CITY OF NEW HAVEN *v.* AFSCME, COUNCIL 4, LOCAL 3144 (SC 20362)

Robinson, C. J., and McDonald, D'Auria, Mullins, Kahn and Keller, Js.

Syllabus

The plaintiff city sought to vacate an arbitration award reinstating the grievant, J, a member of the defendant union, to her employment as executive director of the city's Commission on Equal Opportunities. In that position, J oversaw construction contract compliance and enforcement of the chapter of the city's code of ordinances that requires building contractors doing business with the city to hire certain percentages of women, minorities and city residents. The union filed a grievance, claiming that the city did not have just cause to terminate J's employment. Thereafter, pursuant to the parties' collective bargaining agreement, the matter proceeded to a hearing before an arbitration panel, which issued an award in which it found that the city had proven only three of the eleven factual claims that it had asserted justified J's termination,

specifically, that she failed to comply with a certain request for information during the city's investigation of the relationship between the commission and a certain training and employment program created and funded by the city, which was operated under the auspices of the commission, until it was spun off into a legally separate private entity, that she formed C Co., a private company that advertised contract compliance services in Connecticut, without informing the city, and that she issued four memoranda under her signature soliciting donations for the subject program from contractors in lieu of fines, despite having been warned by the city's corporation counsel office that doing so could expose her, commission staff or the city to potential claims of bribery. The panel concluded that, although J's misconduct was serious in nature, the city was not justified in terminating J's employment. The panel, therefore, ordered that J be reinstated to her position; however, she did not receive two years of back pay and benefits. The city filed an application to vacate the award, claiming that the award violated the clear public policy prohibiting unethical, unlawful and/or illegal conduct by public officials. The union, in turn, filed an application to confirm the award. Following a hearing, the trial court rendered judgment granting the union's application to confirm the award and denying the city's application to vacate the award, from which the city appealed. *Held* that the trial court properly confirmed the arbitration award and correctly determined that the award did not violate public policy, the city having failed to meet its burden of demonstrating that the reinstatement of J's employment violated public policy: although the statutory, regulatory and decisional law of Connecticut evinces an explicit, well-defined and dominant public policy against public corruption in all of its forms, this court's review of the applicable factors governing whether termination of employment is the sole means to vindicate public policy indicated that the arbitration award reinstating J did not violate those public policies, as the record revealed that, with respect to the only relevant findings of misconduct, namely, those related to J's formation of C Co. and her issuing four memoranda under her signature soliciting donations, the provisions of the city's ethics ordinance prohibiting conflicts of interest or the appearance of any such conflicts did not require termination of employment but, rather, permitted the imposition of discipline up to and including removal from office only for certain specified offenses, none of which were implicated in this case, and the city identified no provision of the collective bargaining agreement, employee regulation or city ordinance that requires the termination of employment for employees who disregard the advice of the corporation counsel's office; moreover, although J's employment arguably implicated the public trust, it did not bring her into contact with vulnerable populations or involve public safety or any other essential public service and the city presented no evidence that her employment involved significant fiscal responsibilities, fiduciary duties, access to financial records or control over public

finances, and J's conduct, although serious, was not so egregious that an award reinstating her employment but docking her two years of pay, could not vindicate the relevant public policies and send a powerful message to other municipal employees and the public at large that similar conduct will not be tolerated; furthermore, there was nothing in the record to suggest that J was incorrigible, but, rather, to the contrary, during the nearly twenty years that she worked for the city, J had a spotless employment record and was cited on several occasions for her high ethical standards, and her amenability to discipline was demonstrated by the fact that she did not appeal from the arbitration award, which imposed one of the most severe punishments short of termination ever meted out in an arbitration proceeding conducted pursuant to a collective bargaining agreement; additionally, the city's contention that a public sector employer should not have to countenance conduct by an executive level employee in a fiscally sensitive position that has a negative impact on public accountability and public confidence was unavailing, as it is well established that general notions of public good, public accountability or public trust are insufficient grounds for invoking the extremely narrow public policy exception to judicial enforcement of arbitral awards.

Argued October 13, 2020—officially released March 4, 2021*

Procedural History

Application to vacate an arbitration award, brought to the Superior Court in the judicial district of New Haven, where the defendant filed an application to confirm the award; thereafter, the case was tried to the court, *Abrams*, *J.*; judgment denying the plaintiff's application to vacate and granting the defendant's application to confirm, from which the plaintiff appealed. *Affirmed.*

Proloy K. Das, with whom, on the brief, was *Chelsea K. Choi*, for the appellant (plaintiff).

Kimberly A. Cuneo, with whom was *J. William Gagne, Jr.*, for the appellee (defendant).

* March 4, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

KELLER, J. The plaintiff, the city of New Haven (city), appeals[1] from the judgment of the trial court granting the application of the defendant, AFSCME, Council 4, Local 3144 (union), to confirm an arbitration award reinstating the grievant, Nichole Jefferson, a member of the union, to her employment as executive director of the city's Commission on Equal Opportunities (commission) and denying the city's corresponding application to vacate the award on public policy grounds. On appeal, the city claims that the trial court incorrectly determined that the award did not violate public policy. We disagree and, accordingly, affirm the judgment of the trial court.

The following facts and procedural history are relevant to our resolution of this appeal. At all times relevant to this appeal, the city and the union were parties to a collective bargaining agreement that provided for final and binding arbitration of disputes arising under the agreement. Jefferson was employed by the city from March 6, 1996, until her termination on August 5, 2015. During that time, she enjoyed an excellent employment record, won various awards and was promoted five times, the last time, in 2001, to the position of executive director of the commission. The commission is comprised of a nine member board of commissioners (board), eight of whom are appointed by the mayor, with the remaining member chosen by the Board of Aldermen from its number.[2] As executive director of the

[1] The city appealed from the judgment of the trial court to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

[2] Chapter 12 1/2, article I, § 12 1/2-3, of the New Haven Code of Ordinances, which established the commission, provides in relevant part: "There is hereby created a commission on equal opportunities . . . which shall consist of nine . . . members, each of whom shall reside in New Haven . . . [and] shall serve without compensation. Eight . . . members shall be appointed by the mayor, and one . . . member shall be elected by the board of aldermen from its number. One . . . member shall be designated by the mayor as chairperson. . . . The commission may adopt such rules and

commission, Jefferson oversaw construction contract compliance[3] and enforcement of chapter 12 1/2 of the New Haven Code of Ordinances, which requires building trade contractors doing business with the city to hire certain percentages of women, minorities and New Haven residents. In addition to its enforcement powers, the commission is responsible for sponsoring educational programs, providing resources and expanding outreach efforts in all segments of society to eliminate discrimination within the city. Although commission staff can recommend fines for violations of chapter 12 1/2, the board has the final say as to whether any such fines will be imposed.[4] As executive director of the commission, Jefferson reported to the board as well as to the city's economic development administrator.

In 2013, the city elected a new mayor, who was sworn in in January, 2014. At the request of the outgoing admin-

regulations, including rules of practice, as it deems necessary to effectuate the purposes and provisions of this chapter. These rules and regulations shall be subject to approval of the board of aldermen."

Chapter 12 1/2, article I, § 12 1/2-5, delineates the powers and duties of the nine board members, which include "(f) [t]o receive, initiate, investigate and mediate discriminatory practice complaints" and "(k) [t]o appoint an executive director and a legal counsel and such other staff and consultants as are necessary for the commission to carry out its responsibilities under this chapter."

[3] Chapter 12 1/2, article II, § 12 1/2-20 (a) (1), of the New Haven Code of Ordinances establishes "a contract compliance office, headed by a contract compliance director." Chapter 12 1/2, article II, § 12 /12-20, (a) (2) specifies that the "contract compliance director shall be subject to the supervision of the executive director of the commission . . . ."

[4] According to the arbitration award, during the relevant time period, "[i]f a contractor was not in compliance, [commission] staff [were] authorized to issue a letter advising a contractor about his or her failure to comply with federal or state regulations . . . and . . . the fines/penalties incurred as a result. . . . If it was determined that a contractor was not in compliance, and a fine was to be imposed, the [board] had to vote to impose the fine and to accept any [money] tendered to satisfy the fine. . . . Former . . . Commissioner Harvey Fineberg, a union witness, testified that, if a [commission] staff [member] and a contractor made arrangements to do so, fines could be dropped prior to the [board's] vote." (Citations omitted; internal quotation marks omitted.)

istration, Jefferson prepared transition documents for the new mayor to familiarize her with the commission, its organizational structure and responsibilities. The documents contained numerous references to the "Construction Workforce Initiative 2" (CWI2), a program created by the city in the early 2000s to provide training and employment opportunities in the construction industry for disadvantaged low to moderate income city residents. CWI2 was funded by the city and operated under the auspices of the commission until 2011, at which time it was spun off, at the direction of the city, into a legally separate, nonprofit entity.[5] According to the arbitration award, after being "spun off, CWI2 was always intended to be the recipient of city assistance and resources, includ[ing] services provided by . . . city paid employees whose salaries were funded in part from fines and donations received by [the commission] and funds received by CWI2 but turned over to the city . . . ." (Citation omitted.) It was also intended that commission staff would continue to "perform duties for [the commission] and CWI2 simultaneously." (Internal quotation marks omitted.)

Upon review of the transition documents submitted by Jefferson, the new mayor ordered an investigation into the relationship between the commission and CWI2. According to the arbitration award, the city's then corporation counsel, Victor Bolden, retained outside counsel to conduct the investigation. "Over the next few months, the office of corporation counsel reviewed the documents received by [outside counsel], including grant applications [that Jefferson had prepared] on

[5] Chapter 12 1/2, article II, § 12 1/2-24 (c), of the New Haven Code of Ordinances required contractors doing business with the city to "utilize city sponsored recruitment and training programs to the most feasible extent in order to ensure the hiring of qualifiable minority, women and physically disabled employees, trainees and apprentices." According to the arbitration panel's findings, "[i]t is undisputed that CWI2 was the only city sponsored recruitment and training program" during the relevant time period.

behalf of CWI2, documents produced by the mayoral transition, and the documents provided by . . . Jefferson." (Internal quotation marks omitted.) On March 18, 2015, Matthew Nemerson, the then newly appointed economic development administrator, placed Jefferson on administrative leave. On August 6, 2015, following a *Loudermill* hearing,[6] the city sent Jefferson a letter terminating her employment. The letter stated in relevant part:

"You have violated the [c]ity's [c]ode of [e]thics and abused your power as the [e]xecutive [d]irector of the [commission]. You have engaged in intimidation, attempted bribery and corruption with contractors doing business with the [c]ity of New Haven, namely, Lab Restoration and Construction, [LLC], John Moriarty and Associates, Inc., and Tri-Con Construction Managers, LLC.

"You used [c]ity time and resources to create and operate a separate entity, [Career Compliance Placement, LLC (CCP)]. At no time did you disclose that you created such an entity.

"You operated a private entity, [CWI2], and through misrepresentations used the [c]ity to further benefit your private entity.[7] You even sought donations for your private entity from the contractors whose employment

[6] "[A] tenured public employee is entitled to oral or written notice of the charges against him [or her], an explanation of the employer's evidence, and an opportunity to present his [or her] side of the story before termination. . . . The opportunity to present one's side of the story is generally referred to as a *Loudermill* hearing." (Citation omitted; internal quotation marks omitted.) *AFSCME, Council 4, Local 2663* v. *Dept. of Children & Families*, 317 Conn. 238, 243 n.3, 117 A.3d 470 (2015); see also *Board of Education* v. *Loudermill*, 470 U.S. 532, 546, 105 S. Ct. 1487, 84 L. Ed. 2d 494 (1985).

[7] At all times relevant to this appeal, CWI2 was a city operated and funded recruitment and training program. As previously indicated, it was spun off into a private, nonprofit entity in 2011. Even then, however, it relied heavily on the city for a variety of support. It was never Jefferson's "private entity," as alleged by the city in Jefferson's termination letter.

practices you were entrusted to enforce [while] affiliating yourself with the [c]ity despite being warned not to do so. You also misrepresented to the [s]tate when applying for grant funds [for] your private entity.

"You failed to cooperate with this investigation while on paid leave. You failed to comply with . . . Nemerson's May 13, 2015 requests for information highly pertinent to this investigation. You failed to attend investigatory meetings in connection with this report. You failed to cooperate in the June 9, 2015 investigatory interview as clearly set forth in the audio of that interview." (Footnote added.)

On August 6, 2015, the union filed a timely grievance, claiming that the city did not have just cause to terminate Jefferson. After exhausting internal grievance procedures, the union invoked its contractual right to submit the matter to the state Board of Mediation and Arbitration for arbitration before a panel of three arbitrators (panel). In its brief to the panel, the union argued, inter alia, that the city had "justified its investigation of . . . Jefferson upon an obvious fallacy and pretext," namely, "the [need for] an investigation into the relationship between . . . Jefferson, the [commission] and CWI2" and that "[n]o such investigation was ever justified because the [c]ity had . . . [itself] created, fostered and maintained the relationship between CWI2 and the [c]ity." The union further argued that the city's claims that Jefferson engaged in acts of intimidation, attempted bribery and corruption toward various contractors were wholly unfounded. Finally, the union asserted that Jefferson had formed CCP "with the expressed permission of the [c]ity's [d]eputy [c]orporation [c]ounsel, John Ward, in 2008" and annually disclosed her consulting work to the city's labor relations and human resources offices.

Following eighteen days of hearings, the parties submitted the following unrestricted submission to the

panel: "Did the [city] have just cause to terminate . . . Jefferson's employment on August 6, 2015? If not, what shall the remedy be?" On March 27, 2018, the panel issued a thirty-seven page decision in which a majority of the panel found that the city had proven only three of the eleven factual claims[8] that it had argued justified Jefferson's termination. Specifically, the panel found that the city had proven that, although Jefferson had "received city authorization to provide consulting services" in New York, she "did not receive authorization, nor did she disclose that she [had] formed [CCP], a Connecticut LLC that advertise[s] contract [compliance] services, which could . . . lead to the appearance of impropriety and a conflict of interest as defined and argued by the city . . . ."[9] (Internal quotation

[8] The eight claims that the panel found were not proven are: (1) in 2004, Jefferson solicited a $15,000 bribe from Artnel Banton, the owner of Lab Restoration and Construction, LLC; (2) on May 24, 2014, Jefferson threatened Brack Poitier, owner of Tri-Con Construction Managers, LLC, during a telephone call; (3) Jefferson incorrectly cited article VI, § 6.2 (A) (10), of a development and land disposition agreement for the development of property located at 100 College Street in New Haven as authority for imposing fines on John Moriarty & Associates, Inc.; (4) Jefferson used city time and resources to create and operate CCP, a private entity that advertised contract compliance services in Connecticut; (5) Jefferson operated a private entity, CWI2, "and through misrepresentations used the city to further benefit [that] entity"; (6) Jefferson "misrepresented to the state when applying for grant funds that [CWI2] was affiliated with the city"; (7) Jefferson failed to cooperate at a June 9, 2015 investigatory meeting; and (8) Jefferson failed to attend investigatory meetings convened in connection with the investigation.

[9] According to the arbitration award, "the CCP website advertise[d] CCP as a woman owned minority business enterprise . . . with a Connecticut office located at 3000 Whitney Avenue, Hamden, CT. . . . The website also advertise[d] that CCP offers a mixed contract compliance inspection service and . . . that its staff has worked primarily in New Syracuse, NY, and New Haven, CT. . . . The city contend[ed] that the cumulative effect of these representations [was] that CCP . . . provide[d] contract compliance services in . . . Connecticut. . . . The city further argue[d] that inasmuch as CCP . . . used [Connecticut counsel] as an agent for service for CCP . . . Jefferson could have formed CCP . . . in New York . . . designating an agent for service in [that] state to avoid a perceived or actual [conflict] with [the commission]." (Citations omitted.)

marks omitted.) The panel found that "the [city's] ethics ordinance establishes standards of conduct that require city employees to 'be impartial and responsive to the public interest' without regard 'to personal gain or advantage.' And, as argued by the city, the advertising of contract compliance service in . . . Connecticut represents a conflict of interest as defined by the city's ethics ordinance." The panel further found, however, that "there [was] no evidence" that Jefferson ever provided any such services in Connecticut or ever intended to deceive the city about CCP's existence, which, the panel added, "was a matter of public record." According to the arbitration award, "Jefferson testified that she formed CCP . . . as a limited liability company [in Connecticut] because she had to form [the company] in . . . the state where [she] live[d] and that she could not perform consulting . . . in New York as Nichole Jefferson because 'you [have] to be a company.' " She further testified that, in January, 2008, she e-mailed Ward requesting permission to perform "consultation work for [national builder and developer] Gilbane [Inc.] . . . in . . . New York" and was told by him "that her consultancy with Gilbane [Inc.] was acceptable provided it . . . was not in . . . Connecticut." (Internal quotation marks omitted.)

The panel also found that the city had proven that, while on administrative leave, Jefferson had "fail[ed] to comply with . . . Nemerson's May 13, 2015 request for information," and, therefore, she "did not cooperate with the investigation," as required by the collective bargaining agreement. The panel further found, however, as a "mitigating circumstance," that Jefferson had followed the union's advice with respect to this request.

Finally, the panel found that the city had proven that, in 2008, "Jefferson, by means of issuing four letters under her signature, sought donations for CWI2 from the contractors whose employment practices [she] was

entrusted to enforce . . . despite being warned not to do so." (Internal quotation marks omitted.) The evidence presented to the panel established that, on or about June 6, 2005, Jefferson requested and received permission from the city's Board of Aldermen "to accept outside funds, gifts, and bequests from public or private sources" to be used "to enhance the resident manpower and training programs sponsored by the city . . . [through CWI2]."[10] Subsequently, in late 2005, Jefferson asked the corporation counsel's office "if [the commission] could collect charitable donations from contractors in lieu of penalties for noncompliance with [chapter] 12 1/2." After researching the issue, Kathleen Foster, the city's then deputy corporation counsel, issued a memorandum on February 23, 2006, in which she stated in relevant part: "In the absence of . . . specific [legal] authority . . . [providing] that [the commission] . . . may arrange for charitable contributions in lieu of penalties, we believe that any such action could expose the commission, the [c]ity and/or any individual involved to civil claims and potential criminal charges for bribery or solicitation of bribery, notwithstanding their lack of criminal intent. I urge [the commission's] enforcement counsel, Attorney [Evans] Jacobs, to examine this issue carefully in the context of any pending disputes. [The commission's] ability to lawfully accept gifts or contributions to fulfill its purposes is a separate legal issue from whatever considerations or actions it may make to resolve violations of [c]hapter 12 1/2. Acceptance of gifts or contributions, again, would require the approval of the [city's] Board of Aldermen."

According to the arbitration award, in connection with this claim, the city also presented "an August 14,

[10] Chapter 12 1/2, article I, § 12 1/2-5, of the New Haven Code of Ordinances provides in relevant part: "The commission shall have the power and duty . . . (*l*) [u]pon the approval of the mayor and the board of aldermen, to accept outside funds, gifts or bequests, public or private, to help finance its activities under this chapter. . . ."

2008 [m]emorandum of [u]nderstanding [(memorandum)] . . . as well as three additional [memoranda] issued on or about September 30, 2008, and November 13, 2008, all stating that noncompliance issues could be resolved with donations to the Career Development School [(school)], a CWI2 program, in lieu of the fines authorized by the . . . [c]ommission. . . . [E]ach of the [memoranda] . . . were under . . . Jefferson's signature and did not contain a notation copying other individuals." (Citation omitted; internal quotation marks omitted.) One such memorandum stated in relevant part: "Barret[t], Inc., and their associates Zeldes, Needle and Cooper, [P.C.], shall make donation[s] [i]n the amount of ($10,000.00) ten thousand and ([$]5,000.00) . . . five thousand dollars respectively to the [school]; Barrett, [Inc.], further agrees to remove all unauthorized workers, if any, from the Eastview Terrace Construction site. Satisfying these two stipulations will bring Barrett, [Inc.], into full compliance in relation to this project." The memorandum further stated that it was subject to ratification by the board and that "Jefferson, as the [e]xecutive [d]irector, recommended ratification by the [board]." In its brief to the panel, the city argued that the memoranda established that "Jefferson was . . . soliciting donations from contractors while she was carrying [out] her enforcement duties for [the commission] in defiance of the direct advice from [the] [c]orporation [counsel's] office." According to the city, although it was perfectly proper for Jefferson to solicit donations from the contractors—indeed, under chapter 12 1/2, article I, § 12 1/2-5, of the New Haven Code of Ordinances; see footnote 10 of this opinion; it was her "duty" to do so—it was improper for her to solicit them in lieu of fines.

Before the panel, the union argued that "Foster's letter on charitable contributions . . . did not forbid donations but instead stated that such donations could

be solicited only with Board of Aldermen approval," and that the Board of Alderman had "passed such an order expressly authorizing donations . . . [and] thereafter adopted budgets expressly accounting for the potential of such donations . . . ." (Citation omitted.) In siding with the city on this issue, the panel rejected the union's interpretation of Foster's letter, concluding, instead, that the letter made clear that whether the commission could accept donations and whether it could accept donations *in lieu of fines* were two separate issues. The panel noted, however, that "there is no evidence as to what eventuated from the [memoranda in question]. Nevertheless, the [memoranda] appear to clearly amount to an attempt to solicit donations in lieu of fines which [as the city argued] 'could expose [the city and/or individual employees] to charges of bribery or solicitation of bribery.' . . . And, as the [memoranda] appeared under . . . Jefferson's signature, a majority of the panel conclude[d] that . . . Jefferson, as with the case of most [e]xecutive [d]irectors, and absent other evidence regarding the background of the [memoranda in] question, bears . . . responsibility for them." (Citation omitted.)

The panel next considered Jefferson's employment record with the city, noting the numerous awards and citations she had received throughout her career, as well as several positive performance evaluations rating her "[e]xcellent" in the category of "[e]thics and [g]overnment" and describing her as exhibiting " 'strong ethical behavior' " in her work. In light of these and other findings, the panel concluded that the city was not justified in terminating Jefferson's employment. Specifically, the panel stated: "It is said to be axiomatic that the degree of penalty shall be in keeping with the seriousness of the offense. . . . [After] [t]horough consideration [of the] seriousness of the proven offenses . . . the panel concluded that, though those offenses are of a

serious nature, they are not individually or cumulatively extreme to the point of justifying termination from employment. . . .

"The panel has devoted thorough consideration to all of the available documentary and testimonial evidence that has been presented by the parties. The panel has also thoroughly considered the nature and the seriousness of the offenses that the city has identified, and met the burden of [proving], and . . . has weighed [the] same in light of . . . Jefferson's employment record, and length of service. . . . Accordingly, a majority of the panel has concluded . . . [that] Jefferson shall be reinstated to the position of executive director of the [commission], and the city shall restore back pay, minus interim earnings, and . . . Jefferson shall otherwise be made whole of contractual benefits for the period starting on August 1, 2017, through [the] date of reinstatement. In the event that . . . Jefferson has . . . receive[d] state unemployment compensation [during] the stipulated period, that compensation shall not be deducted." (Citations omitted; internal quotation marks omitted.) Thus, pursuant to the award, Jefferson did not receive back pay and benefits for the two year period beginning on August 5, 2015, the date of her termination, and ending on August 1, 2017.

