party, although he offered to make a single payment of $10,000 to the defendant and to transfer $42,500 from his retirement account to the defendant.

In its memorandum of decision, the court stated: "In Connecticut, no one gains a right to support or property solely by marrying someone capable of providing support or owning property. . . . General Statutes §§ 46b-81 and 46b-82 create a fact flexible scheme for considering alimony and property distribution that focuses on what the parties contributed to the marriage, the length of the marriage, the parties' needs, their ages, their health, along with their prospects of making money and acquiring property as shaped by their opportunities, their education, and their work experience. Connecticut is not a community property state. . . . [O]ur courts consider all property and divide it based upon the balancing of equitable factors. Nothing in right or statute requires any use of any percentage division as a starting point or for anything else." (Citation omitted.)

We begin with the standard of review and relevant legal principles. "[W]hether the court applied the correct legal standard is a question of law subject to plenary review." (Internal quotation marks omitted.) *Ferri* v.

*Powell-Ferri*, 200 Conn. App. 63, 73, 239 A.3d 1216, cert. denied, 335 Conn. 970, 240 A.3d 285 (2020); see also *In re Christina C.*, 221 Conn. App. 185, 211, 300 A.3d 1188, cert. denied, 348 Conn. 907, 301 A.3d 1056 (2023). Our Supreme Court has stated that "[o]ur alimony statute does not recognize any absolute right to alimony. . . . By statute, neither husband nor wife acquires any right in the property of the other, except for certain survivorship rights . . . whether such property is acquired before or after the marriage." (Citations omitted.) *Thomas* v. *Thomas*, 159 Conn. 477, 486, 271 A.2d 62 (1970); see also *Valante* v. *Valante*, 180 Conn. 528, 530, 429 A.2d 964 (1980); *Wilson* v. *Di Iulio*, 192 Conn. App. 101, 109, 217 A.3d 3 (2019). The decision of whether to award alimony to a party rests in the discretion of the trial court after consideration of the statutory factors set forth in § 46b-82. See *Weinstein* v. *Weinstein*, 18 Conn. App. 622, 637, 561 A.2d 443 (1989). Stated differently, "§ 46b-82 governs awards of alimony. That section requires the trial court to consider the length of the marriage, the causes for the annulment, dissolution of the marriage or legal separation, the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81 . . . . In awarding alimony, [t]he court must consider all of these criteria. . . . It need not, however, make explicit reference to the statutory criteria that it considered in making its decision or make express findings as to each statutory factor. . . . The trial court may place varying degrees of importance on each criterion according to the factual circumstances of each case." (Internal quotation marks omitted.) *Wilson* v. *Di Iulio*, supra, 109.

We next consider the court's role in distributing the marital property. "In fashioning orders that distribute

marital property . . . § 46b-81 (c) directs the court to consider numerous separately listed criteria. . . . [Section] 46b-81 (a) permits the farthest reaches from an equal division as is possible, allowing the court to assign to either the husband or wife all or any part of the estate of the other. On the basis of the plain language of § 46b-81, *there is no presumption in Connecticut that marital property should be divided equally* prior to applying the statutory criteria." (Emphasis in original; internal quotation marks omitted.) *Kammili* v. *Kammili*, 197 Conn. App. 656, 664, 232 A.3d 102, cert. denied, 335 Conn. 947, 238 A.3d 18 (2020); see also *Pencheva-Hasse* v. *Hasse*, 221 Conn. App. 113, 130, 300 A.3d 1175 (2023).

After a thorough review of the court's memorandum of decision, we disagree with the defendant's assertion that the court utilized an improper standard with respect to the issues of alimony and distribution of the marital property. The court properly cited to and applied the relevant statutes in issuing its financial orders regarding alimony and the distribution of property. "Because the court stated that it had considered all the relevant statutory factors, it is presumed to have performed its duty unless the contrary appears from the record." *Walker* v. *Walker*, 222 Conn. App. 192, 196, 304 A.3d 523 (2023). We conclude, therefore, that this claim is without merit.

III

The defendant next claims that the court applied an improper legal standard to her claim for attorney's fees in this dissolution matter. Specifically, she argues that the court's denial of her request for attorney's fees undermined its other financial orders with respect to the issues of alimony and property distribution. The plaintiff counters, inter alia, that the court employed the correct legal standard and its order denying payment

of attorney's fees to the defendant did not constitute an abuse of its discretion. We agree with the plaintiff.

The following additional facts are relevant to this issue. The plaintiff testified that he paid the defendant $15,000 for her attorney's fees. He also stated that, in his opinion, the legal fees in this case were excessive, particularly when compared to his 2011 divorce in New York. During cross-examination, he indicated that he had paid between $50,000 and $75,000 to his attorney during this dissolution of marriage action. The defendant testified that she owed $80,555 in legal fees for this dissolution action.

In its memorandum of decision, the court stated: "The parties will be solely responsible for their respective attorney's fees." In its articulation, the court explained that it "saw no reason under the applicable statutes to award [the defendant] attorney's fees or to award them outside the statutes for bad faith. The court found no bad faith in its ruling. It found no contempt against [the plaintiff] meriting an award under General Statutes § 46b-87. The court also rejected an award under General Statutes § 46b-62. Having reviewed all the factors in . . . § 46b-82, the court believed that a fee award to [the defendant] was not appropriate considering its financial orders, nor would those orders be frustrated by a failure to grant it. This was so because the court's financial award was adequate to account for what it believed would be a reasonable attorney's fee for handing the case reflected on the docket and the evidence before it."

"In dissolution and other family court proceedings, pursuant to § 46b-62 (a), the court may order either [party] to pay the reasonable attorney's fees of the other in accordance with their respective financial abilities and the equitable criteria set forth in § 46b-82, the alimony statute. That statute provides that the court may

consider the length of the marriage, the causes for the . . . dissolution of the marriage . . . the age, health, station, occupation, amount and sources of income, earning capacity, vocational skills, education, employability, estate and needs of each of the parties and the award, if any, which the court may make pursuant to section 46b-81 for the assignment of property. . . .

"Courts ordinarily award counsel fees in divorce cases so that a party . . . may not be deprived of [his or] her rights because of lack of funds. . . . Where, because of other orders, both parties are financially able to pay their own counsel fees they should be permitted to do so. . . . An exception to the rule . . . is that an award of attorney's fees is justified even where both parties are financially able to pay their own fees if the failure to make an award would undermine its prior financial orders . . . . [A]n award of attorney's fees in a marital dissolution case is warranted only when at least one of two circumstances is present: (1) one party does not have ample liquid assets to pay for attorney's fees; or (2) the failure to award attorney's fees will undermine the court's other financial orders." (Citations omitted; internal quotation marks omitted.) *Dolan* v. *Dolan*, 211 Conn. App. 390, 404–405, 272 A.3d 768, cert. denied, 343 Conn. 924, 275 A.3d 626 (2022); see also *Zakko* v. *Kasir*, 209 Conn. App. 619, 625–26, 269 A.3d 220 (2022).

At the outset, we note our agreement with the plaintiff that the proper standard of review for this claim is an abuse of discretion.[8] The court identified and applied the proper legal test for an award of attorney's fees in a dissolution matter. The issue, therefore, is whether the denial of such an award amounted to an abuse of the court's discretion. See *Leonova* v. *Leonov*, 201 Conn.

[8] We disagree, therefore, with the defendant's claim that this claim is subject to plenary review.

App. 285, 327, 242 A.3d 713 (2020) ("Whether to allow counsel fees, [under § 46b-62 (a)], and if so in what amount, calls for the exercise of judicial discretion. . . . An abuse of discretion in granting counsel fees will be found only if [an appellate court] determines that the trial court could not reasonably have concluded as it did." (Internal quotation marks omitted.)), cert. denied, 336 Conn. 906, 244 A.3d 146 (2021); *Lynch* v. *Lynch*, 153 Conn. App. 208, 247, 100 A.3d 968 (2014) (same), cert. denied, 315 Conn. 923, 108 A.3d 1124, cert. denied, 577 U.S. 839, 136 S. Ct. 68, 193 L. Ed. 2d 66 (2015).

After reviewing the record before us, including the trial transcript, memorandum of decision, and the articulation, we conclude that the court did not abuse its discretion in declining to award the defendant attorney's fees. As it explained in its articulation, the court considered the factors set forth in § 46b-82 and determined that an award of attorney's fees was not warranted given its other financial orders and that those orders would not be frustrated in the absence of such an award. The court expressly stated that its "*financial award was adequate to account for what it believed would be a reasonable attorney's fee for handling the case reflected on the court's docket and the evidence before it*." (Emphasis added.) Although she may have incurred significant attorney's fees in this dissolution action, the court was free to determine that the total claimed by the defendant was not reasonable.[9] "Courts have a general knowledge of what would be a reasonable attorney's fee for services which are fairly stated and described. . . . [C]ourts may rely on their general

[9] During closing argument, the plaintiff's counsel stated: "This should have been a simple matter to resolve. It's a short marriage. However, simply resolving this matter is not what's happened. Indeed, the defendant has incurred more than $100,000 in counsel fees, some of which are not even related to this case. She has incurred counsel fees without abandon and has not even made an attempt at paying them."

knowledge of what has occurred at the proceedings before them to supply evidence in support of an award of attorney's fees. . . . The court [is] in a position to evaluate the complexity of the issues presented and the skill with which counsel had dealt with these issues. . . . While the decision as to the liability for payment of such fees can be made in the absence of any evidence of the cost of the work performed . . . the dollar amount of such an award must be determined to be reasonable after an appropriate evidentiary showing." (Internal quotation marks omitted.) *M. S.* v. *P. S.*, 203 Conn. App. 377, 403, 248 A.3d 778, cert. denied, 336 Conn. 952, 251 A.3d 992 (2021).

Additionally, we note that the trial court, in addition to the statutory factors, has inherent equitable powers and may consider other factors appropriate for a just and fair resolution with respect to a claim for attorney's fees in a marital dissolution case. See *Clougherty* v. *Clougherty*, 162 Conn. App. 857, 876, 133 A.3d 886, cert. denied, 320 Conn. 932, 134 A.3d 621 (2016), and cert. denied, 320 Conn. 932, 136 A.3d 642 (2016). Finally, we note that, "[u]nder the abuse of discretion standard of review, [w]e will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion." (Internal quotation marks omitted.) Id. We cannot conclude that such abuse occurred in the present case and, therefore, we are not persuaded by the defendant's claim regarding failure to award attorney's fees.

## IV

The defendant next claims that the court improperly took judicial notice[10] of facts regarding her employment

[10] "The doctrine of judicial notice excuses the party having the burden of establishing a fact from introducing formal proof of the fact. Judicial notice takes the place of proof." (Internal quotation marks omitted.) *Scalora* v. *Scalora*, 189 Conn. App. 703, 713, 209 A.3d 1 (2019). Section 2-1 (c) of the Connecticut Code of Evidence provides: "A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) within the

prospects and future earning capacity. Specifically, she argues that the court improperly took judicial notice of the labor market for educators and failed to assign her a specific earning capacity.[11] Further, she contends that, as a result of these improprieties, the court's financial orders are flawed. We conclude that, contrary to the defendant's claim, the court did not take judicial notice of facts regarding her employment prospects and future earnings and, therefore, this claim is without merit.

In its memorandum of decision, the court found that the defendant earned "very little" and that due to the length of the marriage, there "was [not] time enough for the parties' lives to intertwine enough to merit seismic shifts in the parties' finances." It further found that, as a result of the marriage, the defendant "improved her financial situation and her children's lifestyle[s]." Her nonmonetary contributions did not enable the plaintiff's financial success and, the court explained that she would need to support herself following the dissolution judgment. It then stated: "And she has the means. She

knowledge of people generally in the ordinary course of human experience, or (2) generally accepted as true and capable of ready and unquestionable demonstration." See also *Vendrella* v. *Astriab Family Ltd. Partnership*, 311 Conn. 301, 331 n.24, 87 A.3d 546 (2014).

[11] "[O]ur case law is clear that a party's earning capacity is the amount that he or she realistically can be expected to earn. . . . It is not the amount the party previously has earned or currently may be earning. . . . In marital dissolution proceedings, under appropriate circumstances the trial court may base financial awards on the earning capacity rather than the actual earned income of the parties . . . when . . . there is specific evidence of the [party's] previous earnings. . . . It is particularly appropriate to base a financial award on earning capacity where there is evidence that the [party] has voluntarily quit or avoided obtaining employment in [the party's] field. . . . Earning capacity, in this context, is not an amount which a person can theoretically earn, nor is it confined to actual income, but rather it is an amount which a person can realistically be expected to earn considering such things as [her] vocational skills, employability, age and health." (Citations omitted; emphasis omitted; internal quotation marks omitted.) *Mitchell* v. *Bogonos*, 218 Conn. App. 59, 74, 290 A.3d 825 (2023).

is fifty-four years old, *but she has a teaching certificate in mathematics and special education during a dramatic labor shortage in one of the best labor markets in the world.* She will have to work to support herself, and fortunately most of her children are adults and the last soon will be." (Emphasis added.) The court's property distribution and decision to not award her alimony were made on the basis of her contributions to the household, her age, her employment prospects,[12] and her time away from gainful employment.

As we previously have noted in this opinion, the interpretation of a court's memorandum of decision presents a question of law subject to plenary review. See *In re Jacquelyn W.*, 169 Conn. App. 233, 241, 150 A.3d 692 (2016). We iterate that, "[a]s a general rule, judgments are to be construed in the same fashion as other written instruments. . . . The determinative factor is the intention of the court as gathered from all parts of the judgment." (Internal quotation marks omitted.) Id. On the basis of our review, we conclude that the court did not take judicial notice of the employment opportunities for an educator, but rather made a passing reference in support of its determination, based on the relevant statutory factors and evidence presented, that the defendant had the ability to support herself following the dissolution judgment and financial orders. We emphasize that the court found that the duration of the marriage, the absence of an intertwinement of their assets, and the lack of the defendant's contribution to the plaintiff's success did not warrant "seismic shifts in the parties' finances." See, e.g., *Mitchell* v. *Bogonos*,

[12] The defendant testified: "In 2017, I was still trying to grow my embroidery business that I had started in 2012. But when I realized that wasn't financially viable, I pivoted and started tutoring and working with children who have learning differences. And I additionally just took a second job as the director of operations at a marking company." She further testified that, in March, 2022, she was offered a full-time teaching position with an annual salary of $60,000.

218 Conn. App. 59, 73, 290 A.3d 825 (2023) (applying statutory factors, court concluded that marriage was of short duration and defendant did not contribute to acquisition, preservation, or appreciation of any of plaintiff's assets). Similarly, the court was not required to make a finding of the defendant's specific earning capacity because it had determined that her financial situation was not altered substantially by the marriage, and her postdissolution employment opportunities, based on her age and education, coupled with the financial orders, would provide sufficient support. For these reasons, this claim must fail.

V

The defendant's final claim is that the court improperly discredited her testimony that the plaintiff's consumption of alcohol caused the marriage to end. Specifically, she argues that the court improperly rejected her testimony regarding the plaintiff's alcohol abuse and its effects on the parties' marriage due to the lack of corroborating evidence.[13] We are not persuaded.

[13] The defendant also argues that the court's trial management order limiting each side to sixty minutes to present his or her case prevented her from presenting additional evidence of the plaintiff's excessive alcohol consumption. On August 22, 2022, the court issued the following order: "The parties will begin a remote trial in this matter on [October 24, 2022] at 2 p.m.. The plaintiff will have sixty minutes of time and the defendant will have sixty minutes. The clock is running whenever a party or a party's witness is speaking, including cross-examination, objections, arguments, etc. A party objecting to the court's time allotment must file a written objection on the docket."

As noted previously in this opinion, the abuse of discretion standard applies to trial management issues. "A party adversely affected by a [trial] court's case management decision thus bears a formidable burden in seeking reversal. . . . A trial court has the authority to manage cases before it as is necessary. . . . Deference is afforded to the trial court in making case management decisions because it is in a much better position to determine the effect that a particular procedure will have on both parties. . . . The case management authority is an inherent power necessarily vested in trial courts to manage their own affairs in order to achieve the expeditious disposition of cases. . . . The ability of trial judges to manage cases is essential to judicial economy and justice." (Internal quotation marks omitted.) *Barnes* v. *Connecticut Podiatry Group, P.C.*, 195 Conn. App. 212, 228, 224 A.3d 916 (2020); see also *Cinotti* v. *Divers*, 151 Conn. App. 297, 304, 94 A.3d 1212, cert. denied, 314 Conn. 924, 100 A.3d 855 (2014).

The defendant testified that, prior to the marriage, the plaintiff refrained from drinking alcohol as a result of the negative effects he had experienced and those he had witnessed impacting other members of his family. The defendant further testified that she suspected that the plaintiff resumed consuming alcohol in January, 2019, and that he admitted to doing so in September, 2019. She stated that, during this time period, the plaintiff became "more irritable," and would "go into a rage and yell and scream . . . ." During the time period from September, 2019, until April, 2020, she claimed that the plaintiff's frequency and amount of alcohol consumption increased to the point of daily use, which caused her to move out of the marital home. She further described his behavior as "erratic, volatile, controlling, mean, unpredictable, unstable, [and] scary" and as negatively impacting both her and her children. Ultimately, she was "100 percent sure that the marriage broke down due to [the plaintiff's] drinking and his change in behavior."

Neither party filed a written objection to the court's time allotment. Furthermore, during the direct examination of the defendant, her counsel stated: "I think I'm going to finish in the allotted time, but I'm hoping that if I need a little extra time for redirect the court might consider it." The court responded that it would evaluate this request on the basis of the nature of the questions and whether they were material. At the conclusion of the defendant's testimony, the court asked: "Is there anything that you claim is so material that should be allowed to inquire, assuming you're out of time . . . ?" The defendant's counsel responded in the negative. Finally, after the plaintiff's rebuttal testimony, the court inquired if the defendant's counsel needed additional time because of "any question that you need to ask in order to receive a fair hearing," and she again replied in the negative.

"It is well known that this court is not bound to consider a claim unless it was distinctly raised at the trial or arose subsequent to the trial. Practice Book § 60-5. The requirement that [a] claim be raised distinctly means that it must be so stated as to bring to the attention of the court the precise matter on which its decision is being asked. . . . The reason for the rule is obvious: to permit a party to raise a claim on appeal that has not been raised at trial—after it is too late for the trial court . . . to address the claim—would encourage trial by ambuscade, which is unfair to both the trial court and the opposing party." (Internal quotation marks omitted.) *Dessa, LLC* v. *Riddle*, 223 Conn. App. 457, 464, 308 A.3d 1051 (2024); see also *Ochoa* v. *Behling*, 221 Conn. App. 45, 50–51, 299 A.3d 1275 (2023).

The defendant specifically represented to the trial court that she did not need additional time to present her case, and, therefore, she cannot now

During his rebuttal testimony, the plaintiff denied excessively consuming alcohol, and stated that he had not been arrested for driving a motor vehicle under the influence of alcohol or that alcohol consumption affected his work performance. He further stated that the defendant did not express concern regarding his use of alcohol during the marriage.

In its memorandum of decision, the court stated: "It's worth noting that the court was unimpressed with [the defendant's] claim that drinking drove the marriage onto the rocks. The evidence, uncorroborated by witnesses, arrest records, treatment, or trouble at work, didn't have enough convincing force for the court to give [the defendant] money for the troubles she claimed it brought her. It was more convenient than convincing." It is clear that the court rejected the defendant's testimony regarding the plaintiff's increased alcohol use and its effects on the marriage as not credible.

"[I]n a case tried before a court, the trial judge is the sole arbiter of the credibility of the witnesses and the weight to be given specific testimony. . . . As such, the trial court is free to accept or reject, in whole or in part, the evidence presented by any witness, having the opportunity to observe the witnesses and gauge their credibility." (Internal quotation marks omitted.) *Hebrand* v. *Hebrand*, 216 Conn. App. 210, 223, 284 A.3d 702 (2022); see also *L. K.* v. *K. K.*, 226 Conn. App. 279, 312, 318 A.3d 243 (2024) (where trial court is arbiter of credibility, this court does not disturb findings made on basis of credibility of witness, as credibility determination is unassailable on appeal). It is the privilege of the trial court to adopt whatever testimony it reasonably believes to be credible, and it is not the function of this court to retry the facts or pass on the credibility of a witness. See *M.B.* v. *S.A.*, 194 Conn. App. 727, 735, 222 A.3d 551 (2019); see also *Emerick* v. *Emerick*, 170 Conn.

claim that the court's management order prevented her from doing so. Accordingly, we decline to review this argument.

App. 368, 377, 154 A.3d 1069, cert. denied, 327 Conn. 922, 171 A.3d 60 (2017).

Contrary to the defendant's appellate argument, the court did not discredit her testimony regarding the plaintiff's purported alcohol abuse due to the lack of additional corroborating evidence. Moreover, the court, as the arbiter of credibility and finder of fact, did not credit the defendant's testimony as to this issue. Rather, the court merely pointed out that she had not presented any additional corroborating evidence. We emphasize that "[i]t is the sole province of the trial court to weigh and interpret the evidence before it and to pass on the credibility of the witnesses. . . . It has the advantage of viewing and assessing the demeanor, attitude and credibility of the witnesses and is therefore better equipped than we to assess the circumstances surrounding the dissolution action." (Emphasis omitted; internal quotation marks omitted.) *Zahringer* v. *Zahringer*, 124 Conn. App. 672, 679–80, 6 A.3d 141 (2010). For these reasons, we reject the defendant's claim that the court improperly discredited her claim that the plaintiff's consumption of alcohol caused the dissolution of the marriage.

The judgment is affirmed.

In this opinion the other judges concurred.

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## STATE OF CONNECTICUT *v.* SHANE K.*
## (AC 46501)

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

*Syllabus*

The defendant appealed from the judgment of conviction of assault in the third degree and two counts of criminal violation of a protective order. He

* 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

claimed, inter alia, that the trial court improperly denied his motion to dismiss or to transfer the case for improper venue because the court, inter alia, incorrectly had concluded that the state constitution did not mandate that a criminal defendant be tried in the judicial district in which the offense occurred. *Held*:

This court declined to consider the merits of the defendant's constitutional and statutory (§ 51-352c (a) and (b)) claims in light of its conclusion that the trial court did not clearly err in finding that the defendant had committed the charged offenses, at least in part, in the judicial district in which he was tried.

The defendant waived his unpreserved claim that the trial court improperly failed to instruct the jury on venue, and, as a result of such waiver, the unpreserved claim also failed under the third prong of *Golding*.

Argued March 21—officially released September 17, 2024

*Procedural History*

Substitute information charging the defendant with two counts of the crime of criminal violation of a protective order and one count of the crime of assault in the third degree, brought to the Superior Court in the judicial district of Ansonia-Milford, geographical area number twenty-two, and tried to the jury before *Hon. H. Gordon Hall*, judge trial referee; thereafter, the court denied the defendant's motion to dismiss or to transfer; verdict and judgment of guilty, from which the defendant appealed to this court. *Affirmed*.

*Jeremiah Donovan*, for the appellant (defendant).

*Timothy J. Sugrue*, assistant state's attorney, with whom, on the brief, were *Margaret E. Kelley*, state's attorney, and *Matthew Kalthoff*, supervisory assistant state's attorney, for the appellee (state).