On April 25, 2018, the city, pursuant to General Statutes § 52-418, filed a timely application to vacate the arbitration award, claiming that the award violated the clearly defined and dominant public policy prohibiting "unethical, unlawful and/or illegal conduct" by public officials, as set forth in chapter 12 5/8 of the New Haven Code of Ordinances,[11] the city's ethics ordinance; the

[11] In particular, the city relied on chapter 12 5/8, § 12 5/8-5 (e), of the New Haven Code of Ordinances, which provides that "[a] public official or municipal employee has a conflict of interest if he makes or participates in the making of any governmental decision or the taking of any governmental action with respect to any matter in which he has any economic interest distinguishable from that of the general public," and on chapter 12 5/8, § 12 5/8-5 (a), of the New Haven Code of Ordinances, which provides that "[a]

Connecticut Code of Ethics for Public Officials, General Statutes § 1-79 et seq.; and General Statutes §§ 53a-148[12] and 53a-161,[13] which govern the solicitation or receipt of bribes by public officials and employees. On October 4, 2018, the union, pursuant to General Statutes § 52-417, filed an application to confirm the award, which the city opposed for the reasons set forth in its application to vacate the award.

Following a hearing, the trial court issued an order granting the union's application to confirm the award and denying the city's corresponding application to vacate. The trial court's order stated in relevant part: "While the city identifies a number of issues with the award, the only issue that it deals with in detail is its claim that the award violated public policy. In such cases, the court must first determine whether the award does, indeed, implicate an explicit, well-defined and dominant public policy, and, if so, then the court must determine whether the award violates that policy." Although the court agreed with the city that the issues addressed in the award raised "strong public policy concerns," it disagreed that the only way to vindicate

public official or municipal employee has a conflict of interest if he or she has, or has reason to believe or expect that they or a member of their immediate family or household, or a business or other organization with which or whom they are employed or with which or whom they are associated with, will or may derive a direct monetary gain or suffer a direct monetary loss, as the case may be, by reason of the official's or employee's official activity or position."

[12] General Statutes § 53a-148 provides in relevant part: "(a) A public servant or a person selected to be a public servant is guilty of bribe receiving if he solicits, accepts or agrees to accept from another person any benefit for, because of, or as consideration for his decision, opinion, recommendation or vote. . . ."

[13] General Statutes § 53a-161 provides in relevant part: "(a) An employee, agent or fiduciary is guilty of receiving a commercial bribe when, without consent of his employer or principal, he solicits, accepts or agrees to accept any benefit from another person upon an agreement or understanding that such benefit will influence his conduct in relation to his employer's or principal's affairs. . . ."

those concerns was for the city to terminate Jefferson's employment.

In reaching its decision, the trial court noted that, in *Burr Road Operating Co. II, LLC* v. *New England Health Care Employees Union, District 1199*, 316 Conn. 618, 114 A.3d 144 (2015), this court identified four factors (*Burr* factors) courts should consider in determining whether termination of employment is the sole means to vindicate an important public policy: "(1) any guidance offered by the relevant statutes, regulations, and other embodiments of the public policy at issue; (2) whether the employment at issue implicates public safety or the public trust; (3) the relative egregiousness of the grievant's conduct; and (4) whether the grievant is incorrigible." Id., 634. Without specifically addressing all of the *Burr* factors,[14] the trial court concluded that "the violation of public policy at issue in this case does not mandate termination . . . ." Specifically, the trial court stated: "While the court finds that there was actual harm sufficient to consider the behavior at issue egregious," there was "insufficient support for the argument that . . . Jefferson would not respond appropriately to progressive workplace discipline, and, as a result, [the court] cannot find her 'incorrigible.' "

On appeal, the city contends that the trial court incorrectly determined that Jefferson's reinstatement did not violate public policy merely because there is no evidence that Jefferson is incorrigible. The city argues, inter alia, that the trial court's decision is untenable in light of the city's claim that the conduct that led to Jefferson's termination violated and implicated state and local ethics laws and criminal statutes. The city further argues that a public sector employer should not be required to prove that an employee "who held a

[14] The trial court did not address the first or second *Burr* factor.

fiscally sensitive position of public trust and engaged in egregious conduct" that included "acts of intimidation, attempted bribery, corruption, and misuse of city time and resources," will not reoffend before it may terminate that employee. The city contends that the four factor test set forth in *Burr Road Operating Co. II, LLC*, does not adequately address a public sector employer's need to maintain and promote public accountability and that, in cases involving public sector employers, courts "should consider the impact on public accountability or public confidence as a factor in its own right . . . ."

The union responds, inter alia, that the trial court correctly determined that termination of Jefferson's employment was not required to vindicate the public polices at issue. The union contends that the city, in arguing to the contrary, incorrectly states that the trial court "found" that Jefferson had violated various state and local laws, when, in fact, the court merely observed that "the issues raised implicate strong public policy concerns." Indeed, the union argues that the city, in its brief to this court, "takes its own argument and makes it seem as if [the trial court agreed with it]," when, in fact, the trial court expressed no such agreement. The union also asserts that the city's brief is replete with factual assertions, including that Jefferson engaged in "acts of intimidation, attempted bribery, corruption, and misuse of city time and resources," that completely disregard the actual findings of the arbitration panel, which were to the contrary. We agree with the union.

At the outset, we set forth the standard of review. "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. . . . When the scope of the submission is unrestricted, the resulting award is not subject to de

novo review even for errors of law so long as the award conforms to the submission. . . . 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. . . . Accordingly, the factual findings of the arbitrator . . . are not subject to judicial review. (Citation omitted; internal quotation marks omitted.) *Norwalk Police Union, Local 1727, Council 15, AFSCME, AFL-CIO* v. *Norwalk*, 324 Conn. 618, 628,153 A.3d 1280 (2017). "[I]n applying this general rule of deference to an arbitrator's award, [e]very reasonable presumption and intendment will be made in favor of the [arbitral] award and of the arbitrators' acts and proceedings. . . .

"We have recognized, however, that an arbitration award should be vacated when, inter alia, it violates clear public policy. . . . When a challenge to a consensual arbitration award raises a legitimate and colorable claim of violation of public policy, the question of whether the award violates public policy requires de novo judicial review.[15] . . .

"The public policy exception applies only when the award is clearly illegal or clearly violative of a strong public policy. . . . A challenge that an award is in contravention of public policy is premised on the fact that the parties cannot expect an arbitration award approving conduct which is illegal or contrary to public policy

[15] Accordingly, we reject the city's repeated assertion, in its brief and in oral argument before this court, that the sole issue before the court is whether the trial court correctly determined that, although the city satisfied the first three *Burr* factors, including proving that Jefferson's conduct was egregious, it did not prove that Jefferson was incorrigible, and, therefore, it did not prove that the award violates public policy. As previously indicated, the trial court did not specifically address each of the *Burr* factors, but even if it had, this court is not bound by that court's determinations with respect thereto but, rather, as we have explained, applies de novo review to the question of whether an arbitration award violates public policy.

to receive judicial endorsement any more than parties can expect a court to enforce such a contract between them. . . . When a challenge to the arbitrator's authority is made on public policy grounds, however, the court is not concerned with the correctness of the arbitrator's decision but with the lawfulness of enforcing the award. . . . Accordingly, the public policy exception to arbitral authority should be narrowly construed and [a] court's refusal to enforce an arbitrator's interpretation of [a collective bargaining agreement] is limited to situations where the contract as interpreted would violate some explicit public policy that is [well-defined] and dominant, and is to be ascertained by reference to the laws and legal precedents and not from general considerations of supposed public interests. . . .

"The party challenging the award bears the burden of proving that illegality or conflict with public policy is clearly demonstrated. . . . [G]iven the narrow scope of the public policy limitation on arbitral authority, the trial court's order [confirming] the arbitrator's award should be [reversed] only if the plaintiff demonstrates that the . . . award clearly violate[d] an established public policy mandate. . . . As we repeatedly have emphasized, implicit in the stringent and narrow confines of this exception to the rule of deference to arbitrators' determinations, is the notion that the exception must not be interpreted so broadly as to swallow the rule." (Citations omitted; footnote altered; internal quotation marks omitted.) *State* v. *Connecticut Employees Union Independent*, 322 Conn. 713, 721–22, 142 A.3d 1122 (2016).

Consistent with the foregoing law, the sole issue before us is whether the panel's award reinstating Jefferson to employment violates public policy. "This court employs a two-pronged analysis to determine whether an arbitration award should be vacated for violating public policy. First, the court determines whether an

explicit, well-defined and dominant public policy can be identified. If so, the court then decides if the arbitrator's award violated [that] policy." (Internal quotation marks omitted.) Id., 723.

In the present case, the city argues that the dominant public policies implicated in this appeal are set forth in the bribery statutes applicable to public servants and employees; see footnotes 12 and 13 of this opinion; and in the city's ethics ordinance, particularly the provisions requiring city employees to avoid conflicts of interest, impropriety or the appearance of impropriety. See footnote 11 of this opinion. We agree with the city that the statutory, regulatory and decisional law of Connecticut evinces an explicit and well-defined public policy against public corruption in all of its forms; see, e.g., *Statewide Grievance Committee* v. *Ganim*, 311 Conn. 430, 462, 87 A.3d 1078 (2014) ("[g]overnment corruption breeds cynicism and mistrust of elected officials . . . [and] has the potential to shred the delicate fabric of democracy by making the average citizen lose respect and trust in elected officials" [internal quotation marks omitted]); and in favor of imposing strong ethical standards on government officials. See, e.g., General Statutes § 1-79 et seq. (establishing code of ethics for state public officials); General Statutes § 7-148h (authorizing establishment of municipal ethics commissions). Because the existence of these important public policies is not in dispute, we turn to the question of whether the panel's award violated them.

In making this determination, we are mindful that "the fact that an employee's misconduct implicates public policy does not require the arbitrator to defer to the employer's chosen form of discipline for such misconduct. As the United States Supreme Court has held, an arbitrator is authorized to disagree with the sanction imposed for employee misconduct. *United Paperworkers International Union, AFL-CIO* v. *Misco, Inc.*, 484

U.S. 29, 41, 108 S. Ct. 364, 98 L. Ed. 2d 286 (1987). . . . [Thus] [t]he arbitrator has the authority to choose the appropriate form of discipline even when the employee misconduct implicates public policy." (Citation omitted; internal quotation marks omitted.) *State* v. *AFSCME, Council 4, Local 391*, 309 Conn. 519, 532, 69 A.3d 927 (2013); see also *State* v. *Connecticut Employees Union Independent*, supra, 322 Conn. 739 (emphasizing that "public policy based, judicial second-guessing of arbitral awards reinstating employees is very uncommon and is reserved for extraordinary circumstances"). "The party seeking to vacate an award reinstating a terminated employee bears the burden of proving that nothing less than . . . termination of . . . employment will suffice given the public policy at issue." (Internal quotation marks omitted.) *State* v. *Connecticut Employees Union Independent*, supra, 725.

As previously indicated, this court has identified four factors "a reviewing court should consider when evaluating a claim that an arbitration award reinstating a terminated employee violates public policy . . . . [They are]: (1) any guidance offered by the relevant statutes, regulations, and other embodiments of the public policy at issue; (2) whether the employment at issue implicates public safety or the public trust; (3) the relative egregiousness of the grievant's conduct; and (4) whether the grievant is incorrigible." (Citation omitted; internal quotation marks omitted.) Id., 725–26.

"The first factor requires us to consider whether the relevant statutes, regulations, and other manifestations of the public policy at issue themselves recommend or require termination of employment as the sole acceptable remedy for a violation thereof. . . . Put differently, we ask whether the offense committed by the employee involves the sort of conduct the law deems to be inexpiable, or that would expose the employer

to substantial liability if it were to reoccur. . . . Whether sources of public policy themselves mandate termination is a question of law subject to plenary review." (Citations omitted; internal quotation marks omitted.) *Burr Road Operating Co. II, LLC* v. *New England Health Care Employees Union, District 1199*, supra, 316 Conn. 634–35.

In considering this factor, we note that Jefferson was found to have engaged in three types of misconduct: (1) failing to respond to Nemerson's May 13, 2015 request for information, (2) forming CCP, a private company that advertised contract compliance services in Connecticut, without informing the city that she had done so, and (3) "by means of issuing four [memoranda] under her signature, '[seeking] donations for CWI2 from the contractors whose employment practices [she] was entrusted to enforce . . . .' " Because the city does not argue that the first finding implicates the type of dominant and well-defined policy that the public policy exception is intended to vindicate, we confine our analysis to the latter two findings.

With respect to Jefferson's formation of CCP, the city argues that this act violated provisions of the city's ethics ordinance prohibiting conflicts of interest or the appearance of any such conflicts. A review of the city's ethics ordinance reveals, however, that it does not require termination of employment for the conduct at issue but, rather, permits "an appropriate authority to impose discipline" up to and including removal from office only for certain specified offenses, none of which is implicated in this appeal.[16] New Haven Code of Ordi-

[16] Chapter 12 5/8, § 12 5/8-8, of the New Haven Code of Ordinances, titled "Prohibited practices; removal from office," provides in relevant part: "In addition to those practices enumerated in the City Charter, section 190 (b) and section 211 (b) of Article XXXVII, which concern removal from office, the following shall be considered cause for removal from office:

"(a) The deliberating, testifying or voting by a member of a board or commission or task force on any matter before said board, or commission, or task force, or any of its committees, which matter requires [or] involves

nances, c. 12 5/8, § 12 5/8-8 (i); see *State* v. *Connecticut Employees Union Independent*, supra, 322 Conn. 726–27 (public policy did not mandate termination of state employee who had been caught smoking marijuana at work because relevant state regulations and drug-free workplace policy provided that state employees may be disciplined short of termination for use of illegal drugs while on duty); S*tate* v. *New England Health Care Employees Union, District 1199, AFL-*

a disclosure of interest on the part of by said member pursuant to section 210 of Article XXXVII of the City Charter or 12 5/8-7 . . . .

"(b) No public official or municipal employee shall request, use, or permit the use of, any consideration, treatment, advantage, benefit, or favor beyond that which it is the general practice to grant or make available to the public at large.

"(c) No public official or municipal employee shall request, use, or permit the use of any publicly owned or supported property, vehicle, equipment, material, labor or service for the personal convenience or the private advantage of himself or any other person, beyond that which is the general practice to grant or make available to the public at large.

"(d) That rule shall not be deemed to prohibit a public official or municipal employee from requesting, using, or permitting the use of such publicly owned or supported property, vehicle, equipment, material, labor, or service that it is the general practice to make available to the public at large, or that is provided as a matter of stated public policy for the use of public officials and municipal employees in the conduct of official business.

"(e) The failure to remove oneself from the decision-making process in cases set forth in subsection 12 5/8-7 (i).

"(f) No public official or municipal employee shall accept any fee or honorarium for an article, appearance, or speech, or for participation in an event in the official's or employee's official capacity, provided that but they may accept reimbursement of necessary expenses incurred that are due to such activity or participation, if those are disclosed within thirty (30) days of the activity or the reimbursement, whichever is later.

"(g) No public official or municipal employee shall knowingly provide false or misleading information to the public.

"(h) No public official or municipal employee shall take any action in retaliation against any person who makes a complaint or allegation of unethical conduct in accordance with the procedures outlined in this chapter with regard to the standards of conduct delineated herein.

"(i) The foregoing prohibited practices are also sufficient for an appropriate authority to impose discipline in accordance with the City Charter, this chapter, the city's executive management compensation plan, and/or any applicable collective bargaining agreement."

CIO, 271 Conn. 127, 136–37, 140, 855 A.2d 964 (2004) (public policy did not mandate termination of state employee who deliberately shoved client into chair, causing him injury).

With respect to the panel's finding that Jefferson attempted to solicit donations in lieu of fines, which the city argues could have exposed the city or commission staff to charges of bribery or solicitation of bribery, we conclude that the strong public policy against the solicitation or acceptance of bribes by public officials would be violated by any discipline short of termination if the panel had found that Jefferson had solicited or accepted a bribe. See, e.g., *Groton* v. *United Steelworkers of America*, 254 Conn. 35, 46–47, 757 A.2d 501 (2000) (reinstatement of municipal employee convicted of embezzling money from employer "violated the clear public policy against embezzlement, [which] encompasses the policy that an employer may not be required to reinstate the employment of one who has been convicted of embezzlement of his employer's funds"). As the union contends, however, the panel made no such finding. Indeed, the panel rejected the city's only claim alleging that Jefferson solicited a bribe (as opposed to a donation in lieu of a fine), concluding that the evidence simply did not support it.[17] We are bound by that factual

[17] As previously indicated in this opinion, in its letter terminating Jefferson's employment, the city alleged that, in 2004, Jefferson solicited a $15,000 bribe from Artnel Banton, the owner of Lab Restoration and Construction, LLC, in exchange for overlooking various noncompliance issues. See footnote 8 of this opinion. In rejecting the city's claim, the panel found, inter alia, that there was no evidence that Banton had a contract with the city in 2004. The panel also questioned why Banton never reported the bribe to city officials, the board or the police. It also found that Banton's testimony that it was difficult for him to secure work with the city after he refused to pay the bribe was not supported by the evidence, which indicated that he was awarded contracts "in 2006 and at least through 2008." Before the panel, the union "questioned 'the nature of the [c]ity's discovery of [Jefferson's] alleged misconduct . . . [arguing that the] [c]ity, without ever speaking to any of the thousands of contractors who interacted with . . . Jefferson incredibly discovered . . . Banton but thereafter made no attempt to ascertain whether she [had ever] solicited any other bribes [from any

determination. See, e.g., *AFSCME, Council 4, Local 1565* v. *Dept. of Correction*, 298 Conn. 824, 837, 6 A.3d 1142 (2010) (in determining whether arbitration award violated public policy, reviewing court was bound by arbitration panel's factual findings regarding nature of employee's misconduct); see also *C. R. Klewin Northeast, LLC* v. *Bridgeport*, 282 Conn. 54, 97, 919 A.2d 1002 (2007) ("even if [we] . . . were to assume . . . that there exists an explicit, well-defined, and dominant public policy against enforcing illegally procured contracts, [we] would defer to the arbitrator's factual findings under this court's standard of review of the narrow public policy exception . . . that the contract [at issue] was not illegally procured" (internal quotation marks omitted)).

Rather, the panel found that, because they "appeared under [her] signature," Jefferson "[bore] . . . responsibility" for four memoranda written in 2008 that "appear to clearly amount to an attempt to solicit donations in lieu of fines," despite having been warned by Foster, the deputy corporation counsel, that doing so "could expose the [commission], the city and/or any individual involved to civil claims and potential criminal charges for bribery or solicitation of bribery, notwithstanding their lack of criminal intent." In other words, the panel found that Jefferson ignored Foster's legal advice and, in doing so, could have exposed herself, her staff or the city to potential claims of bribery—meritorious or not—a serious disciplinary matter perhaps, but one clearly governed by the disciplinary procedures outlined in the parties' collective bargaining agreement, not the state's bribery statutes. The city has identified

other contractors].' " In the arbitration award, the panel also noted that Banton "did not report the bribe solicitation until interviewed in 2015, though the evidence indicates that he had contact with the police in connection with [an] incident with CWI2 staff in 2006," which resulted in the police issuing him a citation warning him "to stay away from the [commission's office]."

no provision of that agreement or an employee regulation or ordinance that requires termination of employment for employees who disregard the advice of the corporation counsel's office.[18] As previously indicated, the panel also found that there was no evidence that the memoranda actually resulted in the receipt of donations to CWI2 in lieu of fines. In light of the foregoing, we conclude that the first *Burr* factor does not support vacating the panel's award.

The second factor we consider is "whether the nature of the employment at issue implicates public safety or the public trust." *Burr Road Operating Co. II, LLC* v. *New England Health Care Employees Union, District 1199*, supra, 316 Conn. 635. As we previously have explained, "in the vast majority of cases in which courts have vacated for public policy reasons arbitration awards reinstating terminated employees, the grievant has been a public sector employee, primarily working in fields such as law enforcement, education, transportation, and health care, in other words, fields that cater to vulnerable populations or help ensure the public safety. . . . This reflects the fact that the threat to public policy involved in reinstating a terminated employee is magnified when the offending employee provides an essential public service, and especially when he is employed by, represents, and, ultimately, is answerable to the people." (Citations omitted.) Id., 635–36. "This factor . . . hinges on general questions of law and policy and is, therefore, subject to plenary judicial review." Id., 637.

It is undisputed that Jefferson's employment did not bring her into contact with vulnerable populations or

[18] We note that the panel's finding in this regard conformed to the city's framing of the issue, which was not that Jefferson had solicited a bribe by seeking charitable donations in lieu of fines but, rather, that she had acted "in defiance of the direct advice [of the] corporation [counsel's] office." (Internal quotation marks omitted.)

involve public safety or any other essential public service. The city argues, nonetheless, that the second factor is satisfied because "[Jefferson's] reinstatement . . . put her back into [a position that] involves policy making, significant fiscal responsibility, fiduciary responsibilities, and access to financial records," all of which "[implicate] the public trust." The union responds, and we agree, that the city presented no evidence that Jefferson's job involved significant fiscal responsibility, fiduciary duties, access to financial records or control over public finances. Although Jefferson's enforcement duties included recommending to the board whether to impose fines for violations of chapter 12 1/2, it is undisputed that the board had the ultimate decision-making authority over whether to impose any such fines. Nevertheless, there was testimony that, "if a [commission] staff [member] and a contractor made arrangements to do so, fines could be dropped prior to the [board's] vote." Thus, Jefferson's job arguably implicated the public trust to the extent it authorized her to negotiate with noncompliant building contractors and to excuse violations of the city's equal opportunity laws. Taking into account all of these facts, we conclude that the second *Burr* factor does not weigh in favor of or against vacating the award but is, instead, neutral.

We next consider the third *Burr* factor, namely, "whether the grievant's conduct was so egregious that no disciplinary measure short of termination will vindicate the relevant public policies." *Burr Road Operating Co. II, LLC* v. *New England Health Care Employees Union, District 1199*, supra, 316 Conn. 645. "This factor encompasses myriad considerations, including, but not limited to: (1) the severity of the harms imposed and risks created by the grievant's conduct; (2) whether that conduct strikes at the core or falls on the periphery of the relevant public policy; (3) the intent of the grievant with respect to the offending conduct and the public

policy at issue; (4) whether reinstating the grievant would send an unacceptable message to the public or to other employees regarding the conduct in question; (5) the potential impact of the grievant's conduct on customers/clients and other nonparties to the employment contract; (6) whether the misconduct occurred during the performance of official duties; and (7) whether the award reinstating the employee is founded on the arbitrator's determination that mitigating circumstances, or other policy considerations, counterbalance the public policy at issue. . . .