*Opinion*

MOLL, J. The defendant, Shane K., appeals from the judgment of conviction, rendered after a jury trial, of

order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

assault in the third degree in violation of General Statutes § 53a-61 (a) (1)[1] and two counts of criminal violation of a protective order in violation of General Statutes § 53a-223.[2] On appeal, the defendant claims that the trial court improperly (1) denied his motion to dismiss or, in the alternative, to transfer the case for improper venue, asserting that the court incorrectly (a) concluded that the state constitution does not require a criminal defendant to be tried in the judicial district where the charged offense occurred and (b) applied General Statutes § 51-352c (a) and (b),[3] and (2) failed

[1] General Statutes § 53a-61 (a) provides in relevant part: "A person is guilty of assault in the third degree when: (1) With intent to cause physical injury to another person, he causes such injury to such person or to a third person . . . ."

[2] General Statutes § 53a-223 provides: "(a) A person is guilty of criminal violation of a protective order when an order issued pursuant to subsection (e) of section 46b-38c, subsection (f) of section 53a-28, or section 54-1k or 54-82r has been issued against such person, and such person violates such order.

"(b) No person who is listed as a protected person in such protective order may be criminally liable for (1) soliciting, requesting, commanding, importuning or intentionally aiding in the violation of the protective order pursuant to subsection (a) of section 53a-8, or (2) conspiracy to violate such protective order pursuant to section 53a-48.

"(c) Criminal violation of a protective order is a class D felony, except that any violation of a protective order that involves (1) imposing any restraint upon the person or liberty of a person in violation of the protective order, or (2) threatening, harassing, assaulting, molesting, sexually assaulting or attacking a person in violation of the protective order is a class C felony."

[3] General Statutes § 51-352c provides: "(a) A criminal prosecution shall not fail by reason of the fact that the evidence may disclose the crime to have been committed in a town or judicial district adjoining that alleged in the indictment or information.

"(b) If any person is accused of committing any offense on the boundary or divisional line between any of the towns or judicial districts in the state, or so near thereto as to render it doubtful in which town or judicial district the offense was committed, the town or judicial district which first assumes jurisdiction by issuing process for the arrest and prosecution of the offender, whether the name of such offender is known or unknown, shall have exclusive jurisdiction to charge, present, indict, try, convict and sentence. In such a case, it shall only be necessary for the state, judicial district, town, city or borough to establish the venue alleged in the information, complaint, warrant or indictment by proving that the offense alleged was committed

to instruct the jury on venue. We affirm the judgment of the trial court.

The following facts, which the jury reasonably could have found, and procedural history are relevant to our resolution of the defendant's claims. The victim, L, became acquainted with the defendant in 2018, and they subsequently were married on July 15, 2018. The defendant thereafter moved in with the victim and her minor daughter, M, at the victim's residence in Bridgeport (residence).

In March, 2021, the victim called the police to the residence because "the dynamic became very toxic and [she] needed third-party interference to remove [the defendant] from the [residence]." On April 13, 2021, the trial court, *Dayton*, *J.*, issued an order of protection against the defendant, which prohibited him, inter alia, from assaulting, threatening, abusing, contacting, or coming within 100 yards of the victim. Whereupon, the defendant returned to the residence to collect his belongings and moved out. The victim and the defendant did not speak to each other for some time after the defendant had vacated the residence. Later, however, while the protective order remained in effect, the victim and the defendant reestablished communication.

On June 20, 2021, notwithstanding the protective order, the defendant, the victim, and M stayed at a hotel in Orange to celebrate Father's Day together. Following two days at the hotel, on June 22, 2021, the defendant drove the victim and M back to the residence. That afternoon, the defendant told the victim that he wanted to purchase marijuana in Shelton. The defendant drove

on the boundary of the judicial district or town in which the accused is being tried or so near thereto as to render it doubtful in which town or judicial district the offense was committed.

"(c) The provisions of this section shall not impair the right of the accused to obtain a change of venue."

the victim and M out of Bridgeport to a certain location and exited the vehicle alone. After returning to the vehicle, the defendant began driving the group back to Bridgeport. While traveling on a highway during the return trip, the victim and the defendant began arguing, and, at one point, the defendant pulled over and told the victim "to get the F out" of the vehicle, which the victim refused to do. After resuming the drive, the defendant stated, "F it, I'll just kill us all," and began repeatedly veering toward the side of the highway, which the victim countered by pushing the steering wheel back to keep the vehicle steady. In an effort to distract the defendant from his attempts to drive off the highway, the victim began "talking very derogator[ily] and very offensively about things that [the defendant] was sensitive to." At that juncture, while continuing to operate the vehicle, the defendant began punching the victim in her face with his right hand. The defendant continued to punch the victim until they were near or in Bridgeport. Once they had returned to the residence, the victim and M exited the vehicle, and the defendant drove away. The victim entered the residence and called the police to report the assault.

The victim later provided the police with a signed, written statement about the assault (victim's statement). In the victim's statement, which was marked as state's exhibit 10 for identification only and not offered by the state as a full exhibit at trial, the victim stated in relevant part that the defendant (1) began punching her while they were in the area of exit 55 on Route 15 southbound and (2) continued to punch her as they crossed over the Sikorsky Bridge and exited Route 15 via exit 52.

Following the assault, a warrant for the defendant's arrest was issued by the Superior Court, geographical area number twenty-two in Milford, which is located in

the judicial district of Ansonia-Milford.[4] The defendant subsequently was arrested and charged with, inter alia, criminal violation of a protective order in violation of § 53a-223 (c) (2) and assault in the second degree in violation of General Statutes § 53a-60.

During a pretrial hearing on November 1, 2022, the prosecutor informed the trial court, *Grogins*, *J.*, of a discussion that he had with the victim earlier that day, which discussion "raise[d] a question in [his] mind as to—it's an incident that allegedly took place in a car, that car ultimately . . . reached . . . Bridgeport, and whether or not that car passed through Milford may not be something that I'm able to prove at trial. It's not an element of an offense. I don't believe that it is anything that impacts the [defendant's] culpability for the case. . . . I disclosed that to [defense counsel] earlier today, I wanted to put that on the record lest there be any question that it was not discussed forthwith."

On November 14, 2022, the state filed a long form information (November 14, 2022 information) charging the defendant with (1) assault in the third degree in violation of § 53a-61 (a) (1), (2) criminal violation of a protective order, predicated on the allegation that the defendant failed to stay 100 yards away from the victim, in violation of § 53a-223, and (3) criminal violation of a protective order, predicated on the allegation that the defendant intentionally caused physical injury to the victim, in violation of § 53a-223 (c) (2). The November 14, 2022 information did not specify in which judicial district the charged offenses had occurred, but it alleged

[4] General Statutes § 51-344 provides in relevant part: "For purposes of establishing venue, the Superior Court shall consist of the following judicial districts:

"(1) The judicial district of Ansonia-Milford, consisting of the towns of Ansonia, Beacon Falls, Derby, Milford, Orange, Oxford, Seymour, Shelton and West Haven . . . ."

that the respective offenses had transpired during a drive to Bridgeport.

By way of a motion dated November 15, 2022, the defendant moved to dismiss or, in the alternative, to transfer the case on the basis of improper venue (motion to dismiss or to transfer).[5] In support of the motion, the defendant cited his due process rights pursuant to the United States constitution and article first, § 8, of the Connecticut constitution. The defendant contended that (1) the November 14, 2022 information did not allege that the charged offenses had occurred in the judicial district of Ansonia-Milford, and (2) "[o]n information and belief . . . the best the [s]tate might claim is that the alleged crime[s] occurred somewhere between Shelton and Bridgeport, most likely along the Merritt Parkway[6] in Stratford or Bridgeport"; (footnote added); with the latter two cities situated in the judicial district of Bridgeport,[7] such that the present case was being prosecuted in the wrong venue. The defendant further argued that, although "typically the question of venue is procedural and not jurisdictional," dismissal of the case was warranted because the state's disclosure on November 1, 2022, concerning new information about the location of the charged offenses, occurred

[5] The court, *Hon. H. Gordon Hall*, judge trial referee, received the original copy of the motion to dismiss or to transfer on November 15, 2022, but the defendant did not file the motion with the clerk's office until November 28, 2022.

[6] Evidence was adduced at trial indicating that Route 15 is the route number for the Merritt Parkway.

[7] General Statutes § 51-344 provides in relevant part: "For purposes of establishing venue, the Superior Court shall consist of the following judicial districts . . .

"(3) The judicial district of Bridgeport, consisting of the towns of Bridgeport, Easton, Fairfield, Monroe, Stratford and Trumbull . . . ."

Effective January 1, 2024, the judicial district of Fairfield was renamed as the judicial district of Bridgeport. See Public Acts 2023, No. 23-46, § 26. In the interest of simplicity, we consider any references in the record to the judicial district of Fairfield as referring to the judicial district of Bridgeport.

on the eve of trial, such that transferring the case would delay the impending trial. In addition, the defendant maintained that keeping the case in the judicial district of Ansonia-Milford "would subject [him] to a different jury pool than what he would have in Bridgeport and could skew the ultimate result at trial in a manner that could and should have been prevented." Accordingly, the defendant requested that the court dismiss the case or, in the alternative, transfer the case to Bridgeport or to the appropriate district determined by the court following a hearing.

By way of a memorandum of law dated November 25, 2022, the state objected to the motion to dismiss or to transfer. The state argued that venue was proper in the judicial district of Ansonia-Milford because (1) the arrest warrant for the defendant was supported by the victim's statement, in which the victim relayed that the defendant began assaulting her on Route 15 southbound in the area of exit 55, which is located in Milford, (2) at trial, it intended to offer evidence of the defendant stating that the incident in question occurred during a trip from New Haven to Bridgeport, which would corroborate the victim's statement as to the path of travel, (3) General Statutes §§ 54-1d (c)[8] and 51-352c permitted the case to be prosecuted in the judicial district of Ansonia-Milford even if the charged offenses had occurred in full or in part in a neighboring judicial district, such as the judicial district of Bridgeport, and (4) location was not an essential element of the charged offenses that the state was obligated to prove. As to the defendant's alternative request to transfer the case to a different venue, the state contended that the defendant could not satisfy his burden to prove that he would

[8] General Statutes § 54-1d (c) provides in relevant part: "A criminal cause shall not fail on the ground that it has been submitted to a session of improper venue."

not receive a fair and impartial trial in the judicial district of Ansonia-Milford. Additionally, with regard to its disclosure on November 1, 2022, concerning the prosecutor's discussion with the victim, the state represented that (1) during the discussion, the prosecutor "sensed that the [victim] may be uncertain as to the path of travel taken by the defendant seventeen months ago," (2) on the basis of the discussion, the prosecutor expected the victim to testify at trial that the charged offenses had occurred, at least in part, in the judicial district of Ansonia-Milford, and (3) "[i]n an abundance of candor," it had disclosed to defense counsel that its evidence "may be vague as to the precise locations of [these] alleged crime[s] in transit."

The matter was tried to a jury on November 28 and 29, 2022. On November 28, 2022, prior to the start of evidence, the state filed an amended long form information (operative information). The operative information, which charged the defendant with the same three crimes as the November 14, 2022 information,[9] alleged that "the following crimes . . . took place, in full or in part, within [the judicial district of Ansonia-Milford] . . . ." That same morning, after hearing argument outside of the jury's presence on the motion to dismiss or to transfer, the court, *Hon. H. Gordon Hall*, judge trial referee, determined that (1) the state had "facially alleged proper venue" in the operative information in compliance with the rules of practice,[10] (2) venue is not

[9] Count one of the operative information was identical to count one of the November 14, 2022 information. The state made minor changes to the allegations in support of counts two and three of the operative information relative to the corresponding counts in the November 14, 2022 information, which changes are immaterial for purposes of this appeal.

[10] Practice Book § 36-13 provides in relevant part: "The information shall be a plain, concise and definite written statement of the offense charged. . . . The information shall also contain . . . (4) [a] statement that such crime was committed in a particular judicial district or geographical area, or at a particular place within such judicial district or geographical area . . . ."

an issue "of constitutional dimension in this state," but, rather, "more an issue of convenience for the litigants," and (3) the state was not required to prove venue, as it was not an element of any of the charged offenses. The court further determined that (1) the defendant had not demonstrated that he would not receive a fair and impartial trial in the judicial district of Ansonia-Milford and (2) "venue, at least where we sit right now, is proper" in light of the victim's statement; however, without objection from the parties, the court reserved its decision on the motion to dismiss or to transfer so as to permit the parties to develop the record further.

During its case-in-chief, the state called several witnesses, including the victim. The victim testified in relevant part that (1) while at the residence on the afternoon of June 22, 2021, the defendant told her that he wanted to purchase marijuana in Shelton, (2) the defendant drove her and M out of Bridgeport via a highway to get to their destination, although she could not recall any details about the destination, had no independent recollection of the specific highway on which they had traveled, and was not certain whether they ever reached Shelton, (3) during their return trip to Bridgeport, the defendant briefly stopped at a gas station close to a highway before entering the highway, although she could not recall the name of the gas station or the highway, and (4) the defendant began assaulting her while driving on the highway, with the assault continuing to transpire while they passed by multiple highway exits and crossed over a bridge that she believed, without certainty, to be the Sikorsky Bridge. The victim further testified that she had been intoxicated at the time of the assault, which made her "memory of what was going on at that particular time . . . blurry . . . ."

The state also called as a witness Charlotte Schmid, an investigator for the Department of Children and Families. Schmid testified in relevant part that (1) she spoke

with the defendant following the assault on July 19, 2021, (2) she asked the defendant "about the incident in the car," which reference the defendant "seem[ed] to understand," and (3) the defendant told her that, on the day of the aforementioned "incident," he was driving with the victim and M to New Haven to get medication.

On November 29, 2022, after the state had rested its case-in-chief, the court excused the jury and invited additional argument on the motion to dismiss or to transfer. The court then orally denied the motion, setting forth its reasoning on the record and further indicating that a written decision would follow, which it later issued on December 2, 2022.[11] The court determined that both the judicial district of Ansonia-Milford and the judicial district of Bridgeport constituted proper venues because the record supported finding that the alleged offenses were committed in both judicial districts. In determining that venue was proper in the judicial district of Ansonia-Milford, the court relied on (1) the victim's statement, which reflected that the defendant began assaulting the victim while they were on Route 15 in Milford,[12] and (2) testimony at trial indicating that, on the day of the assault, the defendant drove the victim and M either to Shelton or to New Haven, such that, in either scenario, they would have had to have gone "out of their way to avoid the judicial district of Ansonia-Milford to get back to Bridgeport." The court observed that, although the victim had testified at trial that she could not recall the details as to where the assault had occurred, her trial testimony did not recant or contradict the substance of the victim's statement.

[11] In the December 2, 2022 written decision, the court stated that the motion to dismiss or to transfer was "denied for the reasons articulated at the [November 29, 2022] hearing and herein." (Emphasis omitted.)

[12] The court referenced a map admitted into evidence as state's exhibit 7 to find that, per the victim's statement, the defendant began assaulting the victim while they were in Milford.

Furthermore, ostensibly assuming arguendo that the record did not support a finding that the alleged offenses occurred in the judicial district of Ansonia-Milford, the court concluded that dismissal of the case was not warranted by operation of § 51-352c (a) and (b) or § 54-1d (c).

Additionally, the court iterated that venue under Connecticut law is a "procedural matter" concerning the convenience of the parties[13] and that the defendant had not demonstrated any prejudice as a result of his trial being conducted in the judicial district of Ansonia-Milford. Moreover, insofar as the defendant was raising a vicinage claim, the court stated that (1) it was unaware of any authority providing that the vicinage clause of the sixth amendment to the United States constitution[14] applies to the states, and (2) our Supreme Court "has not upheld a right of an accused to be tried within the county or other territorial jurisdiction within which the offense was committed" and the state constitution "contain[ed] no provision restricting the place of trial of persons accused of a crime," citing *State* v. *Pace*, 129 Conn. 570, 572, 29 A.2d 755 (1943).

On November 29, 2022, the jury found the defendant guilty on all counts. On February 6, 2023, the court

[13] The court noted that the defendant was not contesting the court's jurisdiction to entertain the case and determined that, on the basis of the record, "the court ha[d] . . . all kinds of jurisdiction, personal, territorial, and subject matter jurisdiction . . . ."

[14] The sixth amendment to the United States constitution provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The vicinage clause of the sixth amendment to the United States constitution "guarantees the right to . . . an impartial jury of the State and district wherein the crime shall have been committed." (Internal quotation marks omitted.) *Smith* v. *United States*, 599 U.S. 236, 244–45, 143 S. Ct. 1594, 216 L. Ed. 2d 238 (2023). "The vicinage right is . . . one aspect of the jury-trial rights protected by the [s]ixth [a]mendment . . . ." Id., 245.

sentenced the defendant to a total effective sentence of ten years of incarceration, execution suspended after five years, followed by three years of probation. This appeal followed. Additional procedural history will be set forth as necessary.

I

We first turn to the defendant's claim that the trial court improperly denied the motion to dismiss or to transfer because the court incorrectly (1) concluded that the state constitution does not mandate that a criminal defendant be tried in the judicial district where the offense occurred and (2) applied § 51-352c (a) and (b). For the reasons that follow, we decline to consider the merits of these claims.

A

The defendant asserts that, contrary to the court's conclusion, the trial of a criminal defendant in the judicial district where the offense occurred is required by the state constitution. The defendant contends that article first, § 19, of the Connecticut constitution, which provides that "[t]he right of trial by jury shall remain inviolate,"[15] encompasses such a requirement.[16] A necessary predicate to this claim is that this purported constitutional requirement was violated in the present case. The defendant maintains on appeal that the record demonstrated that the charged offenses occurred in the

[15] The defendant refers to article first, § 21, of the Connecticut constitution in identifying the right of trial by jury; however, that right is now contained in article first, § 19. See *State* v. *Langston*, 346 Conn. 605, 633 n.11, 294 A.3d 1002 (2023) ("The right to trial by jury in the 1818 constitution was contained in article first, § 21. The 1965 constitution retained the language of the right but relocated it to article first, § 19, where it currently remains."), cert. denied, U.S. , 144 S. Ct. 698, 217 L. Ed. 2d 391 (2024).

[16] We note that General Statutes § 51-352 (a) provides that "[e]ach person charged with any offense shall be tried in the judicial district in which the offense was committed, except when it is otherwise provided." The defendant takes the position on appeal that this statute "seeks to implement a right that is constitutional in dimension."

judicial district of Bridgeport and that there was inadequate evidence establishing that the charged offenses happened in the judicial district of Ansonia-Milford, where he was tried. We conclude that the court did not err in finding that the defendant committed the charged offenses, at least in part, in the judicial district of Ansonia-Milford. Accordingly, we decline to address the merits of the constitutional question posed by the defendant.

It is well settled that "[w]e . . . do not engage in addressing constitutional questions unless their resolution is unavoidable. Ordinarily, [c]onstitutional issues are not considered unless absolutely necessary to the decision of a case . . . ." (Internal quotation marks omitted.) *State* v. *McCahill*, 261 Conn. 492, 501, 811 A.2d 667 (2002); see also *In re Kaleb H.*, 306 Conn. 22, 26 n.3, 48 A.3d 631 (2012) ("[t]his court has a basic judicial duty to avoid deciding a constitutional issue if a nonconstitutional ground exists that will dispose of the case" (internal quotation marks omitted)).

Our analysis requires us to review the court's factual finding that the defendant committed the charged offenses, at least in part, in the judicial district of Ansonia-Milford. "Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (Internal quotation marks omitted.) *Delena* v. *Grachitorena*, 216 Conn. App. 225, 229–30, 283 A.3d 1090 (2022).

In denying the motion to dismiss or to transfer, the court determined that venue was proper in the judicial

district of Ansonia-Milford, relying on the victim's statement,[17] a map of the area described in the victim's statement, and testimony elicited at trial to support its finding that the defendant committed the charged offenses, at least in part, in that judicial district. The victim's statement provided that the defendant (1) began assaulting the victim in the area of exit 55 on Route 15 southbound and (2) continued the assault while crossing over the Sikorsky Bridge and later exiting the highway via exit 52. The map of the area described in the victim's statement reflected that the assault began in Milford.[18] During trial, the victim testified that she could not recall the highway on which the assault had occurred and that she vaguely, but without certainty, remembered traveling over the Sikorsky Bridge during the assault. As the court correctly noted, although the victim could not recall at trial the details of where the assault had occurred, none of her testimony contradicted the victim's statement. Additionally, Schmid testified that the defendant informed her that, on the day of the assault, he had driven the victim and M to New Haven, which, if true, would lead to the reasonable inference that they drove through the judicial district

[17] Although the victim's statement was not admitted as a full exhibit at trial for the jury's consideration, the court relied on the victim's statement in concluding that venue was proper in the judicial district of Ansonia-Milford. The defendant did not brief a cognizable claim of error in his appellate brief challenging the court's reliance on the victim's statement. See *New Milford* v. *Standard Demolition Services, Inc.*, 212 Conn. App. 30, 34 n.1, 274 A.3d 911 (claims of error not briefed on appeal are deemed abandoned), cert. denied, 345 Conn. 908, 283 A.3d 506 (2022). During oral argument before this court, the defendant's appellate counsel asserted for the first time that the trial court could not rely on the victim's statement, as contained in the arrest warrant affidavit, in considering the issue of venue. This claim is not properly before us, as "[i]t is well settled that a claim cannot be raised for the first time at oral argument." (Internal quotation marks omitted.) *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 797 n.12, 256 A.3d 655 (2021).

[18] Otis Vinston, a state police trooper through whom the state offered the map of the area referenced in the victim's statement, testified at trial that the Sikorsky Bridge is located between Milford and Stratford on Route 15. He further testified that, after the victim had called the local police to report the defendant's actions, "it was ultimately determined that [the assault] happened before the Sikorsky Bridge heading southbound on Route 15."

of Ansonia-Milford while returning to Bridgeport. Accordingly, we conclude that there was sufficient evidence in the record supporting the court's finding that the defendant committed the charged offenses, at least in part, in the judicial district of Ansonia-Milford.

In light of our conclusion that the court did not clearly err in finding that the defendant committed the charged offenses, at least in part, in the judicial district where he was tried, it would serve no purpose for us to address whether our state constitution requires a criminal defendant to be tried in the judicial district where the offense occurred. "Such discussion would be purely academic because it would have no effect on the final outcome of this case." *Pasco Common Condominium Assn., Inc.* v. *Benson*, 192 Conn. App. 479, 508 n.22, 218 A.3d 83 (2019). Accordingly, we decline to consider the merits of the defendant's constitutional claim.

B

The defendant also contends that the court incorrectly applied § 51-352c (a) and (b) in denying the motion to dismiss or to transfer. Taking into account our conclusion in part I A of this opinion that the court did not commit clear error in finding that the defendant committed the charged offenses, at least in part, in the judicial district where he was tried, we need not address the merits of this claim.

In concluding that considering the merits of the defendant's claim is not necessary, we construe the court's decision denying the motion to dismiss or to transfer and briefly examine § 51-352c (a) and (b). As such, our review is plenary. See *CCI Computerworks, LLC* v. *Evernet Consulting, LLC*, 221 Conn. App. 491, 523, 302 A.3d 297 (2023) ("[t]he interpretation of a trial court's judgment presents a question of law over which our review is plenary" (internal quotation marks omitted)); *Coleman* v. *Bembridge*, 207 Conn. App. 28, 40,

263 A.3d 403 (2021) ("[i]ssues of statutory construction raise questions of law, over which we exercise plenary review" (internal quotation marks omitted)).

In its written decision denying the motion to dismiss or to transfer, after having determined that venue was proper in the judicial district of Ansonia-Milford, the court stated that "the only other venue suggested by the [defendant] as proper [is the] judicial district of [Bridgeport, which] borders [the judicial district of Ansonia-Milford] in the area where [the victim] first swore, and never denied, the offense conduct began . . . ." The court proceeded to conclude that, pursuant to § 51-352c (a) and (b), dismissal of the case was not warranted.[19]

We construe the court's application of § 51-352c (a) and (b) to be premised on the court's implicit assumption, for the sake of argument, that the charged offenses did not occur in the judicial district of Ansonia-Milford as alleged in the operative information. Indeed, the provisions of § 51-352c (a) and (b) are plainly inapposite when, as is the case here, an offense is alleged and found to have occurred in the judicial district where the criminal trial is conducted. See General Statutes § 51-352c (a) ("[a] criminal prosecution shall not fail by reason of the fact that *the evidence may disclose the crime to have been committed in a town or judicial district adjoining that alleged in the indictment or information*" (emphasis added)); General Statutes § 51-352c (b) ("[*i*]*f any person is accused of committing any offense on the boundary or divisional line between any of the towns or judicial districts in the state, or so near thereto as to render it doubtful in which town or judicial district the offense was committed*, the town or judicial district which first assumes

[19] The court did not expressly cite § 51-352c (a) or (b) on the record when it orally denied the motion to dismiss or to transfer on November 29, 2022.

jurisdiction by issuing process for the arrest and prosecution of the offender, whether the name of such offender is known or unknown, shall have exclusive jurisdiction to charge, present, indict, try, convict and sentence" (emphasis added)).

In short, we interpret the court's decision to reflect that it determined that § 51-352c (a) and (b) would function to militate against dismissing the case *only if* the record did not, in fact, support a finding that the defendant committed the charged offenses, at least in part, in the judicial district of Ansonia-Milford as alleged in the operative information. Given our analysis in part I A of this opinion upholding the court's finding of the same, examining the propriety of the court's application of § 51-352c (a) and (b) would not affect the final outcome of this case, and, therefore, "[s]uch discussion would be purely academic . . . ." *Pasco Common Condominium Assn., Inc.* v. *Benson*, supra, 192 Conn. App. 508 n.22. Accordingly, we decline to consider the merits of the defendant's claim concerning the court's reliance on these statutory provisions.

II

The defendant's remaining claim is that the trial court improperly failed to instruct the jury on venue. We conclude that the defendant has waived this unpreserved claim of instructional error.

The following additional procedural history is relevant to our resolution of this claim. On November 28, 2022, following the initial argument on the motion to dismiss or to transfer, the court stated in relevant part: "I do not find any requirement that venue needs to be proven by the state. It is not an element of any of the offenses charged . . . ." The court further stated that, subject to any objection from the parties, it would take the motion to dismiss or to transfer under advisement in order to allow the parties to develop the record

further. When the court inquired whether the parties had any additional comments, defense counsel responded, "I don't think so, Your Honor." The next day, when the court invited additional argument on the motion to dismiss or to transfer, defense counsel responded that he had "[n]o further argument on that, Your Honor, beyond what I argued the other day." Following additional argument by the state, the court asked defense counsel if he had "[a]nything in response," to which counsel responded, "[n]o, Your Honor." In orally denying the motion to dismiss or to transfer, the court iterated that "the [state is] not required to prove venue, it's not an element of any offense that's charged here . . . ."

The record indicates that, on November 18, 2022, before resuming jury selection that day, the court requested that the parties submit any requests to charge by the following Tuesday, November 22, 2022. Neither party submitted a request to charge. The record further reflects that the court provided the parties with (1) proposed jury instructions at some point prior to the start of evidence, and (2) the final jury instructions on the morning of November 29, 2022. Defense counsel did not object on the record either to the proposed or final jury instructions, whereas the state (1) notified the court at the end of the first day of trial that it wanted to address "one or two things" vis-à-vis the proposed jury instructions and (2) alerted the court following closing arguments the next day to a minor error in the final jury instructions.[20] The court charged the jury following a lunch recess on November 29, 2022. Beyond providing that, with respect to count two of the operative information, the state had alleged that the defendant had violated the protective order by driving the victim to Bridgeport, the jury instructions did not reference the location of the charged offenses or mention

[20] The court did not hold an on-the-record charge conference.

venue. Thereafter, when asked whether there were any exceptions to the charge, defense counsel responded, "[n]o, Your Honor."

On appeal, the defendant maintains that his claim of instructional error was preserved by (1) the motion to dismiss or to transfer and (2) "the court's ruling that the question of proper venue would not be presented to the jury . . . ." In the alternative, if his claim of instructional error is unpreserved, the defendant requests review pursuant to *State* v. *Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015).[21] The state argues in relevant part that the defendant's claim of instructional error is unpreserved, and, furthermore, that the claim has been waived. We conclude that the defendant's claim is unpreserved and, pursuant to the doctrine of implied waiver, fails under the third prong of *Golding*.

"In the context of jury instructions, a party may preserve for appeal a claim that an instruction . . . was . . . defective either by: (1) submitting a written request to charge covering the matter; or (2) taking an exception to the charge as given. . . . [S]ee . . . Practice Book § 42-16."[22] (Citation omitted; internal quotation marks omitted.) *State* v. *Ramon A. G.*, 190 Conn.

[21] "In *Golding*, our Supreme Court held that a defendant can prevail on a claim of constitutional error not preserved at trial only if *all* of the following conditions are met: (1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate harmlessness of the alleged constitutional violation beyond a reasonable doubt." (Emphasis in original; internal quotation marks omitted.) *State* v. *Roberts*, 224 Conn. App. 471, 486 n.27, 312 A.3d 1086, cert. denied, 349 Conn. 912, 314 A.3d 602 (2024).

[22] Practice Book § 42-16 provides: "An appellate court shall not be bound to consider error as to the giving of, or the failure to give, an instruction unless the matter is covered by a written request to charge or exception has been taken by the party appealing immediately after the charge is delivered. Counsel taking the exception shall state distinctly the matter objected to and the ground of exception. The exception shall be taken out of the hearing of the jury."

App. 483, 493, 211 A.3d 82 (2019), aff'd, 336 Conn. 386, 246 A.3d 481 (2020).

As the defendant concedes, defense counsel neither submitted a written request to charge on the issue of venue nor objected to the jury instructions as charged. Insofar as the defendant maintains that his claim of instructional error was otherwise preserved by way of either (1) the motion to dismiss or to transfer or (2) the court's "ruling" regarding venue, we disagree. There is nothing in the motion to dismiss or to transfer that reasonably could have alerted the court that the defendant sought a jury instruction on venue. Additionally, we disagree with the defendant's contention that the court issued a "ruling that the question of proper venue would not be presented to the jury . . . ." In denying the motion to dismiss or to transfer, the court determined that venue was not an element of the charged offenses for the state to prove, which determination the defendant did not dispute before the trial court.[23] We discern no ruling in the record by the court wholly precluding the submission of venue to the jury, which is no surprise given that the defendant did not make any such request at any point during the criminal proceedings. For these reasons, we conclude that the defendant's claim of instructional error is unpreserved.

In light of our conclusion that the defendant's claim of instructional error is unpreserved, we next consider

[23] During closing argument, defense counsel argued in relevant part: "The [victim's] recall wasn't very good about the details of [the] trip home, what bridge she claims to have gone over, what highway they were on, what route they took, where they went and where they stopped. Now the state has suggested to you that those kinds of things are not elements of the offenses that are charged in this case. At the same time, *while it may not be or they may not be elements of the offense*[*s*], that testimony is a fact and it's something that you can consider in determining the credibility of [the victim] or determining the credibility of any witness. So, *while it may not be an element that the state has to show*, *what bridge*, *where it started*, *where it ended*, the fact that somebody know[s] or wouldn't know or didn't know, those kinds of things are things that you can consider in judging their credibility." (Emphasis added.)

whether the defendant waived his right to challenge the court's jury instructions, which presents a question of law subject to plenary review. See *State* v. *Ramon A. G.*, supra, 190 Conn. App. 500.

"Our analysis begins with the seminal decision of *State* v. *Kitchens*, 299 Conn. 447, 10 A.3d 942 (2011), in which our Supreme Court established a framework under which we review claims of waiver of instructional error . . . . In *Kitchens*, the court emphasized that waiver involves the idea of assent . . . and explained that implied waiver occurs when a defendant had sufficient *notice* of, and accepted, the instruction proposed or given by the trial court. . . . More specifically, the court held that when the trial court provides counsel with a copy of the proposed jury instructions, allows a meaningful opportunity for their review, solicits comments from counsel regarding changes or modifications and counsel affirmatively accepts the instructions proposed or given, the defendant may be deemed to have knowledge of any potential flaws therein and to have waived implicitly the constitutional right to challenge the instructions on direct appeal. . . . The court further explained that [s]uch a determination by the reviewing court must be based on a close examination of the record and the particular facts and circumstances of each case." (Citations omitted; emphasis in original; internal quotation marks omitted.) *State* v. *Ramon A. G.*, supra, 190 Conn. App. 500–501. "In *Kitchens*, our Supreme Court explained that the doctrine of implied waiver, when applicable, bars recourse under *Golding*, as [a] constitutional claim that has been waived does not satisfy [its] third prong . . . because, in such circumstances, we simply cannot conclude that injustice [has been] done to either party . . . or that the alleged constitutional violation . . . exists and . . . deprived

the defendant of a fair trial . . . .”[24] (Internal quotation marks omitted.) Id., 503 n.13.

The record demonstrates that the defendant failed (1) to submit a written request to charge, (2) to raise any objection on the record to the court's proposed jury instructions, which were provided in advance, or (3) to take exception to the jury instructions immediately after the court had delivered the charge. Thus, despite being given ample opportunity, the defendant did not pursue the venue instruction that he now claims that the court improperly failed to charge. Under these circumstances, we conclude that the defendant has waived his claim of instructional error. See, e.g., *State* v. *Robert B.*, 200 Conn. App. 637, 649, 240 A.3d 1077 (2020) (defendant waived claim of instructional error when he failed to submit request to charge, to ask court to include instruction at issue after he had reviewed court's proposed charge, or to take exception to charge as given). We further conclude that, as a result of said waiver, the defendant's unpreserved claim of instructional error fails under the third prong of *Golding*.

The judgment is affirmed.

In this opinion the other judges concurred.

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## JENNIFER LABIENIEC *v.* ROBERT MEGNA
## (AC 45809)

Suarez, Clark and Vertefeuille, Js.

*Syllabus*

The defendant father appealed from the trial court's judgment denying his postjudgment motion for an order seeking a passport for the parties' minor child and granting the plaintiff mother's postjudgment motion to modify the custody of the child. *Held*:

[24] We may analyze the defendant's claim under the third prong of *Golding* without addressing *Golding*'s first two prongs. See *State* v. *Jan G.*, 329 Conn. 465, 472–73, 186 A.3d 1132 (2018).

The trial court did not abuse its discretion in denying the defendant's motion for an order seeking a passport for the child, as there was evidence to support the court's finding that it was not in the child's best interest to grant the motion.

The trial court erred in granting the plaintiff's postjudgment motion for modification of custody of the child, as that court improperly determined that the language of the parties' agreement was clear and unambiguous as to their intent with respect to the child's schooling, and the case was remanded for a determination of the parties' intent after consideration of relevant extrinsic evidence.

Argued May 13—officially released September 17, 2024

*Procedural History*

Application for custody of the parties' minor child, brought to the Superior Court in the judicial district of New Haven, where the court, *Goodrow*, *J.*, rendered judgment regarding custody in accordance with the agreement of the parties; thereafter, the court, *Laskos*, *J.*, granted the plaintiff's postjudgment motion to modify custody, from which the defendant appealed to this court; subsequently, the court, *Laskos*, *J.*, denied the defendant's motion for order regarding a passport for the parties' minor child, and the defendant filed an amended appeal to this court. *Reversed in part*; *further proceedings*.

*Campbell D. Barrett*, with whom were *Stacie L. Provencher* and, on the brief, *Kelly A. Scott*, for the appellant (defendant).

*Brette H. Fitton*, for the appellee (plaintiff).

*Opinion*

CLARK, J. In this custody dispute, the defendant, Robert Megna, appeals from the judgment of the trial court granting a postjudgment motion to modify custody of the parties' minor child, C, filed by the plaintiff, Jennifer Labieniec, and from the denial of his postjudgment motion for a passport for C. On appeal, the defendant claims that the trial court improperly (1) denied

his motion for order regarding a passport for C, and (2) modified the agreement of the parties as to C's primary residence for school purposes. We disagree with the defendant as to his first claim but agree with him on his second claim. Accordingly, we affirm in part and reverse in part the judgment of the trial court.

We begin by setting forth the relevant facts, as found by the trial court, and procedural history of this case. The parties, who were never married, are the parents of C, a daughter born in September, 2016. The plaintiff also has a minor child, P, who is C's older half brother from another relationship. The defendant currently resides in New Haven, and the plaintiff currently resides in Middletown.

On July 31, 2019, the plaintiff filed a custody application, requesting, among other things, joint legal custody and primary physical custody of C. On August 23, 2019, the defendant filed a cross complaint, similarly seeking joint legal custody and primary physical custody of C.

On September 12, 2019, the court, *Goodrow*, *J.*, approved and incorporated into the judgment of the court an agreement of the parties concerning C (agreement), which provided in relevant part: "(1) The parties shall share joint legal custody of [C] . . . . (5) Both parties shall give thirty days advanced notice of any vacations of three days or more they take with or without [C]. There shall be no vacations with [C] out of the country without mutual agreement and consent. . . . (10) [The defendant] shall have primary residence for school purposes. It is the intention of the parties that [C] will not be placed in the New Haven public school system."

When C was ready to start kindergarten in the 2021–2022 school year, the defendant attempted to enroll her in a private school in North Haven, but she was denied admission. Thereafter, the defendant proceeded to

enroll C in the New Haven public school system for kindergarten.

On June 23, 2021, the plaintiff filed a motion for modification seeking to modify section 10 of the parties' agreement to award her primary residential custody of C for school purposes, and to enroll C in the Middletown public school system. Specifically, the plaintiff stated in her motion: "Since the date of the [agreement], the circumstances in this case have changed substantially, as follows:

"[The defendant] failed to enroll [C] in private school as contemplated in the agreement. [The defendant] unilaterally enrolled [C] in [the] New Haven public [school system] contrary to the agreement, and in violation of joint legal custody. Further, he is attempting to unilaterally impose a change to the parenting schedule by telling [the plaintiff] that [C] will stay with him throughout the week, despite the existing court orders. It is in the best interest of [C] to be enrolled in [the] Middletown public [school system], where [P and the plaintiff] live. . . .

"Further, throughout the pandemic [the] defendant failed to consult or coordinate with [the plaintiff] regarding his travel outside . . . of Connecticut and outside [of] the United States . . . resulting in [the plaintiff] having to choose risking exposure to Covid or having parenting time with [C] at various points throughout the pandemic."

The defendant filed an objection to the plaintiff's motion on December 20, 2021, in which he stated: "In her motion, the [plaintiff] states that the [defendant] failed to enroll [C] in a private school as contemplated by the agreement of the parties dated September 12, 2019. . . .

"The agreement executed by the parties . . . states in [section] 10 that "[t]he [defendant] shall have primary

residence for school purposes. It is the intention of the parties that [C] will not be placed in the New Haven public school system. . . .

"In reality, the plaintiff unilaterally filed an application to enroll [C] in the Middletown school district on or around April 29, 2021, unbeknownst to the defendant. She only withdrew that application in August, 2021. . . .

"In addition, the plaintiff went with the defendant to enroll [C] in the New Haven [public school system] only after [C] was not accepted in a private school which was agreed upon by the parties. The plaintiff cooperated in the enrollment of [C] in the New Haven public [school system]. . . .

"The plaintiff now disingenuously seeks to paint the defendant as the culprit who has masterminded enrollment of [C] in the New Haven public school system distancing herself from a decision in which she partook. Any [substantial change in circumstances] has been caused by and agreed to by the plaintiff. . . .

"There is no basis for the plaintiff's modification of custody including diminution of time spent with the [defendant] by [C]. In fact, the defendant has helped the plaintiff by offering his services to watch [C]. He participates in [C's] activities and interests. He loves [C] and he is equally committed to providing for her welfare. It is in [C's] best interest for the parties to continue to have joint legal, shared physical custody of [C]."

Separately, on November 2, 2021, the defendant filed a postjudgment motion for order seeking to have the court direct the parties to cooperate in obtaining a passport for C. The defendant further requested that he retain the passport in his custody. The plaintiff did not file any objection to the defendant's motion. On

July 28 and August 8, 2022, the court, *Laskos*, *J.*, held a hearing on, inter alia, the plaintiff's motion for modification, the defendant's objection to the plaintiff's motion for modification, and the defendant's motion for order seeking a passport for C. The court heard testimony from both parties, a friend of the plaintiff, and the guardian ad litem, Attorney Joseph DiSilvestro.[1]

On August 26, 2022, the court issued a written order regarding the plaintiff's motion for modification. The court stated: "[The plaintiff] and [the defendant] are the parents of [C] . . . . [C] is a well-adjusted, happy child who loves both parents. She is social and has many friends. The parties entered into an agreement concerning [C]. . . . This agreement gave the [defendant] primary residency for school purposes under the assumption that [the defendant] would not place [C] in a specific public school system. Section 10 of the agreement . . . is clear as to purpose and intent. This section states: '[The defendant] shall have primary residence for school purposes. It is the intention of the parties that [C] will not be placed in the New Haven public school system.'

"[The defendant] once tried to enroll [C] in a school that would have satisfied the agreement, however [C's] admission was denied. Beyond this there was little to no effort by [the defendant] to enroll [C] during her second school year in a school consistent with the parties' agreement.

[1] We note that the guardian ad litem representing C on appeal is Attorney Richard W. Callahan. Attorney Callahan adopted the defendant's appellate brief as to the claim regarding the defendant's motion for order regarding a passport for C and requested that we reverse the judgment of the trial court as to that claim. As to the defendant's claim regarding the change in primary custody for school purposes, the guardian ad litem stated, "If there is reversible error as to [the defendant's claim regarding primary custody for school purposes], the guardian ad litem reserves the right on remand to formulate an opinion as to what is in the best interest of [C]."

"Before [C] entered school, and for this school year, alternative school options that satisfy the agreement of the parties exist[ed], including a school near [the plaintiff's] home and another school in between the [parties'] residences. [The plaintiff] contacted [the defendant] to discuss these options, however, these options were rebuffed by [the defendant], and he enrolled [C] in the school closest to his home. [The plaintiff] did not consent to the enrollment of [C] in this school, however, having no other option, she determined it was in the best interest of [C] to proceed with the orientation process and file . . . this motion for modification. After a full year of [C] attending her current school, [the plaintiff] continues to disagree that the current school meets the intent of the agreement, and she believes that remaining in the current school is not in [C's] best interest.

"Upon the 2022–2023 school year, there was no effort by [the defendant] to apply to another school as intended in the agreement. [The plaintiff] obtained information to compare schools to determine what school is in [C's] best interest. [The defendant] did not review this information and unilaterally determined that the current school is in [C's] best interest.

"The current school and parenting schedule in place resulted in an inequity between the parents because [the plaintiff] had to adjust her work schedule so that she could transport [C] to the school near [the defendant's] home. The commute to [C's] school, given [the plaintiff's] work schedule and additional expenses due to [an] increase in gas prices, created stressors that are not in [C's] best interest. [The defendant] did not have similar stressors. [The defendant] has more time and has resources for [C's] school transportation needs, in part because he is retired.

"[C] makes friends easily. She has expressed [a] willingness to remain in her current school and/or to attend

another school. [C] has an admirable temperament. If [C] remains in the same school, there is no certainty that she would retain her current friends or teacher. The [guardian ad litem] supported [C] remaining in her current school or a change of school to a private school if that option is available.

"The court finds that the intent of the agreement was not followed and that this resulted in a lack of trust between the parties. This is not in [C's] best interest.

"The parties reached their agreement under the mistaken impression that [C] would be admitted to an alternative school. The court finds that this deviation from the agreement is a material change in circumstances that was not anticipated by either party when the agreement was made an order of the court.

"The court considers this evidence in light of the relevant law found at [General Statutes] § 46b-56 (c). When considering a modification of custody pursuant to § 46b-56 (c) the court must consider the best interests of the children utilizing the factors contained within that statute.

"The statutory factors most relevant to this decision include:

"1. The physical and emotional safety of the child; [C] is physically and emotionally safe in both parents' homes.

"2. The temperament and developmental needs of the child. [C] has an easygoing temperament.

"3. The child's adjustment to his or her home, school, and community environments. [C] easily transitions between the homes for parenting time. She makes friends easily and can easily transition to a new school.

"4. Any relevant and material information obtained from the child, including the informed preferences of

the child. [C] is happy in her current school, however, [C] has also expressed wanting to attend the same school as [her] brother, [P], although [P] is older than [C].

"5. The willingness and ability of each parent to facilitate and encourage such continuing parent-child relationship between the child and the other parent as is appropriate, including compliance with any court order. Both parties had a clear understanding of the intent of the agreement as to school when it was ordered. [The plaintiff] followed this section of the court order even though [C] was enrolled in a school that did not meet the intent of the agreement. [The defendant] did not follow the intent of the agreement." The court ordered that the plaintiff have primary residence of C for school purposes, effective for the 2022–2023 school year. On September 14, 2022, the defendant filed this appeal challenging the court's August 26, 2022 decision on the plaintiff's motion for modification.

Subsequently, on November 28, 2022, the court denied the defendant's motion for order regarding obtaining a passport for C. The court stated: "[C] was five years old at the time of the hearing. The defendant enjoys traveling and he would travel internationally with [C], if allowed. The defendant failed to provide the plaintiff with advance notice of any vacations of three days or more taken with or without [C] as required by court order. This resulted in the plaintiff having to choose risking exposure to Covid or having parenting time with [C] at various points throughout the pandemic. The court finds the plaintiff's concerns with international travel are reasonable given [C's] age and development and that it is not in [C's] best interest . . . for the court to grant an order for a passport at this time." Thereafter, the defendant filed an amended appeal to include the court's November 28, 2022 denial

of his motion for order regarding obtaining a passport for C.

On May 12, 2023, the defendant filed a motion for articulation with respect to the court's order that C's primary residence be with the plaintiff for school purposes and its denial of the defendant's motion for order regarding a passport for C. On May 26, 2023, the trial court denied the motion for articulation. The defendant then filed a motion for review with this court on July 25, 2023. On September 13, 2023, this court granted review, but denied the relief requested therein. Additional facts and procedural history will be set forth as necessary.

I

The defendant first argues that the court erred in denying his motion for order regarding a passport for C. Specifically, the defendant argues that the court's finding that he did not comply with the agreement by notifying the plaintiff of his vacations is clearly erroneous and that the court abused its discretion in denying his motion because granting the motion is in C's best interest. We are not persuaded.

Section 46b-56 provides in relevant part: "(a) In any controversy before the Superior Court as to the custody or care of minor children . . . the court may make or modify any proper order regarding the custody, care, education, visitation and support of the children . . . . (b) In making or modifying any [such] order . . . the rights and responsibilities of both parents shall be considered and the court shall enter orders accordingly that serve the best interests of the child and provide the child with the active and consistent involvement of both parents commensurate with their abilities and interests. . . ."