"This factor presents a mixed question of law and fact. We take as our starting point the factual findings of the arbitrator, which are not subject to judicial review. . . . We defer as well to the arbitrator's ultimate determination whether termination was a just or appropriate punishment for the conduct at issue. . . . [F]or purposes of the public policy analysis, [however] our determination of whether the conduct in question was so egregious that any punishment short of termination would offend public policy is not restricted to those findings. . . . A broader review is required because the arbitrator, in determining whether there was just cause or some other contractual basis for termination, may focus on case specific considerations such as how the employer has disciplined other employees under similar circumstances. Judicial review, by contrast, necessarily transcends the interests of the parties to the contract, and extends to the protection of other stakeholders and the public at large, who may be adversely impacted by the decision to reinstate the employee. . . . Accordingly, we review de novo the question whether the remedy fashioned by the arbitrator is sufficient to vindicate the public policies at issue." (Citations omitted.) Id., 638–39.

Upon consideration of these myriad factors, and bearing in mind the parties' arguments with respect thereto,

we agree with the panel that Jefferson's acts, though serious, were not so egregious that an award reinstating her employment but not making her whole, essentially docking her two years of pay,[19] could not vindicate the public policies at issue and send a powerful message to other municipal employees and the public at large that similar conduct will not be tolerated. Indeed, the city has not cited a single case from Connecticut—or any other jurisdiction for that matter—in which a court, in applying the public policy exception, concluded that termination of employment was the sole, acceptable punishment for similar conduct. Nor has our independent research revealed any such case. The only case cited by the city, *Groton* v. *United Steelworkers of America*, supra, 254 Conn. 46–47, is readily distinguishable because it involved reinstatement of a municipal employee who was convicted of embezzling funds from his employer, a far cry from the conduct at issue in the present case.[20]

[19] As previously indicated, although Jefferson was terminated on August 5, 2015, the panel awarded her back pay and benefits only "for the period starting on August 1, 2017, through [the] date of reinstatement."

[20] The union complains, and we agree, that the city, throughout its brief to this court, mischaracterizes the nature of the panel's findings. Although the city leveled extremely serious charges of misconduct against Jefferson, it failed to prove the most serious of those charges. For example, in addition to rejecting the city's claim that Jefferson attempted to solicit a bribe from Lab Restoration and Construction, LLC, the panel also rejected the city's claim that Jefferson had threatened another contractor, Brack Poitier, during a telephone call. In so doing, the panel noted the flimsy nature of the city's evidence, stating in relevant part: "It is noted as the union points out, that there is no evidence that . . . Poitier made any claim of misconduct against . . . Jefferson, [the commission] or CWI2 prior to his 2015 interview, though the threat was alleged to have taken place in the course of a telephone call from . . . Jefferson to . . . Poitier just before Memorial Day weekend, 2014. Of course, an allegation of a threat is a serious matter. In this case, the perceived threat, according to . . . Poitier, consisted of . . . [Jefferson's] asking, in the course of a telephone conversation, if . . . Poitier intended to have any [Sheetrock] workers over the Memorial [Day] weekend at the 603 Orchard Street, New Haven site, and . . . that [the commission] would be watching and might inspect the property. The city referred to this scenario, as . . . Poitier explained to the interviewer, as [the commission applying] 'heightened scrutiny' . . . though it does not argue that [that] scrutiny itself . . . would amount to a threat. . . . [With respect to Jeffer-

The panel found that Jefferson (1) disregarded Foster's advice not to solicit donations in lieu of fines from companies whose labor and employment practices she oversaw, and (2) formed a private company that ran afoul of the city's conflict of interest laws. The panel also found, however, that the city authorized Jefferson to solicit donations from the companies she oversaw[21] and even allowed her to perform consulting work for

son's question about Sheetrock workers], the union argued that . . . [chapter 12 1/2, article II, §] 12 1/2-24 (c) [of the New Haven Code of Ordinances] . . . requires that all firms doing business in the city shall utilize city sponsored recruitment and training programs. . . . It is undisputed that CWI2 was the only city sponsored recruitment and training program. Thus, any effort by [Jefferson] and [the commission] to encourage the contractors to utilize graduates to avoid future compliance issues with [the commission] was not only proper but was required by the city's own rules. . . . Taking these factors into account and attempting to understand the essence of the perceived threat, it is concluded that substantial proof of a threat is not evident. Furthermore, it is noted that, [although] two city . . . investigators . . . and . . . the Federal Bureau of Investigation among other agencies . . . were involved to look into . . . Jefferson's interactions with the contractors doing business with the city, there is no evidence in the record that, on or about May 24, 2014 . . . Poitier received a [threatening] telephone call from . . . Jefferson," as the city claims. (Citations omitted; internal quotation marks omitted.)

[21] Before the panel, the city acknowledged that Jefferson's job required her to enforce chapter 12 1/2 *and* to fundraise for CWI2; it argued, however, that "[b]lending enforcement and fundraising create[d] a conflict of interest." To demonstrate just how blurred the ethical lines could become, the panel found that, in April, 2014, John Moriarty, a contractor doing business with the city, "received an invitation from CWI2 to attend a fundraiser . . . . On April 9, 2014, Moriarty provided a check for $10,000 for the occasion. . . . On the same date, a preaward conference took place which involved [the commission], Moriarty and the subcontractors for the 100 College Street project. . . . There does not appear to be [any] question regarding the solicitation and receipt of the donation, [which] as the union points out . . . '*was made with the full knowledge and participation of the* [*c*]*ity*.' " (Citations omitted; emphasis added.) Chapter 12 1/2, article II, § 12 1/2-26 (a), of the New Haven Code of Ordinances explains that a preaward conference occurs "prior to award of a contract" and that, "[a]t such pre-award conference the contract compliance director shall . . . determine whether or not the apparent successful bidder has complied with sections 12 1/2-22 through 12 1/2-25, and then shall submit his determination and recommendation thereon to the commission and the director of the department involved. After receiving the recommendation of the contract compliance director, the executive director of the commission shall process the award recommendation to the awarding agency."

one of them, Gilbane, Inc., in New York.[22] Thus, the city is hardly blameless in this matter. Indeed, it is evident that the city's own policies and decision making at critical junctures created for Jefferson an ethical tightrope that could only end in the ethical lapses and errors of judgment of which the city now complains.

As for Jefferson's specific acts of misconduct, although the panel found that Jefferson failed to seek authorization from the city to form CCP, it also found in mitigation that CCP never provided any consulting services in the state and that Jefferson never sought to hide the company from the city. As previously indicated, Jefferson testified that she formed CCP for liability reasons after the city granted her permission to provide consulting services in New York and that she registered it in Connecticut because she thought that she was required to register it in the state where she lived.

As for the panel's finding that Jefferson, as executive director of the commission, "[bore] . . . responsibility" for four memoranda issued "under [her] signature" in 2008, in which the commission agreed to accept donations to CWI2 in lieu of the payment of fines, the panel also found that there was no evidence as to what eventuated from the memoranda in question, which, by their express terms, had to be approved by the board. We note, moreover, as the union argues, that the city presented no evidence that Jefferson personally benefited in any way from her fundraising efforts for CWI2, which, in 2008, was a city program operated under the auspices of the commission.[23] Nor was there any evidence that

[22] According to the arbitration award, "on or about June 9, 2009, [commission] staff, under the direction of . . . Jefferson, as [e]xecutive [d]irector, prepared another [memorandum] to resolve a noncompliance issue by payment of [a] $10,000 fine. . . . [T]he [memorandum] was prepared for . . . Jefferson's signature, and contained a notation copying several people, including two representatives from Gilbane [Inc.], and Economic Development [Administrator] Kelly Murphy." (Citation omitted.)

[23] As previously indicated in this opinion, CWI2 was not spun off into a separate entity until 2011.

the fines discussed in the memoranda were not actually owed by the contractors or were in any way improper. Furthermore, according to the testimony of Attorney Clifton Graves, a member of the board during the relevant time period, "when fines [were] collected, they were put into the [commission] fund," which "was a fund that was set up primarily to run programs and to assist the [commission] in achieving its goals." Because CWI2 was itself a city program operated by the commission, and because the memoranda merely allowed the contractors to donate to CWI2 directly in lieu of paying fines into the commission's general fund, it is difficult to discern the basis for the city's contention that the memoranda exposed the city and commission staff to "potential criminal charges for bribery or solicitation of bribery . . . ." We need not resolve this question, however, to conclude that the third *Burr* factor weighs against the conclusion that the panel's award violates public policy.

The fourth *Burr* factor requires us to consider "whether the grievant is so incorrigible as to require termination. . . . Put differently, in light of the grievant's full employment history, is there a substantial risk that, should a court uphold the arbitration award of reinstatement, this particular employee will reengage in the offending conduct? . . . Here, relevant considerations include whether, on the one hand, the grievant has committed similar offenses in the past and has disregarded an employer's prior warnings or clear policy statements; or, on the other hand, whether the grievant: (1) has generally performed his work in a competent and professional manner; (2) has demonstrated a willingness to change and an amenability to discipline; (3) has exhibited remorse and attempted to make restitution for past offenses; and (4) is likely to benefit from additional training and guidance. . . . We also consider whether the penalty imposed by the arbitrator is

severe enough to deter future infractions by the grievant or others. . . .

"Because these considerations are largely fact based and case specific, a reviewing court must defer to an arbitrator's assessment—whether express or implied—that a particular employee is unlikely to reoffend if reinstated. . . . [In the absence of] an express finding by the arbitrator, which would be unreviewable, a court will deem an employee incorrigible only when the likelihood of recidivism is plain from the face of the record." (Citations omitted; internal quotation marks omitted.) *Burr Road Operating Co. II, LLC* v. *New England Health Care Employees Union, District 1199*, supra, 316 Conn. 639–40.

Although the panel made no express finding regarding Jefferson's incorrigibility, the city concedes that there is nothing in the record to suggest that she is incorrigible. To the contrary, the panel found that, during the nearly twenty years that she worked for the city, Jefferson enjoyed a spotless employment record and was cited on several occasions for her high ethical standards. As for Jefferson's amenability to discipline, we note that she did not appeal the panel's decision not to award her back pay and benefits for two of the three years that she was out of work as a result of her termination and the parties' lengthy arbitration, which, as the city acknowledged during oral argument before this court, ranks as one of the most severe punishments short of termination ever meted out in an arbitration proceeding conducted pursuant to a collective bargaining agreement.

The city argues, however, that incorrigibility or "a likelihood to reoffend should not be a dispositive factor . . . in reviewing the termination of a public employee who commits egregious acts that violate public trust and confidence." We disagree that it is a dispositive

factor. Although it may have figured prominently in the trial court's analysis, the weight a reviewing court attaches to it—or to any *Burr* factor—necessarily depends on the facts of the case. Undoubtedly, there will be cases in which an employee's misconduct is so egregious that even an exemplary employment history will have no bearing on the outcome. See, e.g., *State* v. *AFSCME, Council 4, Local 387, AFL-CIO*, supra, 252 Conn. 468–69, 478 (reinstatement of correction officer convicted of harassment in second degree after using work phone to place obscene, racist telephone call to state senator violated public policy); *State* v. *Council 4, AFSCME*, 27 Conn. App. 635, 636, 641, 608 A.2d 718 (1992) (reinstatement of employee who admitted to misusing state funds by cashing falsely generated public assistance checks violated public policy). This is not such a case.

The city contends, nonetheless, that a public sector employer should not have to countenance conduct by an executive level employee in a "fiscally sensitive position" that "has a negative impact on public accountability and public confidence." The city asserts that, "[a]side from [her] fiscally sensitive misconduct, [Jefferson also] failed to cooperate with an investigation while on administrative leave," which "[n]o public employer should be expected to treat . . . as not constituting good cause to dismiss an employee." We disagree.

"When a reviewing court is applying the public policy exception, considerations of . . . what . . . an employer *should* be able to do . . . do not in any manner constitute public policy and are thus not relevant to our inquiry. A reviewing court's only inquiry is whether the arbitration award . . . violates a clearly established public policy." (Emphasis added; internal quotation marks omitted.) *State* v. *AFSCME, Council 4, Local 391*, supra, 309 Conn. 531. It is well established that general notions of the public good, public account-

ability or the public trust are insufficient grounds for invoking the extremely narrow public policy exception to judicial enforcement of arbitral awards. See, e.g., *State* v. *New England Health Care Employees Union, District 1199, AFL-CIO*, supra, 271 Conn. 135–36 ("the public policy exception to arbitral authority [must] be narrowly construed and [a] court's refusal to enforce an [arbitration award] is limited to situations where the contract as interpreted would violate some explicit public policy that is [well-defined] and dominant, and is to be ascertained by reference to the laws and legal precedents and *not from general considerations of supposed public interests*" (emphasis added; internal quotation marks omitted)); *South Windsor* v. *South Windsor Police Union Local 1480, Council 15*, 255 Conn. 800, 824, 770 A.2d 14 (2001) ("the public policy requiring the confidence of the public in its police force with respect to matters of public safety" is "[a] general consideration [that] fails to meet the test [for] the public policy exception to arbitral authority" (internal quotation marks omitted)); *Board of Police Commissioners* v. *Stanley*, 92 Conn. App. 723, 740 n.15, 887 A.2d 394 (2005) (citing cases and explaining that "general notion of the public interest fails to meet the test for the public policy exception to arbitral authority").

We note, finally, that, in *State* v. *Connecticut Employees Union Independent*, supra, 322 Conn. 713, we rejected a claim that the public policy exception should be construed more broadly to allow employers to dismiss their employees for a wider range of misconduct, and our reasons for doing so are fully applicable to the present case: "Our general deference to an experienced arbitrator's determinations regarding just cause and the appropriate remedy is vital to preserve the effectiveness of an important and efficient forum for the resolution of employment disputes. If an employer wishes to preserve the right to discharge employees guilty of miscon-

duct such as that at issue in this case, thereby removing the matter from an arbitrator's purview, it remains free to negotiate for the inclusion of an appropriate provision in the collective bargaining agreement that would achieve that result." Id., 739–40. Until such time, however, the employer must abide by the arbitrators' determinations regarding just cause and the appropriate remedy for that conduct.

In light of the foregoing, we conclude that the city has failed to meet its burden of demonstrating that Jefferson's reinstatement violated public policy.

The judgment is affirmed.

In this opinion the other justices concurred.

KENT LITERARY CLUB OF WESLEYAN UNIVERSITY AT MIDDLETOWN ET AL. *v.* WESLEYAN UNIVERSITY ET AL.
(SC 20226)

Robinson, C. J., and Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker, Js.*

Syllabus

The plaintiffs, K Co., the owner of a certain fraternity house on the campus of Wesleyan University, the local chapter of the fraternity, and a member of the fraternity, sought, inter alia, injunctive relief and damages from the defendants, the university, its president, and its vice president for student affairs, in connection with the university's decision to preclude the fraternity from allowing its members to reside in the fraternity house. Following the university's announcement in 2014 that all residential fraternities on campus would be required to coeducate, and following

* This case originally was scheduled to be argued before a panel of this court consisting of Chief Justice Robinson and Justices Palmer, McDonald, D'Auria, Mullins, Kahn and Ecker. Although Justice Palmer was not present when the case was argued before the court, he has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

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

a series of unsuccessful negotiations between the parties to establish a mutually agreeable coeducation plan, the university notified the plaintiffs that fraternity members could no longer reside in or use the fraternity house as of the 2015–2016 academic year. A Greek Organization Standards Agreement (agreement) between K Co. and the fraternity, on the one hand, and the university, on the other, which was a prerequisite to allowing the use of the fraternity house for residential purposes, permitted any party to terminate the relationship for any reason upon thirty days' notice and required the fraternity to comply with and be bound by all university rules and policies, which the university could amend or modify at any time. In their action against the defendants, the plaintiffs alleged promissory estoppel, negligent misrepresentation, tortious interference with business expectancies, and violations of the Connecticut Unfair Trade Practices Act (CUTPA). Following a trial, the jury awarded K Co. damages. In addition, the trial court issued an injunction requiring that the university enter into a new agreement with K Co. and the fraternity, allow the housing of fraternity members in the fraternity house, and afford the fraternity three years in which to coeducate. Moreover, the trial court, pursuant to CUTPA, awarded the plaintiffs attorney's fees and costs. The defendants appealed, raising various challenges to the trial court's jury instructions, the sufficiency of the evidence with respect to both liability and damages, and the award of injunctive relief. *Held*:

1. The trial court improperly declined to instruct the jury, in accordance with the defendants' request, that a party cannot prevail on a claim of promissory estoppel based on alleged promises that contradict the terms of a written contract, as the relationship between the parties was governed by a written agreement that allowed the university to terminate its arrangement with the plaintiffs without cause upon thirty days' notice and the plaintiffs' claims revolved around the contention that the university wrongfully terminated its housing arrangement with them; nevertheless, the trial court was not required to instruct the jury, in accordance with the defendants' request, that the principle of promissory estoppel applies only when there is no enforceable contract between the parties, as the existence of a contract does not create an absolute bar to a promissory estoppel claim when that claim addresses aspects of the parties' relationship that are collateral to the subject matter, and does not vary or contradict the terms, of the written agreement, and, because the plaintiffs arguably claimed that the university promised the fraternity that, if it took good faith steps to develop a viable coeducation plan, it could then allow members to reside in the fraternity house, the trial court should have instructed the jury that the plaintiffs' promissory estoppel claim is cognizable but only insofar as the plaintiffs alleged that the university made promises or commitments that did not alter or contradict the terms of the agreement.

2. The trial court should have instructed the jury as to the legal implications of the parties' agreement in connection with the plaintiffs' CUTPA claim, and its failure to do so entitled the defendants to a new trial on that claim.
3. The plaintiffs, having expressly eschewed any claim that the university modified the parties' agreement, waived any rights thereunder, or breached a provision of that agreement that requires consistent treatment of all residential fraternities on the university's campus, had no legal grounds for contesting the university's unilateral decision not to continue to allow the fraternity to house its members during the 2015–2016 academic year, and, accordingly, the trial court improperly failed to instruct the jury that, in light of the parties' agreement, the plaintiffs could not, as a matter of law, reasonably have relied on any perceived extracontractual promise or representation by the university that the fraternity could continue to house its members during that academic year and beyond.
4. This court having determined that any damages in connection with the plaintiffs' claim for tortious interference with business expectancies should be assessed in terms of net profits, the trial court improperly failed to instruct the jury that it should have subtracted K Co.'s expenses of operating an occupied versus an unoccupied fraternity house from its anticipated lost revenue in order to calculate lost profits; because the most reasonable reading of the jury's damages award was that the award included K Co.'s total anticipated lost revenues for the 2015–2016 academic year, without regard to any savings from expenses it did not incur, the trial court's failure to properly instruct the jury as to the correct method of calculating tortious interference damages resulted in an improper award.
5. The trial court improperly failed to instruct the jury that the parties' agreement limited the defendants' potential exposure to only those losses that K Co. incurred before the termination of the agreement for the 2015–2016 academic year, as a defendant cannot be held liable for tortious interference of business expectancies merely for exercising its legitimate contractual rights, regardless of the motive therefor; moreover, damages, if any were incurred, were available to compensate K Co. for interference with its rights only under the parties' agreement covering the 2014–2015 academic year, as K Co. could not have had any reasonable expectation that the university would continue to facilitate its business with fraternity members after that academic year; accordingly, the trial court's failure to correctly instruct the jury as to the law governing damages that may be recovered for tortious interference with business expectancies required a retrial on that particular claim.
6. The defendants were entitled to a new trial on the plaintiffs' claim of negligent misrepresentation, as the trial court failed to instruct the jury as to the proper measure of K Co.'s losses in connection with that claim; although the plaintiffs testified that they had relied to their detriment on the university's alleged misrepresentations, the plaintiffs made no

attempt to quantify the costs associated with those representations, and, in light of the evidence and arguments presented at trial, the jury's award was intended to compensate K Co. not for its reliance damages but, instead, for its expectation or benefit of the bargain losses.

7. Because the parties' agreement, which substantially limited the potential scope of the university's liability, did not immunize the university with respect to the plaintiffs' claim that the university had negotiated the renewal of the parties' agreement in bad faith, and because there was sufficient evidence for the jury to have found that the university intentionally misled the plaintiffs during the negotiations, leading them to reasonably rely on its representations that the fraternity could continue to house its members if it agreed to coeducate and simply submitted a basic, preliminary plan to coeducate, when, in fact, the university was secretly determined to terminate its relationship with K Co. in the hope of being able to acquire the property on which the fraternity house was situated, a reasonable jury could have found the defendants liable to that limited extent.

8. The defendants could not prevail on their claim that, because the Federal Trade Commission and the federal courts no longer apply the cigarette rule as the test governing unfair trade practice claims under the Federal Trade Commission Act, and because CUTPA directs the courts of this state to be guided by interpretations given by the Federal Trade Commission and federal courts in construing the federal act, the trial court improperly instructed the jury that it should find that the university committed an unfair trade practice or practices if its conduct violated the cigarette rule; this court concluded that, until such time as the legislature chooses to enact a different standard, the cigarette rule remains the operative standard for unfair trade practice claims under CUTPA; moreover, the current federal standard is applied primarily in the regulatory context, as there is no private right of action under the federal act, unlike under CUTPA, and the current federal standard is less readily administrable by a jury and, therefore, arguably ill-suited for claims asserted under CUTPA.

9. The trial court abused its discretion in issuing an injunction requiring the university to enter into the "same" agreement that it had with other residential fraternities, to allow the housing of members in the fraternity house, and to give the fraternity three years in which to coeducate: the injunction was unenforceable, and, thus, was without legal effect, insofar as the university could terminate the new agreement without cause after giving thirty days' notice, as it reserves the right to do so in the agreements it had with other residential fraternities, and the right to house members in the fraternity house would be extinguished as a result of that termination; moreover, the residential fraternities and the university historically had entered into one year agreements terminable at will by either party, there was no claim that the university agreed to waive or modify this provision of the standard agreement, and, therefore, if the

trial court intended to bind the university to a three year housing agreement with the plaintiffs by extending the time to coeducate to three years, that aspect of the injunction represented an expansion of the terms of the same agreement the university had with other residential fraternities and was improper.

(*One justice concurring separately*)

Argued May 1, 2019—officially released March 5, 2021**

Procedural History

Action to recover damages for, inter alia, the defendants' alleged violation of the Connecticut Unfair Trade Practices Act, and for other relief, brought to the Superior Court in the judicial district of Middlesex and tried to the jury before *Domnarski*, *J.*; verdict for the plaintiffs; thereafter, the court, *Domnarski*, *J.*, denied the defendants' motions for a directed verdict and to set aside the verdict, issued an injunction requiring the defendants to enter into a certain agreement with the plaintiffs, and rendered judgment for the plaintiffs, from which defendants appealed. *Reversed*; *new trial.*

Aaron S. Bayer, with whom was *Benjamin M. Daniels*, for the appellants (defendants).

Richard J. Buturla, with whom was *Bryan L. LeClerc*, for the appellees (plaintiffs).