"An appellate court will not disturb a trial court's orders in domestic relations cases unless the court has

abused its discretion or it is found that it could not reasonably conclude as it did, based on the facts presented. . . . In determining whether a trial court has abused its broad discretion in domestic relations matters, we allow every reasonable presumption in favor of the correctness of its action. . . . Appellate review of a trial court's findings of fact is governed by the clearly erroneous standard of review. The trial court's findings are binding upon this court unless they are clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . Therefore, to conclude that the trial court abused its discretion, we must find that the court either incorrectly applied the law or could not reasonably conclude as it did." (Internal quotation marks omitted.) *De Almeida-Kennedy* v. *Kennedy*, 224 Conn. App. 19, 29–30, 312 A.3d 150 (2024).

In its order denying the defendant's motion, the court found that it was not in C's best interest at that time for it to order the plaintiff to cooperate with the defendant in obtaining a passport for C. Specifically, the court stated that "[C] was five years old at the time of the hearing. The defendant enjoys traveling and he would travel internationally with [C], if allowed. The defendant failed to provide the plaintiff with advance notice of any vacations of three days or more taken with or without [C] as required by court order. This resulted in the plaintiff having to choose risking exposure to Covid or having parenting time with [C] at various points throughout the pandemic. The court finds the plaintiff's concerns with international travel are reasonable given [C's] age and development and that it is not in [C's]

best interest . . . for the court to grant an order for a passport at this time."

The defendant argues that the record does not support the court's finding that he failed to provide the plaintiff with advance notice of any of his vacations and that his lack of notice caused the plaintiff to risk exposure to Covid in order to have parenting time with C. The defendant argues that, although these allegations were made in the plaintiff's motion for modification, there was no evidence presented at the hearing in support of these allegations and, therefore, the court's findings were clearly erroneous.

Although we agree with the defendant that there was little or no evidence regarding the defendant's alleged lack of notice regarding his travel, the defendant ignores the fact that there was evidence to support the court's additional findings in support of its order denying his motion, namely, that it was not in C's best interest for the court to grant the order for a passport in light of C's age and development.

At the hearing on the defendant's motion, the plaintiff testified regarding her concerns about C travelling internationally. In response to a question from her attorney on direct examination, she testified that her "biggest concern [is with] C traveling [to] countries where she doesn't speak the language. God forbid anything were to happen. I know [the defendant] travels alone. She can't tell you where she lives, her phone number, or speak the language. That is my biggest concern." The plaintiff then went on to testify about other concerns she had, including concerns about the company that the defendant keeps when he travels internationally.

At the time of the hearing, C was five years old. On the basis of the plaintiff's testimony about her concerns regarding C's age and development, it was reasonable for the court to conclude that it was not in C's best

interest to require the plaintiff to assist the defendant in acquiring a passport for C at that time. Furthermore, it bears mentioning that the parties' agreement provides in relevant part that "[b]oth parties shall give . . . thirty . . . days advanced notice of any vacations of [three] days or more they take with or without [C]. There shall be no vacations with [C] out of the country without mutual agreement and consent." Thus, the agreement essentially gives each parent full veto power over the other parent's international travel with C. Because the plaintiff had not agreed or consented to allow C to travel internationally with the defendant (or expressed any intention of allowing C to do so in the future), had the court granted the motion for a passport, the court essentially would have been facilitating the defendant's international travel with C, even though under the agreement the plaintiff has full veto authority over such travel. Accordingly, we cannot conclude on this record that the court abused its discretion in denying the defendant's motion for an order regarding a passport.

II

The defendant next argues that the court improperly granted the plaintiff's motion for modification, which changed C's primary residence for school purposes from the defendant's address to the plaintiff's address. Specifically, the defendant argues that the court's (1) "conclusion that the [defendant] did not follow the intent of the agreement is contradicted by the plain language of the agreement," (2) "reliance on [C's] preferences is logically inconsistent," and (3) findings regarding the plaintiff's concerns with C's placement in the New Haven public school system are "flawed." We agree with the defendant that the court improperly granted the plaintiff's motion for modification, but we do so for a somewhat different reason. Specifically, we conclude that the court improperly determined that the

language of the agreement was clear and unambiguous with respect to the parties' intent concerning where C would attend school. Because the court's order granting the plaintiff's motion for modification was predicated on its determination that the relevant language of the agreement was clear and unambiguous with respect to where C would attend school, a remand is required so that the court can consider extrinsic evidence concerning the parties' intent with respect to that ambiguous provision of the agreement.

We begin by setting forth the principles of law relevant to our resolution of this claim. "[Section] 46b-56 provides trial courts with the statutory authority to modify an order of custody or visitation. When making that determination, however, a court must satisfy two requirements. First, modification of a custody award must be based upon either a material change [in] circumstances which alters the court's finding of the best interests of the child . . . or a finding that the custody order sought to be modified was not based upon the best interests of the child.[2] . . . Second, the court shall consider the best interests of the child and in doing so may consider several factors. General Statutes § 46b-56 (c). . . . Before a court may modify a custody order, it must find that there has been a material change in circumstances since the prior order of the court, but the ultimate test is the best interests of the child. . . . These requirements are based on the interest in finality of judgments . . . and the family's need for stability. . . . The burden of proving a change to be in the best interest of the child rests on the party seeking the change. . . .

"Not all changes occurring in the time between the prior custody order and the motion for modification

[2] In her motion for modification, the plaintiff argued only that there had been a substantial change in circumstances, not that the original custody order was not based upon the best interests of the child.

are material. . . . Although there are no bright-line rules for determining when a material change in circumstances warranting the modification of custody has occurred, there are several relevant considerations, including whether . . . the change was not known or reasonably anticipated when the order was entered, and the change affects the child's well-being in a meaningful way." (Citations omitted; emphasis omitted; footnote added; footnote omitted; internal quotation marks omitted.) *Clougherty* v. *Clougherty*, 162 Conn. App. 857, 868–70, 133 A.3d 886, cert. denied, 320 Conn. 932, 134 A.3d 621 (2016), and cert. denied, 320 Conn. 932, 136 A.3d 642 (2016).

In the present case, the court's determination that there was a material change in circumstances was predicated on its determination that section 10 of the agreement was clear and unambiguous as to the parties' intent with respect to C's schooling and that the circumstances presented were not anticipated by the parties' agreement. Specifically, the court found that "[s]ection 10 of the agreement . . . is clear as to purpose and intent" and that "[b]oth parties had a clear understanding of the intent of the agreement . . . ." The court interpreted the agreement to mean that the defendant would have "primary residency for school purposes under the assumption that [he] would not place [C] in [the New Haven public school system]." The court stated that the defendant "once tried to enroll [C] in a school that would have satisfied the agreement, however [C's] admission was denied. Beyond this there was little to no effort by [the defendant] to enroll [C] during her second school year in a school consistent with the parties' agreement." The court concluded that "the intent of the agreement was not followed . . . [and] [t]he parties reached their agreement under the mistaken impression that [C] would be admitted to an alternative school. . . . [T]his deviation from the agreement is a material change in circumstances that was

not anticipated by either party when the agreement was made an order of the court."

For the reasons that follow, we disagree with the trial court's conclusion that section 10 of the parties' agreement is clear and unambiguous. We begin with the relevant legal principles.

"It is well established that a separation agreement that has been incorporated into a dissolution decree and its resulting judgment must be regarded as a contract and construed in accordance with the general principles governing contracts. . . . When construing a contract, we seek to determine the intent of the parties from the language used interpreted in the light of the situation of the parties and the circumstances connected with the transaction. . . . [T]he intent of the parties is to be ascertained by a fair and reasonable construction of the written words and . . . the language used must be accorded its common, natural, and ordinary meaning and usage where it can be sensibly applied to the subject matter of the contract. . . . When only one interpretation of a contract is possible, the court need not look outside the four corners of the contract. . . . Extrinsic evidence is always admissible, however, to explain an ambiguity appearing in the instrument. . . .

"If a contract is unambiguous within its four corners, the determination of what the parties intended by their contractual commitments is a question of law [and our review is plenary]. . . . When the language of a contract is ambiguous, [however] the determination of the parties' intent is a question of fact, and the trial court's interpretation is subject to reversal on appeal only if it is clearly erroneous. . . .

"Accordingly, [t]he threshold determination in the construction of a separation agreement . . . is whether, examining the relevant provision in light of

the context of the situation, the provision at issue is clear and unambiguous, which is a question of law over which our review is plenary. . . . Contract language is unambiguous when it has a definite and precise meaning . . . concerning which there is no reasonable basis for a difference of opinion . . . . The proper inquiry focuses on whether the agreement on its face is reasonably susceptible of more than one interpretation. . . . It must be noted, however, that the mere fact that the parties advance different interpretations of the language in question does not necessitate a conclusion that the language is ambiguous. . . . A court will not torture words to import ambiguity where the ordinary meaning leaves no room for ambiguity . . . .'' (Citations omitted; internal quotation marks omitted.) *Fazio* v. *Fazio*, 162 Conn. App. 236, 243–45, 131 A.3d 1162, cert. denied, 320 Conn. 922, 132 A.3d 1095 (2016).

''In contrast, a contract is ambiguous if the intent of the parties is not clear and certain from the language of the contract itself. . . . [A]ny ambiguity in a contract must emanate from the language used by the parties. . . . The contract must be viewed in its entirety, with each provision read in light of the other provisions . . . and every provision must be given effect if it is possible to do so. . . . If the language of the contract is susceptible to more than one reasonable interpretation, the contract is ambiguous.'' (Internal quotation marks omitted.) *Parisi* v. *Parisi*, 315 Conn. 370, 383–84, 107 A.3d 920 (2015).

As noted, section 10 of the parties' agreement provides in relevant part that ''[the defendant] shall have primary residence for school purposes. It is the intention of the parties that [C] will not be placed in the New Haven public school system.'' The first sentence of section 10 of the agreement appears to have little meaning outside of the context of enrollment in a public school system. A child's residence is important for

school purposes precisely because it dictates where a child is entitled to attend public school. See General Statutes § 10-184 ("[s]ubject to the provisions of this section and section 10-15c, each parent or other person having control of a child five years of age and over and under eighteen years of age shall cause such child to attend a public school regularly during the hours and terms the public school in the district in which *such child resides* is in session" (emphasis added)); General Statutes § 10-220 (a) ("[e]ach local or regional board of education . . . shall make such provisions as will enable each child of school age *residing in the district* to attend some public day school for the period required by law" (emphasis added)). Thus, the provision of the agreement stating that "[the defendant] shall have primary residence for school purposes" strongly suggests that the parties intended for C to attend public school in New Haven—the city in which the defendant resides.

The second sentence of section 10, however, goes on to state that "it is the intention of the parties that [C] will not be placed in the New Haven public school system." The ambiguity caused by these two sentences of section 10 of the agreement is manifest on its face. Indeed, the two sentences are entirely inconsistent. See *Thoma* v. *Oxford Performance Materials, Inc.*, 153 Conn. App. 50, 60, 100 A.3d 917 (2014) ("[i]rreconcilable inconsistent provisions have been treated by this court and our Supreme Court as creating an ambiguity within the contract").

The parties' competing interpretations further elucidate this ambiguity. The defendant claims that, although the second sentence reflects the parties' wishes and desires that C attend a private school instead of the New Haven public schools, the second sentence was not obligatory or mandatory on the parties. He contends that, if C were unable to attend private school for whatever reason (such as not being admitted by the private

school), C necessarily would have to attend public school and the agreement made clear that C would attend the public schools based on his residence—New Haven. He claims that his interpretation of the agreement is the only way to give effect to both sentences of the provision.

The plaintiff, on the other hand, contends that the plain language of section 10 demonstrated that the parties agreed that C would be enrolled in a private school, not in the New Haven public schools. The plaintiff argues that, because C did not get into the private school to which the defendant applied, and because the defendant did not apply to any other private schools on behalf of C, there was a material change in circumstances because neither party contemplated C not being admitted to a private school. She fails to address the meaning or purpose of the first sentence of section 10, however.

In concluding that the language of section 10 is clear and unambiguous and that it reflected the parties' intent that C not be placed in New Haven public schools under any circumstances and that, instead, the parties intended only that she be placed in a private school, the trial court focused exclusively on the second sentence of section 10, making little attempt to explain how the language stating that the defendant, who lives in New Haven, would have primary residence for school purposes could be reconciled with the second provision of the agreement. Although the parties have advanced competing interpretations of the contractual language at issue, it is not the role of this court to determine which interpretation is more reasonable. The ambiguity in the contractual language gives rise to an issue of fact that must be resolved, in the first instance, by the trial court.

On the basis of the conflicting language of section 10 of the agreement, we conclude that the agreement

is ambiguous as to C's schooling. In light of this ambiguity, the court should have considered extrinsic evidence with respect to the parties' intent under section 10 of the agreement. See *Parisi* v. *Parisi*, supra, 315 Conn. 385 (if language of contract is ambiguous, parties' intent is question of fact that trial court is required to consider and resolve after considering extrinsic evidence and surrounding circumstances). Because the court's determination that there was a material change in circumstances was predicated on its determination that section 10 of the agreement was clear and unambiguous as to the parties' intent with respect to C's schooling, we must remand the case to the trial court to determine the intent of the parties' after consideration of any relevant extrinsic evidence.[3] See *Casablanca* v. *Casablanca*, 190 Conn. App. 606, 620–21, 212 A.3d 1278 ("[o]n the basis of our conclusion that the court erroneously determined that the provision was unambiguous, we conclude that a remand to the trial court is necessary for the court to hold a new hearing on the parties' motions and to determine the intent of the parties after consideration of all the available extrinsic evidence and the circumstances surrounding the entering of the agreement" (footnote omitted)), cert. denied, 333 Conn. 913, 215 A.3d 1210 (2019); *Hirschfeld* v. *Machinist*, 181 Conn. App. 309, 328, 186 A.3d 771 (court was required to resolve ambiguity by considering extrinsic evidence and making factual findings as to parties' intent), cert. denied, 329 Conn. 913, 186 A.3d 1170 (2018).

[3] "We recognize . . . that none of the parties on remand has an obligation to present extrinsic evidence, whether testimonial or documentary, to resolve this ambiguity. Nor does any party have an obligation to present evidence as to who drafted the agreement, such that, in the event that extrinsic evidence did not resolve the ambiguity, the contra proferentem rule could properly be applied. We simply note that a [a party] who fails to present any evidence that would permit the fact finder to resolve a material ambiguity risks failing to satisfy [their] burden of proof." *Murchison* v. *Waterbury*, 218 Conn. App. 396, 415 n.19, 291 A.3d 1073 (2023).

The judgment is reversed with respect to the granting of the plaintiff's postjudment motion for modification and the case is remanded for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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## MYSTIC OIL COMPANY, INC. *v.* SHAUKAT, LLC, ET AL.
## (AC 45832)

Moll, Cradle and Westbrook, Js.

*Syllabus*

The defendants, a gasoline retailer and its guarantor, appealed from the trial court's award of damages to the plaintiff, a wholesale petroleum dealer, for breach of contract and breach of guarantee and from the grant of the plaintiff's motion for attorney's fees and costs. The defendants claimed, inter alia, that the trial court erred in awarding certain damages. *Held*:

This court declined to review the defendants' unpreserved claim that they were not liable for point of sale fees charged after the plaintiff had stopped delivering fuel under the contract because the claim was inadequately briefed and because the defendants failed to provide the trial court with an evidentiary foundation to support their argument.

Contrary to the defendants' assertions, there was sufficient evidence to support the trial court's damages determination with respect to the cost of unpaid fuel deliveries.

The trial court did not err in awarding the plaintiff damages for the unreimbursed sales tax that it had prepaid or for the balance of the cost of two fuel dispensers it had delivered because the court previously had granted the plaintiff's motion for summary judgment as to liability with respect to those claims and the hearing in damages did not constitute an opportunity for the defendants to attempt to undo the liability findings.

The trial court incorrectly granted the plaintiff's motion for attorney's fees and costs because, in the absence of an evidentiary hearing, the defendants were deprived of their ability to litigate fully the issue of the reasonableness of the requested fees and costs.

Argued February 1—officially released September 17, 2024

*Procedural History*

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of New London, where the plaintiff withdrew its claims against the defendant Mohammad Sohail; thereafter, the court, *S. Murphy*, *J.*, granted in part the plaintiff's motion for summary judgment as to liability only; subsequently, the matter was tried to the court, *Jacobs*, *J.*; judgment for the plaintiff, from which the named defendant et al. appealed to this court; thereafter, the court, *Jacobs*, *J.*, granted the plaintiff's motion for attorney's fees, and the named defendant et al. filed an amended appeal. *Reversed in part*; *judgment directed*; *further proceedings*.

*S. Zaid Hassan*, for the appellants (named defendant et al.).

*Richard S. Gora*, for the appellee (plaintiff).

*Opinion*

MOLL, J. The defendants Shaukat, LLC (Shaukat), and Raja Shaukat Ali appeal from the judgment of the trial court rendered after a hearing in damages following the rendering of summary judgment as to liability only in favor of the plaintiff, Mystic Oil Company, Inc., with respect to its claims for breach of contract and breach of guarantee.[1] Specifically, the defendants challenge on appeal (1) the court's award of certain damages and (2) the court's granting of the plaintiff's motion for attorney's fees and costs without an evidentiary hearing. We affirm in part and reverse in part the judgment of the trial court.

[1] The plaintiff's complaint also named Mohammad Sohail as a defendant. The plaintiff subsequently withdrew its claims against Sohail. For this reason, we refer to Shaukat and Ali as the defendants.

The court found the following relevant facts. The plaintiff is a wholesale petroleum distributor of Exxon-Mobil branded products located in Mystic.[2] On June 9, 2015, the plaintiff entered into a "Complete Contract of Sale (Branded)," as well as a commodity schedule incorporated therein (contract), with Shaukat, a gasoline retailer formerly operating in Owego, New York, pursuant to which the plaintiff would, for a ten year term beginning on June 9, 2015, and ending on June 8, 2025, be the exclusive supplier of Shaukat's motor fuel product requirements. The contract was guaranteed by Shaukat's principal, Ali. Under the terms of the contract, as stated in paragraph 5 of the commodity schedule, "[t]he [plaintiff's] price per gallon to be paid by [Shaukat] shall be [Mobil's] posted per gallon terminal price ('Rack') at the applicable terminal in effect at the time loading commences, plus all applicable taxes and all fees . . . ."

Shaukat failed to pay for deliveries from the plaintiff on October 10, 17 and 24, 2017. The total amount of the unpaid invoices was $46,496.98, comprising $43,648.21 for unpaid fuel deliveries and $2848.77 in unpaid point of sale (POS) fees, namely, "Cybera POS" fees, "Gilbarco Plus" fees, and "Mobil POS" fees.[3]

The plaintiff prepaid New York sales tax on its fuel deliveries to Shaukat, which was obligated to reimburse the plaintiff for such prepayments pursuant to paragraph 10 of the contract, which provides in relevant part: "Taxes. It is agreed that any duty, tax, fee or other charge [the plaintiff] may be required to collect or pay

[2] To be consistent with the references used by the parties and the trial court, we will refer to the "Mobil" brand throughout this opinion.

[3] The plaintiff's principal, Peter Zelken, testified at trial that (1) Cybera POS fees relate to an Internet communication device that allows the gasoline station to have highspeed credit card processing, (2) Gilbarco Plus fees relate to "the helpdesk" for the station's POS system, as required by Mobil, and (3) Mobil POS fees are Mobil's monthly merchant card processing fees.

under any law . . . with respect to the . . . sale, delivery or use of the product(s) covered by this [c]ontract shall be added to the prices to be paid by [Shaukat] for product(s) purchased hereunder." Shaukat failed to reimburse the plaintiff for prepaid sales tax in the amount of $12,829.52.

The plaintiff delivered two fuel dispensers to Shaukat, the total cost of which was $14,000. Of that amount, Shaukat paid $6613.58 in accordance with an amortization schedule, leaving a balance of $7386.42.

In February, 2018, the plaintiff commenced this action against the defendants. The complaint consisted of five counts: (1) breach of contract as to Shaukat (count one); (2) breach of guarantee as to Ali (count two); (3) unjust enrichment as to both defendants (count three); (4) breach of the implied covenant of good faith and fair dealing as to both defendants (count four); and (5) violation of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., as to both defendants (count five). On July 30, 2019, the plaintiff filed a motion for summary judgment directed to all counts, to which the defendants objected.

On June 16, 2020, the court, *S. Murphy, J.*, granted in part and denied in part the plaintiff's motion for summary judgment. Specifically, the court granted the motion with respect to counts one and two as to liability only. The court concluded: "Regarding the plaintiff's claims at count one and two, there exists no genuine issue [of] material fact that, on June 9, 2015, the plaintiff . . . entered into an agreement with [Shaukat] for the purchase and delivery of fuel with a ten year term and payment provisions. Further, there is no issue of material fact that the contract included, among other things, a certain commodity schedule and an exclusivity provision concerning the supply of the motor fuel at issue. Further, there is no issue of material fact that [Ali]

signed a personal guarantee as to [Shaukat's] performance of the terms and condition[s] of the contract. There is no issue of material fact that the plaintiff performed its obligations under the agreement and that [Shaukat] has violated the exclusivity provision and has failed to make payment to the plaintiff in accordance with the terms and conditions of the agreement. Additionally, there is no issue of material fact that [Ali] has failed to perform in accordance with the executed guarantee and that, as a result of the breach of contract and breach of guarantee, the plaintiff has sustained damages. The court does, however, find issues of material fact concerning the actual amount of recoverable damages incurred as a result of the breach of contract and guarantee under counts one and two. As such, summary judgment is granted in favor of the plaintiff as a matter of law only as to breach of contract and breach of guarantee at counts one and two."[4]

A bench trial, which was essentially a hearing in damages on counts one and two, took place on August 4 and 5, 2022.[5] At trial, in support of its contractual damages claims, the plaintiff sought to prove, inter alia, that Shaukat (and Ali as guarantor) owed the plaintiff (1) $46,496.98 in unpaid fuel deliveries and POS fees, (2) pursuant to paragraph 10 of the contract, $12,829.52 in unreimbursed sales tax on fuel deliveries, which the

[4] The court also stated that, in light of its conclusion as to count one, it would not reach the plaintiff's motion for summary judgment as to the plaintiff's unjust enrichment claim in count three. In addition, the court found that the plaintiff had not sustained its burden as to counts four (breach of the implied covenant of good faith and fair dealing) and five (CUTPA), whereupon it denied the plaintiff's motion for summary judgment as to those counts.

[5] In its memorandum of decision, the court stated that counts three through five were abandoned at trial. We note that count three is deemed abandoned because the plaintiff did not address it in its posttrial brief; see *Nation Electrical Contracting, LLC* v. *St. Dimitrie Romanian Orthodox Church*, 144 Conn. App. 808, 814 n.6, 74 A.3d 474 (2013); and counts four and five were expressly abandoned at trial.

plaintiff had prepaid to the state of New York, (3) a $7386.42 balance for the cost of two fuel dispensers, and (4) $21,191.60 for brand incentive/brand growth programs. The president and chief executive officer of the plaintiff, Peter Zelken, testified for the plaintiff; Shaukat's principal, Ali, testified for Shaukat. The court, *Jacobs*, *J.*, concluded that the plaintiff had met its burden to prove its first three claims for damages, but not the fourth.[6] Thus, the court rendered judgment for the plaintiff in the amount of $68,712.92.[7]

On October 3, 2022, the plaintiff filed a motion for attorney's fees and costs, seeking an award of trial related, contractual attorney's fees and costs in the amount of $21,550. On October 17, 2022, the court granted the plaintiff's motion and awarded the amount of $21,550. This amended appeal followed.[8] Additional facts and procedural history will be provided as necessary.