Opinion

PALMER, J. This appeal involves a commercial dispute arising in the unique context of an undergraduate housing program. The plaintiffs are Kent Literary Club of Wesleyan University at Middletown (Kent), which owns a Delta Kappa Epsilon fraternity house on the Wesleyan University campus (DKE House); the Gamma Phi Chapter of Delta Kappa Epsilon at Wesleyan (DKE); and Jordan Jancze, who, at the time of trial, was a

** March 5, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Wesleyan student and DKE member.[1] The defendants include Wesleyan University (Wesleyan or the university); Wesleyan's president, Michael S. Roth; and Wesleyan's vice president for student affairs, Michael J. Whaley. Following Wesleyan's September, 2014 announcement that all residential fraternities on campus would be required to coeducate, and following a series of unsuccessful negotiations between the parties to establish a mutually agreeable coeducation plan, Wesleyan notified Kent and DKE that they would no longer be eligible to participate in the university's program housing system as of the 2015–2016 academic year and, therefore, that Wesleyan students no longer could reside in or use the DKE House. In response, the plaintiffs commenced the present action, alleging promissory estoppel, negligent misrepresentation, tortious interference with business expectancies, and violations of the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and seeking damages, attorney's fees and costs, and injunctive relief. Following a jury trial, the jury returned a verdict for the plaintiffs on all counts and awarded Kent $386,000 in damages. In addition, the trial court, acting pursuant to CUTPA, awarded the plaintiffs $398,129 in attorney's fees and $13,234.44 in costs, and issued a mandatory injunction requiring, among other things, that Wesleyan enter into a new contract with Kent and DKE, resume housing Wesleyan students in the DKE House, and give DKE three years in which to coeducate.

On appeal, the defendants raise various challenges to the judgment, including claims concerning the trial court's jury instructions and the sufficiency of the evidence with respect to both liability and damages. The defendants also contend that the trial court abused its discretion or otherwise acted contrary to law in

[1] The case was withdrawn as to two other plaintiffs, Tucker Ingraham and Zac Cuzner, prior to trial.

awarding the plaintiffs injunctive relief. We conclude that, although there was sufficient evidence for the jury to find the defendants liable, the trial court failed to properly instruct the jury regarding the legal effects of the parties' contract and the proper means of calculating damages.[2] Accordingly, we reverse the judgment of the trial court and remand the case for a new trial.

I

FACTS AND PROCEDURAL HISTORY

The relevant facts, which were developed at trial, and procedural history may be briefly summarized as follows. Wesleyan is a small, private, liberal arts university located in the city of Middletown. With a few exceptions not relevant to the present action, Wesleyan requires all undergraduate students to reside on campus, primarily in university owned housing.

The university considers residential life to be an important component of the undergraduate education experience. In lieu of residing in traditional dormitories, students can opt to enter Wesleyan's program housing system and live in a theme house based on shared hobbies, experiences, cultural interests, or identities. Students who wish to live in residential fraternities—there are no residential sororities at Wesleyan—must do so via program housing. During the 2014–2015 academic year, three all-male fraternities, one of which was DKE, operated houses on campus and participated in Wesleyan program housing.

In order to participate in program housing, to have Wesleyan students placed in their house, and to receive those students' housing dollars as rent, Kent and DKE,

[2] Our resolution of the appeal on this ground makes it unnecessary to resolve the parties' other claims. In part VI of this opinion, however, we offer some guidance on issues that are likely to arise again on retrial. See, e.g., *State* v. *T.R.D.*, 286 Conn. 191, 206, 942 A.2d 1000 (2008).

like the other residential fraternities, were required to enter into an annual Greek Organization Standards Agreement with Wesleyan. Among other things, that contract (1) allows either party to terminate the relationship for any reason upon thirty days' notice, (2) requires the fraternity to comply with and be bound by all university rules and policies, which the university is permitted to amend or modify at any time, (3) requires the university to enforce and apply the provisions of the agreement in a manner consistent with how it treats other residential Greek organizations, and (4) provides that the university's failure to enforce any provision of the agreement shall not be construed as a waiver with respect to any subsequent breaches. In the present action, the plaintiffs have never contended that Wesleyan breached or modified that agreement.

DKE is the local chapter of an international fraternal organization, Delta Kappa Epsilon, whose charter bars local chapters from admitting women as members. DKE has existed as a Greek fraternal organization recognized by Wesleyan since 1867. Kent is a Connecticut, nonstock corporation that is operated by Wesleyan's DKE alumni and has owned the DKE House at 276 High Street, in the center of the Wesleyan campus, since 1888.

In the spring of 2014, following a series of incidents in which young women at Wesleyan claimed to have been raped at other fraternity houses[3] and Wesleyan was named as a defendant in resulting lawsuits, it began to participate in what had become a nationwide debate regarding the role of fraternities on college campuses. Specifically, the administration began to consider whether all-male residential fraternities contribute to sexual assault and harassment, and whether main-

[3] No evidence was presented at trial that any female had complained of any improper or offensive treatment by a Wesleyan DKE member or at the DKE House. Nor was any evidence presented that there ever had been a complaint of sexual assault or binge drinking at the DKE House.

taining such fraternities as program housing options was consistent with the university's prioritizing of gender equity, inclusiveness, and the safety of its female students. At the same time, according to Scott Karsten, a DKE alumnus, the plaintiffs sought to take proactive steps to be in the forefront of Wesleyan's educational effort to combat sexual assault and binge drinking, such as enlisting a physician to give an educational program for DKE members on bystander intervention.

After consulting with various stakeholders and considering various options, Roth announced, on September 22, 2014, that Wesleyan intended to require that residential fraternities become fully coeducational over the next three years. The announcement stated that "women as well as men must be full members and [well represented] in the body and leadership of the [residential fraternity] organization." It further stated that the university "looks forward to receiving plans from the residential fraternities to [coeducate]" and would "work closely with them to make the transition as smooth as possible."

In the months that followed, the parties engaged in a series of negotiations and communications aimed at achieving a mutually agreeable plan for coeducating the DKE House. The parties place very different spins on the nature of those negotiations.

Wesleyan contends that it tried to meet the plaintiffs half way, such as by agreeing to allow DKE to coeducate at the residential level—bringing female residents into the DKE House and giving them equal say in house management and programming—but not at the organizational/membership level, that is, not requiring DKE to accept women as members of the fraternity itself. In the university's view, however, the plaintiffs failed to negotiate in good faith and chose instead to stonewall and delay the negotiations, ultimately via litigation, in

a calculated effort to outlast the administration and, in particular, Roth's tenure as president.

The plaintiffs, for their part, contend that it was Wesleyan that failed to negotiate in good faith. They argue that Wesleyan recognized at the outset that it would "have to develop goals and benchmarks for 'meaningful coeducation' " but that the university never provided any such goals or benchmarks to the plaintiffs to aid them in drafting an acceptable coeducation plan. They emphasize that they submitted a preliminary coeducation plan for the DKE House on January 5, 2015, that complied with Wesleyan's stated requirements and was more detailed than the plan submitted by Psi Upsilon, another residential fraternity that was permitted to remain in program housing.[4] They argue that Roth never intended to allow them to coeducate solely at the residential level and that, in fact, his coeducation requirement was merely a pretext to sever ties with DKE and to force Kent to sell the centrally located DKE House to the university. Because the jury found for the plaintiffs on all counts, we must assume that the jury found their account, or at least some substantial portion thereof, to be more persuasive.

In any event, February 7, 2015, the date of Wesleyan's annual student housing selection, arrived without an agreement between the parties. Accordingly, on February 13, 2015, Whaley wrote to inform the plaintiffs that Wesleyan was terminating their Greek Organization Standards Agreement, effective June 18 of that year. Since that time, Wesleyan student members of DKE, such as Jancze, have been denied the opportunity to reside in the DKE House or even to use the house for nonresidential purposes, such as for studying and

[4] Aside from DKE and Psi Upsilon, the only other two residential fraternities active at Wesleyan at the time were Alpha Delta Phi, which already had coeducated at the membership level, and Beta Theta Pi, which was subsequently suspended and lost its charter due to an unrelated incident.

chapter meetings. This action effectively rendered the property, which has sat empty, useless to the plaintiffs.[5]

The plaintiffs responded by filing the present action. The operative third amended complaint alleges promissory estoppel, negligent misrepresentation, tortious interference with business expectancies, and various CUTPA violations. These different causes of action encompass several different, overlapping theories of liability. The plaintiffs allege, for example, that Wesleyan (1) falsely reassured them that they would be eligible to remain in program housing under the new policy if they agreed to coeducate at the residential, but not the organizational, level, on which promise they relied to their detriment, such as by taking steps necessary to prepare a residential coeducation plan, (2) failed to honor its promise that DKE would be given three years in which to coeducate if the fraternity satisfied certain criteria, and (3) broke a promise to prospective and incoming freshman students that they would have the opportunity to reside in the DKE House.

The defendants moved for summary judgment, arguing that all of the plaintiffs' claims failed as a matter of law because, among other things, the plain and unambiguous language of the parties' Greek Organization Standards Agreement permitted Wesleyan to terminate its relationship with Kent and DKE for any reason at the end of the 2014–2015 academic year.[6] The trial court, *Aurigemma*, *J.*, denied the motion, concluding that Wesleyan's contractual right to terminate the Greek Organization Standards Agreement did not preclude a claim that Wesleyan misrepresented that the plaintiffs

[5] The jury declined the defendants' invitation to find that Kent had failed to mitigate its losses by, for example, renting the DKE House to other parties.

[6] With respect to plaintiff Jancze, the defendants argued that his claims were barred by the housing contract that all Wesleyan students sign, which expressly provides that students are not guaranteed to receive a specific housing assignment of their choosing.

could remain eligible to participate in program housing if they agreed to coeducate solely at the residential level.

The case proceeded to trial in June, 2017, by which time the DKE House had been sitting empty for two full academic years. The jury returned a verdict in favor of the plaintiffs as to all four counts and awarded unspecified damages to Kent in the amount of $386,000. Subsequently, the trial court, *Domnarski, J.*,[7] (1) denied the defendants' motions for a directed verdict, to set aside the verdict, and for remittitur, (2) granted the plaintiffs' motion for attorney's fees and costs, as authorized under CUTPA, in the amount of approximately $411,000, (3) denied the plaintiffs' motion for punitive damages, and (4) granted the plaintiffs' motion for an award of specific performance, issuing a mandatory injunction ordering Wesleyan to enter into a new Greek Organization Standards Agreement with Kent and DKE, and to reinstate the DKE House as a program housing option beginning in the 2018 fall semester. The court rendered judgment in accordance with the jury verdict and its posttrial orders under CUTPA.

The defendants appealed to the Appellate Court, and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. On appeal, the defendants contend that (1) the trial court's jury instructions as to liability and damages were legally incorrect, (2) there was insufficient evidence to support the jury's verdict as to each cause of action, and (3) the trial court abused its discretion or committed legal error in issuing a mandatory injunction requiring that Wesleyan readmit DKE into program housing.[8] Additional facts will be set forth as necessary.

[7] All subsequent references to the trial court are to *Domnarski, J.*

[8] That injunction has been stayed pending the resolution of this appeal.

II

LEGAL OVERVIEW

Because there is a substantial degree of overlap between the plaintiffs' various legal theories, and also among the defendants' various challenges to the verdict, our analysis of the issues presented by this appeal necessarily involves some measure of redundancy. In the interests of streamlining that analysis to the extent possible, we offer the following initial observations, apropos of many, if not most, of the issues in this case.

Wesleyan is a private university. Unless otherwise restricted by law, it is permitted to establish any student housing system that it chooses and to require that Wesleyan students adhere to its housing rules as a condition of matriculation. The flip side of that coin is that Kent, as an outsider to Wesleyan's relationship with its students, has no right or enforceable expectation that *any* Wesleyan students will be permitted to live in the DKE House or have their housing dollars flow to Kent, other than as agreed to by the parties.

The plaintiffs make much of the fact that DKE has been recognized as a fraternal organization at Wesleyan for approximately 150 years and that Kent has owned the DKE House for nearly that long. But that history does not create an enforceable right for Kent to continue to conduct business with Wesleyan or to house Wesleyan students in perpetuity, any more than any other organization or business can insist on maintaining relations with an unwilling, long-term commercial partner after relations have soured and the governing contract has expired.[9] See, e.g., *Guyer* v. *Cities Service Oil*

[9] Any expectation by the plaintiffs that they would be entitled to play a perpetual role in the Wesleyan community would have been especially ill-founded in light of the ongoing national debate over the role of fraternities on college campuses and, in particular, the apparent trend toward abolishing Greek systems among Wesleyan's peer institutions. See, e.g., N. Horton, "Traditional Single-Sex Fraternities on College Campuses: Will They Survive in the 1990s?," 18 J.C. & U.L. 419, 422 and n.8 (1992).

Co., 440 F. Supp. 630, 633 (E.D. Wis. 1977); cf. *United States* v. *Colgate & Co.*, 250 U.S. 300, 307, 39 S. Ct. 465, 63 L. Ed. 992 (1919) ("The trader or manufacturer . . . carries on an entirely private business, and can sell to whom he pleases. . . . A retail dealer has the unquestioned right to stop dealing with a wholesaler for reasons sufficient to himself . . . ." (Citation omitted; internal quotation marks omitted.)).

What this means is that, if the plaintiffs have any enforceable rights, those rights are grounded, first and foremost, in the parties' contracts. Unfortunately for the plaintiffs, the contracts to which they agreed afford them little recourse in the event that Wesleyan decides not to renew DKE's eligibility for program housing. Both Kent and DKE were signatories to the fraternity's Greek Organization Standards Agreement with Wesleyan, and the university placed students in the DKE House pursuant to the housing contract to which each Wesleyan student accedes. By entering into that agreement, Kent necessarily accepted that its ability to lease its property to Wesleyan students under the auspices of the university's official program housing system could be curtailed at Wesleyan's sole discretion. Just as Kent may freely decide each academic year whether it wishes to continue to rent to Wesleyan students, and DKE may elect whether it wishes to participate as a program housing option, Wesleyan is free to choose, with thirty days' notice and for any reason not prohibited by law, *not* to offer DKE as a program housing option and *not* to permit its students to rent from an outside party such as Kent. Many institutions of higher learning make precisely those choices each academic year.

Of course, the plaintiffs could have brought this case in contract, alleging that Wesleyan breached, or seeking enforcement of, the Greek Organization Standards Agreement. But, importantly, they brought no such claim. Indeed, the plaintiffs repeatedly and expressly

have eschewed any claims sounding in breach of contract. For instance, they do not contend that Wesleyan's conduct had the legal effect of extending the agreement from a one year term to a three year term, waiving Wesleyan's right to terminate the agreement without cause upon thirty days' notice, or otherwise modifying the agreement.[10]

The plaintiffs' legal theories and the decision of the trial court, rather, are largely predicated on the contention that Wesleyan's allegedly deceptive and misleading conduct was *independently tortious*. The plaintiffs further contend that Wesleyan's conduct gave rise to a separate, supra-contractual, but enforceable, obligation for Wesleyan to continue to conduct business with Kent and to assign students to live in the DKE House.

Undoubtedly, it is possible, under certain limited circumstances, to commit a tort or an unfair trade practice in the context of exercising one's legitimate contractual rights. This may happen, for example, if one party negotiates in bad faith so as to cause the other party reasonably to rely on a false belief that an annual contract will be renewed or extended. To this limited degree, the plaintiffs' claims are cognizable.

Nevertheless, under such circumstances, a party generally cannot recover more in tort than it would have been entitled to recover under the contract. In the present case, the terms of the parties' contract substantially

[10] It is noteworthy in this respect that the other residential fraternities, Psi Upsilon and Alpha Delta Phi, which, the plaintiffs contend, received preferential treatment from the university, have continued to enter into Greek Organization Standards Agreements that are freely terminable by either party without cause. There is no indication, then, that Wesleyan's public commitment to support coeducation of the residential fraternities over a three year period has been interpreted as a modification of its contractual rights under the agreement.

limit the scope of Wesleyan's potential liability in tort, as well as the availability of injunctive relief. Prior to September 22, 2014, when Roth first announced Wesleyan's new coeducation policy, the plaintiffs could not, as a matter of law, have held any reasonable expectation that they would be able to insist on continuing to do business with Wesleyan after the end of the 2014–2015 academic year upon the expiration of the Greek Organization Standards Agreement that was then in place between the parties. Further, on February 13, 2015, Wesleyan notified the plaintiffs that it was terminating the parties' contract, effective as of June 18, 2015, the end of the 2014–2015 academic year. By implication, this meant that Wesleyan would not be placing any students in the DKE House during the 2015–2016 academic year. From that time forward, the plaintiffs also could not, as a matter of law, have held any reasonable expectation that they would be able to insist on continuing to do business with Wesleyan, in light of the fact that Kent and DKE's right to house Wesleyan students was grounded entirely in, and limited by, the terms of the Greek Organization Standards Agreement, to which they repeatedly had assented. Wesleyan's potential liability, then, extends only so far as they made misrepresentations regarding the renewal or extension of the contract or otherwise bargained in bad faith between September 22, 2014, and February 13, 2015 (the negotiation period). Kent's potential recovery is likewise limited to any documented costs it accrued during that negotiation period in reliance on Wesleyan's alleged misrepresentations. To the extent that the jury was not instructed accordingly and the damages awarded exceeded those that were proven to occur during the negotiation period in detrimental reliance on Wesleyan's alleged misrepresentations or bad faith conduct, the judgment is not sustainable.

III

PROMISSORY ESTOPPEL AND CUTPA INSTRUCTIONS

The defendants' central argument throughout the course of this litigation has been that the parties' Greek Organization Standards Agreement essentially immunizes the university against the plaintiffs' various legal claims. Although a jury instruction on that subject might well have been appropriate as to each of the plaintiffs' four causes of action, the defendants asked the trial court to instruct the jury that the parties' contract barred liability only with respect to the plaintiffs' promissory estoppel and CUTPA claims. Accordingly, we will limit our consideration of the issue to those two causes of action. We conclude that, although the jury instructions that the defendants sought at trial overstated the extent to which the agreement shields Wesleyan from liability, the trial court should have instructed the jury as to the legal import of the agreement. Its failure to do so was reversible error.

A

Procedural History

The following additional procedural history is relevant. Throughout the course of this litigation, the defendants have argued that the agreement shields them from any liability in connection with the plaintiffs' various claims. At the outset, the defendants pleaded seven special defenses, the first of which was that the "[p]laintiffs' claims are barred by the terms of the Greek Organization Standards Agreement, pursuant to which Wesleyan had the right to terminate the [a]greement [upon] thirty [days'] written notice for any reason." Subsequently, in their motion for summary judgment, the defendants argued that all of the "[p]laintiffs' claims fail as matter of law because they are barred by the

plain and unambiguous language of the parties' express contracts."

In their amended request to charge, the defendants sought the following jury instructions consistent with that position:

"6. Connecticut Unfair Trade Practices Act—Conduct Consistent with Contract Terms.

"In determining whether there was an unfair act or practice, you must take into account the parties' written contracts, including the housing contract and the Greek Organization Standards Agreement . . . . When a party acts consistently with its rights under a contract, its conduct cannot violate CUTPA.

* * *

"8. Promissory Estoppel—Effect of Written Contract.

"The plaintiffs also allege claims based on the legal principle known as promissory estoppel. The principle of promissory estoppel applies only when there is no enforceable contract between the parties. A party cannot prevail on a claim for promissory estoppel based on alleged promises that contradict the terms of a written contract.

* * *

"20. Effect of Parties' Written Contracts.

"As a special defense to the plaintiffs' CUTPA claims, the defendants contend that they acted consistently with the terms of the parties' two written contracts—the housing contract and Greek Organization Standards Agreement . . . . In particular, the defendants point to the following:

* * *

"[T]he [Greek Organization] Standards Agreement allows the parties to terminate upon thirty [days'] prior

written notice to the other party for any reason. I will instruct you that the ordinary meaning of the language 'any reason' is that the parties may terminate for cause; for no cause; or for a reason that may be considered morally indefensible.

"It is not your function to remake the parties' contracts or to change the terms thereof. You must determine the intent of the parties from the contracts that the parties themselves made and apply the terms of those contracts according to their ordinary meaning. If you find that the defendants acted consistently with the ordinary terms of the parties' contracts, then you must return a verdict in favor of the defendants with respect to the plaintiffs' CUTPA claims." (Citations omitted.)

The trial court declined to give the requested instructions and, indeed, gave no instructions whatsoever as to the defendants' first affirmative defense or the legal significance of the Greek Organization Standards Agreement. The defendants took exception to the court's charge, consistent with their requested instructions.

B

Legal Standards

"The standard of review for claims of instructional impropriety is well established. [I]ndividual jury instructions should not be judged in artificial isolation [but must be viewed in the context of the overall charge] . . . . The pertinent test is whether the charge, read in its entirety, fairly presents the case to the jury in such a way that injustice is not done to either party under the established rules of law. . . . Thus, [t]he whole charge must be considered from the standpoint of its effect on the [jurors] in guiding them to the proper verdict . . . and not critically dissected in a microscopic search for possible error." (Internal quotation

marks omitted.) *Kos* v. *Lawrence + Memorial Hospital*, 334 Conn. 823, 837–38, 225 A.3d 261 (2020). In other words, we must "consider whether the instructions [in totality] are sufficiently correct in law, adapted to the issues and ample for the guidance of the jury." (Internal quotation marks omitted.) *Potter* v. *Chicago Pneumatic Tool Co.*, 241 Conn. 199, 239–40, 694 A.2d 1319 (1997). "A challenge to the validity of jury instructions presents a question of law over which [we have] plenary review." *Pickering* v. *Rankin-Carle*, 103 Conn. App. 11, 14, 926 A.2d 1065 (2007).

With respect to situations in which the challenged instruction failed to address important legal principles but the instruction that the appellant had requested also was not a completely accurate statement of the relevant law, we have offered the following guidance: "As a rule, to entitle a party to a new trial for the refusal of the court to charge as requested, the request should be so framed that the court can properly comply with it. . . . [However] there should be an exception when the request relates to a material and important feature of the case concerning which it is clearly the duty of the court to instruct the jury irrespective of the request. If in such cases the court not only refuses to instruct them as requested, but entirely omits all reference to the subject, thereby leaving the jury to have, and to act [on], erroneous impressions of the law, we think the party is entitled to a new trial, notwithstanding the imperfect manner of making the request." (Internal quotation marks omitted.) *Mei* v. *Alterman Transport Lines, Inc.*, 159 Conn. 307, 311, 268 A.2d 639 (1970); see also *Mack* v. *Clinch*, 166 Conn. 295, 297, 348 A.2d 669 (1974) ("[W]e [are not] limited to the specific question of whether the defendant's request to charge should have been granted. Having been informed of a material and important issue by the request, it was the duty of the court to charge correctly on that subject."). As we

discuss more fully hereinafter, although the actual instructions that the defendants sought in the present case overstated the extent of their contractual protections, it is clear that the legal significance of the Greek Organization Standards Agreement that governed the parties' relationship was of sufficient import to the plaintiffs' promissory estoppel and CUTPA causes of action that the trial court was obliged to instruct the jury thereon.