I

The defendants challenge on appeal four categories of damages awarded by the court, namely, (1) POS fees charged after the plaintiff had stopped delivering motor fuel products to Shaukat, (2) unpaid fuel deliveries, (3) unreimbursed sales tax that the plaintiff had prepaid to the state of New York, and (4) the balance of the cost of two fuel dispensers.

[6] The court expressly found Zelken's testimony to be credible on the plaintiff's damages claims for (1) unpaid fuel deliveries and associated fees, (2) prepaid sales taxes, and (3) the balance of the cost of two fuel dispensers.

[7] The court appears to have made a mathematical error in calculating the sum of the proven damages amounts. The correct amount of damages should be $66,712.92. Although not raised by the parties, the error is clearly technical and not substantive, and, thus, we will direct its correction on remand. See *Greco* v. *Morcaldi*, 145 Conn. 685, 690–91, 146 A.2d 589 (1958); *Amwax Corp.* v. *Chadwick*, 28 Conn. App. 739, 741 n.1, 612 A.2d 127 (1992).

[8] The plaintiff did not file a cross appeal.

Before reaching the defendants' claims with respect to each of these categories, we briefly address the applicable standard of review. "Our standard of review applicable to challenges to damages awards is well settled. . . . [T]he trial court has broad discretion in determining damages. . . . The determination of damages involves a question of fact that will not be overturned unless it is clearly erroneous. . . . [If], however, a damages award is challenged on the basis of a question of law, our review [of that question] is plenary." (Internal quotation marks omitted.) *RCN Capital, LLC* v. *Chicago Title Ins. Co.*, 196 Conn. App. 518, 523, 230 A.3d 740 (2020).

A

The defendants first claim that the court erred in awarding the plaintiff $2848.77 for POS fees charged after the plaintiff had stopped delivering motor fuel products to Shaukat.[9] This claim fails.

By way of background, on the basis of the figures reflected on a business record generated by the plaintiff's accounting system, which was admitted in full as plaintiff's exhibit 5, Zelken testified to the amount of POS fees that were due and owing from the defendants, namely, $2848.77. Zelken testified that the plaintiff had incurred those fees as part of its Mobil franchise—testimony that the trial court expressly credited.

On appeal, the defendants do not contend that there was insufficient evidence to support the court's damages determination as to POS fees. Rather, they argue, without any citation to the record or any legal authority, that they are not liable for any POS fees charged after the plaintiff had stopped delivering motor fuel products to Shaukat. The defendants' argument in this regard is little more than the ipse dixit of counsel, and, therefore,

[9] See footnote 3 of this opinion.

the argument initially fails because of inadequate briefing. The argument suffers from an equally fatal flaw, illuminated by our review of the record, which is that, by failing to provide the trial court with an evidentiary foundation to support their present argument, the defendants did not preserve their claim on appeal. Thus, we decline to review it further.

B

The defendants next claim that the court erred in awarding the plaintiff $43,648.21 for unpaid invoices for fuel deliveries on October 10, 17 and 24, 2017. Specifically, the defendants argue that the evidence on which the court relied to make this damages determination was merely subjective and speculative and, therefore, insufficient to support the award. This argument is unavailing.

We set forth the well settled legal principles governing a claim of evidentiary insufficiency in this context. "Damages are recoverable only to the extent that the evidence affords a sufficient basis for estimating their amount in money with reasonable certainty. . . . [T]he court must have evidence by which it can calculate the damages, which is not merely subjective or speculative . . . but which allows for some objective ascertainment of the amount. . . . This certainly does not mean that mathematical exactitude is a precondition to an award of damages, but we do require that the evidence, with such certainty as the nature of the particular case may permit, lay a foundation [that] will enable the trier to make a fair and reasonable estimate." (Emphasis omitted; internal quotation marks omitted.) *Roach* v. *Transwaste, Inc.*, 347 Conn. 405, 412, 297 A.3d 1004 (2023).

Mindful of these principles, we turn to whether the evidence on which the court relied was sufficient to satisfy the reasonable certainty standard of proof. In

the present action, Zelken testified that Shaukat had failed to pay the invoices for fuel deliveries on October 10, 17 and 24, 2017. He based this testimony on plaintiff's exhibit 5, described previously in this opinion, which reflected an amount due and owing of $43,648.21. The court expressly credited this testimony and cited the admitted exhibit in its memorandum of decision in calculating its damages award for the unpaid fuel deliveries, which is consistent with the figures set forth in plaintiff's exhibit 5.

The defendants complain on appeal that this evidence was insufficient because the business record admitted at the hearing in damages was the same document that the plaintiff had submitted in support of its motion for summary judgment, which the court necessarily found insufficient to entitle the plaintiff to an award of damages as a matter of law. In making this argument, the defendants cite no authority, and we are not aware of any, for the proposition that a business record submitted in the summary judgment context—in which the court does not weigh evidence—may not be sufficient to prove damages to the satisfaction of the fact finder at trial. See *Augustine* v. *CNAPS, LLC*, 199 Conn. App. 725, 733, 237 A.3d 60 (2020) ("[T]he trial court does not sit as the trier of fact when ruling on a motion for summary judgment. . . . [Its] function is not to decide issues of material fact, but rather to determine whether any such issues exist." (Internal quotation marks omitted.)).

In sum, because there was sufficient evidence to support the court's damages determination with respect to the unpaid fuel deliveries, the court's award of $43,648.21 in connection therewith was not clearly erroneous.

C

The defendants next claim that the court erred in awarding the plaintiff $12,829.52 for unreimbursed sales

tax that it prepaid to the state of New York. Although not a model of clarity, the defendants' claim distills into three parts, namely, that they should not be held liable for such amount because (1) Shaukat had no liability to remit sales tax directly to the state of New York, (2) it was not Shaukat's fault that, at the time the plaintiff stopped delivering to Shaukat, there was a balance of unreimbursed prepaid sales tax, and (3) the contract did not contemplate or permit the amortization of the amount due (i.e., the amount that the plaintiff voluntarily amortized, rather than requiring Shaukat to pay the amount due in one lump sum). These contentions are without merit and warrant little discussion.

Paragraph 10 of the contract provides in relevant part: "Taxes. It is agreed that any duty, tax, fee or other charge [the plaintiff] may be required to collect or pay under any law . . . with respect to the . . . sale, delivery or use of the product(s) covered by this [c]ontract shall be added to the prices to be paid by [Shaukat] for product(s) purchased hereunder." Relying on a business record generated by the plaintiff showing the amortization of the unreimbursed New York prepaid sales tax, which was admitted in full, Zelken testified that, pursuant to the obligation under paragraph 10 of the contract, Shaukat owed the plaintiff the amount of $12,829.52 in unreimbursed New York prepaid sales tax. The trial court expressly credited this testimony.

On appeal, the defendants essentially challenge their underlying liability for this component of the damages award. In doing so, the defendants ignore that the court rendered summary judgment in favor of the plaintiff as to liability on counts one and two—a ruling that the defendants do not challenge on appeal. That is, count one of the complaint included the allegation that Shaukat's failure to pay the plaintiff the amount of $12,829.52

for sales tax prepaid to the state of New York constituted a breach of contract. Count two, which incorporated the allegations of count one, alleged that Ali's failure to pay such amount constituted a breach of guarantee. In its motion for summary judgment, supported by appropriate documents, the plaintiff specifically argued that it was entitled to judgment as a matter of law on counts one and two, including with respect to the unreimbursed prepaid sales tax in the amount of $12,829.52. The court granted the plaintiff's motion with respect to counts one and two as to liability only, necessarily concluding that there was no genuine issue of material fact that such a breach had occurred. Simply stated, a hearing in damages is not an opportunity to attempt to undo a liability finding made in the context of summary judgment. See, e.g., *Ninth RMA Partners, L.P.* v. *Krass*, 57 Conn. App. 1, 3–5, 746 A.2d 826 (defendants improperly raised issue of liability at hearing in damages following summary judgment as to liability only rendered following defendants' concession as to liability), cert. denied, 253 Conn. 918, 755 A.2d 215 (2000).

In sum, we find no error in the court's award to the plaintiff of $12,829.52 for unreimbursed sales tax that it prepaid to the state of New York.

D

The defendants also argue that the court erred in awarding the plaintiff $7386.42 for the balance of the cost of two fuel dispensers on the basis of an implied contract theory[10] when there was a written contract between the parties, which, according to the defendants, does not require Shaukat to pay for the fuel

[10] We need not resolve why the court, *Jacobs, J.*, relied on an implied contract theory in making its damages determination with respect to the fuel dispensers when the court, *S. Murphy, J.*, previously had found liability relating thereto pursuant to the plaintiff's breach of contract and breach of guarantee claims in counts one and two.

dispensers. For the same reason that we rejected the defendants' claim with respect to the prepaid sales tax discussed in part I C of this opinion, we reject this claim.

The defendants challenge on appeal their underlying liability for this component of the damages award and again ignore that the court rendered summary judgment in favor of the plaintiff as to liability on counts one and two. Count one of the complaint included the allegation that Shaukat's failure to pay the plaintiff the $7386 balance of the cost of two fuel dispensers constituted a breach of contract. Count two, which incorporated the allegations of count one, alleged that Ali's failure to pay such amount constituted a breach of guarantee. In its motion for summary judgment, supported by appropriate documents, the plaintiff specifically argued that it was entitled to judgment as a matter of law on counts one and two, including with respect to the balance of $7386 relating to the purchase and installation of two fuel dispensers. Because the court granted the plaintiff's motion with respect to counts one and two as to liability only, the court necessarily concluded that there was no genuine issue of material fact that such a breach had occurred. The hearing in damages did not provide the defendants with an opportunity to attempt to undo the liability finding made in the context of summary judgment. See, e.g., id., 4–5.

Accordingly, we find no error in the court's award of $7386.42 for the balance of the cost of two fuel dispensers.

II

Finally, the defendants claim that, because they timely objected to the plaintiff's motion for attorney's fees and costs and requested an evidentiary hearing with respect thereto, the court incorrectly granted the motion without conducting a hearing. We agree.

The record reveals the following additional facts and procedural history that are relevant to our resolution of this claim. Paragraph 33 of the contract provides that "[the plaintiff] shall be entitled to recover from [Shaukat] all reasonable [attorney's] fees and other legal costs incurred to secure or protect its rights under this [c]ontract or enforce the terms thereof, whether at law or in equity." During trial, Zelken testified that the plaintiff had thus far incurred approximately $20,000 in attorney's fees to prosecute the action. In its posttrial brief, the plaintiff maintained its claim that the judgment should include an award of attorney's fees under paragraph 33 of the contract and requested a briefing schedule.

When the court issued its September 2, 2022 memorandum of decision, it stated that "[t]he case shall be assigned for a postjudgment hearing on the plaintiff's claim for attorney's fees." On October 3, 2022, the plaintiff filed its motion for attorney's fees and costs, seeking an award of trial related, contractual attorney's fees and costs in the amount of $21,550. See Practice Book § 11-21. The plaintiff also filed an accompanying affidavit of Attorney Richard S. Gora, which provided a breakdown of the time spent, tasks, hourly rate, and fees charged to support the amount requested, as well as redacted billing invoices from Gora, LLC, to the plaintiff. The defendants subsequently filed an objection (1) contending that the requested fees improperly included time spent on claims that were not pursued and/or were withdrawn and (2) indicating "ORAL ARGUMENT REQUESTED. TESTIMONY REQUIRED." On October 17, 2022, without having conducted a hearing, the court granted the plaintiff's motion for attorney's fees and costs, finding the request to be reasonable and necessary and awarding the amount of $21,550.

On the question of whether the defendants were entitled, under the circumstances of this case, to an evidentiary hearing on the plaintiff's motion for attorney's fees

and costs, we find our Supreme Court's decision in *Commission on Human Rights & Opportunities* v. *Sullivan*, 285 Conn. 208, 939 A.2d 541 (2008), to be instructive. In *Sullivan*, a housing discrimination action, the trial court found in favor of the plaintiffs, the Commission on Human Rights and Opportunities and a prospective tenant. Id., 210–11. On appeal, the defendants claimed, inter alia, that the trial court improperly prevented them from fully litigating the reasonableness of the plaintiff tenant's request for statutory attorney's fees by precluding them from eliciting the testimony of the billing attorney who had submitted an affidavit and her billing records in support of the request. Id., 235–36. The trial court had concluded that the affidavit and billing records were sufficiently detailed to allow a reasonableness determination, that the records constituted prima facie evidence of the reasonableness of the requested fees, and that "the defendants had been free to challenge the reasonableness of the requested fees through the submission of their own affidavits and through the presentation of expert testimony." Id., 237.

The question presented to our Supreme Court in *Sullivan* was "whether a party opposing a request for attorney's fees has a right, during a hearing on the reasonableness of the requested fees, to question under oath a billing attorney who has presented an affidavit in support of those fees." Id. In its analysis, the court iterated its prior clarification of "the basis on which a trial court may make a determination of the reasonableness of requested attorney's fees, [namely] that 'more than [a] trial court's mere general knowledge is required for an award of attorney's fees.' *Smith* v. *Snyder*, 267 Conn. 456, 472, 839 A.2d 589 (2004). The burden of showing reasonableness rests on the party requesting the fees, and 'there is an undisputed requirement that the reasonableness of attorney's fees and costs must

be proven by an appropriate evidentiary showing.' . . . Id., 471. Specifically, [the court] concluded that 'there must be a clearly stated and described factual predicate for the fees sought, apart from the trial court's general knowledge of what constitutes a reasonable fee.' Id., 477. That factual predicate must include 'a statement of the fees requested and a description of services rendered.' Id., 479.

"[The court] explained that imposing such a preliminary burden on the proponent of the fees 'affords the opposing party an opportunity to challenge the amount requested at the appropriate time.' Id. It was unnecessary in *Smith* for [the court] to consider what procedural rights were encompassed by the opposing party's right to challenge the amount requested, because the defendants in *Smith* had not opposed the plaintiffs' request for attorney's fees at trial. In the opinion, however, [the court] noted in dicta that when a party against whom attorney's fees are sought 'affirmatively [objects] to the submission of evidence in support of the request for attorney's fees'; id., 480 n.14; the opposing party is entitled 'to litigate fully the reasonableness of the fees requested.' Id., 479 n.14. [The court] illustrated this point by citing [its] decision in *Barco Auto Leasing Corp.* v. *House*, 202 Conn. 106, 121, 520 A.2d 162 (1987), in which the defendants' attorneys had submitted affidavits in support of the defendants' request for attorney's fees. The trial court overruled the plaintiff's objection that expert testimony was necessary to determine the value of reasonable attorney's fees. [Id.] The [trial] court did not admit the affidavits as evidence, but did allow them to be included in the file, and instructed the parties to address any further issues regarding attorney's fees in their briefs. Id. [Our Supreme Court] reversed the judgment of the trial court, concluding that the court had denied the plaintiff 'the undisputed right to litigate fully the reasonableness of the attorney's fees . . . .'

Id." *Commission on Human Rights & Opportunities* v. *Sullivan*, supra, 285 Conn. 237–39.

The court in *Sullivan* proceeded to conclude expressly "what was implicit, both in *Smith* and *Barco Auto Leasing Corp.*, namely, that the right to litigate fully the reasonableness of attorney's fees entitles the opposing party to question under oath a billing attorney who has submitted an affidavit in support of the requested fees, in order to challenge the reasonableness of those fees. This rule will ensure that the party opposing the requested fees has available to it the most fair and efficient means of challenging those fees, that is, questioning under oath the very person on whom the court relies in assessing the fees, the billing attorney. It is not a sufficient substitute to limit the opposing party to filing opposing affidavits or calling expert witnesses. Allowing the challenging party this right will also aid the court in making its determination regarding the reasonableness of those fees. It would be inconsistent with the placement of the burden on the requesting party, and with [the court's] statement in *Smith* that an opposing party should have the right to litigate fully the issue of reasonableness, to allow the requesting party to present an affidavit by the billing attorney in support of the reasonableness of the requested fees, without allowing the opposing party to test that evidence by questioning the affiant under oath." Id., 239.

Applying *Sullivan* to the present action, we conclude that, because the defendants had timely objected to the plaintiff's motion for attorney's fees and costs and had requested an evidentiary hearing, the trial court erred in adjudicating the plaintiff's motion without holding such a hearing. In the absence of such a hearing, the defendants were deprived of the ability to litigate fully the issue of reasonableness of the requested fees and costs.

The judgment is reversed only as to (1) the calculation of the proven damages amounts; see footnote 7 of this opinion; and (2) the award of attorney's fees and costs, and the case is remanded (1) with direction to render judgment for the plaintiff in the amount of $66,712.92 and (2) for an evidentiary hearing limited to the issue of the amount of attorney's fees and costs; the judgment is affirmed in all other respects.

In this opinion the other judges concurred.

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## CINDY L. KAREN *v.* WILLIAM P. LOFTUS
## (AC 46184)

Clark, Seeley and Prescott, Js.

*Syllabus*

The plaintiff appealed following the trial court's denial of her motion to open the dissolution judgment to allow discovery on her claim that the defendant had fraudulently procured an arbitration award that was incorporated into that judgment pursuant to statute (§ 46b-66). The plaintiff claimed that the trial court incorrectly determined that she had failed to establish probable cause to substantiate her fraud allegations. *Held*:

The trial court had subject matter jurisdiction to adjudicate the plaintiff's motion to open, even though it was filed outside the applicable statutory (§ 52-420 (b)) time frame.

The trial court improperly denied the plaintiff's motion to open the judgment based on fraud, as the plaintiff presented evidence of the defendant's making of false statements or his failure to disclose facts, which was sufficient to establish probable cause to substantiate her claim of fraud, thereby warranting discovery and further proceedings.

Argued January 29—officially released September 17, 2024

*Procedural History*

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial district of Fairfield, where the court, *Hon. Gerard I. Adelman*, judge trial referee, approved the stipulation of the parties to enter into binding arbitration as to certain disputed matters; thereafter, the arbitrator issued a

decision, and the court, *Sommer*, *J.*, incorporated the arbitrator's decision into its judgment dissolving the marriage and granted certain other relief in accordance with the parties' separation agreement; subsequently, the court, *Hon. Eddie Rodriguez*, *Jr.*, judge trial referee, denied the plaintiff's motion to open the judgment, and the plaintiff appealed to this court, *Elgo*, *Suarez* and *Palmer*, *Js.*, which reversed the trial court's judgment and remanded the case for further proceedings; thereafter, the court, *Truglia*, *J.*, denied the plaintiff's motion to open the judgment, and the plaintiff appealed to this court. *Reversed*; *further proceedings*.

*Thomas J. Rechen*, with whom were *Charles D. Ray* and, on the brief, *Gregory A. Hall*, for the appellant (plaintiff).

*Anthony L. Cenatiempo*, with whom, on the brief, was *Norman A. Roberts*, for the appellee (defendant).

*Opinion*

PRESCOTT, J. This marital dissolution matter, which requires the resolution of jurisdictional and merits related issues arising from the arbitration of a specific aspect of the parties' prenuptial agreement, returns to us for a second time. Following the dissolution of the parties' marriage, the plaintiff, Cindy L. Karen, has endeavored to open that judgment for the limited purpose of allowing discovery with respect to her claim that the arbitration award, which subsequently was incorporated into the dissolution judgment, was procured by fraud committed by the defendant, William P. Loftus.[1] In this appeal, the plaintiff claims that the court

[1] The defendant recently commenced a separate action against the plaintiff alleging vexatious litigation on the basis of the plaintiff's prosecution of the motion to open that is the subject of this appeal. See *Loftus* v. *Karen*, Superior Court, judicial district of Fairfield, Docket No. CV-23-6127590-S. A motion to dismiss filed by the plaintiff was granted by the trial court on February 26, 2024.

improperly denied her motion to open the dissolution judgment for the limited purpose of conducting discovery after it concluded that she had failed to establish probable cause that the arbitration award pertaining to the financial ramifications of the defendant's departure from his employment with Merrill Lynch, and its subsequent incorporation into the dissolution judgment, was obtained by fraud.[2] The defendant disagrees with the merits of the plaintiff's claim and, additionally, contends that the trial court lacked subject matter jurisdiction to consider the plaintiff's motion to open because her challenge to the arbitration award was not timely pursuant to General Statutes § 52-420 (b). We are not persuaded by the defendant's jurisdictional claim and agree with the plaintiff that the court improperly concluded that she had failed to establish probable cause as to her fraud claim.[3] Accordingly, we reverse the judgment denying the plaintiff's motion to open and remand the matter for further proceedings.

In our prior decision, we set forth the following relevant facts and procedural history. "The plaintiff and the defendant were married in June, 2007. Prior to the marriage, on May 14, 2007, the parties entered into a prenuptial agreement . . . . Paragraph 6 (B) of the [prenuptial] agreement provides: If, at the time that an

[2] See *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 540 A.2d 713 (1988).

[3] The defendant also argues that we should not review the plaintiff's claim on the basis of inadequate briefing. Specifically, he contends that "[o]ther than one reference . . . which did not include the elements of a fraud claim, the plaintiff's brief is devoid [of] any analysis of the fraud elements based upon the evidence submitted in the hearing on the motion to open." In her reply brief, the plaintiff counters that her principal appellate brief adequately addressed the "central issue of this appeal, which is whether [the plaintiff] established probable cause that [the defendant] lied to the arbitrator, resulting in an award that was based on his fraud." (Emphasis omitted.) We agree with the plaintiff. See, e.g., *Electrical Contractors, Inc.* v. *Dept. of Education*, 303 Conn. 402, 444, 35 A.3d 188 (2012); *Lafferty* v. *Jones*, 225 Conn. App. 552, 579 n.33, 316 A.3d 742 (2024); *State* v. *Estrella J.C.*, 169 Conn. App. 56, 81 n.9, 148 A.3d 594 (2016).

action for dissolution of marriage, annulment or legal separation is commenced, [the defendant] has left his employment with Merrill Lynch under an arrangement that is in any fashion tantamount to a sale of his interest in Merrill Lynch, i.e. a transaction under which [the defendant] receives any property, real or personal, including but not limited to a sum of money, by way of a sign-on bonus or otherwise, a premium bonus, and/or restricted stock or other ownership interest (Sale Proceeds), to work for another entity for any reason whatsoever, including his bringing a book of business and/or a clientele and/or a book of other assets to a prospective employer, then [the defendant] shall first be entitled to set aside the value of $75,000, or $75,000 from the Sale Proceeds, and the balance of such Sale Proceeds, whenever received or receivable by [the defendant], shall be divided between [the defendant] and [the plaintiff] according to the Allocation. . . . If the Sale Proceeds have been invested in other assets, the Parties shall maintain a record of all such investments, and each Party shall be entitled to the value of such Sale Proceeds so invested and any proportional gain or loss that is associated with such investment according to the Allocation. . . .