C

Instructions Relating to Promissory Estoppel Claim

With these principles in mind, we turn to the defendants' central claim, namely, that the jury should have been instructed that the fact that Wesleyan was contractually permitted to terminate its relationship with DKE and Kent for any reason upon thirty days' notice means that it could not be held liable under a theory of promissory estoppel or under CUTPA for having exercised that contractual right, regardless of the manner in which it chose to do so. We begin with promissory estoppel.

To prevail in a cause of action sounding in promissory estoppel, a plaintiff must convince the jury that (1) the promisor has failed to honor a clear and definite promise that (2) the promisor reasonably should expect to induce detrimental action or forbearance on the part of the promisee or a third person, and (3) the promise does, in fact, induce detrimental action or forbearance in reasonable reliance on the promise. See, e.g., *D'Ulisse-Cupo* v. *Board of Directors of Notre Dame High School*, 202 Conn. 206, 213, 520 A.2d 217 (1987). The trial court also must find, as a matter of law, that injustice can be avoided only by enforcement of the promise. See id.; 1 Restatement (Second), Contracts § 90 (1), p. 242 (1981); see also "From the Committee on Standard Civil Jury Instructions," 78 Mich. B.J. 352, 354 (1999) (majority view is that whether injustice can be avoided

only by enforcement of promise is equitable question that should be determined by trial court as matter of law). The trial court's charge to the jury in the present case was accurate, as far as it went, insofar as it was consistent with these principles.[11]

The extent to which liability under the doctrine of promissory estoppel is precluded by the existence of a contract between the parties also is well established. As a general matter, "[w]hen an enforceable contract exists . . . parties cannot assert a claim for promissory estoppel [on the basis of] alleged promises that contradict the written contract. . . . Put differently, a plaintiff cannot use the theor[y] of promissory estoppel . . . to add terms to [a] contract that are entirely inconsistent with those expressly stated in it." (Citation omitted; internal quotation marks omitted.) *Marino* v. *Guilford Specialty Group, Inc.*, Docket No. 3:14CV705 (AVC), 2015 WL 1442749, *8 (D. Conn. March 27, 2015); see also *In re Pilgrim's Pride Corp.*, 706 F.3d 636, 641 (5th Cir. 2013) (it is unreasonable to rely on alleged promise that purports to extend duration of written contract); *Kuwaiti Danish Computer Co.* v. *Digital Equipment Corp.*, 438 Mass. 459, 468, 781 N.E.2d 787 (2003) (concluding that "[r]eliance on any statement or conduct . . . was unreasonable as a matter of law [insofar as] it conflicted with the qualifying language [in a written document]").

Consistent with these principles, the defendants asked the trial court to charge the jury that "[a] party

[11] The court instructed the jury as follows: "The plaintiffs claim that they are entitled to recover based upon a legal principle known as promissory estoppel. For you to find for the plaintiffs under this legal principle, the plaintiffs must establish that (1) the defendants made clear and unambiguous promises, (2) the defendants reasonably should have expected the plaintiffs to take acts in reliance on those promises, (3) the plaintiffs reasonably acted based upon those promises, and (4) enforcement of that promise is the only way to avoid injustice to the plaintiffs."

cannot prevail on a claim for promissory estoppel based on alleged promises that contradict the terms of a written contract." Because the relationship between the parties was governed by a written contract that allowed the university to terminate its arrangement with the plaintiffs without cause upon thirty days' notice and the plaintiffs' claims revolved around the contention that Wesleyan wrongly terminated its housing arrangement with them, the defendants were entitled to such an instruction.

We are not persuaded, however, that the trial court was obliged to give the entire promissory estoppel charge sought by the defendants. The defendants also asked the court to instruct the jury that "[t]he principle of promissory estoppel applies only when there is no enforceable contract between the parties." That is not strictly the law. The existence of a contract does not create an absolute bar to a promissory estoppel claim when that claim addresses aspects of the parties' relationship that are collateral to the subject matter, and does not directly vary or contradict the terms, of the written agreement. See, e.g., *Weiss* v. *Smulders*, 313 Conn. 227, 248–53, 96 A.3d 1175 (2014); see also *Sparton Technology, Inc.* v. *Util-Link, LLC*, 248 Fed. Appx. 684, 690 (6th Cir. 2007), cert. denied, 552 U.S. 1295, 128 S. Ct. 1739, 170 L. Ed. 2d 539 (2008).

In the present case, the plaintiffs arguably made such claims, namely, that Wesleyan promised DKE that, if it took good faith steps to develop a viable residential coeducation plan, it could then remain eligible to participate in program housing under the new policy. As we explain more fully in part III E of this opinion, the plaintiffs' promissory estoppel claim is cognizable, then, but only insofar as they allege that Wesleyan made promises and commitments that did not alter or contradict the terms of the Greek Organization Standards

Agreement. The trial court should have instructed the jury accordingly.

As we noted, when a proposed charge is largely accurate but either contains inaccurate statements of the law or omits relevant legal principles, the trial court is obliged to accurately instruct the jury on the subject matter of the proposed instruction if the instruction speaks to a material and important feature of the case. There is no doubt that that is true in the present case, as the significance of the Greek Organization Standards Agreement is a central issue and has been the defendants' primary legal defense from the outset.

D

Instructions Relating to CUTPA Claim

For similar reasons, we conclude that the trial court should have instructed the jury as to the legal implications of the parties' contract for the plaintiffs' CUTPA claim, and that its failure to do so entitles the defendants to a new trial on that count. General Statutes § 42-110b (a) provides that "[n]o person shall engage in unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce." Accordingly, to prevail in a private cause of action under CUTPA, a plaintiff must establish that the defendant has (1) engaged in unfair methods of competition or unfair or deceptive acts or practices (2) in the conduct of any trade or commerce,[12] (3) resulting in (4) an ascertainable loss of money or property, real or personal, by the plaintiff. See, e.g., *Abrahams* v. *Young & Rubicam, Inc.*, 240 Conn. 300, 306–307, 692 A.2d 709 (1997). See generally R. Langer et al., 12 Connecticut Practice

[12] Because the issue has not been raised, we express no opinion as to whether the provision of student housing by a private university such as Wesleyan is performed in the conduct of its trade or commerce for purposes of CUTPA or is so peripheral to its central educational mission as to fall outside CUTPA's purview.

Series: Connecticut Unfair Trade Practices, Business Torts and Antitrust (2020–2021 Ed.) §§ 2.1 through 2.9, pp. 13–111.

Once again, the defendants requested a legally valid instruction—in this case that the jury must take the parties' written contracts into account in deciding whether there was an unfair act or practice—but their proposed instruction overstated the protection that those contracts conferred. Although action in accordance with a party's express rights under a contract ordinarily is shielded from CUTPA liability, liability may attach when, for example, the defendant has acted in bad faith with respect to the contract. 12 R. Langer et al., supra, § 4.3, pp. 423–24, 452–54; see, e.g., *Levitz, Lyons & Kesselman* v. *Reardon Law Firm, P.C.*, Docket No. 3:04cv00870 (JBA), 2005 WL 8166987, *5 (D. Conn. March 31, 2005) (allegations of bad faith efforts to impose modifications to existing contract implicate CUTPA). As was the case with respect to promissory estoppel, the trial court was required to instruct the jury fully and accurately as to the significance of the Greek Organization Standards Agreement in connection with the plaintiffs' CUTPA claim.

E

Wesleyan's Contractual Special Defense

Although the trial court did not specify its reasons for declining to give the defendants' requested instructions, we may assume that the reasons are similar to that on the basis of which the court denied the defendants' pretrial and posttrial motions, namely, that the Greek Organization Standards Agreement did not shield the university from liability. The court reasoned that the plaintiffs' claims were predicated not on an alleged breach of the contract or on Wesleyan's allegedly improper motives for terminating the agreement but, rather, on allegations that Wesleyan misled the plaintiffs

as to the standards that they would have to meet in order to remain in program housing. The court concluded therefrom that all of the plaintiffs' claims were legally viable, including their claims alleging that Wesleyan had made an enforceable promise that the plaintiffs could remain in program housing for three years while they worked to coeducate the DKE House.

Although the general premises underlying the trial court's reasoning may be true, the conclusion does not follow. Wesleyan had the right, under the parties' contract, to remove DKE from program housing at any time upon thirty days' notice. Wesleyan was free to make that decision for reasons of student safety and gender equity; on the basis of concerns—whether founded or unfounded—that DKE members had engaged or would engage in inappropriate conduct; out of a desire to try to acquire the DKE House; due to Roth's distrust of or inability to work with DKE members or alumni; or for any other reason not prohibited by law. Nor were Roth and other representatives of the university under any *legal* obligation to share with the plaintiffs and the Wesleyan community all of their true reasons and motivations for deciding to part ways with DKE. That is the contract to which the plaintiffs agreed, and the law shall not hear them to complain if Wesleyan chose to exercise its contractual rights in a manner that they did not anticipate or welcome.

It follows that the plaintiffs, having expressly eschewed any claim that Wesleyan modified the one year term of the Greek Organization Standards Agreement, waived any rights thereunder, or breached the provision of the agreement that requires consistent treatment of the various residential fraternities, have no legal grounds for contesting Wesleyan's unilateral decision not to readmit DKE into program housing for the 2015–2016 academic year. Accordingly, in light of the parties' contract, the plaintiffs could not, as a matter

of law, reasonably have relied on any perceived extra-contractual promise or representation by Wesleyan that their participation in program housing would not be terminated until at least 2018. The jury should have been instructed accordingly.

At the same time, however, as we have explained, the contract does not immunize Wesleyan from the plaintiffs' claims that the university acted in bad faith in the process of *renegotiating* the Greek Organization Standards Agreement for the 2015–2016 academic year. Those claims arise from a novel and distinct question, namely, what coeducation benchmarks the fraternity would have to satisfy in order to remain potentially eligible for participation in program housing beyond 2015. The jury reasonably could have found that that issue was collateral to the 2014–2015 contract. Because the trial court failed to give the jury sufficient guidance as to a central legal issue, the defendants are entitled to a new trial.

IV

TORTIOUS INTERFERENCE AND NEGLIGENT MISREPRESENTATION INSTRUCTIONS

We next turn our attention to the plaintiffs' tortious interference with business expectancies and negligent misrepresentation claims, and, specifically, the question of whether the trial court correctly instructed the jury with respect to damages. Because the jury was not asked to specify the legal theory pursuant to which it awarded damages to Kent, we must assume, in accordance with the general verdict rule, that the $386,000 in unspecified damages could have been awarded on the basis of any of the plaintiffs' four causes of action. See, e.g., *Goodman* v. *Metallic Ladder Mfg. Corp.*, 181 Conn. 62, 65, 434 A.2d 324 (1980) ("[when] a complaint is divided into separate counts and a general verdict is returned, it will be presumed, if the charge and all

rulings are correct on any count, that damages were assessed as to that count and the verdict will be sustained" (internal quotation marks omitted)). We have concluded that a retrial is necessary on the promissory estoppel and CUTPA counts, and, therefore, any award of damages pursuant to those causes of action must be vacated. See part III of this opinion. In this part, we consider whether the jury's damages award can be sustained with respect to tortious interference or negligent misrepresentation.

The following additional procedural history is relevant to the defendants' claim that the trial court failed to instruct the jury correctly as to the law of damages. In their amended request to charge, the defendants sought the following jury instructions:

"16. Damages—Lost Profits.

"With respect to its claim for tortious interference, [Kent] seeks damages for rents that it allegedly would have earned from DKE House. In determining the amount of any damages you award in this respect, you must account for the costs that [Kent] would have incurred in connection with renting DKE House to undergraduate students. [Kent] may only recover damages in an amount equal to the money that it would have earned from renting DKE House, after subtracting the costs it would have incurred in doing so.

"You must also keep in mind that the [Greek Organization] Standards Agreement . . . had a one year term and permitted the parties to terminate upon thirty days' notice for any reason. Wesleyan terminated the [Greek Organization] Standards Agreement on February 13, 2015, effective June 18, 2015. Accordingly, [Kent's] damages are limited to the lesser of its net profits for the (i) thirty day period following termination on February 13, 2015; or (ii) remainder of the one year term covering the time period of February 13, 2015, to June 18, 2015.

* * *

"17. Damages—Reliance.

"With respect to the plaintiffs' negligent misrepresentation claims, any damages you award should compensate the plaintiffs for losses incurred as a result of relying on the defendants' alleged representations. In other words, the amount awarded should put the plaintiffs in a position they would have been had they not relied on the representations. The plaintiffs must establish the fair and reasonable value of any loss sustained as a result of said reliance." (Citations omitted.)

The trial court declined to give the proposed instructions or to instruct the jury separately as to the different categories of damages that are available under the plaintiffs' various legal theories. Instead, the court gave the following general damages instructions: "The rule of damages is as follows. Insofar as money can do it, the plaintiff is to receive fair, just and reasonable compensation for all losses which are proximately caused by the defendants' conduct. Under this rule, the purpose of an award of damages is not to punish or penalize the defendants for their conduct but to compensate the plaintiff for his resulting losses. You must attempt to put the plaintiff in the same position, as far as money can do it, that he would have been in had the defendant not so acted.

"Our laws impose certain rules to govern the award of damages in any case where liability is proven. Just as the plaintiff has the burden of proving liability by a fair preponderance of the evidence, he has the burden of proving his entitlement to recover damages by a fair preponderance of the evidence. To that end, the plaintiff must prove both the nature and extent of each particular loss for which he seeks to recover damages and that the loss in question was proximately caused by the defendant's conduct. You may not guess or speculate

as to the nature or extent of the plaintiff's losses. Your decision must be based on reasonable probabilities in light of the evidence presented at trial.

"Once the plaintiff has proved the nature and extent of his compensable losses, it becomes your job to determine what is fair, just and reasonable compensation for those losses.

* * *

"If you find that a party is entitled to damages, that party must prove by a preponderance of the evidence the amount of any damages to be awarded. The evidence must give you a sufficient basis to estimate the amount of damages to a reasonable certainty. Although damages may be based on reasonable and probable estimates, you may not award damages on the basis of guess, speculation or conjecture."[13]

The jury, having found for the plaintiffs on all counts, awarded Kent unspecified damages of $386,000. During closing arguments, the plaintiffs' counsel asked the jury to award damages to compensate Kent for its lost revenues following the 2014–2015 academic year as a result of Wesleyan's termination of the Greek Organization Standards Agreement, as well as for Kent's costs of having to maintain the uninhabited DKE House since June, 2015. The undisputed testimony of Kent's treasurers as to those losses, which counsel reiterated in closing, was that Kent lost potential gross revenues of $216,000 in the 2015–2016 academic year, and that its costs to maintain the empty DKE House was $170,000 in 2016–2017. The most plausible reading of the trial record, then, is that the jury combined those figures for a total of $386,000. In any event, the plaintiffs failed to proffer any evidence from which the jury could have

[13] The court also instructed the jury regarding mitigation of damages and the rule against double recovery of damages.

calculated damages of that magnitude occurring prior to June, 2015.

A

Tortious Interference

Turning our attention first to the tortious interference count, we note that the defendants contend that any damages (1) should be assessed in terms of net profits and (2) must be cabined by the limited liability available under the parties' contract. The plaintiffs respond that the general damages instructions that the court gave provided the jury with sufficient guidance. We agree with the defendants.

1

Although other types of damages may be available under appropriate circumstances; see 4 Restatement (Second), Torts § 774A (1), pp. 54–55 (1979); the standard method for calculating damages when a defendant has interfered with a plaintiff's ability to enter into a prospective contract or to reap the benefits of an existing contract is the plaintiff's lost profits, "[t]hat is, what its income *above expenses* would have been with respect to the revenue lost." (Emphasis added; internal quotation marks omitted.) *Hi-Ho Tower, Inc.* v. *Com-Tronics, Inc.*, 255 Conn. 20, 29, 761 A.2d 1268 (2000); see also 4 Restatement (Second), Torts, supra, § 774A, comment (b), p. 55. In the present case, at no time did the trial court instruct the jury that it must subtract Kent's expenses from its anticipated lost revenues in order to calculate the lost profits. There was undisputed testimony from Kent's officers that Kent was running the DKE House on a more or less break even basis, with little or no net profit. Yet, as we have discussed, the most reasonable reading of the damages award is that the jury awarded Kent compensation that included Kent's total anticipated lost *revenues* for the 2015–2016

academic year. Accordingly, we are compelled to conclude that the trial court's failure to instruct the jury as to the proper method of calculating tortious interference damages resulted in an improper award.[14]

2

We also agree with the defendants that, whether as a matter of damages or of liability, the trial court should have instructed the jury that the Greek Organization Standards Agreement limited the defendants' potential exposure to only those losses—if any—that Kent incurred prior to the expiration of that contract on June 18, 2015. It is the prevailing view that a defendant cannot be held liable in tortious interference merely for exercising its legitimate contractual rights, regardless of its motive therefor. See, e.g., *Omega Environmental, Inc.* v. *Gilbarco, Inc.*, 127 F.3d 1157, 1166 (9th Cir. 1997) (under Washington law, equipment manufacturer could not be held liable for tortious interference with business relations when manufacturer merely exercised express

[14] We do not mean to suggest that Kent's compensable injuries necessarily were limited to its lost profits. For example, if Kent was responsible for fixed costs, such as building maintenance, insurance, and property taxes for the DKE House, which costs Kent was required to continue to shoulder regardless of whether the house was occupied by paying students, then those costs also were compensable losses. See, e.g., *Hi-Shear Technology Corp.* v. *United States*, 53 Fed. Cl. 420, 444 (2002), aff'd, 356 F.3d 1372 (Fed. Cir. 2004). One would assume, however, that a not insignificant portion of the lost rent would have gone to cover variable costs such as janitorial services, utilities, and the provision of food for the students. The jury should have been instructed that lost revenues that merely would have offset those sorts of variable costs, which Kent did not have to pay while the DKE House sat empty, were not available as damages. To the extent that the jury calculated benefit of the bargain losses using estimates of Kent's lost *gross revenues* for certain years, that was not a valid method of calculating damages because the jury failed to subtract costs that Kent saved as a result of not doing business with Wesleyan. Hypothetically, then, if Kent had spent $50,000 providing food for student residents of the DKE House, and Kent's gross revenues included $50,000 that the students paid to Kent to cover the costs of providing that food, Kent would not be entitled to recover that unspent $50,000 as expectation damages.

contractual right to cancel distribution agreement), cert. denied, 525 U.S. 812, 119 S. Ct. 46, 142 L. Ed. 2d 36 (1998); *Allen* v. *Oil Shale Corp.*, 570 F.2d 154, 155 (6th Cir. 1978) (trial court properly directed verdict for defendant when petroleum supply contracts were terminable by either party at will); *Hendler* v. *Cuneo Eastern Press, Inc.*, 279 F.2d 181, 184 (2d Cir. 1960) (protection of contractual right in defendant ordinarily justifies interference with another's contract); *Mac Enterprises, Inc.* v. *Del E. Webb Development Co.*, 132 Ariz. 331, 336, 645 P.2d 1245 (App. 1982) (lessor had right to cancel lease of primary tenant and, therefore, was not subject to damages for tortious interference of contract between primary lessee and sublessee); *Florida Telephone Corp.* v. *Essig*, 468 So. 2d 543, 544–45 (Fla. App. 1985) (when contract expressly reserved to defendant right to promptly remove subcontractors' employees from job, defendant was privileged to interfere with subcontractor's relationship with general contractor, regardless of motive); Annot., "Liability for Procuring Breach of Contract," 26 A.L.R.2d 1227, 1259, § 23 (1952) (unqualified contractual right or privilege can be exercised, regardless of motive, without incurring liability).[15]

[15] Should the issue arise on remand, we note that the defendants, had they sought one, also would have been entitled to an instruction as to the significant limits that the Greek Organization Standards Agreement placed on Wesleyan's potential liability for tortious interference with the plaintiffs' business expectancies. See part IV of this opinion. Because the issue has not been raised, we need not determine whether the trial court's charge as to the law of tortious interference also was defective because it failed to instruct the jury that, as a general matter, to be liable for tortious interference with business expectancies, a defendant must be an outsider to the business relationship at issue. That is to say, a person cannot tortiously interfere with a contractual arrangement, existing or anticipated, to which the person is a party. See, e.g., *Metcoff* v. *Lebovics*, 123 Conn. App. 512, 520, 2 A.3d 942 (2010); see also *Bai Haiyan* v. *Hamden Public Schools*, 875 F. Supp. 2d 109, 134 (D. Conn. 2012) (under Connecticut law, "[t]here can be no intentional interference with contractual relations by someone who is directly *or indirectly* a party to the contract" (emphasis added; internal quotation marks omitted)).

Moreover, the plaintiffs were entitled to recover only those damages that were the direct result of the defendants' tortious interference with their reasonable business expectancies. To prevail on such a claim, "it [must] appear that, except for the tortious interference of the defendant, there was a reasonable probability that the plaintiff would have entered into a contract or made a profit. . . . There must be some certainty that the plaintiff would have gotten the contract but for the fraud." (Citations omitted; internal quotation marks omitted.) *Goldman* v. *Feinberg*, 130 Conn. 671, 675, 37 A.2d 355 (1944); see also *Golembeski* v. *Metichewan Grange No. 190*, 20 Conn. App. 699, 703, 569 A.2d 1157 ("[s]tated simply, to substantiate a claim of tortious interference with a business expectancy, there must be evidence that the interference *resulted from* the defendant's commission of a tort" (emphasis added)), cert. denied, 214 Conn. 809, 573 A.2d 320 (1990).

In the present case, the plaintiffs' claims are predicated on the allegation that Wesleyan had no intention of ever renewing its contract with them. Accordingly, even if Wesleyan had engaged in no misleading or otherwise tortious conduct, and had simply exercised its contractual right to terminate the Greek Organization Standards Agreement in a transparent and straightforward manner, the plaintiffs would have been in no better position with respect to their *future* contractual relations with Wesleyan students after June 18, 2015. Kent could not have harbored any reasonable expectation that Wesleyan would continue to bless and facilitate its business with DKE members after that time. Accordingly, damages, if any were incurred, were available to compensate Kent for interference with its rights only under the 2014–2015 contract.

For all of these reasons, we conclude that the trial court's failure to correctly instruct the jury as to the law governing the damages that a plaintiff may recover

for tortious interference with its business expectancies requires a retrial on that count. See, e.g., *Herrera* v. *Madrak*, 58 Conn. App. 320, 326, 752 A.2d 1161 (2000) ("[t]he general rule is that [t]he decision to retain the jury verdict on the issue of liability and order a rehearing to determine only the issue of damages should never be made unless the court can clearly see that this is the way of doing justice in [a] case" (internal quotation marks omitted)).