"In December, 2014, the plaintiff commenced a dissolution action against the defendant . . . . The parties disagreed as to whether the defendant's obligation to pay the plaintiff pursuant to paragraph 6 (B) was triggered by the specific circumstances surrounding the defendant's departure from his employment at Merrill Lynch. Under this paragraph of the [prenuptial] agreement, if the defendant's departure from Merrill Lynch was determined to be tantamount to a sale of his interest in Merrill Lynch, the plaintiff would be entitled to one half of the sale proceeds after the defendant set aside $75,000. If the defendant's departure from Merrill Lynch was not tantamount to a sale, however, the plaintiff

would not receive any of the proceeds. On August 1, 2016, the parties entered into [an agreement that clarified the specific schedule and amounts of monthly payments of the defendant's alimony obligation[4] and requested that the court refer] the case to an arbitrator for resolution of the issue of whether the defendant's departure from Merrill Lynch was a sale of his interest in Merrill Lynch. On that same day, the court, *Hon. Gerard I. Adelman*, judge trial referee, accepted the parties' [agreement comprised of the statement regarding the timing of alimony payments and their agreement to arbitrate] and referred the issue of the defendant's departure from Merrill Lynch to an arbitrator.

"The parties agreed to have C. Ian McLachlan, a retired justice of the Connecticut Supreme Court, act as the arbitrator of their dispute.[5] Beginning on February 16, 2017, McLachlan held a two day hearing wherein

[4] Specifically, the parties agreed to the following: "The total amount of the alimony due the plaintiff from the defendant is $1,500,000 ($8333 per month times 15 years (180 months). The defendant paid the plaintiff alimony beginning December, 2014, through and including July, 2016, in the amount of $189,416. The defendant therefore owes the plaintiff $1,310,584 ($1,500,000 minus $189,416). Beginning on or before August 15, 2016, and on or before the 15th of each month thereafter, the defendant shall pay the plaintiff $8333 per month through and including July, 2029 (156 months). The defendant's final monthly alimony payment in the amount of $2333 shall be paid to the plaintiff on or before August 15, 2029."

[5] The August 1, 2016 agreement to arbitrate provided in relevant part: "The parties join in asking this court to refer this case to the Honorable Ian McLachlan (Ret.) to arbitrate and determine the applicability of article 6 of the prenuptial agreement to certain facts presented to Justice McLachlan by each of the parties. The defendant shall be solely [responsible] for Justice McLachlan's fees. . . . Any orders entered pursuant to this paragraph . . . shall be binding upon the parties and incorporated into the judgment of the court. Each party acknowledges that (a) he or she is entering the agreement to arbitrate voluntarily and without coercion; (b) the agreement to arbitrate is fair and equitable under the circumstances; and (c) the agreement to arbitrate does not include issues related to child support, visitation and custody.

"Upon the court's acceptance of the arbitration award . . . the court's orders regarding article 6 of the prenuptial agreement shall supersede the prenuptial agreement and render it null and void after judgment for dissolution of the marriage is entered except as specifically set forth herein."

both parties testified. On April 27, 2017, McLachlan issued a decision in which he concluded that the defendant's departure from Merrill Lynch was not tantamount to a sale under the [prenuptial] agreement. In his memorandum of decision, McLachlan found that, in October, 2008, sixteen months after the parties were married, the defendant and three colleagues left Merrill Lynch and formed a business known as LLBH. Each partner invested between $10,000 and $15,000 to start LLBH. Shortly after the business was formed, Focus Financial (Focus) purchased an option to buy an interest in LLBH for $2 million, which was shared equally among the partners. Focus subsequently exercised its option, there was a corporate reorganization, and Partner Wealth Management, LLC, was created. When Focus exercised its option, the defendant received $1,665,000 and 90,000 shares of Focus stock, as well as some options.

"McLachlan further found that, at the time of the [prenuptial] agreement, the defendant had certain benefits incident to his employment with Merrill Lynch, including restricted stock units, which he forfeited by leaving Merrill Lynch. This practice of forfeiture was very common in the financial services industry and was one of the reasons that brokers were generally paid a sign-on bonus when changing jobs by the new employer. Additionally, brokers were being paid [by their new employers] for their book of business which, in effect, represented their customers. The plaintiff and the defendant negotiated the [prenuptial] agreement, specifically paragraph 6 (B), to account for this possibility.

"Additionally, McLachlan concluded that the evidence did not support the plaintiff's claim that the defendant contemplated leaving Merrill Lynch at the time the [prenuptial] agreement was made. The defendant did not leave Merrill Lynch until sixteen months after the date of the marriage, and there was no mention

of the defendant starting his own business in the [prenuptial] agreement. Ultimately, McLachlan determined that paragraph 6 (B) was drafted in contemplation of the defendant leaving Merrill Lynch and going to a competitor that would compensate him for both the employment benefits that he was forfeiting from Merrill Lynch and the contracts and business that he would bring to the new company. Instead, the defendant left Merrill Lynch to start his own company and invested his own money into the venture. An option to invest in that new venture was sold, and more than one year later, the business created by the venture itself was sold. According to McLachlan, this scenario is substantially different than the situation where an employee leaves a brokerage house and is compensated by the new employer." (Footnotes added; internal quotation marks omitted.) *Karen* v. *Loftus*, 210 Conn. App. 289, 291–94, 270 A.3d 126 (2022).

On May 12, 2017, the plaintiff filed a motion to confirm the arbitration award, which the court subsequently granted. On June 16, 2017, the trial court, *Sommer*, *J.*, incorporated (1) the terms of the prenuptial agreement with respect to the division of real estate, personal property, debts and liabilities, (2) the August 1, 2016 agreement, which the court found to be fair and equitable, regarding the timing of the defendant's alimony payments to the plaintiff, and (3) McLachlan's arbitration award into a final judgment of dissolution. Id., 294.

On April 3, 2018, the plaintiff filed a motion to open the dissolution judgment on the ground that the defendant had made fraudulent representations and failed to disclose material facts to McLachlan during the arbitration. Specifically, she claimed that the defendant's contentions that LLBH was a new business, and that business was not sold to Focus when he and his partners left Merrill Lynch, were "wholly contradicted by evidence presented in a subsequent trial concerning the same

business . . . .'' The plaintiff further alleged that the defendant's representations to McLachlan that (1) when leaving Merrill Lynch, he did not contemplate taking his contacts and clients with him to LLBH, (2) the defendant and his partners did not contemplate an agreement with Focus until after the May 14, 2007 execution of the prenuptial agreement, and (3) the agreement and transaction with Focus did not constitute a sale, were materially false. ''The essence of the plaintiff's argument in her motion to open is that the defendant testified falsely during the arbitration and that McLachlan relied on the purportedly false testimony in concluding that paragraph 6 (B) [of the prenuptial agreement] did not apply to the defendant's departure from Merrill Lynch to form LLBH.'' *Karen* v. *Loftus*, supra, 210 Conn. App. 294–95.

After additional filings by the parties, the court, *Hon. Eddie Rodriguez, Jr.*, judge trial referee, held a hearing on May 6, 2019, to consider the plaintiff's motion to open the dissolution judgment. Id., 296. The purpose of this hearing was to determine whether a sufficient basis existed to open the judgment for the limited purpose of proceeding with discovery on the allegations of fraud set forth by the plaintiff. See *Spilke* v. *Spilke*, 116 Conn. App. 590, 593–94 and n.6, 976 A.2d 69, cert. denied, 294 Conn. 918, 984 A.2d 68 (2009); *Oneglia* v. *Oneglia*, 14 Conn. App. 267, 269–70, 540 A.2d 713 (1988).

On September 25, 2019, the court denied the plaintiff's motion to open, stating in relevant part: ''[T]he plaintiff is mistakenly claiming a second bite at the apple. She is attempting to open a judgment by filing a motion which is well beyond [the] permissible four [month] window to open civil judgments and she is claiming fraud. The exception to opening judgments outside of the initial four months does not apply to cases where a party wants to [relitigate] issues already litigated and decided. She seeks to reopen the judgment and obtain

a new trial based on what she attempts to characterize as newly discovered evidence. However the evidence she references as newly discovered is evidence which was available during the arbitration and it would have been cumulative of the evidence offered at the arbitration. The plaintiff's claim fails because the evidence relied upon was not in fact newly discovered evidence and the plaintiff has failed to demonstrate that the evidence could not have been discovered and produced at the former trial by the exercise of due diligence. Also, it does not appear to this court that a different result would be had at another trial." (Internal quotation marks omitted.) *Karen* v. *Loftus*, supra, 210 Conn. App. 296.

The plaintiff then appealed to this court from the denial of her motion to open, claiming that the trial court had utilized an incorrect legal standard when it rejected her claim. Id., 296–97. We agreed and identified the proper standard as follows: "[T]he court was required to make a preliminary determination of whether there was probable cause to believe that the judgment was obtained by fraud before it could consider the merits of the claim. If the court found probable cause to believe that the judgment was obtained by fraud, then the court was required to conduct an evidentiary hearing to determine whether, in fact, there was fraud." Id., 302. As a result of the trial court's failure to make this preliminary determination, we reversed the judgment and remanded the case for further proceedings. Id., 303.

Pursuant to our remand, the court, *Truglia*, *J.*, held a hearing on September 9, 2022, and January 4 and 5, 2023, for the purpose of determining whether probable cause existed to open the judgment for the limited purpose of proceeding with discovery as to the plaintiff's claim of fraud. After hearing testimony and considering

the submitted exhibits, the court orally denied the plaintiff's motion, stating that it did not "see any fraud . . . any fraud whatsoever [and that] [t]here's no proof, *there's no compelling evidence that* [*the defendant*] *misled . . . McLachlan*." (Emphasis added.) On February 1, 2023, the court issued a "statement of decision" that contained a brief synopsis of the case and concluded that it had "found no evidence of fraud." This appeal followed.[6] Additional facts will be set forth as necessary.

On appeal, the plaintiff claims that the trial court improperly concluded that she had failed to establish probable cause that the arbitration award, which subsequently was incorporated into the judgment of dissolution, was obtained by fraud. Specifically, the plaintiff argues that she presented ample evidence of the defendant's misrepresentations and failure to disclose material facts and evidence to McLachlan that resulted in the defendant's fraudulently obtaining an arbitration award in his favor. The defendant counters that the trial court lacked jurisdiction to consider the plaintiff's motion to open and, in the alternative, properly denied the plaintiff's motion to open. We disagree with the defendant's arguments and conclude that the court improperly determined that the plaintiff had failed to meet her preliminary burden of demonstrating that probable cause existed to warrant discovery and an evidentiary hearing as to her allegation of fraud.

I

Before considering the merits of this appeal, we must first address the defendant's claim that the trial court lacked subject matter jurisdiction over the plaintiff's

[6] On May 23, 2023, the plaintiff moved for an articulation of the denial of her motion to open. The trial court denied this motion on June 6, 2023. Thereafter, the plaintiff filed a motion for review with this court. On July 19, 2023, we granted review but denied the relief requested.

motion to open the judgment. Specifically, he argues that the plaintiff's April 3, 2018 motion to open constitutes an untimely attempt to vacate the April 27, 2017 arbitration award and that, consequently, the trial court did not have jurisdiction to consider it pursuant to § 52-420 (b). In her reply brief, the plaintiff responds that, under the facts and circumstances of this case, where the court incorporated the arbitration award into the terms of a judgment of dissolution, General Statutes § 46b-66 (e) provides the basis for the trial court to consider her motion and claim of fraud related to the arbitration. We conclude that the court had subject matter jurisdiction to adjudicate the plaintiff's motion to open.

We begin our analysis of this issue by setting forth the relevant legal principles regarding the opening of a dissolution judgment based on fraud. It is a well established principle that a court has the inherent authority to open a judgment, subject to certain limitations. See, e.g., *Jonas* v. *Playhouse Square Condominium Assn., Inc.*, 173 Conn. App. 36, 39, 161 A.3d 1288 (2017). "Within four months of the date of the original judgment, Practice Book [§ 17-4] vests discretion in the trial court to determine whether there is a good and compelling reason for its modification or vacation." (Internal quotation marks omitted.) *McGovern* v. *McGovern*, 217 Conn. App. 636, 645–46, 289 A.3d 1255, cert. denied, 346 Conn. 1018, 295 A.3d 111 (2023); see also General Statutes § 52-212a;[7] *Hebrand* v. *Hebrand*, 216 Conn. App. 210, 220–21, 284 A.3d 702 (2022).

[7] General Statutes § 52-212a (a) provides in relevant part: "Unless otherwise provided by law and except in such cases in which the court has continuing jurisdiction, a civil judgment or decree rendered in the Superior Court may not be opened or set aside unless a motion to open or set aside is filed within four months following the date on which the notice of judgment or decree was sent . . . ." Practice Book § 17-4 (a) essentially mirrors the language of § 52-212a (a). See *Fitzsimons* v. *Fitzsimons*, 116 Conn. App. 449, 454–55, 975 A.2d 729 (2009).

This rule serves to further the compelling interest in the finality of judgments. *Strauss* v. *Strauss*, 220 Conn. App. 193, 203–204, 297 A.3d 581, cert. denied, 348 Conn. 914, 303 A.3d 602 (2023). "Finality of litigation is essential so that parties may rely on judgments in ordering their private affairs and so that the moral force of court judgments will not be undermined. The law favors finality of judgments . . . . This court has emphasized that due consideration of the finality of judgments is important and that judgments should only be set aside or opened for a strong and compelling reason. . . . It is in the interest of the public as well as that of the parties [that] there must be fixed a time after the expiration of which the controversy is to be regarded as settled and the parties freed of obligation to act further in the matter by virtue of having been summoned into or having appeared in the case. . . . Without such a rule, no judgment could be relied on." (Internal quotation marks omitted.) Id., 204; see also *Bruno* v. *Bruno*, 146 Conn. App. 214, 229, 76 A.3d 725 (2013).

Our appellate courts, however, have recognized that § 52-212a "does not abrogate the court's common-law authority to open a judgment beyond the four month limitation upon a showing that the judgment was obtained by fraud, duress or mutual mistake. . . . The common-law reasons for opening a judgment seek to preserve fairness and equity." (Citation omitted; internal quotation marks omitted.) *Bruno* v. *Bruno*, supra, 146 Conn. App. 230; see also *Conroy* v. *Idlibi*, 343 Conn. 201, 205, 272 A.3d 1121 (2022) (fraud is exception to four month limitation for motion to open judgment); *Veneziano* v. *Veneziano*, 205 Conn. App. 718, 726, 259 A.3d 28 (2021) (although motion to open normally must be filed within four months of entry of judgment, motion to open based on fraud is not subject to this limitation). Our Supreme Court specifically has recognized that a marital dissolution judgment based on a stipulation

between the parties may be opened if the stipulation, and thus the judgment, was obtained by fraud. See, e.g., *Reville* v. *Reville*, 312 Conn. 428, 440–41, 93 A.3d 1076 (2014); *Weinstein* v. *Weinstein*, 275 Conn. 671, 685, 882 A.2d 53 (2005); *Billington* v. *Billington*, 220 Conn. 212, 217–18, 595 A.2d 1377 (1991).

We now turn to the defendant's specific jurisdictional claim, made for the first time in this appeal.[8] He argues that the plaintiff's challenge to the underlying arbitration award was untimely because she did not file an application to vacate the award within thirty days of the issuance of notice of the award. As a result, the defendant contends that the trial court lacked subject matter jurisdiction to open the judgment that incorporated the arbitration award pursuant to § 52-420 (b). As factual support for this argument, he notes that McLachlan issued his award on April 27, 2017, which the court, *Sommer*, *J.*, then incorporated into the judgment of dissolution on June 16, 2017, and that the plaintiff did not move to open that dissolution judgment based on her claim of fraud until April 3, 2018.

"[S]ubject matter jurisdiction involves the authority of the court to adjudicate the type of controversy presented by the action before it. . . . [A] court lacks discretion to consider the merits of a case over which it is without jurisdiction . . . . Furthermore, [j]urisdiction of the [subject matter] is the power [of the court] to hear and determine cases of the general class to which the proceedings in question belong. . . . A court has subject matter jurisdiction if it has the authority to adjudicate a particular type of legal controversy." (Citation omitted; internal quotation marks omitted.) *A Better Way Wholesale Autos, Inc.* v. *Saint Paul*, 338

[8] A claim that a court lacks subject matter jurisdiction may be raised at any time during the proceedings, including on appeal. See, e.g., *Mention* v. *Kensington Square Apartments*, 214 Conn. App. 720, 727, 280 A.3d 1195 (2022); *Parisi* v. *Niblett*, 199 Conn. App. 761, 768, 238 A.3d 740 (2020).

Conn. 651, 658, 258 A.3d 1244 (2021); see also *Bloomfield* v. *United Electrical, Radio & Machine Workers of America, Connecticut Independent Police Union, Local 14*, 285 Conn. 278, 286, 939 A.2d 561 (2008); *Petrucelli* v. *Travelers Property Casualty Ins. Co.*, 146 Conn. App. 631, 640, 79 A.3d 895 (2013), cert. denied, 311 Conn. 909, 83 A.3d 1164 (2014). Stated differently, "[a] court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it." *Monroe* v. *Monroe*, 177 Conn. 173, 185, 413 A.2d 819, appeal dismissed, 444 U.S. 801, 100 S. Ct. 20, 62 L. Ed. 2d 14 (1979).

Under the circumstances in the present case, the question of whether the court lacked jurisdiction over the motion to open is a question of law because it requires us to interpret the statutory provisions relied on by the parties. See, e.g., *Davis* v. *Davis*, 200 Conn. App. 180, 201, 238 A.3d 46, cert. denied, 335 Conn. 977, 241 A.3d 130 (2020); *Malpeso* v. *Malpeso*, 165 Conn. App. 151, 165, 138 A.3d 1069 (2016). Moreover, we note that there are no jurisdictional facts in dispute regarding the defendant's subject matter jurisdictional claim that would require adjudication by the trial court. See, e.g., *Sessa* v. *Reale*, 213 Conn. App. 151, 158, 278 A.3d 44 (2022); cf. *Conboy* v. *State*, 292 Conn. 642, 652–53, 974 A.2d 669 (2009) (if question of jurisdiction is intertwined with merits of case, court cannot resolve jurisdictional question without evidentiary hearing).

We turn then to the relevant statutory provisions. Section 52-420 (b) provides that "[n]o motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion." Our Supreme Court repeatedly has held that the trial court lacks subject matter jurisdiction over a motion not filed within this thirty day time period. See, e.g., *A Better Way Wholesale*

*Autos, Inc.* v. *Saint Paul*, supra, 338 Conn. 659; *Bloomfield* v. *United Electrical, Radio & Machine Workers of America, Connecticut Independent Police Union, Local 14*, supra, 285 Conn. 292–93. Stated differently, "[t]he only jurisdictional requirement in filing a motion to vacate an arbitration award is that it be filed with the trial court within thirty days of the moving party's notice of the arbitration award." *Middlesex Ins. Co.* v. *Castellano*, 225 Conn. 339, 345, 623 A.2d 55 (1993).

Our Supreme Court's decision in *Wu* v. *Chang*, 264 Conn. 307, 823 A.2d 1197 (2003), warrants discussion because the court in that case addressed whether an arbitration award could be attacked outside the thirty day time period of § 52-420 (b) if the party alleges that the award was obtained through fraud. In *Wu*, the parties had formed several companies as vehicles for their investments in hotel and condominium properties, which ultimately led to financial losses. Id., 308. Disputes arose, and the defendant commenced a civil action against one of the plaintiffs, alleging improprieties in his management of the companies. Id.

After an unsuccessful attempt at mediation, the parties agreed to sell the assets of the companies and have their respective shares conclusively determined by binding, nonappealable arbitration. Id., 308–309. The arbitrator determined that the respective share of each party in the proceeds from the sale of assets would be equal to their respective capital contributions. Id., 309. Notice of the arbitration award was sent to the parties. Id.

After receiving the arbitration award, the plaintiffs filed an application to confirm the arbitration award pursuant to General Statutes § 52-417.[9] Id. The defendant objected on the basis of fraud by one of the plaintiffs, and the court treated the defendant's objection as

[9] General Statutes § 52-417 provides in relevant part: "At any time within one year after an award has been rendered and the parties to the arbitration notified thereof, any party to the arbitration may make application to the

a motion to vacate the arbitration award[10] under § 52-420.[11] Id., 309–10. The court denied the defendant's motion to vacate, concluding that it lacked subject matter jurisdiction, as the motion had not been filed within the thirty day period set forth in § 52-420 (b). Id., 310. The defendant appealed, claiming that "the thirty day limitation period set forth in § 52-420 (b) was tolled by his claim of fraud and, consequently, the trial court improperly concluded that it lacked jurisdiction to entertain his motion to vacate." Id.

Our Supreme Court first explained that the trial court properly granted the plaintiffs' timely motion to confirm

superior court . . . for an order confirming the award. The court or judge shall grant such an order confirming the award unless the award is vacated, modified or corrected as prescribed in sections 52-418 and 52-419."

[10] General Statutes § 52-418 provides in relevant part: "(a) Upon the application of any party to an arbitration, the superior court . . . shall make an order vacating the award if it finds any of the following defects: (1) If the award has been procured by corruption, fraud or undue means; (2) if there has been evident partiality or corruption on the part of any arbitrator; (3) if the arbitrators have been guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown or in refusing to hear evidence pertinent and material to the controversy or of any other action by which the rights of any party have been prejudiced; or (4) if the arbitrators have exceeded their powers or so imperfectly executed them that a mutual, final and definite award upon the subject matter submitted was not made.

"(b) If an award is vacated and the time within which the award is required to be rendered has not expired, the court or judge may direct a rehearing by the arbitrators. . . ."

[11] General Statutes § 52-420 provides: "(a) Any application under section 52-417, 52-418 or 52-419 shall be heard in the manner provided by law for hearing written motions at a short calendar session, or otherwise as the court or judge may direct, in order to dispose of the case with the least possible delay.

"(b) No motion to vacate, modify or correct an award may be made after thirty days from the notice of the award to the party to the arbitration who makes the motion.

"(c) For the purpose of a motion to vacate, modify or correct an award, such an order staying any proceedings of the adverse party to enforce the award shall be made as may be deemed necessary. Upon the granting of an order confirming, modifying or correcting an award, a judgment or decree shall be entered in conformity therewith by the court or judge granting the order."

the arbitration award because the defendant's motion to vacate had not been filed within the thirty day limitation period of § 52-420 (b). Id., 312. It then turned to the defendant's contention that fraud tolled this time period. Id. In rejecting this argument, the court stated: "Chapter 909 of the General Statutes, General Statutes §§ 52-408 through 52-424, controls arbitration in this state whe[n] the common law is inconsistent with our statutory scheme. . . . The statutory arbitration scheme encompasses many aspects of the arbitration process . . . . Thus, it is evident that the legislature's purpose in enacting the statutory scheme was to displace many [common-law] rules. . . . The statutory framework governing the arbitration process expressly covers claims of fraud. Specifically . . . § 52-418 (a) requires a court to make an order vacating [an arbitration] award if it finds . . . [that] the award has been procured by corruption, fraud or undue means . . . . Under § 52-420 (b), however, a party seeking an order to vacate an arbitration award on grounds of corruption, fraud or undue means—or on any other ground set forth in § 52-418—must do so within the thirty day limitation period set forth in § 52-420 (b). In other words, once the thirty day limitation period of § 52-420 (b) has passed, the award may not thereafter be attacked on any of the grounds specified in . . . § 52-418 . . . including fraud. To conclude otherwise would be contrary not only to the clear intent of the legislature as expressed in §§ 52-417, 52-418 and 52-420 (b), but also to a primary goal of arbitration, namely, the efficient, economical and expeditious resolution of private disputes." (Citations omitted; emphasis omitted; internal quotation marks omitted.) Id., 312–13.