B

Negligent Misrepresentation

At trial, the defendants also sought an instruction that, with respect to the plaintiffs' negligent misrepresentation claim, any damages awarded should be limited to those necessary to compensate the plaintiffs for losses incurred as a result of relying on the defendants' alleged representations. Although the defendants do not expressly reference this instruction in their brief to this court, they make essentially the same argument on appeal in contending that there was insufficient evidence of detrimental reliance to sustain the jury's verdict on the plaintiffs' negligent misrepresentation claim. For the sake of expediency, we address the defendants' claim in the context of the trial court's jury instructions rather than as a challenge to the sufficiency of the evidence.

As a general matter, the damages available to a plaintiff in connection with a claim for negligent misrepresentation are measured by the plaintiff's costs incurred in reliance on the defendant's misstatements and false promises, rather than by the profits that the plaintiffs hoped to accrue therefrom. See 3 Restatement (Second), Torts § 552B (1) (b) and (2), p. 140 (1977) (plaintiff may recover for pecuniary loss sustained in reliance on negligent misrepresentation but recovery does not encompass benefit of plaintiff's contract with defen-

dant);[16] see also *Bailey Employment System, Inc.* v. *Hahn*, 545 F. Supp. 62, 73 and n.10 (D. Conn. 1982) (restitution is appropriate measure of damages with respect to CUTPA claim predicated on theory of misrepresentation), aff'd mem., 723 F.2d 895 (2d Cir. 1983), and aff'd mem. sub nom. *Hahn* v. *Leighton*, 723 F.2d 895 (2d Cir. 1983); *Glazer* v. *Dress Barn, Inc.*, 274 Conn. 33, 78, 873 A.2d 929 (2005) (damages in negligent misrepresentation action are limited to pecuniary losses caused by justifiable reliance on information at issue); *New London County Mutual Ins. Co.* v. *Sielski*, 159 Conn. App. 650, 662, 123 A.3d 925 (indicating that Connecticut has adopted § 552B of the Restatement (Second) of Torts), cert. granted, 319 Conn. 956, 125 A.3d 533 (2015) (appeal withdrawn June 29, 2016); *Bokma Farms, Inc.* v. *State*, 302 Mont. 321, 325, 14 P.3d 1199 (2000) (loss of anticipated profits was not recoverable because it resulted from lack of enforceable contract, rather than from plaintiff's reliance on defendant's negligent misrepresentations).

In the present case, although the plaintiffs testified that they had relied to their detriment on Wesleyan's alleged misrepresentations, such as by hiring an architect and otherwise preparing for coeducation of the DKE House, they made no attempt to quantify those costs. Rather, it is apparent that, in light of the evidence and arguments presented at trial, the jury's award of damages was intended to compensate Kent not for its reliance damages but, instead, for its expectation, or benefit of the bargain losses. Because the trial court failed to instruct the jury as to the proper measure of Kent's losses in connection with the plaintiffs' negligent

[16] We recognize that comment (b) to § 552B suggests that benefit of the bargain damages might be appropriate if a defendant engaged in fraudulent conduct. See 3 Restatement (Second), Torts, supra, § 552B, comment (b), p. 141. For present purposes, we need not determine the applicability or scope of that exception under Connecticut law because the plaintiffs did not allege fraud with respect to their negligent misrepresentation claim.

misrepresentation claim, a new trial is required on that claim as well.

V

SUFFICIENCY OF THE EVIDENCE

We next consider the defendants' claim that there was insufficient evidence for the jury to find the defendants liable under each of the plaintiffs' four causes of action.[17] Our resolution of the defendants' instructional error claims in parts III and IV of this opinion largely resolves this claim as well. Specifically, although the Greek Organization Standards Agreement substantially cabins the potential scope of Wesleyan's liability, as a matter of law, that agreement does not immunize Wesleyan against the plaintiffs' claim that it negotiated the renewal of the agreement in bad faith.[18] We conclude that there was sufficient evidence for the jury to have found the defendants liable to that limited extent.

At trial, the plaintiffs sought to establish, among other things, that, during the negotiation period, Wesleyan promised them that they would not have to coeducate at the membership level in order to remain eligible to participate in program housing and also that Wesleyan would work with them to develop a viable residential coeducation plan for the DKE House. They further

[17] We note that it is the usual practice of this court to address challenges to the sufficiency of the evidence before addressing claims of instructional error, because the former, if successful, generally will entitle the party asserting the evidentiary sufficiency challenge to judgment on the merits, rather than merely a new trial. See, e.g., *State* v. *Padua*, 273 Conn. 138, 178–79, 869 A.2d 192 (2005). Under the unique circumstances of the present case, however, addressing the instructional claims at the outset cuts the shorter path and does not prejudice the defendants.

[18] For the sake of brevity, and because the plaintiffs' various allegations largely overlap and cut across their four causes of action, we discuss the evidence in support of the jury's verdict in general terms, rather than with reference to each specific theory of liability. We express no view as to whether the plaintiffs may prevail at a new trial on their claim for tortious interference of business expectancies. See footnote 15 of this opinion.

sought to establish that Wesleyan—or at least Roth—never intended to keep any of those promises. Rather, the coeducation plan was, from the start, a pretext to conceal Wesleyan's true intentions, which allegedly were to completely eliminate the residential fraternities, to force Kent to sell the DKE House to Wesleyan, and/or to depopulate the DKE House due to Roth's personal dislike or distrust of DKE. Finally, the plaintiffs sought to establish that they had relied in various ways on Wesleyan's purported false promises and misrepresentations.

Although the plaintiffs' case was hardly overwhelming, construing the evidence in the light most favorable to sustaining the verdict, as we must, we are persuaded that there was sufficient evidence to establish those allegations. The discussion that follows is not a comprehensive list of all of the trial evidence in support of the plaintiffs' various allegations but, rather, merely some examples of the evidence on the basis of which the jury reasonably could have found in favor of the plaintiffs.

With respect to Wesleyan's alleged promises, several witnesses testified that, during a November 20, 2014 meeting, Whaley informed members and representatives of the plaintiffs that DKE would not be required to coeducate its membership in order to remain in program housing. Whaley further represented not only that Wesleyan would work with the plaintiffs to accomplish the residential coeducation of the DKE House, but also that the deadline to fully coeducate the house could be extended, even beyond the three years that Roth had announced, as long as the plaintiffs continued to make substantial progress toward that goal. There was further testimony that a second representative of the university, Wesleyan's vice president of development, Barbara Jan Wilson, offered similar commitments in an e-mail prior to that meeting.

In addition, in a January 21, 2015 e-mail to representatives of the plaintiffs, Whaley wrote that "Wesleyan is willing to consider DKE for 2015–2016 [p]rogram [h]ousing status if DKE is willing to execute [certain residential coeducation benchmarks] . . . . I stand ready to assist you in any reasonable way so that you can refine your plan to comply with our program housing requirements and remain in program housing for the coming academic year (2015–2016)."

During his trial testimony, Whaley arguably could be understood to acknowledge that Roth, too, had made promises of this sort to the plaintiffs. During Whaley's redirect examination, the plaintiffs' counsel asked him: "Well, when somebody gives their word, and they say you're going to have three years to implement it, you can—like in this case. The president said there's going to be three years to implement coeducation. You take that as a promise from the president, and . . . people could rely on that, right?" Whaley responded: "That was the timeframe that was outlined." Again, on redirect examination, the plaintiffs' counsel asked Whaley about Roth's original, September 22, 2014 coeducation announcement, in which Roth stated that "[t]he university looks forward to receiving plans from the residential fraternities to coeducate, after which it will work closely with them to make the transition as smooth as possible." Again, Whaley could be understood to recognize that the announcement represented a promise made by Roth to the Wesleyan community.

The record also contains evidence from which the jury reasonably could have concluded that those various promises were insincere and that Roth never intended to permit DKE to remain in the program housing system or to assist the fraternity in that process. On December 4, 2014, Whaley sent an e-mail to the plaintiffs reiterating that they could remain eligible for program housing even if they did not coeducate DKE

as an organization and admit women as full members. While Whaley was continuing to make those representations, however, Wesleying, the Wesleyan student blog, published an interview with Roth in which he appeared to contradict Whaley's promises. Roth was quoted as stating that "there won't be any single sex residential Greek organizations in five years. . . . [I]f they don't have . . . women as equal and full members, then they won't exist [as] residential organizations at Wesleyan." Roth was aware at the time that DKE's national organization barred local chapters from admitting women as members and, therefore, that, unless and until the national organization changed its policy to permit women members, as certain other fraternal organizations had, DKE would be unable to comply with the condition that he had articulated.

There also was evidence from which the jury reasonably could have found that Roth and Whaley were driven by a hostility toward Greek organizations and harbored a desire to eliminate all residential fraternities. Minutes of an April 22, 2014 meeting between the two men, for example, express the opinion that "eliminating Greek organizations would be ideal . . . ."

In addition, there was evidence from which the jury reasonably could have found that Roth was motivated by a personal dislike of DKE and the DKE House in particular. There was testimony that he repeatedly had complained about noise emanating from the house, which is situated directly across from his own residence in the center of the Wesleyan campus. Moreover, during direct examination, Roth acknowledged that, in the past, he was personally offended that certain DKE members had referred to him as a "fascist."[19]

[19] Roth testified: "I was offended to be called a fascist. But it's perfectly in their right . . . to call people names . . . as [it] is in our right not to approve such entities for housing our students."

Finally, there was evidence from which the jury reasonably could have found that Roth never intended to permit the plaintiffs to remain in program housing because he believed that curtailing their access to Wesleyan student renters and, thus, their cash flow, would force them to sell the DKE House to Wesleyan. In a July 17, 2014 memorandum to other Wesleyan administrators, Whaley discussed various options as to the future of residential Greek organizations at the university. One option he outlined was to restrict or terminate the Greek houses. Whaley wrote: "Wesleyan could offer to buy the houses . . . . If we then acquire Greek houses subsequently, we can divest of 100 beds in [dormitories] that are in poor condition—a good thing for the overall housing program!" One month later, on August 20, 2014, Roth wrote to Wesleyan's chairman of the board of trustees, Joshua Boger, that, "[i]f we don't make the [Greek] houses [off limits] to Wesleyan students for social uses, this will be a disaster. . . . If we don't close [down] the houses with the hopes of acquiring them, then we shouldn't go down this road at all." This evidence was consistent with testimony from various DKE alumni that Wesleyan administrators long had coveted the centrally located DKE property and recently had inquired as to whether the DKE House was for sale.

There also was evidence from which the jury could have determined that, during the negotiation period, the plaintiffs relied to their detriment on Wesleyan's false promises and misrepresentations. There was testimony, for example, that, after having been assured that they could remain eligible for program housing without coeducating at the membership level, the plaintiffs began to work with an architect to develop plans for the renovations that would be necessary to accommodate female residents.[20]

[20] Whether these allegations are sufficient to establish detrimental reliance or ascertainable/pecuniary loss under each of the plaintiffs' four causes of

We conclude, then, that there was sufficient evidence for the jury to have found that Wesleyan intentionally misled the plaintiffs during the negotiation period, leading them to reasonably rely on the university's representations that they could remain eligible for program housing if they agreed to coeducate the DKE House and simply submitted a bare-bones, preliminary residential coeducation plan, such as the one submitted by Psi Upsilon, when, in fact, Wesleyan was secretly determined to terminate its relationship with Kent in the hope of being able to acquire the DKE property. We do not suggest that this reading of the record is the most reasonable, or that we would have been persuaded to embrace the plaintiffs' theories if we had been the triers of fact. But we are not prepared to say that no reasonable jury, presented with this evidence, could have so found.[21]

action, in the absence of evidence that the plaintiffs compensated their architect financially or made any other financial outlays, is a very close question. At the very least, we think that a jury reasonably could have found that the ascertainable loss element of CUTPA was satisfied. See, e.g., *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 287 Conn. 208, 218–19, 947 A.2d 320 (2008) ("[A]scertainable loss . . . may be proven by establishing, through a reasonable inference, or otherwise, that the defendant's unfair trade practice has caused the plaintiff [injury]. . . . The fact that a plaintiff fails to prove a particular loss or the extent of the loss does not foreclose the plaintiff from obtaining injunctive relief and [attorney's] fees pursuant to CUTPA if the plaintiff is able to prove by a preponderance of the evidence that an unfair trade practice has occurred and a reasonable inference can be drawn by the trier of fact that the unfair trade practice has resulted in a loss to the plaintiff." (Emphasis omitted; internal quotation marks omitted.)); see also *Service Road Corp.* v. *Quinn*, 241 Conn. 630, 641–44, 698 A.2d 258 (1997) (trier of fact reasonably could have inferred that deployment of video cameras facing entrances to exotic dance clubs would have adversely impacted clubs' business so as to satisfy ascertainable loss element of CUTPA); *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 614, 440 A.2d 810 (1981) ("[u]nder CUTPA, there is no need to . . . prove the amount of the ascertainable loss").

[21] The defendants' arguments to the contrary notwithstanding, the plaintiffs' claims are not barred by the statute of frauds, insofar as the plaintiffs' eligibility to remain in program housing for the 2015–2016 academic year was a question that could be—and was—definitively resolved in less than one year following the public and private statements on which the plaintiffs

VI

ISSUES LIKELY TO ARISE ON REMAND

The defendants have raised various other claims of error. Although some of them need not be addressed at this time, in light of our disposition of the defendants' appeal, we offer brief guidance as to the following two issues, which may be expected to confront the trial court again on retrial: (1) whether the trial court properly instructed the jury as to certain other legal standards that govern a CUTPA claim, and (2) whether the trial court abused its discretion or acted contrary to law in issuing a mandatory injunction requiring that the parties reinstate and maintain their contractual relations for three additional years.

A

Unfair Trade Practices Standard

We first address the defendants' contention that the trial court improperly instructed the jury regarding the definition of unfair trade practices under CUTPA. Consistent with this court's precedent, the trial court instructed the jury that it should find that Wesleyan committed an unfair trade practice if Wesleyan's conduct violated the so-called cigarette rule. The defendants contend that, because the Federal Trade Commission (FTC) and the federal courts no longer apply the cigarette rule as the test governing unfair trade practice claims; see, e.g., *Soto* v. *Bushmaster Firearms International, LLC*, 331 Conn. 53, 123–24 n.46, 202 A.3d 262, cert. denied sub nom. *Remington Arms Co., LLC* v. *Soto*, U.S. , 140 S. Ct. 513, 205 L. Ed. 2d 317 (2019); Connecticut should follow suit and adopt the now prevailing federal standard, the substantial unjustified injury test. We take this opportunity to clarify that,

claim to have relied. See, e.g., *C. R. Klewin, Inc.* v. *Flagship Properties, Inc.*, 220 Conn. 569, 578, 600 A.2d 772 (1991).

until such time as the legislature chooses to enact a different standard, the cigarette rule remains the operative standard for unfair trade practice claims under CUTPA.

The historical context of this issue is as follows. "[I]n determining whether a practice violates CUTPA we have adopted the criteria [previously] set [forth] in the cigarette rule by the [FTC] for determining when a practice is unfair: (1) [w]hether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law, or otherwise—in other words, it is within at least the penumbra of some [common-law], statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; [or] (3) whether it causes substantial injury to consumers, [competitors or other businesspersons]." (Internal quotation marks omitted.) *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, 318 Conn. 847, 880, 124 A.3d 847 (2015). "[T]he cigarette rule . . . standard originated in a policy statement of the [FTC] issued more than one-half century ago . . . and rose to prominence when mentioned in a footnote in *Federal Trade Commission* v. *Sperry & Hutchinson Co.*, 405 U.S. 233, 244–45 n.5, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972). The decades since have seen a move away from the cigarette rule at the federal level. . . . That move culminated with a revision of the FTC Act by Congress in 1994, which codified the limitations on the FTC's authority to regulate unfair practices. . . . This court has characterized the federal standard for unfair trade practices contained therein as a more stringent test known as the substantial unjustified injury test, under which an act or practice is unfair [only] if it causes substantial injury, it is not outweighed by countervailing benefits to consumers or competition, and consumers themselves

could not reasonably have avoided it." (Citations omitted; internal quotation marks omitted.) *Soto* v. *Bushmaster Firearms International, LLC*, supra, 331 Conn. 123–24 n.46.

As the defendants correctly note, members of this court have, at times, indicated an openness to revisiting the question of whether to abandon the cigarette rule and to adopt the substantial unjustified injury test as the proper standard for unfair trade practices under CUTPA. See, e.g., *Naples* v. *Keystone Building & Development Corp.*, 295 Conn. 214, 238–39, 990 A.2d 326 (2010) (*Zarella, J.*, concurring). At the same time, notwithstanding the questions raised in those decisions, we consistently have continued to apply the cigarette rule as the law of Connecticut. E.g., *Landmark Investment Group, LLC* v. *CALCO Construction & Development Co.*, supra, 318 Conn. 880.

In *Artie's Auto Body, Inc.* v. *Hartford Fire Ins. Co.*, 317 Conn. 602, 119 A.3d 1139 (2015), we remarked that this court had observed ten years earlier that the cigarette rule is no longer the guiding rule under federal unfairness law but that, in the intervening decade, "the legislature ha[d] given no indication that it disapprove[d] of our continued use of the cigarette rule as the standard for determining unfairness under CUTPA, notwithstanding the federal courts' abandonment of that rule . . . ." Id., 622 n.13. In *Artie's Auto Body, Inc.*, we again flagged the issue for the legislature, stating that, "[b]ecause of the likelihood that this court will be required to address this issue in a future case . . . the legislature may wish to clarify its position with respect to the proper test." Id. Five additional years have passed since we issued that invitation, and, still, the legislature has given no indication that it is dissatisfied with our continued application of the more consumer friendly cigarette rule. Accordingly, there now is a powerful argument that the legislature has acqui-

esced in our ongoing application of that standard. See 12 R. Langer et al., supra, § 2.2, p. 60 (noting that one reason to retain cigarette rule standard is that this court "has applied the current standard for [twenty] years without legislative action to change the standard").

The contrary argument, that we should adopt the current federal standard for unfair trade practices, relies primarily on § 42-110b (b), which provides that "[i]t is the intent of the legislature that in construing subsection (a) of this section, the [C]ommissioner [of Consumer Protection] and the courts of this state shall be *guided by* interpretations given by the Federal Trade Commission and the federal courts to Section 5 (a) (1) of the Federal Trade Commission Act (15 [U.S.C. §] 45 (a) (1)), as from time to time amended." (Emphasis added.) There are several reasons, however, why § 42-110b (b) does not compel us to adopt the substantial unjustified injury test. First, the current statutory language was added in a 1976 amendment, replacing a provision that stated that "[u]nfair or deceptive acts or practices . . . shall be those practices . . . *determined to be* unfair . . . in rules, regulations or decisions interpreting the Federal Trade Commission Act . . . ." (Emphasis added.) General Statutes (Rev. to 1975) § 42-110b (a); see Public Acts 1976, No. 76-303, § 1. The legislature's apparent purpose in transitioning from the "determined to be unfair" language to the more flexible "guided by" language was to make clear that the Commissioner of Consumer Protection and our state courts are not to be constrained, in applying CUTPA, to find actionable only those practices that have been deemed unlawful under the FTC Act. 12 R. Langer et al., supra, § 2.6, p. 92.

Second, "[w]e have . . . repeatedly looked to the reasoning and decisions of the Supreme Judicial Court of Massachusetts with regard to the scope of CUTPA." *Normand Josef Enterprises, Inc.* v. *Connecticut*

National Bank, 230 Conn. 486, 521, 646 A.2d 1289 (1994). Although the Massachusetts counterpart to CUTPA contains language substantially similar to that of § 42-110b (b); see Mass. Ann. Laws ch. 93A, § 2 (LexisNexis 2012);[22] the courts of that state have continued to define unfair trade practices according to a version of the cigarette rule. See, e.g., *UBS Financial Services, Inc.* v. *Aliberti*, 483 Mass. 396, 412, 133 N.E.3d 277 (2019); see also 12 R. Langer et al., supra, § 2.6 p. 91 n.1. Indeed, Connecticut and Massachusetts are two among sixteen states—out of twenty-eight that prohibit unfair trade practices generally—that continue to apply the cigarette rule, even though a number of those states' unfair trade practice statutes likewise counsel deference to the FTC's interpretations. 12 R. Langer et al., supra, § 2.2, pp. 53–54 and n.128.

One possible reason for this is that the federal standard is applied primarily in the regulatory context—there is no private right of action under the FTC Act—whereas CUTPA and sister state consumer protection laws often must be applied by juries in private consumer actions. See id., pp. 56–58. The substantial unjustified injury test is less readily administrable by a jury and, therefore, arguably ill-suited for state statutes such as CUTPA. See id. In any event, for all the foregoing reasons, we reject the defendants' argument that the trial court improperly instructed the jury as to the first element of a private CUTPA claim. Until such time as the legislature chooses to enact a different standard, the cigarette rule is and will remain the operative standard for unfair trade practice claims under CUTPA.

[22] Mass. Ann. Laws ch. 93A, § 2, provides in relevant part: "(a) Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

"(b) It is the intent of the legislature that in construing paragraph (a) of this section . . . the courts will be guided by the interpretations given by the Federal Trade Commission and the Federal Courts to section 5 (a) (1) of the Federal Trade Commission Act . . . ." (Citation omitted.)

B

Mandatory Injunction

Lastly, we consider the defendants' claim that, if their conduct did violate CUTPA, the trial court abused its discretion or acted contrary to law when it issued a mandatory injunction requiring Wesleyan to enter into a new contract with the plaintiffs that allows them again to house Wesleyan students as a program housing option and that affords them three years in which to fully coeducate the DKE House. We agree that, even construing the factual record in a manner consistent with the jury verdict and giving due deference to the trial court's credibility determinations, the injunction issued was not warranted.

The following additional procedural history is relevant to this issue. After the jury returned its verdict in favor of the plaintiffs, the plaintiffs filed a motion in the trial court seeking equitable relief in the form of specific performance. Specifically, they sought an order requiring Wesleyan to include the DKE House as a program housing option and allowing DKE members full access to reside and engage in social activities at the house "as they had prior to [the implementation of Wesleyan's coeducation] policy . . . ." (Internal quotation marks omitted.) The trial court concluded that equitable relief was necessary to make the plaintiffs whole because, among other things, the plaintiffs had participated in Wesleyan's program housing system for many years, other residential Greek organizations had been given three years in which to implement a viable coeducational scheme, and Wesleyan had committed to giving DKE the same opportunity as those other organizations to adapt to the new policy. The court also alluded to the fact that the jury had found that Wesleyan acted arbitrarily, capriciously, or in bad faith.