Ultimately, our Supreme Court agreed with the reasoning of the trial court that a motion to vacate an arbitration award based on any of the grounds set forth in § 52-418, including fraud, must be filed within the

thirty day period in order for the court to have subject matter jurisdiction. Id., 313–14. It is clear, therefore, that a trial court in most cases lacks subject matter jurisdiction to consider a motion to vacate an arbitration award based on a claim of fraud filed outside of the thirty day time period of § 52-420 (b).[12]

Salutary policy reasons typically support the strict time requirements that limit a party's ability to attack an arbitration award. As a general rule, "[a]rbitration is favored by courts as a means of settling differences and expediting the resolution of disputes. . . . There is no question that arbitration awards are generally upheld and that we give great deference to an arbitrator's decisions since arbitration is favored as a means of settling disputes." (Internal quotation marks omitted.) *Clasby* v. *Zimmerman*, 191 Conn. App. 143, 155, 213 A.3d 1144, cert. denied, 333 Conn. 919, 217 A.3d 1 (2019); see also *Garrity* v. *McCaskey*, 223 Conn. 1, 4, 612 A.2d 742 (1992); *Jenkins* v. *Jenkins*, 186 Conn. App. 641, 645, 200 A.3d 1193 (2018). "The core principles of Connecticut's arbitration law are set forth in . . . §§ 52-408 through 52-424. . . . [Section] 52-417 provides that in ruling on an application to confirm an arbitration

[12] See, e.g., *A Better Way Wholesale Autos, Inc.* v. *Saint Paul*, supra, 338 Conn. 659 (expiration of limitation period of § 52-420 (b) deprives trial court of subject matter jurisdiction over any ground to vacate arbitration award even if such ground to vacate is raised in opposition to prevailing party's application to confirm award); *Bloomfield* v. *United Electrical, Radio & Machine Workers of America, Connecticut Independent Police Union, Local 14*, supra, 285 Conn. 285–86 (thirty day limitation period of § 52-420 (b) applies to application to vacate arbitration awards on public policy grounds); *Rosenthal Law Firm, LLC* v. *Cohen*, 165 Conn. App. 467, 471, 139 A.3d 774 (thirty day limitation period to file motion to vacate arbitration award applies to grounds enumerated in § 52-418 as well as common-law ground such as claimed violation of public policy), cert. denied, 322 Conn. 904, 138 A.3d 933 (2016); *Amalgamated Transit Union Local 1588* v. *Laidlaw Transit, Inc.*, 33 Conn. App. 1, 4, 632 A.2d 713 (1993) (if motion to vacate, modify or correct is not made within thirty day limitation period of § 52-420 (b), award may not be attacked thereafter on any ground specified in § 52-418 or § 52-419).

award [t]he court or judge shall grant such an order confirming the award unless the award is vacated, modified or corrected as prescribed in [General Statutes §§] 52-418 and 52-419. . . . The trial court lacks any discretion in confirming the arbitration award unless the award suffers from any of the defects described in . . . §§ 52-418 and 52-419." (Citation omitted; emphasis omitted; footnotes omitted; internal quotation marks omitted.) *Clasby* v. *Zimmerman*, supra, 156–57.

Additionally, our Supreme Court has explained: "Judicial review of arbitral decisions is narrowly confined. . . . When the parties agree to arbitration and establish the authority of the arbitrator through the terms of their submission, the extent of our judicial review of the award is delineated by the scope of the parties' agreement. . . . Because we favor arbitration as a means of settling private disputes, we undertake judicial review of arbitration awards in a manner designed to minimize interference with an efficient and economical system of alternative dispute resolution. . . .

"Where the submission does not otherwise state, the arbitrators are empowered to decide factual and legal questions and an award cannot be vacated on the grounds that . . . the interpretation of the agreement by the arbitrators was erroneous. Courts will not review the evidence nor, where the submission is unrestricted, will they review the arbitrators' decision of the legal questions involved. . . .

"*Even in the case of an unrestricted submission, we have . . . recognized three grounds for vacating an award: (1) the award rules on the constitutionality of a statute . . . (2) the award violates clear public policy . . .* [*and*] *(3) the award contravenes one or more of the statutory proscriptions of § 52-418*." (Emphasis added; internal quotation marks omitted.) *Economos* v.

*Liljedahl Bros., Inc.*, 279 Conn. 300, 305–306, 901 A.2d 1198 (2006); see also *Industrial Risk Insurers* v. *Hartford Steam Boiler Inspection & Ins. Co.*, 273 Conn. 86, 93–94, 868 A.2d 47 (2005). The plaintiff has not raised a constitutional or public policy challenge to the arbitration award. Thus, in most contexts, the plaintiff's ability to raise her claim of fraud as to the arbitration process would be closed after the expiration of the thirty day period set forth in § 52-420 (b).

In proceedings such as the present case, however, in which an arbitration award is incorporated into a marital dissolution judgment rendered by the trial court, competing policies exist that are inherent in the statutes that apply to family matters. We start with a review of General Statutes § 46b-66. That statute governs the approval of agreements by the parties to resolve their marital dissolution proceeding. Subsection (a) of this statute[13] requires the trial court to determine, as a preliminary matter, that a dissolution settlement agreement is fair and equitable. *Roos* v. *Roos*, 84 Conn. App. 415, 419, 853 A.2d 642 (§ 46b-66 (a) specifically grants court authority to incorporate by reference into its judgment of dissolution separation agreement reached by parties if it is determined to be fair and equitable), cert. denied, 271 Conn. 936, 861 A.2d 510 (2004); see also *Costello* v. *Costello*, 186 Conn. 773, 776, 443 A.2d 1282 (1982) (court has affirmative duty to ascertain whether parties' settlement agreement is fair, equitable, and has been knowingly agreed upon). Subsection (c) provides

[13] General Statutes § 46b-66 (a) provides in relevant part: "[I]n any case under this chapter where the parties have submitted to the court a final agreement concerning the custody, care, education, visitation, maintenance or support of any of their children or concerning alimony or the disposition of property, the court shall inquire into the financial resources and actual needs of the parties and their respective fitness to have physical custody of or rights of visitation with any minor child, in order to determine whether the agreement of the parties is fair and equitable under all the circumstances."

in relevant part that, "[i]f the court finds the agreement fair and equitable, it shall become part of the court file, and if the agreement is in writing, it shall be incorporated by reference into the order or decree of the court. If the court finds the agreement is not fair and equitable, it shall make such orders as to finances and custody as the circumstances require . . . ." General Statutes § 46b-66 (c). This type of judicial review regarding the private resolution of a dispute generally is not part of the process for other types of civil litigation. See *Brycki* v. *Brycki*, 91 Conn. App. 579, 587, 881 A.2d 1056 (2005) (requirement that court must determine whether separation agreement is fair and equitable described as "peculiar to settlement agreements in the area of family law").

We next turn to subsection (e) of § 46b-66,[14] which provides in relevant part: "The provisions of chapter 909 [§§ 52-408 through 52-424] shall be applicable to any agreement to arbitrate in an action for dissolution of marriage under this chapter . . . . An arbitration award in such action shall not be enforceable until it has been confirmed, modified or vacated in accordance

[14] We are cognizant that the pertinent provisions of subsection (e) of § 46b-66 were enacted after the arbitration proceedings and the filing of the motion to open in the present case. Number 21-104, § 21, of the 2021 Public Acts amended § 46b-66, effective June 28, 2021, by, inter alia, moving subsection (c) to subsection (e), and adding the following language: "An arbitration award relating to a dissolution of marriage that is incorporated into an order or decree of the court shall be enforceable and modifiable to the same extent as an agreement of the parties that is incorporated into an order or decree of the court pursuant to subsection (c) of this section." General Statutes § 46b-66 (e).

In our view, it is appropriate to rely on this provision in resolving the present case because the statute simply clarifies, among other things, that, if the parties' final agreement to resolve their dissolution proceeding contains an arbitration award embedded in that agreement, the parties' agreement is subject to the same review and approval process set forth in subsection (c) of § 46b-66. Moreover, the legislature did not limit the applicability of this provision only to final agreements entered into after the effective date of the public act.

with the provisions of chapter 909 and incorporated into an order or decree of court in an action for dissolution of marriage between the parties. . . . *An arbitration award relating to a dissolution of marriage that is incorporated into an order or decree of the court shall be enforceable and modifiable to the same extent as an agreement of the parties that is incorporated into an order or decree of the court pursuant to subsection (c) of this section.*" (Emphasis added.)

Pursuant to this statutory language, the parties may choose to use arbitration as a means to resolve some or even all of the disputed financial and custody issues relating to the dissolution of their marriage. If they choose to do so, the court must first find that the agreement to arbitrate was entered into voluntarily and is fair and equitable under the circumstances. If the court permits the arbitration, that arbitration is conducted in accordance with the provisions of chapter 909 of the General Statutes. Finally, subsection (e) provides that an arbitration award that is incorporated into an order or decree of the court is enforceable and modifiable to same extent as an agreement of the parties that is incorporated into an order or decree of the court pursuant to subsection (c) of § 46b-66. Therefore, arbitration awards are subject to enforcement and modification as any other aspect of the dissolution judgment. By implication, because a judgment of dissolution may be opened on the basis of fraud, an arbitration award in this context may be opened outside of the thirty day limit of § 52-420 (b) for fraud. Stated differently, unlike arbitration awards in other civil contexts, arbitration awards in dissolution matters must be made part of a dissolution judgment pursuant to § 46b-66 (e) and may be subject to modification or later attack under appropriate circumstances.

Principles of statutory construction further inform our analysis. As §§ 46b-66 and 52-420 (b) relate to the

same subject matter, we presume that the legislature intended to create a harmonious and consistent body of law, and we must consider the broader statutory scheme to ensure the coherency of our construction. See *LaFrance* v. *Lodmell*, 322 Conn. 828, 837–38, 144 A.3d 373 (2016); see also *Independent Party of CT—State Central* v. *Merrill*, 330 Conn. 681, 706, 200 A.3d 1118 (2019); *Langello* v. *West Haven Board of Education*, 142 Conn. App. 248, 258, 65 A.3d 1 (2013). In doing so, we conclude that the time limitation of § 52-420 (b) does not apply in situations where an arbitration award in a dissolution proceeding has been obtained by fraud and made part of the dissolution judgment pursuant to § 46b-66 (e). A contrary result might permit such fraud to invidiously invade and infect the court's statutorily required determination regarding the fairness and equitable nature of a final agreement of the parties. In other words, to allow an arbitration award obtained by fraud discovered outside of the very short time limitation imposed by § 52-420 (b) may severely undermine, if not eviscerate, the judicial review requirements of § 46b-66. As a result, such fraud may cause the corruption of the other aspects of a court's financial orders and fracture the mosaic of the dissolution judgment in a case in which the arbitration award is embedded in the parties' final agreement.

Further, in construing these statutes together, it is important to remember that marital dissolution proceedings are essentially equitable in nature. *Leonova* v. *Leonov*, 201 Conn. App. 285, 304, 242 A.3d 713 (2020), cert. denied, 336 Conn. 906, 244 A.3d 146 (2021). For example, in *Foisie* v. *Foisie*, 335 Conn. 525, 239 A.3d 1198 (2020), our Supreme Court described the opening of a dissolution judgment for the purpose of reconsidering financial orders on the basis of an allegation of fraud as follows: "[I]n family matters, the court exercises its equitable powers. . . . While an action for

divorce or dissolution of marriage is a creature of statute, it is essentially equitable in its nature. . . . The trial court has considerable discretion to balance equities in a dissolution proceeding. . . . The power to act equitably is the keystone to the court's ability to fashion relief in the infinite variety of circumstances which arise out of the dissolution of a marriage. Without this wide discretion and broad equitable power, the courts in some cases might be unable fairly to resolve the parties' dispute . . . . For that reason, equitable remedies are not bound by formula but are molded to the needs of justice. . . . [I]n some situations, the principle of protection of the finality of judgments must give way to the principle of fairness and equity." (Citations omitted; internal quotation marks omitted.) Id., 543–44; see also *Baker* v. *Baker*, 187 Conn. 315, 323, 445 A.2d 912 (1982) (trial court in dissolution of marriage action sits as court of law and of equity). Simply stated, the only remedy available to a defrauded party in a marital dissolution case is to have the court open and reconsider the judgment as a matter of equity. *Weiss* v. *Weiss*, 297 Conn. 446, 467 n.15, 998 A.2d 766 (2010).

Marital dissolution cases also have unique requirements for full and frank disclosure of relevant information between the parties and to the court. To achieve the goal of private settlements, with judicial supervision, of financial disputes between estranged marital partners, reasonable settlements that have been knowingly agreed upon are essential, and this can occur only *when the parties engage in full and frank disclosure to ensure each side has all the essential information necessary*. *Weinstein* v. *Weinstein*, supra, 275 Conn. 686–87. As such, in dissolution proceedings, "[t]he presiding judge has the obligation to conduct a searching inquiry to make sure that the settlement agreement is substantively fair and has been knowingly negotiated. . . . *Pivotal to the validity of such an inquiry is the absolute*

*accuracy of the financial information furnished by the parties to one another and the court.*" (Citations omitted; emphasis added; internal quotation marks omitted.) *Jucker* v. *Jucker*, 190 Conn. 674, 676, 461 A.2d 1384 (1983); see also *Dougan* v. *Dougan*, 301 Conn. 361, 370–71, 21 A.3d 791 (2011); *Baker* v. *Baker*, supra, 187 Conn. 321–22.

Our Supreme Court has explained that the principle of complete disclosure "is consistent with the notion that the settlement of a marital dissolution case is not like the settlement of an accident case. It stamps with finality the end of a marriage. . . . Courts simply should not countenance either party to such a unique human relationship dealing with each other at [arm's] length. Whatever honesty there may, or should, have been during the marriage should at least be required at its end." (Citation omitted; internal quotation marks omitted.) *Billington* v. *Billington*, supra, 220 Conn. 221. Further, this court has observed that, "[u]nlike civil litigants who stand at arm's length from one another, marital litigants have a duty of full and frank disclosure analogous to the relationship of fiduciary to beneficiary . . . ." (Internal quotation marks omitted.) *Mensah* v. *Mensah*, 145 Conn. App. 644, 652, 75 A.3d 92 (2013). These equitable concerns do not apply with the same vigor to arbitration proceedings that occur in commercial and other civil contexts.[15]

[15] We acknowledge that our Supreme Court's decision in *Blondeau* v. *Baltierra*, 337 Conn. 127, 136, 252 A.3d 317 (2020), includes language that could be read, in isolation, as inconsistent with our analysis in the present case. In *Blondeau*, a marital dissolution action, the defendant appealed from the judgment of the trial court granting the motion of the plaintiff to vacate an arbitration award and denying the defendant's corresponding motion to confirm the arbitration award. Id., 133. The arbitration award, pursuant to the submission, resolved various issues relating to the division of marital assets and child support. Id., 132–33.

On appeal, the plaintiff claimed that the Supreme Court lacked subject matter jurisdiction over an appeal taken from an order vacating an arbitration award that included issues related to child support. Id., 135. As the court explained, "[t]he plaintiff's jurisdictional argument seizes on the proviso in

For these reasons, we conclude that the thirty day time limitation imposed by § 52-420 (b) does not apply in the present case. A contrary conclusion would run afoul of our "strong policy that the private settlement of the financial affairs of estranged marital partners is a goal that courts should support rather than undermine. . . . Our support of that goal will be effective only if we instill confidence in marital litigants that we require, as a concomitant of the settlement process,

§ 46b-66 (c) stating that the arbitration statutes, including the right to appeal under [General Statutes] § 52-423 of chapter 909, are applicable in a marital dissolution action 'provided . . . such agreement and an arbitration pursuant to such agreement shall not include issues related to child support, visitation and custody.' The plaintiff contends, in other words, that § 46b-66 (c) contains a condition precedent categorically excluding from the scope of cases subject to appeal any trial court order vacating or confirming an arbitration award that includes 'issues related to child support, visitation and custody.' " Id., 136.

In rejecting the plaintiff's argument in *Blondeau*, our Supreme Court first generally observed that "[t]he fact that the arbitration at issue involves a marital dissolution is of no consequence" and then noted that § 46b-66 (c) expressly provides that the arbitration statutes apply to arbitrations occurring in the context of a marital dissolution action. Id. The Supreme Court also noted that the final judgment in an arbitration proceeding generally is the order of the court vacating, modifying or confirming the arbitrator's award, regardless of whether the arbitration at issue involves a marital dissolution. Id. Specifically, the court explained that "[t]he restriction contained in § 46b-66 (c) [did] not operate as a categorical condition on a party's right of appeal but, instead, merely [limited] the enforceable scope of the parties' arbitration agreement and award under chapter 909." Id.

In our view, and for several reasons, the Supreme Court's decision in *Blondeau* does not impact our resolution of the defendant's claim that the trial court lacked subject matter jurisdiction over the plaintiff's motion to open the dissolution judgment. First, the claim in *Blondeau* involved an attack on the appellate jurisdiction of the Supreme Court rather than, as here, an attack on the subject matter jurisdiction of the trial court. Second, the language of § 46b-66 on which the plaintiff in *Blondeau* based her claim was subsequently repealed by the legislature. See footnote 14 of this opinion. Finally, and most significantly, it does not appear that the arbitration award at issue in *Blondeau* had been incorporated into a judgment of dissolution, which § 46b-66 (e) now expressly requires. Accordingly, we conclude that the procedural differences between *Blondeau* and the present case, as well as the subsequent statutory changes and fundamental dissimilarities between the claims, renders *Blondeau* inapposite.

such full and frank disclosure from both sides, for then they will be more willing to [forgo] their combat and to settle their dispute privately, secure in the knowledge that they have all the essential information. . . . This principle will, in turn, decrease the need for extensive discovery, and will thereby help to preserve a greater measure of the often sorely tried marital assets for the support of all of the family members." (Internal quotation marks omitted.) *Reville* v. *Reville*, supra, 312 Conn. 443–44. Furthermore, to shield a fraudulently obtained arbitration award from challenge on the basis of fraud after the passage of a mere thirty days would discourage parties from engaging in these types of private settlements. For these reasons, we conclude that the court had subject matter jurisdiction to address the plaintiff's motion to open the dissolution judgment, even though it was filed outside of the time frame set forth in § 52-420 (b).

II

Having concluded that the trial court had jurisdiction over the plaintiff's motion to open, we now turn to the merits of her appeal. The plaintiff claims that the court improperly concluded that she had failed to establish probable cause as to the existence of fraud that would permit the court to open the judgment for the limited purpose of conducting discovery on that claim. See *Spilke* v. *Spilke*, supra, 116 Conn. App. 593–94; *Oneglia* v. *Oneglia*, supra, 14 Conn. App. 269–70. Specifically, she argues that, contrary to the court's determination that there was "no evidence" to support her fraud claim, she presented sufficient evidence that established probable cause to warrant further discovery and additional proceedings. We agree with the plaintiff.

The following additional facts and procedural history are relevant to our resolution of this claim. On April 3, 2018, the plaintiff moved to open the judgment on the

basis of fraud.[16] The defendant filed a memorandum in opposition and exhibits on December 11, 2018. The plaintiff submitted a reply brief on January 11, 2019. Following the first appeal and our remand for additional proceedings; see *Karen* v. *Loftus*, supra, 210 Conn. App. 289; the court, *Truglia*, *J.*, conducted a hearing over the course of three days, September 9, 2022, and January 4 and 5, 2023, to determine whether the plaintiff met her burden to move forward with discovery in connection with her motion to open. At the hearing, the plaintiff, the defendant, and Kevin Collins, the plaintiff's attorney during the arbitration, testified. Additionally, because McLachlan was unavailable to testify, a transcript of his December 19, 2022 deposition was admitted into evidence.

On January 5, 2023, at the conclusion of the hearing, Judge Truglia stated that the plaintiff had failed to prove that the defendant had misled McLachlan at the arbitration and therefore denied the motion to open. Approximately one month later, the court issued a "statement of decision" that provided in relevant part: "The gravamen of the plaintiff's motion to open is that the defendant made material statements during the arbitration . . . that were false, and that the defendant knew were false. The plaintiff alleges in her motion that [McLachlan] relied on these false statements in reaching a decision that was unfavorable to her. Had the defendant not made false statements during the arbitration proceedings, the plaintiff further alleges, the outcome of the arbitration would have been different. . . .

[16] The plaintiff requested the following relief in her motion to open: (1) an order reopening the judgment; (2) an order awarding her 50 percent of the defendant's interest in LLBH and Partner Wealth Management, LLC, pursuant to paragraph 6 (a) of the prenuptial agreement; (3) damages; (4) interest; (5) attorney's fees; (6) costs; (7) in the alternative, a new marital dissolution trial; and (8) such other and further relief as the court deemed just and equitable.

"The court heard approximately nine hours of testimony from both parties in this case and two other witnesses over the three days of evidentiary hearing. The court carefully reviewed and weighed the testimony presented. The court also carefully reviewed all of the exhibits submitted by the plaintiff in support of her motion. *The court found no evidence of fraud.*" (Citation omitted; emphasis added.)

As an initial matter, we review the relevant legal principles. "In *Oneglia* v. *Oneglia*, [supra, 14 Conn. App. 267], this court held that, in considering a motion to open on the basis of fraud, a court must first make a preliminary determination of whether there is probable cause to believe that the judgment was obtained by fraud. *Oneglia* and its progeny are grounded in the principle of the finality of judgments. . . . [T]he finality of judgments principle recognizes the interest of the public as well as that of the parties [that] there be fixed a time after the expiration of which the controversy is to be regarded as settled and the parties freed of obligations to act further by virtue of having been summoned into or having appeared in the case. . . . Without such a rule, no judgment could be relied on. . . . *Oneglia* carefully balanced that interest in finality with the reality that in some situations, the principle of protection of the finality of judgments must give way to the principle of fairness and equity. . . . The court in *Oneglia* thus ratified the gatekeeping mechanism employed by the trial court, whereby a court presented with a motion to open by a party alleging fraud in a postjudgment dissolution proceeding conducts a preliminary hearing to determine whether the allegations are substantiated. . . . [I]f the plaintiff was able to substantiate her allegations of fraud beyond mere suspicion, then the court [properly] would open the judgment for the limited purpose of discovery, and would later issue an ultimate decision on the motion to open after

discovery had been completed and another hearing held. . . . *This preliminary hearing is not intended to be a full scale trial on the merits of the* [*moving party's*] *claim. The* [*moving party*] *does not have to establish that he* [*or she*] *will prevail, only that there is probable cause to sustain the validity of the claim*." (Emphasis added; internal quotation marks omitted.) *Kuselias* v. *Zingaro & Cretella, LLC*, 224 Conn. App. 192, 195–96 n.2, 312 A.3d 118, cert. denied, 349 Conn. 916, 316 A.3d 357 (2024).

Stated differently, "a party seeking to obtain discovery related to allegedly fraudulent conduct that transpired prior to the entry of judgment must, consistent with the aforementioned precedent, (1) move to open that judgment and (2) demonstrate to the trial court that the allegations of fraud are founded on probable cause. Absent such evidence, the court lacks authority to permit postjudgment discovery on such matters." *Brody* v. *Brody*, 153 Conn. App. 625, 634, 103 A.3d 981, cert. denied, 315 Conn. 910, 105 A.3d 901 (2014); see also *Nolan* v. *Nolan*, 76 Conn. App. 583, 585, 821 A.2d 772 (2003). This is because, until the judgment has been opened, there is no active civil matter, discovery is permitted only when there is a cause of action pending, and "there is no such thing as postjudgment discovery in a vacuum." (Internal quotation marks omitted.) *Bruno* v. *Bruno*, supra, 146 Conn. App. 231.