Consistent with those findings, the court issued the following order: "Kent . . . and DKE are ordered to submit and reaffirm in current form the plan for coeducation of 276 High Street on or before January 15, 2018. . . . Wesleyan . . . is ordered to include the DKE House . . . as an option in its offering of program housing for the . . . 2018 [fall] semester. Kent . . . and DKE, as organizations, and [Wesleyan], are ordered to enter into a Greek [Organization] Standards Agreement, which agreement is necessary to allow Kent . . . and DKE to house Wesleyan students for the 2018 fall semester. Under this order, DKE is not authorized to occupy or utilize the premises at 276 High Street until the start of the 2018 fall semester. Except as provided herein, the agreement is to be the same Greek [Organization] Standards Agreement that Wesleyan enters into with other residential Greek organizations. The Greek [Organization] Standards Agreement to be executed by the parties should contain the same nondiscrimination clause that was previously agreed to by the parties. . . . The court retains jurisdiction to ensure compliance with this order. This order is without prejudice to Wesleyan . . . to enforce its rights under the agreement, subject to its obligations under the agreement." (Citation omitted.)

The trial court provided the following additional "guidance" in the event that further proceedings might become necessary to enforce the order: "The purpose of this order is to place the plaintiffs and [Wesleyan] in the same position they would have been in had Wesleyan accepted the plaintiffs' plan for coeducation . . . when it was submitted to [Wesleyan] in 2015. The three year period for full coeducation of [the] DKE House should begin with the . . . 2018 [fall] semester. It is expected that the plaintiffs will diligently fulfill the obligations they have committed to under their coeducation plan. It is also expected that, as to the plaintiffs, Wes-

leyan will apply the same standards for compliance with the plan of coeducation of residential Greek organizations that it has applied to other similar organizations." The court finally noted: "The order issued herein is not intended to overturn, modify, or thwart Wesleyan's plan of coeducation of residential Greek organizations. To the contrary, in fashioning this relief, the court has sought to provide an instrumentality to bring about compliance with the coeducation plan by all parties." The defendants contend that the court's order, as refined and illuminated by the accompanying guidance, is both legally unsound and an abuse of the court's discretion.

The following principles pertaining to injunctive relief govern our review of this issue. As a general matter, "[t]he granting of [such] relief is within the trial court's discretion. In exercising this discretion, the court must balance the competing interests of the parties . . . and [t]he relief granted must be compatible with the equities of the case." (Citation omitted; internal quotation marks omitted.) *Dukes* v. *Durante*, 192 Conn. 207, 225, 471 A.2d 1368 (1984). Specifically, the trial court "may consider and balance the injury complained of with that which will result from interference by injunction." *Moore* v. *Serafin*, 163 Conn. 1, 6, 301 A.2d 238 (1972).

More stringent standards, however, govern the issuance of mandatory injunctions. Unlike a prohibitory injunction—an order of the court that merely maintains the status quo by restraining a party from the commission of some act—a mandatory injunction is a court order that commands a party to perform some affirmative act. E.g., *Tomasso Bros., Inc.* v. *October Twenty-Four, Inc.*, 230 Conn. 641, 652, 646 A.2d 133 (1994). "Relief by way of mandatory injunction is an extraordinary remedy granted in the sound discretion of the court [but] only under compelling circumstances." (Internal

quotation marks omitted.) *Monroe* v. *Middlebury Conservation Commission*, 187 Conn. 476, 480, 447 A.2d 1 (1982); see also *Cheryl Terry Enterprises, Ltd.* v. *Hartford*, 270 Conn. 619, 650, 854 A.2d 1066 (2004) ("[m]andatory injunctions are . . . disfavored as a harsh remedy and are used only with caution and in compelling circumstances" (internal quotation marks omitted)), overruled in part on other grounds by *Tremont Public Advisors, LLC* v. *Connecticut Resources Recovery Authority*, 333 Conn. 672, 217 A.3d 953 (2019). Mandatory injunctions are deemed to be "drastic" remedies; *Herbert* v. *Smyth*, 155 Conn. 78, 85, 230 A.2d 235 (1967); because, among other things, they may place the trial court in the undesirable position of having to monitor, construe, and police the parties' private conduct, relationship, and contractual dealings on an ongoing basis. See, e.g., *Cheryl Terry Enterprises, Ltd.* v. *Hartford*, supra, 651 n.22. Those concerns are heightened in a case such as this, which arises in a unique context involving student living arrangements at a private university occurring within a highly charged atmosphere arising from an ongoing local and national dialogue about gender equality and student safety in the higher education setting.[23]

Applying these principles to the present appeal, we conclude that the trial court abused its discretion in issuing an injunction that requires Wesleyan (1) to reinstate the DKE House as a program housing option, (2) to enter into a new Greek Organization Standards Agreement with the plaintiffs, and (3) to afford the plaintiffs three years in which to coeducate. We reach this conclusion primarily because, depending on how the ambiguous terms of the trial court's injunction are interpreted, either the order is unenforceable and,

[23] Again, all of this assumes, without deciding, that CUTPA even governs the student housing arrangements of a private university. See footnote 12 of this opinion.

therefore, a nullity, or it impermissibly expands the terms of the parties' contractual relationship beyond those to which they agreed.

The court's order requires the parties to enter into "the same Greek [Organization] Standards Agreement that Wesleyan enters into with other residential Greek organizations." Those agreements, including ones renewed following Wesleyan's announcement of the new residential coeducation policy; see footnote 10 of this opinion; permit Wesleyan to terminate the relationship without cause upon thirty days' notice. The trial court indicated that its "order is without prejudice to Wesleyan . . . to enforce its rights under the agreement . . . ." Accordingly, the most reasonable reading of the injunction is that, if Wesleyan were required to enter into a new Greek Organization Standards Agreement with the plaintiffs, nothing would bar the university from immediately giving notice of its plan to terminate that agreement, assuming that its officers remain of the belief that they cannot successfully partner with DKE, whether due to personal animus, distrust arising from the present litigation, incompatible visions of residential coeducation, or other reasons.

It is blackletter law that "an injunction will not be granted against a party who can substantially nullify the effect of the order by exercising a power of termination or avoidance." 3 Restatement (Second), Contracts, supra, § 368 (1), p. 195; see also id., § 368, comment (a), pp. 195–96 (injunction is pointless if party may terminate on short notice or if notice period is substantial, such as thirty days or more, but substantial performance cannot be rendered within that period). If the injunction at issue in the present case went into effect today, and Wesleyan immediately exercised its right to terminate and gave the plaintiffs thirty days' notice thereof, the plaintiffs' right to participate in program housing would be extinguished before the commence-

ment of the next academic semester. Under this interpretation of the trial court's order, then, the injunction is unenforceable and, thus, is without legal effect.

On the other hand, the trial court also provided guidance implying that its order should be implemented as if (1) Wesleyan had accepted the plaintiffs' coeducation plan, (2) the plaintiffs had been afforded three years in which to coeducate, and (3) Wesleyan had agreed to apply the same coeducation standards to DKE as to the university's other residential fraternities. If we understand this guidance to mean that Wesleyan cannot terminate its relationship with the plaintiffs for three years after the order goes into effect, or at least that Wesleyan cannot do so for any currently existing reasons, then the injunction becomes problematic in various other ways. Most of these boil down to the fact that the trial court has imposed a binding, long-term relationship, one requiring ongoing collaboration and cooperation, on parties who, despite their decades long partnership, have never formally chosen to enter into that sort of contractual agreement, and between whom mutual respect and trust have been lost. As we noted, those concerns are heightened in the present case, situated as they are at the intersection of an intense, ongoing debate over gender inclusion, campus violence, and the role of the residential experience in the higher education mission.

"It is axiomatic that courts do not rewrite contracts for the parties." (Internal quotation marks omitted.) *Gibson* v. *Capano*, 241 Conn. 725, 732, 699 A.2d 68 (1997). Accordingly, "it is well settled that we will not import terms into [an] agreement . . . that are not reflected in the contract." (Internal quotation marks omitted.) *Ramirez* v. *Health Net of the Northeast, Inc.*, 285 Conn. 1, 16, 938 A.2d 576 (2008). In particular, a court may not, to effectuate the parties' ability to achieve their contractual ends, impose orders that

expand or exceed the terms of their agreement. See, e.g., *Nassra* v. *Nassra*, 139 Conn. App. 661, 669, 56 A.3d 970 (2012). In the present case, the residential fraternities and Wesleyan always have chosen to enter into one year contracts terminable at will by either party. As we noted, there is no claim, and the trial court made no finding, that Wesleyan agreed to waive or modify this provision of the contract. Accordingly, if the trial court intended to bind Wesleyan to a three year housing agreement with the plaintiffs, that aspect of the order represented an expansion of the terms of the Greek Organization Standards Agreement and was improper.

An injunction that nullifies Wesleyan's long-standing contractual right to terminate its relationship with the plaintiffs at its sole discretion would be especially troubling in that it would place the university at a decided disadvantage relative to the fraternity. If disagreements arose over coeducation, discipline, or other matters, as they quite likely would, the plaintiffs would remain free to cut ties with Wesleyan as they saw fit, whereas Wesleyan could part ways only with the court's blessing. Enforcing Wesleyan's extracontractual promises in that manner would destroy the mutuality of obligation for which the parties have bargained. See, e.g., *Bower* v. *AT & T Technologies, Inc.*, 852 F.2d 361, 364 (8th Cir. 1988).

The defendants suggest various additional, albeit related, rationales as to why the trial court's issuance of a mandatory injunction was improper. They contend, for example, that the injunction (1) is inconsistent with the limited scope of their potential liability, as cabined by the Greek Organization Standards Agreement, (2) improperly forces hostile, mistrustful parties to enter into a prolonged relationship that will require close, ongoing collaboration on issues ranging from academic programming to student safety, (3) necessitates a

degree of ongoing judicial supervision over and intervention into the parties' dealings that is plainly disproportionate to any potential benefits to be gained therefrom, and (4) impermissibly intrudes on Wesleyan's academic freedom and responsibility to ensure student safety. Although these arguments may well have merit, we need not address them further at this time in light of our foregoing discussion concerning the impropriety of the injunctive relief issued.

The judgment is reversed and the case is remanded for a new trial.

In this opinion the other justices concurred.

D'AURIA, J., concurring. I agree with the majority's opinion in full. I write separately only to highlight certain concerns I have that might arise on remand if the plaintiffs, the Kent Literary Club of Wesleyan University at Middletown (Kent), the Gamma Phi Chapter of Delta Kappa Epsilon at Wesleyan (DKE) and Jordan Jancze, succeed on their claims under the Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq., and once again seek equitable relief.

The plaintiffs brought this action alleging promissory estoppel, negligent misrepresentation, tortious interference with business expectancies, and violations of CUTPA. Their prayer for relief sought compensatory damages, punitive damages, attorney's fees and costs, and specific performance. As to the CUTPA claims, the plaintiffs alleged that the named defendant, Wesleyan University (Wesleyan), engaged in trade or commerce in two ways. First, they claim that, "by virtue of its advertising of, and its offering for rent or lease, various properties to students as residential housing, which it markets as an integral part of their educational experience," Wesleyan engaged in trade or commerce. In this paradigm, the student plaintiff, Jancze (this is not a

class action), is a consumer of residential housing, and Kent is Wesleyan's "competitor." The plaintiffs also claim that Wesleyan used DKE and promised housing there to students (including athletes) as a way of enticing them to choose to attend Wesleyan but always intended to pull the rug out from under them by denying students DKE housing and requiring students to "reside in more expensive housing" offered by Wesleyan.

Prior to trial, Wesleyan and the other defendants, Wesleyan's president, Michael S. Roth, and its vice president for student affairs, Michael J. Whaley, moved to strike both of the plaintiffs' CUTPA claims and their prayer for relief for specific performance. As to the CUTPA claims, the defendants argued that the plaintiffs failed to allege sufficient facts to establish that the alleged misrepresentations violated CUTPA because the plaintiffs did not allege that the defendants made the misrepresentations with the intent to deceive. The trial court agreed with the defendants and struck the CUTPA claims. The plaintiffs repleaded the CUTPA claims to correct this defect and to include the intent element. The defendants did not file any subsequent motion to strike the repleaded CUTPA claims.

As to the prayer for relief, the defendants argued that none of the alleged causes of action permitted the court to order specific performance requiring Wesleyan to include the DKE House as an option in its offering of program housing. The trial court, however, agreed with the plaintiffs that their claims for *promissory estoppel* supported a prayer for relief of specific performance. Specifically, despite a lack of any controlling case law from this court or the Appellate Court on the issue, the trial court explained that, under breach of contract principles, the plaintiffs may be entitled to specific performance if monetary damages proved inadequate or impracticable, and that this principle applies equally to claims of promissory estoppel.

Following a trial, the jury returned a verdict in favor of the plaintiffs on all counts and awarded Kent $386,000 in damages. In addition, the trial court, acting under CUTPA, awarded the plaintiffs $398,129 in attorney's fees and $13,234.44 in costs. The plaintiffs then filed a motion in the trial court seeking equitable relief in the form of specific performance solely on the basis of their claim of promissory estoppel. Specifically, they sought an award requiring Wesleyan to include the DKE House as a program housing option and allowing DKE brothers full access to reside and to engage in social activities at the house "as they had prior to [Wesleyan's] 'coeducation' policy . . . ." In neither their prayer for relief nor in their motion for an award of specific performance did the plaintiffs request injunctive relief under CUTPA. The trial court determined that this failure by the plaintiffs did not prevent it from awarding injunctive relief under both CUTPA and the promissory estoppel claims, as the defendants were aware from the beginning of the case that the plaintiffs were seeking specific performance and alleging CUTPA violations.

The trial court issued a mandatory injunction, requiring, among other things, that Wesleyan enter into a new contract with Kent and DKE, resume housing Wesleyan students in the DKE House, and give DKE three years in which to coeducate.[1] The trial court determined that

[1] With respect to the injunction, the court issued the following order: "Kent . . . and DKE are ordered to submit and reaffirm in current form the plan for coeducation of 276 High Street [the location of the DKE House] on or before January 15, 2018. . . . Wesleyan . . . is ordered to include the DKE House . . . as an option in its offering of program housing for the . . . 2018 [fall] semester. Kent . . . and DKE, as organizations, and [Wesleyan], are ordered to enter into a Greek [Organization] Standards Agreement, which agreement is necessary to allow Kent . . . and DKE to house Wesleyan students for the 2018 fall semester. Under this order, DKE is not authorized to occupy or utilize the premises at 276 High Street until the start of the 2018 fall semester. Except as provided herein, the agreement is to be the same Greek [Organization] Standards Agreement that Wesleyan enters into with other residential Greek organizations. The Greek [Organization] Standards Agreement to be executed by the parties should contain

injunctive relief was necessary for the plaintiffs to obtain the full measure of justice under both their CUTPA claims and their promissory estoppel claims because, among other things, DKE and Kent had participated in Wesleyan's program housing system for many years, other residential Greek organizations had been given three years in which to implement a viable coeducational scheme, and Wesleyan had committed to providing DKE the same opportunity as those other organizations to adapt to the new policy. The court also alluded to the fact that the jury had found that Wesleyan acted arbitrarily, capriciously, or in bad faith. Yet, the trial court declined to award punitive damages, which, under CUTPA, are for the court to award in its discretion. See General Statutes § 42-110g (a) ("[t]he court may, *in its discretion*, award punitive damages" (emphasis added)).

This court's ultimate conclusion in the present case that a new trial is warranted on all claims, including

the same nondiscrimination clause that was previously agreed to by the parties. . . . The court retains jurisdiction to ensure compliance with this order. This order is without prejudice to Wesleyan . . . to enforce its rights under the agreement, subject to its obligations under the agreement." (Citation omitted.)

The trial court provided the following additional "guidance" in the event that further proceedings might become necessary to enforce the order: "The purpose of this order is to place the plaintiffs and [Wesleyan] in the same position they would have been in had Wesleyan accepted the plaintiffs' plan for coeducation . . . when it was submitted to [Wesleyan] in 2015. The three year period for full coeducation of [the] DKE House should begin with the . . . 2018 [fall] semester. It is expected that the plaintiffs will diligently fulfill the obligations they have committed to under their coeducation plan. It is also expected that, as to the plaintiffs, Wesleyan will apply the same standards for compliance with the plan of coeducation of residential Greek organizations that it has applied to other similar organizations.

* * *

"The order issued herein is not intended to overturn, modify, or thwart Wesleyan's plan of coeducation of residential Greek organizations. To the contrary, in fashioning this relief, the court has sought to provide an instrumentality to bring about compliance with the coeducation plan by all parties."

CUTPA, means it is entirely possible that the question of a mandatory injunction might not reoccur on remand. The parties might litigate the case very differently on remand, or it is possible the plaintiffs will not prevail on their CUTPA counts, obviating the need for the trial court or an appellate court to consider such an injunction. Because I consider central to this appeal the scope of the injunction that the trial court entered after trial, I believe it warrants comment in this unique case, lest the trial court on remand construe our not reaching the question of its propriety as suggesting tacit approval.

I find the injunction that the trial court entered problematic for multiple reasons. First, as the trial court noted, neither this court nor the Appellate Court ever has determined whether the remedy of specific performance is available in a promissory estoppel case in which there are no allegations of an underlying contract. I do not address this issue, however, because, even if specific performance is a permissible remedy under promissory estoppel, the injunction at issue went well beyond ordering specific performance. Specific performance "requires precise fulfillment of a legal or contractual obligation . . . ." Black's Law Dictionary (11th Ed. 2019) p. 1686 (specific performance is "[t]he rendering, as nearly as practicable, of a promised performance through a judgment or decree; specif[ically], a court-ordered remedy that requires precise fulfillment of a legal or contractual obligation when monetary damages are inappropriate or inadequate"). Here, the trial court did not merely order Wesleyan to fulfill the precise terms of the alleged promises but went beyond those terms and ordered it to enter into a three year contractual relationship with DKE. For this reason, I do not believe the scope of the injunction was proper under the promissory estoppel claim. My view is bolstered by the plaintiffs' counsel's concession at oral argument before this court that the better argument for the source

of authority for the injunction, if there is one, is under CUTPA, not promissory estoppel.

My remaining concerns involve the issuance of the injunction under CUTPA. Initially, I note that I am not convinced that the plaintiffs' request for specific performance under the promissory estoppel claims placed the defendants on notice that the plaintiffs were seeking an injunction under CUTPA. The purpose of specific performance differs greatly from the purpose of equitable relief under CUTPA—the former, as discussed previously, requires the parties to fulfill their promised obligations exactly as stated; the latter, as I will discuss in more detail, seeks to remedy the allegedly unfair or deceptive practice or method of competition.

But even if the defendants were on notice of the plaintiffs' request for equitable relief under CUTPA, and assuming that there is a cognizable CUTPA claim to begin with, I question the scope of the injunction in this case—specifically, whether the injunction actually serves to eliminate or to compensate for the allegedly unfair or deceptive trade practices. Because the case is remanded for a new trial, I do not need to address in detail the propriety of the scope of the injunction at issue under CUTPA. Nonetheless, in the event that the plaintiffs succeed on their CUTPA claims, I wish to note my significant concerns over the scope of this injunction.

I recognize that CUTPA affords plaintiffs broad remedies beyond simple monetary damages, including attorney's fees, punitive damages, and injunctive and other equitable relief. See, e.g., *Marinos* v. *Poirot*, 308 Conn. 706, 712–13, 66 A.3d 860 (2013). Further, this court has yet to clarify to what extent the general rules governing injunctions apply to injunctions issued under CUTPA, but I have no reason to believe that these general principles do not apply in this context, with one exception I will discuss. To be entitled to injunctive relief, "[a] party

seeking injunctive relief has the burden of alleging and proving irreparable harm and lack of an adequate remedy at law. . . . A prayer for injunctive relief is addressed to the sound discretion of the court and the court's ruling can be reviewed only for the purpose of determining whether the decision was based on an erroneous statement of law or an abuse of discretion. . . . [I]n exercising its discretion, the court . . . may consider and balance the injury complained of with that which will result from interference by injunction." (Internal quotation marks omitted.) *Wallingford* v. *Werbiski*, 274 Conn. 483, 494, 877 A.2d 749 (2005). "[T]he relief granted must be compatible with the equities of the case." (Internal quotation marks omitted.) *Dukes* v. *Durante*, 192 Conn. 207, 225, 471 A.2d 1368 (1984). "[I]t may be inequitable to grant an injunction which would cause damage to the defendant greatly disproportionate to the injury of which the plaintiff complains [especially if] . . . the judgment went beyond the relief to which the plaintiff was entitled under the statutes." (Citations omitted.) *DeCecco* v. *Beach*, 174 Conn. 29, 35, 381 A.2d 543 (1977); see *Lydall, Inc.* v. *Ruschmeyer*, 282 Conn. 209, 240–41, 919 A.2d 421 (2007) (holding that injunction is overly broad under Connecticut Unfair Trade Secrets Act, General Statutes § 35-50 et seq., if it protects information that is not trade secret).

Unlike other statutes, the CUTPA statutes do not provide that "[i]n such actions the court shall follow the rules and principles governing the granting of injunctive relief." General Statutes § 35-34; cf. General Statutes § 42-110g (d). See generally R. Langer et al., 12 Connecticut Practice Series: Connecticut Unfair Trade Practices, Business Torts and Antitrust (2020–2021 Ed.) § 6.9. Moreover, this court specifically has explained that, to be entitled to injunctive relief under CUTPA, a plaintiff need not establish that no adequate alternative remedy exists and that the injury is irreparable. See *Fairchild*

Heights Residents Assn., Inc. v. *Fairchild Heights, Inc.*, 310 Conn. 797, 805 n.6, 82 A.3d 602 (2014). Like injunctive relief in general, however, injunctive relief under CUTPA is entrusted to the trial court's discretion. See General Statutes § 42-110g (d) ("the court may, *in its discretion*, order, in addition to damages or in lieu of damages, injunctive or other equitable relief" (emphasis added)). "[D]iscretion means a legal discretion, to be exercised in conformity with the spirit of the law and in a manner to [serve] and not to impede or defeat the ends of substantial justice." (Internal quotation marks omitted.) *Hurley* v. *Heart Physicians, P.C.*, 298 Conn. 371, 392, 3 A.3d 892 (2010). Thus, although the general requirements of irreparable harm and lack of an adequate remedy at law need not be satisfied to entitle a plaintiff to injunctive relief under CUTPA, I believe that the general rule that, in ordering injunctive relief, the trial court must consider and balance the equities of the case so that the injunction is not disproportionate to the injury at issue still applies. Even under CUTPA, the injunctive relief must be tailored to the alleged harm and not go beyond the relief to which the plaintiff is entitled under the statute.

Two trial level cases support my conclusion. In *Bristol Technology, Inc.* v. *Microsoft Corp.*, 114 F. Supp. 2d 59, 95–96 (D. Conn. 2000), vacated on other grounds, 250 F.3d 152 (2d Cir. 2001), the defendant challenged both the plaintiff's entitlement to injunctive relief under CUTPA, arguing that the plaintiff had failed to establish irreparable harm, as well as the scope of the injunction. Judge Janet C. Hall of the United States District Court for the District of Connecticut, applying state law, held that the plaintiff did not have to establish irreparable harm to be granted injunctive relief. Id. Nevertheless, the court noted that the scope of the injunctive relief had to be "no broader than necessary to cure the effects of the harm caused by the violation . . . . Injunctive

relief should be narrowly tailored to address specific harms and not impose unnecessary burdens on lawful activity. . . . [The] court must exercise its discretion in framing an injunction that is reasonably designed to prevent wrongful conduct. . . . The court should grant injunctive relief only in conformity with the spirit of the law, and in a manner to [serve] and not to impede or defeat the ends of substantial justice." (Citations omitted; internal quotation marks omitted.) Id., 97. Because the plaintiff was seeking injunctive relief under CUTPA for allegedly deceptive trade practices, the court concluded that "[t]he injunctive relief in this case should be designed to eliminate [that] deception." Id., 98.