Next, we identify the applicable standard of review. Generally, our decisions have applied a discretionary standard of review to the denial of a motion to open. "Our review of a court's denial of a motion to open [based on fraud] is well settled. . . . In an appeal from a denial of a motion to open a judgment, our review is limited to the issue of whether the trial court has acted unreasonably and in clear abuse of its discretion. . . .

In determining whether the trial court abused its discretion, this court must make every reasonable presumption in favor of its action. . . . The manner in which [this] discretion is exercised will not be disturbed so long as the court could reasonably conclude as it did." (Internal quotation marks omitted.) *Cimino* v. *Cimino*, 174 Conn. App. 1, 5, 164 A.3d 787, cert. denied, 327 Conn. 929, 171 A.3d 455 (2017).

In this appeal, however, the specific legal issue raised by the plaintiff warrants the application of a less deferential standard of review. Here, the plaintiff claims that the trial court improperly determined that she had failed to establish probable cause to substantiate her fraud allegations. Our Supreme Court has stated that "[w]hether particular facts constitute probable cause is a question of law." (Internal quotation marks omitted.) *Journal Publishing Co.* v. *Hartford Courant Co.*, 261 Conn. 673, 682, 804 A.2d 823 (2002); *Paranto* v. *Ball*, 132 Conn. 568, 571, 46 A.2d 6 (1946). Accordingly, we apply the plenary standard of review to the plaintiff's claim. See *Rousseau* v. *Weinstein*, 204 Conn. App. 833, 853, 254 A.3d 984 (2021); see also *State* v. *Smith*, 344 Conn. 229, 244, 278 A.3d 481 (2022); *Falls Church Group, Ltd.* v. *Tyler, Cooper & Alcorn, LLP*, 281 Conn. 84, 94, 912 A.2d 1019 (2007); *Nowak* v. *Environmental Energy Services, Inc.*, 218 Conn. App. 516, 530, 292 A.3d 4 (2023).

With our standard of review in mind, we turn to the relevant legal principles regarding the standard of probable cause. We acknowledge that most of the cases that have addressed the existence of probable cause in the context of a motion to open based on fraud have not discussed the standard itself in much detail. Accordingly, we look to the use of probable cause in other contexts for guidance. "Our Supreme Court has determined that [p]robable cause is a standard widely used to validate a preliminary impairment of a broad range

of personal and property rights, from the suspension of professional licenses to the issuances of warrants for seizure and arrest. . . . A hearing in probable cause is not intended to be a full scale trial on the merits of the [moving party's] claim. The [moving party] does not have to establish that he [or she] will prevail, only that there is probable cause to sustain the validity of the claim. . . . The court's role in such a hearing is to determine probable success by weighing probabilities. . . . The legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a [person] of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . . Probable cause is a flexible common sense standard. It does not demand that a belief be correct or more likely true than false." (Citations omitted; internal quotation marks omitted.) *Malave* v. *Ortiz*, 114 Conn. App. 414, 426, 970 A.2d 743 (2009);[17] see also *Spilke* v. *Spilke*, supra, 116

[17] The Superior Court in *Malave* v. *Ortiz*, Superior Court, judicial district of New Haven, Docket No. FA-05-4008026-S (March 19, 2007) (43 Conn. L. Rptr. 148), aff'd, 114 Conn. App. 414, 970 A.2d 743 (2009), set forth a thorough discussion of the probable cause standard as applied in various family, administrative, civil and criminal contexts. "Running throughout all the cases describing the probable cause standard are certain constants. The standard is described, on the one hand, as a modest one; *36 DeForest Avenue, LLC* v. *Creadore*, 99 Conn. App. 690, [698], 915 A.2d 916 (2007); more than mere belief, suspicion or conjecture; *Heussner* v. *Day, Berry & Howard, LLP*, 94 Conn. App. 569, [577, 893 A.2d 486, cert. denied, 278 Conn. 912, 899 A.2d 38] (2006); no matter how sincere; but substantially less than proof beyond [a] reasonable doubt necessary for conviction; *State* v. *Clark*, 255 Conn. 268, 291–94, 764 A.2d 1251 (2001); and not as demanding as proof by a fair preponderance of the evidence. *Newtown Associates* v. *Northeast Structures, Inc.*, 15 Conn. App. 633, 636–37, 546 A.2d 310 (1988). The United States Supreme Court has described probable cause as a fluid concept—turning on the assessment of probabilities in particular factual contexts—not readily, or even usefully, reduced to a neat set of legal rules. *Illinois* v. *Gates*, 462 U.S. 213, 232, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983). [The Appellate] Court has repeatedly emphasized, in a variety of contexts, that probable cause is a flexible [commonsense] standard. *36 DeForest Avenue, LLC* v. *Creadore*, supra . . . 695 (application to discharge [mechanic's] lien); *Morris* v. *Cee Dee, LLC*, 90 Conn. App. 403, 411 [877 A.2d 899] (prejudg-

Conn. App. 594 n.6; *Goree* v. *Goree*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FA-17-5018347-S (May 26, 2022).

We next turn to the evidence offered by the plaintiff in support of this standard. We first recognize that the fraud inquiry was made more difficult because no transcript exists from the arbitration proceeding, as it was not held on the record. We must, therefore, rely on other documents, including the defendant's April 3, 2017 arbitration brief, the arbitration decision itself, the testimony from the motion to open hearing, and McLachlan's December 19, 2022 deposition, to determine whether the plaintiff has met her burden to establish probable cause as to the existence of fraud.

The issue at the February 16 and 17, 2017 arbitration concerned the interpretation of paragraph 6 (B) of the prenuptial agreement and whether the defendant had "*left his employment with Merrill Lynch under an arrangement that is in any fashion tantamount to a*

ment remedy) [cert. granted, 275 Conn. 929, 883 A.2d 1245 (2005) (appeal withdrawn March 13, 2006)]; *Donenfeld* v. *Friedman*, 79 Conn. App. 64, [68, 829 A.2d 107] (2003) (application for discharge of lis pendens); *Ezikovich* v. *Commission on Human Rights & Opportunities*, [57 Conn. App. 767, 771, 750 A.2d 494] (finding of reasonable cause regarding discrimination or retaliation necessary before [c]ommission may undertake certain actions) [cert. denied, 253 Conn. 925, 754 A.2d 796 (2000)]. The most frequent articulation of the probable cause standard in Connecticut cases is that [t]he legal idea of probable cause is a bona fide belief in the existence of the facts essential under the law for the action and such as would warrant a [person] of ordinary caution, prudence and judgment, under the circumstances, in entertaining it. . . .

"The court's role in such a hearing is to determine probable successes by weighing probabilities. . . . In judging the probabilities, a court must weigh the evidence, assess the credibility and demeanor of the witnesses, and evaluate exhibits offered. Evidence offered by the party subject to that standard is not to be accepted uncritically or presumed to be true; nor is the evidence necessarily construed, as would be true on a motion to dismiss at the end of a plaintiff's [case-in-chief] in a full-blown trial, in the light most favorable to the plaintiff." (Citation omitted; internal quotation marks omitted.) *Malave* v. *Ortiz*, supra, 43 Conn. L. Rptr. 148–49.

*'sale' of his interest in Merrill Lynch, i.e. a transaction under which* [*the defendant*] *receives any property*, real or personal, *including but not limited to a sum of money*, by way of a 'sign-on' bonus or otherwise, a premium bonus, and/or restricted stock or other ownership interest ('Sale Proceeds'), *to work for another entity for any reason whatsoever*, including his bringing a book of business and/or a clientele and/or a book of other assets to a prospective employer, [and, if so] then [the defendant] shall first be entitled to set aside the value of $75,000, or $75,000 from the Sale Proceeds, and the balance of such Sale Proceeds, whenever received or receivable by [the defendant], shall be divided between [the defendant and the plaintiff]." (Emphasis added.)

In the defendant's arbitration brief, he claimed that neither his prior employment at Merrill Lynch nor his "book of business" had anything to do with the formation of LLBH. Additionally, he maintained that his business at LLBH bore "no resemblance to his prior business at Merrill Lynch," and he "did not bring [former Merrill Lynch] clients to LLBH and LLBH did not bring those clients." He also stated that Focus purchased an option to buy a minority interest in LLBH for $2 million "*soon after its formation* . . . ." (Emphasis added.) He described LLBH as a "startup company" and that he was self-employed in a new industry at Focus. The defendant further indicated that Focus purchased this option after LLBH had been formed and was open for business, and, because the defendant and his three partners had already left Merrill Lynch, the option bought by Focus was not material to his departure from that company. Finally, the defendant maintained that Focus' option to purchase "*was a transaction which has no nexus to the defendant's leaving the employ of Merrill Lynch, was not 'tantamount to a sale' of his interest in Merrill Lynch, and as such does not implicate the*

*provisions of* [*the parties' prenuptial agreement*]." (Emphasis added.)

In his arbitration award, McLachlan found that, when the defendant and his partners left Merrill Lynch and formed LLBH, each invested approximately $10,000 to $15,000 into the startup of this business. He further determined that Focus purchased the option to buy an interest in LLBH for $2 million shortly after its formation, and each partner received $500,000. After Focus exercised this option to purchase an interest in LLBH, a corporate reorganization, and the creation of a new entity known as Partner Wealth Management, LLC, the defendant received, inter alia, $1,655,000 and 90,000 shares of Focus stock.

McLachlan then determined that the language of paragraph 6 (B) of the parties' prenuptial agreement did not apply to the defendant's departure from Merrill Lynch and the formation of a new business with his partners. "The only conclusion one could reach is . . . that [paragraph 6 (B)] was drafted in contemplation of [the defendant] leaving Merrill Lynch and *going to a competitor who would pay him to come not only in recognition of the Merrill Lynch employment benefits he would be forfeiting, but because some of the contacts and business that he would be bringing with him* . . . . The context, as it actually occurred, was [the defendant] leaving initially with three (3) partners to form a new business. *He and his partners were not paid to go to LLBH* but, in fact, each paid into the venture to start it. . . . This is substantially different than the situation where an employee leaves a brokerage house and is compensated by the new employer. [The defendant's] new employer was a company that he owned a portion of and in which he had invested. *The new employer was not in a position to, and in fact, did not give him any property, real or personal, including, but not limited to, a sum of money by way of a 'sign-on' bonus*

or otherwise, a premium bonus and/or restricted stock or other ownership interest. [The defendant] acquired an ownership interest in LLBH because he invested in it. This transaction is not tantamount to a sale. *He was then able to sell a portion of that ownership interest to Focus*." (Emphasis added.) The arbitration decision, therefore, accepted the defendant's testimony about the timeline of events regarding his departure from Merrill Lynch and forming LLBH.

At the hearing on the plaintiff's motion to open, however, the defendant acknowledged that Focus paid him and his three partners $2 million at the same time LLBH was formed. The defendant admitted that the option agreement with Focus was signed on the same day that he resigned from Merrill Lynch. He also conceded that the negotiations with Focus had occurred prior to his leaving Merrill Lynch and that Focus was committed to supporting their new business venture. The defendant further admitted that he received $500,000 from Focus at the time he left Merrill Lynch. The defendant then conceded that, during a prior deposition, he had stated that "no one gave [him] any money" when he formed LLBH with his partners. Several aspects of the defendant's testimony were contrary to his prior statements and the evidence presented to McLachlan during the arbitration hearing.

Additionally, during a July 27, 2016 deposition that was taken as a part of the marital dissolution proceeding and utilized at the hearing before Judge Truglia, the defendant had testified that he and his three partners left Merrill Lynch and "put our own money into LLBH. . . . We set up our firm. We put our own capital in, and we set up a business." Later in that deposition, the defendant stated: "For the record, for the record, *I did not sell anything. . . . I started a business. No one—no one gave me any money. I got no consideration. I put my own money into a . . . new company*, took

[an] inordinate amount of risk at the absolute peak of the financial crisis, had no way of knowing that my clients would come with me, [and] walked away from . . . millions of dollars . . . .'' (Emphasis added.)

The defendant's counsel indicated to Judge Truglia that, during the arbitration proceeding, McLachlan had been provided with a copy of the option agreement between LLBH and Focus.[18] The plaintiff's attorney disagreed with this representation. The defendant confirmed that the option contract was executed on October 17, 2008, the same day he and his three partners left their employment with Merrill Lynch. The defendant further conceded that the negotiation regarding the option contact had occurred prior to October 17, 2008, and he knew he would receive payment once the contract was executed. The defendant then admitted, during a September 26, 2016 deposition during the dissolution proceedings, that he had stated that he started LLBH ''on day one with nothing'' and set up a new company that did not pay him ''anything.''

At the January 4, 2023 hearing, the plaintiff's counsel read from the defendant's testimony in a separate lawsuit[19] in which he had testified that the option contract with Focus had been contemplated before leaving Merrill Lynch, and he described his receipt of $500,000 as a ''payment.'' In this prior testimony, he also stated that he and his LLBH partners, over the course of three months, brought over approximately $375 million in assets to manage from former Merrill Lynch clients.

The plaintiff testified at the hearing on her motion to open that she, her attorney and McLachlan had not

[18] The court subsequently stated that it considered it ''very important'' and a ''[v]ery significant piece of evidence as to whether . . . McLachlan . . . had [the option contract] in front of him when he issued his decision.''

[19] See *Lomas* v. *Partner Wealth Management, LLC*, Superior Court, judicial district of Stamford-Norwalk, Docket No. CV-15-5014808-S.

been in possession of the Focus option agreement at the time of the arbitration, and that she did not learn of its existence, or the subsequent asset purchase agreement, until "[l]ong after" the arbitration.[20] She also stated that, at the arbitration hearing, the defendant had testified that it was not until "sometime after" he left Merrill Lynch and formed LLBH "that Focus came around in any way." She also recalled that his testimony before McLachlan was that he and his partners had no contact with Focus before leaving Merrill Lynch. She further indicated that, at the time of his departure from Merrill Lynch, the defendant had worked to transfer client accounts to the new enterprise.

Pursuant to an agreement of the parties, the court admitted into evidence a transcript of McLachlan's December 19, 2022 deposition. During his deposition, McLachlan was shown a copy of the October 17, 2008 Focus option agreement, and he testified that he did not recognize it and that he knew that it was not part of the record during the arbitration proceeding. He specifically stated that he was unaware "when [he] issued [his] award that [the defendant] and his partners had executed an option agreement with Focus . . . on the very day they left Merrill Lynch to open their own business." On the basis of the evidence presented during the deposition, which differed from what had been presented during the arbitration proceeding, McLachlan concluded that this transaction had occurred on the same day that the defendant left Merrill Lynch, contrary to his statement in the award that Focus purchased an option to buy an interest in LLBH shortly after LLBH's formation. McLachlan also testified that he had been unaware that the defendant received $500,000 from

[20] On cross-examination, the plaintiff conceded that she was aware that the defendant had received a payment from Focus on or about October 17, 2008. She also acknowledged that she was generally aware of a financial agreement with Focus in May, 2007.

Focus on the day he left Merrill Lynch. He specifically stated that "the timeline [described by the defendant at the arbitration proceeding] was a little bit different and not as crisp as the timeline [described by the defendant at the hearing on the plaintiff's motion to open]." McLachlan also testified that there was no evidence at the arbitration hearing that the defendant and his partners had been negotiating with Focus prior to their departure from Merrill Lynch. McLachlan also had not known that approximately $350 million to $370 million dollars of business from Merrill Lynch clients had been transferred to LLBH.

During cross-examination by the defendant's counsel during his deposition, McLachlan described his recollection of the defendant's theory of the case: "Well, he said first of all he wasn't being paid—this is as I recall his theory—he wasn't being paid for bringing the clients, the book of business with him, he was—because what he was doing was different, that he—I am not sure if he represented—if he was advising corporations when he was at Merrill Lynch that went to advising individuals, but that it wasn't really the same as just bringing a book of business because he started a new business. And his theory was that he started this new business, he and his partners, that it wasn't as though they went to [an existing competitor of Merrill Lynch]." McLachlan later was asked: "[I]n your mind, [were] there any efforts made to obfuscate the existence of the option, the $2 million payment, $500,000 of which went to [the defendant] or it's temporal connection with the group of men leaving Merrill Lynch?" He responded: "Well, I would say yes. I think there was, I—I mean, I think, you know, [the defendant] didn't want to represent that [he] walked out the door and somebody gave [him] $500,000. You know, whether or not that would still be within [paragraph 6 (B) of the prenuptial agreement] is a separate issue, but he certainly didn't say

that [he] had a deal with Focus, that when [the four partners] left they were going to [be paid] $2 million." McLachlan also stated that, had he known this information regarding the timing of the Focus option agreement, he would have asked more questions and that the facts ultimately were different from the impression that he had formed at the arbitration proceeding, and based on these facts, it looked "more like they were going to work for Focus than starting their own business."

We now turn to the legal principles governing fraud in the context of a motion to open filed in a marital dissolution action. We emphasize that, at this stage of the proceedings, the plaintiff is not required to prove the existence of fraud but, rather, must demonstrate only probable cause as to the existence of fraud in order for the court to open the judgment for the limited purpose of proceeding with discovery. See, e.g., *Longbottom* v. *Longbottom*, 197 Conn. App. 64, 72, 231 A.3d 310 (2020). Additionally, "[t]his preliminary hearing is not intended to be a full scale trial on the merits of the [moving party's] claim. *The* [*moving party*] *does not have to establish that he will prevail, only that there is probable cause to sustain the validity of the claim.* . . . If the moving party demonstrates to the court that there is probable cause to believe that the judgment was obtained by fraud, the court may permit discovery." (Emphasis added; internal quotation marks omitted.) Id.[21]

[21] At the conclusion of the hearing, the court explained that the plaintiff had failed to present any "compelling evidence" or prove that the defendant had "misled" McLachlan at the arbitration. In its subsequent "statement of decision," the court indicated that it "found no evidence of fraud." These statements suggest that the court misapprehended the plaintiff's burden. As to the former, there is no requirement in our law that the plaintiff present "compelling" evidence of fraud in the context of a motion to open the judgment. Regarding the latter, the plaintiff was required only to meet the lesser standard of probable cause, and, as we conclude in this opinion, she has done so.

"Fraud consists in deception practiced in order to induce another to part with property or surrender some legal right, and which accomplishes the end designed. . . . The elements of a fraud action are: (1) a false representation was made as a statement of fact; (2) the statement was untrue and known to be so by its maker; (3) the statement was made with the intent of inducing reliance thereon; and (4) the other party relied on the statement to his detriment. . . .

"Fraud by nondisclosure, which expands on the first three of [the] four elements [of fraud], involves the failure to make a full and fair disclosure of known facts connected with a matter about which a party has assumed to speak, under circumstances in which there is a duty to speak. . . . A lack of full and fair disclosure of such facts must be accompanied by an intent or expectation that the other party will make or will continue in a mistake, in order to induce that other party to act to her detriment. . . . *In a marital dissolution case, the requirement of a duty to speak is imposed* by Practice Book § [25-30], requiring the exchange and filing of financial affidavits . . . and *by the nature of the marital relationship*." (Citation omitted; emphasis added; internal quotation marks omitted.) Id., 72–73; see also *Reville* v. *Reville*, supra, 312 Conn. 441–42; *Cimino* v. *Cimino*, supra, 174 Conn. App. 9–11; *Pospisil* v. *Pospisil*, 59 Conn. App. 446, 450, 757 A.2d 655, cert. denied, 254 Conn. 940, 761 A.2d 762 (2000).

The plaintiff presented evidence that, during the arbitration proceeding, the defendant represented to McLachlan that he and his partners left their employment at Merrill Lynch essentially to start a new company, LLBH, and that they did not receive any funding from Focus until after its formation. The defendant specifically had argued to McLachlan that the Focus payment of $2 million constituted a transaction without a nexus to his departure from Merrill Lynch. Indeed,

during a deposition taken earlier in this proceeding, he stated that he did not sell anything, nor did he receive any money or consideration from a third party; he used his own money to create a new business. He also failed to provide the plaintiff or McLachlan with a copy of the Focus option agreement. The plaintiff presented further evidence that showed that the defendant and his partners had been working with Focus prior to their departure from Merrill Lynch, and they executed the option agreement with Focus on the same day they formed LLBH. The group also brought over former Merrill Lynch clients and their assets worth approximately $375 million.

Applying the flexible, commonsense standard of probable cause that would warrant a person of ordinary caution, prudence and judgment to entertain a bona fide belief in the existence of the claim of fraud, we conclude that the plaintiff had satisfied her "modest" burden at this preliminary stage of the proceedings by substantiating her allegations to warrant discovery and further proceedings. Our Supreme Court has instructed that, in determining whether there is proof of fraud, a court should consider the evidence "through the lens of our well settled policy regarding full and frank disclosure in marital dissolution actions." (Internal quotation marks omitted.) *Reville* v. *Reville*, supra, 312 Conn. 442. Pursuant to paragraph 6 (B) of the parties' prenuptial agreement, if the defendant ended his employment with Merrill Lynch under an arrangement that was tantamount to a sale of his interest therein, then the plaintiff was entitled to a share of the proceeds. If, however, the defendant left Merrill Lynch under conditions that were not tantamount to a sale, then the plaintiff would not receive any additional money from the defendant. The defendant, therefore, had a financial incentive to misrepresent the nature and timing of his dealings with Focus in connection with the formation of LLBH. Stated

differently, by framing this transaction as the risky creation of a new business done solely with modest financial contributions from himself and the other LLBH partners, rather than one in which he received a substantial sum of money along with the backing and assistance from a third party, a reasonable person could conclude that the defendant used deception regarding the circumstances surrounding his leaving Merrill Lynch and the formation of LLBH in order to deprive the plaintiff of her share of the money from the new venture to which she was entitled pursuant to paragraph 6 (B) of the prenuptial agreement. See *Grayson* v. *Grayson*, 4 Conn. App. 275, 287, 494 A.2d 576 (1985), appeal dismissed, 202 Conn. 221, 520 A.2d 225 (1987); see also *Reville* v. *Reville*, supra, 441; *Gelinas* v. *Gelinas*, 10 Conn. App. 167, 173, 522 A.2d 295, cert. denied, 204 Conn. 802, 525 A.2d 965 (1987).

We determine that the plaintiff presented evidence that satisfied the probable cause standard that the defendant had made false statements, or failed to disclose facts, regarding the details of the end of his employment at Merrill Lynch and the formation of LLBH in an effort to deprive her of money she may have been entitled to under the terms of the parties' prenuptial agreement. Such conduct, if proven, would result in a situation "in which one party held a valuable asset, the true worth and nature of which only that party knew." *Weinstein* v. *Weinstein*, supra, 275 Conn. 690. Efforts to hide or obfuscate material facts in a marital dissolution proceeding are incompatible with our jurisprudence, and we will not countenance such an attempt to unfairly bypass the conditions of a prenuptial agreement to the detriment of the plaintiff. See id., 695; see also *Miller* v. *Appleby*, 183 Conn. 51, 57 n.1, 438 A.2d 811 (1981) (when false representations are made for purpose of inducing act to another's injury, necessarily there is plain implication that such representations were made

with intent to deceive). We conclude, therefore, that the court improperly denied the plaintiff's motion to open the judgment based on fraud. As a result, we reverse the trial court's judgment denying the plaintiff's motion to open and remand the case with direction to open the judgment for the limited purpose of allowing further discovery in conjunction with the plaintiff's claim of fraud.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.