More recently, then Judge Bright similarly explained that, even if a plaintiff is entitled to injunctive relief under CUTPA, "the injunction must be narrowly tailored to address only the conduct that violates the statute." *State* v. *Tracey's Smoke Shop & Tobacco, LLC*, Superior Court, judicial district of Hartford, Docket Nos. CV-11-6024334S and CV-11-6024337S (February 24, 2012) (*Bright, J.*) (53 Conn. L. Rptr. 594, 601). According to Judge Bright, although the trial court has discretion to determine the scope of the injunction, "[s]uch relief should be narrowly drawn to the circumstances of the case." Id., 600. Judge Bright applied these principles in a sovereign enforcement action in which the state alleged that the defendant, a tobacco shop, became a cigarette manufacturer when its employees assisted customers in the operation of the filling stations that allowed customers to roll their own cigarettes, thus violating General Statutes § 4-28m (b) (2), which constituted a CUTPA violation under § 4-28m (d). Id., 599–600. Judge Bright disagreed with the state that the plaintiff should be enjoined from using the filling stations under any and all circumstances; rather, Judge Bright ruled that, under CUTPA, the state was entitled to a more narrow

injunction enjoining the plaintiff from conduct only to the extent that it was acting as a tobacco product manufacturer. Id., 600.

I agree with the admonitions of the courts in both *Bristol Technology, Inc.*, and *Tracey's Smoke Shop & Tobacco, LLC*, that an injunction issued under CUTPA must be properly tailored to vindicate the alleged CUTPA violation. In the present case, on remand, to the extent that the plaintiffs establish their CUTPA claims, the trial court, in exercising its discretion to grant injunctive relief under CUTPA, must consider and balance the equities of the case so that the injunction (1) is not disproportionate to the injury at issue, and (2) does not go beyond the relief to which the plaintiffs are entitled under CUTPA. In considering these factors, I emphasize that the purpose of CUTPA as a whole "is aimed at eliminating or discouraging unfair methods of competition and unfair or deceptive acts or practices." (Internal quotation marks omitted.) *Hinchliffe* v. *American Motors Corp.*, 184 Conn. 607, 616–17, 440 A.2d 810 (1981). This does not give the trial court carte blanche to fashion any injunctive relief it might wish to fashion, even on the basis of a jury finding of arbitrary, capricious, or bad faith conduct. Although such conduct might justify punitive damages, which are available under CUTPA but which the trial court chose to deny in the present case, it does not allow the trial court to craft equitable relief that exceeds the scope of the alleged CUTPA violation.

I have difficultly seeing how the injunction the trial court entered after trial vindicates the alleged CUTPA violations. For example, in counts one and two of the operative complaint, the plaintiffs alleged that the defendants violated CUTPA as to DKE members and the individually named student plaintiff, Jancze, on the ground that Wesleyan marketed its residential housing by emphasizing its " 'diversity of housing options,' "

including the opportunity for upperclassmen to select the DKE House, and used this marketing to recruit athletes but intentionally failed to disclose that Wesleyan had the unilateral ability to eliminate the DKE House as a housing option, and, intending not to deliver on those representations, thereby deceived consumers—the prospective students. The deceptive practice at issue is that of deceiving prospective students about the possibility of the DKE House being available as a housing option. The injunction does not address this allegedly deceptive practice. It does not require the defendants to disclose Wesleyan's unilateral ability to control its residential housing options. Rather, it *requires* that the DKE House be a housing option. Not only does this not eliminate the deceptive practice, but it does not remedy the alleged injustice. Because Jancze likely is no longer a Wesleyan student, given the time that has passed since trial, the injunction mandating that Wesleyan and Kent enter into a three year contract does not provide him any remedy. The same goes for other DKE members who might claim to have been deceived by the defendants, as the DKE House has not been an option since the 2015–16 academic year.

Additionally, in counts seven through nine, the plaintiffs alleged that the defendants violated CUTPA as to Kent on the ground that Wesleyan engaged in trade or commerce by advertising and leasing residential housing to students; that Wesleyan was a competitor of Kent in the market for student housing; and that the defendants engaged in unfair methods of competition by intentionally misrepresenting the criteria that Kent would have to satisfy for the DKE House to remain a housing option. Similarly, in counts ten and eleven, the plaintiffs alleged that the defendants violated CUTPA as to DKE on the ground that Wesleyan engaged in trade or commerce by advertising and leasing residential housing to students, including members of DKE,

and that the defendants engaged in unfair or deceptive practices by intentionally misrepresenting the criteria that the members of DKE would have to satisfy for the DKE House to remain a housing option.

The injunction the court entered, however, does not actually seek to police the student housing market or to promote competition in that market. It does not seek to eliminate the allegedly unfair practices and methods of competition—i.e., the alleged marketing misrepresentation. Rather, it forces the parties into a continued contractual relationship. Although this may seem at first glance to be an equitable remedy, attempting to put the plaintiffs in the position they would have been in but for the misrepresentations, in my view, it is a disproportionate remedy. Prior to the injunction, Wesleyan was not required to permit students to live off campus and, under the Greek Organization Standards Agreement, could terminate the agreement for any reason. But the injunction forces Wesleyan not only to allow off-campus housing but to enter into a contract with Kent and DKE requiring the DKE House to be a housing option.[2]

As the court is remanding this case for a new trial regardless of the propriety of the scope of the injunction, I recognize that we need not decide whether the injunction was properly tailored to vindicate the alleged

[2] I note that there is at least some ambiguity in the trial court's posttrial injunction and guidance regarding the required duration of the imposed contractual relationship. Although the trial court's posttrial injunction states that the parties are to enter into "the same Greek [Organization] Standards Agreement that Wesleyan enters into with other residential Greek organizations," implying that the thirty day termination provision still applies, the trial court did not clarify how this provision would interact with its order that the DKE House has three years to coeducate. If the DKE House has three years to coeducate, it is unclear whether Wesleyan could terminate their court-mandated contractual relationship before the end of three years for bad faith conduct during the coeducation process, for conduct unrelated to the coeducation process, or for any reason at all, as it could under the previous consensual contract.

CUTPA violations. Rather, I merely raise this issue in this unique trade practices action to emphasize that, in the event that the plaintiffs succeed on their CUTPA claims and request equitable relief, the trial court should look closely at the remedies afforded by the legislature under CUTPA and choose those that vindicate that act and not some other causes of action. I respectfully concur.

STATE OF CONNECTICUT *v.* CHRISTOPHER S.* (SC 20247)

McDonald, D'Auria, Mullins, Kahn, Ecker and Vertefeuille, Js.

Syllabus

Pursuant to statute (§ 54-1o (b)), a "written . . . statement of a person under investigation for or accused of" certain crimes "made as a result of a custodial interrogation at a place of detention shall be presumed to be inadmissible as evidence against the person in any criminal proceeding unless . . . [a]n electronic recording is made of the custodial interrogation . . . ."

Pursuant further to statute (§ 54-1o (h)), the presumption of inadmissibility under § 54-1o (b) may be overcome when the state proves, by a preponderance of the evidence, that "the statement was voluntarily given and is reliable, based on the totality of the circumstances."

Convicted of the crimes of strangulation in the second degree and assault in the third degree, the defendant appealed to the Appellate Court. The defendant and the victim had a physical altercation in the early morning, and the police arrested the defendant. The arresting officer, C, read the defendant his rights under *Miranda* v. *Arizona* (384 U.S. 436), both at the time he was arrested and later that morning at the police station. Thereafter, less than six hours after the defendant's second *Miranda* warning, the defendant was questioned by a detective, M, but the interrogation was not video recorded. M did not readvise the defendant of his *Miranda* rights but did confirm with the defendant that he had been previously advised of his rights and that he was willing to speak with M. M then wrote out a narrative of the incident, and the defendant, after making several changes, signed and initialed the statement. Before trial, the state filed a motion seeking permission to introduce the defendant's

* In accordance with our policy of protecting the privacy interests of the victim of family violence, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

signed statement into evidence. Although the state acknowledged that, because the interrogation was not recorded, the defendant's statement was presumptively inadmissible pursuant to § 54-1o (b), it requested a hearing to establish that the defendant's statement was admissible pursuant to § 54-1o (h). After the hearing, the trial court determined that the state could introduce the defendant's statement, reasoning that the state had met its burden under § 54-1o (h) of proving that the defendant's statement was voluntarily given and reliable under the totality of the circumstances. At trial, the state offered the defendant's statement into evidence. The Appellate Court concluded, inter alia, that the defendant's statement was properly admitted and affirmed the judgment of conviction. On the granting of certification, the defendant appealed to this court. *Held*:

1. The defendant could not prevail on his claim that the Appellate Court improperly upheld the trial court's decision to admit his unrecorded, written statement into evidence on the ground that the state had failed to meet its burden of proving, in accordance with § 54-1o (h), that the statement was voluntarily given and reliable under the totality of the circumstances:

a. This court concluded that the defendant's claim regarding § 54-1o (h) was constitutional with respect to the voluntariness inquiry but evidentiary with respect to the reliability inquiry; it was significant that the legislature chose to use the word "voluntar[y]" in a statute dealing with the admission of statements made by criminal defendants subject to custodial interrogation in places of detention because "voluntary" was a constitutional term of art in this context, and voluntary in the constitutional sense was the meaning that the statute's intended audience of criminal lawyers, judges, and law enforcement personnel would assume.

b. The defendant could not prevail on his claim that the state had failed to meet its burden of proving that his unrecorded statement was voluntarily given, as the record supported the trial court's determination that there was no *Miranda* violation and that that defendant's statement was voluntary under the totality of the circumstances: the defendant received a valid *Miranda* warning at the police station, and there was no merit to the defendant's claim that M should have readvised him of his rights before beginning the interrogation, as less than six hours had passed between the defendant's *Miranda* warning at the station and the interrogation, M reminded the defendant of his rights by expressly confirming with him that he had been advised of those rights earlier that day, the interview concerned the same incident for which the defendant had been arrested and advised of his rights, and the trial court found that the defendant understood the warnings he received and that he was not intoxicated or otherwise mentally incapacitated; moreover, the defendant, having received and understood valid *Miranda* warnings and voluntarily participated in the interrogation, implicitly gave a knowing, voluntary waiver of his *Miranda* rights; furthermore, the totality of the

circumstances surrounding the defendant's interrogation supported the trial court's determination that the defendant voluntarily gave his statement to M, as the defendant was thirty-eight years old and was not intoxicated or impaired, the interrogation lasted only one hour, there was no evidence that M used any potentially coercive methods during the interrogation, and the defendant did not explain how the specific circumstances, including M's failure to record the interrogation, could have served to overbear his will and to elicit an involuntary confession. c. The defendant failed to establish that the trial court had incorrectly determined that his unrecorded statement was reliable because, even if this court were to require independent, corroborating evidence to prove the reliability of his statement, the totality of the circumstances in this case, including instances of corroboration, demonstrated that the trial court correctly concluded that the state had met its burden.

2. This court declined to exercise its supervisory authority over the administration of justice to require trial courts to give a special instruction in all cases in which the police fail to record a custodial interrogation, but it emphasized that it was well within the trial court's discretion to give a specific, cautionary instruction when the police fail to record a custodial interrogation in violation of § 54-1o (b); because an unrecorded statement obtained during a custodial interrogation already has a legislatively prescribed presumption of inadmissibility, a jury instruction in all cases was not necessary to guard against a threat to the integrity of a particular trial or the perceived fairness of the judicial system as a whole, and the statutes of other states that provide for a jury instruction requirement when the police fail to record certain custodial interrogations were distinguishable from § 54-1o because they did not provide for a presumption that such statements were inadmissible.

(Two justices concurring separately in one opinion)

Argued June 12, 2020—officially released March 10, 2021**

Procedural History

Substitute information charging the defendant with the crimes of burglary in the first degree, kidnapping in the second degree, strangulation in the second degree, and assault in the third degree, brought to the Superior Court in the judicial district of Hartford and tried to the jury before *Bentivegna*, *J.*; verdict and judgment of guilty of strangulation in the second degree and assault in the third degree, from which the defendant appealed to the Appellate Court, *Prescott*, *Bright* and

** March 10, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Flynn, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Timothy H. Everett, assigned counsel, with whom, on the brief, were *Corinne Burlingham*, *Brendan Donahue*, *Alexander Hyder* and *Michael Nunes*, certified legal interns, for the appellant (defendant).

Matthew A. Weiner, assistant state's attorney, with whom, on the brief, were *Gail P. Hardy*, state's attorney, and *Richard J. Rubino*, senior assistant state's attorney, for the appellee (state).

Maura Barry Grinalds and *Darcy McGraw* filed a brief for the Connecticut Innocence Project et al. as amici curiae.

Opinion

McDONALD, J. General Statutes § 54-1o[1] provides that, if a person suspected of one of several enumerated

[1] General Statutes § 54-1o provides in relevant part: "(b) An oral, written or sign language statement of a person under investigation for or accused of a capital felony or a class A or B felony made as a result of a custodial interrogation at a place of detention shall be presumed to be inadmissible as evidence against the person in any criminal proceeding unless: (1) An electronic recording is made of the custodial interrogation, and (2) such recording is substantially accurate and not intentionally altered.

* * *

"(d) If the court finds by a preponderance of the evidence that the person was subjected to a custodial interrogation in violation of this section, then any statements made by the person during or following that nonrecorded custodial interrogation, even if otherwise in compliance with this section, are presumed to be inadmissible in any criminal proceeding against the person except for the purposes of impeachment.

"(e) Nothing in this section precludes the admission of:

* * *

"(2) A statement made during a custodial interrogation that was not recorded as required by this section because electronic recording was not feasible;

"(3) A voluntary statement, whether or not the result of a custodial interrogation, that has a bearing on the credibility of the person as a witness;

* * *

"(6) A statement made during a custodial interrogation by a person who requests, prior to making the statement, to respond to the interrogator's

classes of felonies gives a statement to law enforcement as a result of a custodial interrogation at a detention facility, the statement will be presumed to be inadmissible unless officers make an audiovisual recording of the interrogation. Under subsection (h) of the statute, the state may overcome the presumption of inadmissibility in any case by proving by a preponderance of the evidence that the statement "was voluntarily given and is reliable, based on the totality of the circumstances." General Statutes § 54-1o (h). The defendant, Christopher S., appeals from the Appellate Court's judgment affirming his conviction of strangulation in the second degree and assault in the third degree. See *State* v. *Spring*, 186 Conn. App. 197, 201, 220, 199 A.3d 21 (2018). His principal claim is that the Appellate Court incorrectly upheld the trial court's decision to admit into evidence a signed, written statement that he made during a custodial interrogation, which officers failed to record in violation of § 54-1o. Specifically, the defendant contends that the Appellate Court incorrectly concluded that the state had met its burden of proving that the statement was both voluntary and reliable under § 54-1o (h). The defendant also asks us to exercise our inherent supervisory authority to require trial courts, in all cases in which the police fail to record an interrogation in violation of the statute, to instruct the jury

questions only if an electronic recording is not made of the statement, provided an electronic recording is made of the statement by the person agreeing to respond to the interrogator's question only if a recording is not made of the statement;

* * *

"(8) Any other statement that may be admissible under law.

"(f) The state shall have the burden of proving, by a preponderance of the evidence, that one of the exceptions specified in subsection (e) of this section is applicable.

* * *

"(h) The presumption of inadmissibility of a statement made by a person at a custodial interrogation at a place of detention may be overcome by a preponderance of the evidence that the statement was voluntarily given and is reliable, based on the totality of the circumstances. . . ."

that the police violated the law and that jurors should evaluate with "particular caution" the weight to give the statement and any police testimony regarding the interrogation. We affirm the judgment of the Appellate Court and decline to mandate the requested jury instruction.

The Appellate Court's opinion sets forth the facts that the jury reasonably could have found; see *State* v. *Spring*, supra, 186 Conn. App. 201–207; which we summarize in relevant part. The Enfield police arrested the defendant at approximately 5:30 a.m., after the defendant and the victim had a physical altercation. The arresting officer, Mark Critz, read the defendant his *Miranda*[2] rights both at the time he was arrested and, again, at approximately 7:23 a.m., at the Enfield police station. The defendant was placed in lockup until approximately 1:10 p.m. the same day, when he was brought to the desk of Detective Martin Merritt for questioning. Merritt's desk was situated in a large room containing a number of cubicles with walls about five feet high. The interrogation was not video recorded. Merritt did not readvise the defendant of his *Miranda* rights because Critz had informed Merritt that the defendant had previously been provided such warnings twice. Merritt did confirm with the defendant that he had been advised of his rights and was willing to speak with Merritt.

Merritt asked the defendant to explain what had happened the night before, asking clarifying questions when necessary and taking notes. From the defendant's statements, Merritt wrote out a narrative of the incident on an Enfield Police Department form titled "Supplement/Statement." Merritt explained to the defendant that this was the defendant's statement and that it

[2] *Miranda* v. *Arizona*, 384 U.S. 436, 478–79, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

should reflect his perspective of what happened. The defendant made several changes to the statement, which he signed in three places and initialed in fourteen places. The preprinted form on which the statement was written also contains the following acknowledgment: "I HAVE READ THE ABOVE STATEMENT AND IT IS TRUE TO THE BEST OF MY KNOWLEDGE. I FULLY UNDERSTAND THAT IF I MAKE A FALSE STATEMENT THAT IS UNTRUE AND WHICH IS INTENDED TO MISLEAD A LAW ENFORCEMENT OFFICER IN THE PERFORMANCE OF HIS OFFICIAL FUNCTIONS I WILL BE IN VIOLATION OF [GENERAL STATUTES § 53a-157]. A FALSE STATEMENT IS A CLASS A MISDEMEANOR, WHICH IS PUNISHABLE UP TO [ONE] YEAR IN JAIL AND/OR A [$1000] FINE AND NOT MORE THAN [THREE] YEARS PROBATION." In the statement, the defendant also acknowledged that he had been advised of his rights, understood those rights, was making the statement of his own free will, without any threats or promises having been made, and that he was giving the statement voluntarily.

The defendant's statement provided the following summary of the incident. The defendant and the victim were married but had been on a break, living in separate residences, for about two weeks. The night before the incident, the defendant was watching a boxing match at a party. After leaving, the defendant drove to the victim's house in Enfield and knocked on a porch window. The victim let the defendant in the house, and they talked for a few minutes, eventually deciding to take a drive together. Once in the car, the defendant and the victim argued about having cheated on each other. The defendant "became very angry," pulled the car over, and began choking the victim with his hands. He also "punched her once in the side of the head . . . and slap[ped] her several times." At some point, the victim punched the defendant in the face and cut his

gum, causing him to bleed from the mouth. The defendant then drove the pair to the home of the defendant's ex-wife. Both the defendant and the victim had a lot of blood on them from the fighting. Shortly thereafter, the police were called. The defendant "hung out on the back patio for a while [and] then went for a walk," and the police detained him while he was walking. The defendant talked to an officer about what had happened before being arrested and taken to the Enfield police station.

The record reveals the following procedural history. The defendant was charged with one count each of (1) burglary in the first degree, (2) kidnapping in the second degree, (3) strangulation in the second degree, and (4) assault in the third degree. Before trial, the state, pursuant to § 54-1o, filed a motion seeking permission to introduce the defendant's signed statement into evidence. In the motion, the state acknowledged that, because Merritt did not record the interrogation, in violation of § 54-1o, the defendant's statement was presumed inadmissible. The state requested a hearing to establish that the statement was admissible pursuant to an exception to the custodial interrogation recording requirement under subsections (e) and (h) of § 54-1o. Section 54-1o (e) (2) provides an exception to the recording rule if "electronic recording [is] not feasible . . . ." Even when no exception applies, § 54-1o (h) provides that the state may overcome the presumption of inadmissibility by proving, by a preponderance of the evidence, that the defendant's statement "was voluntarily given and is reliable, based on the totality of the circumstances."

The court held a pretrial hearing on the state's motion, at which Critz, Merritt, and Detective Sergeant Daniel Casale testified. Critz testified that, at approximately 5:30 a.m., he read the defendant his *Miranda* rights from a *Miranda* warning card that he carries

during his shifts, and the defendant acknowledged that he understood his rights. The defendant talked to Critz, saying that he had been at a party watching the "[Manny] Pacquiao" fight. Critz noted that the defendant was bleeding from the mouth, and he did not appear to be intoxicated. Critz also testified that he advised the defendant of his *Miranda* rights a second time at 7:23 a.m. at the Enfield police station, using a Connecticut Judicial Branch form titled "Notice of Rights—Bail," which the defendant signed. Critz had no further involvement in the case. The state entered into evidence both the *Miranda* warning card and Notice of Rights—Bail form.

Merritt testified that, at approximately 1:10 p.m., he spoke with the defendant at the police station in an interview that lasted approximately one hour. Merritt did not readvise the defendant of his *Miranda* rights because Critz told him that he had already given the defendant two advisements earlier that morning. Merritt did testify, however, that he confirmed with the defendant that he had been advised of his rights and that the defendant spoke voluntarily. Merritt followed his usual technique in questioning the defendant—he obtained the defendant's version of the incident and then wrote out a statement that the defendant could freely edit and adopt. The defendant made and initialed changes, ultimately signing the statement. Merritt also testified that the defendant did not appear intoxicated. He acknowledged that he knew that, under § 54-1o, he should have recorded the interrogation. Although Merritt testified that the police department's recording equipment was not working around the time of the defendant's interrogation, he also admitted that he neither checked to find out if the equipment was working at the time nor documented a reason for not recording. Merritt also admitted that he had a department issued

iPhone with him at the time and that holding cells at the station also had video cameras.

Casale testified that he "overs[aw] the process" of the defendant's interrogation. His office was approximately twenty feet from Merritt's desk, and, during the course of the interview, he was "bouncing back and forth" between his office and Merritt's desk. Casale also acknowledged that he had no explanation for why the interrogation was not recorded.

After testimony and brief argument by the parties, the trial court issued an oral ruling, concluding that the state could introduce the defendant's statement in its case-in-chief. The court initially noted: "[T]he defendant . . . was under formal arrest. There was a postbooking statement. The defendant was subjected to police interrogation. This was a custodial interrogation at a police station. No electronic recording was made. The written statement [was taken from a] person under investigation or accused of a . . . class A or B felony . . . . [T]he court finds by the preponderance of the evidence that there was [no] compliance with the electronic recording requirement, and . . . based on that, the statement is presumed to be inadmissible as evidence . . . ."

The court considered the claimed exceptions to § 54-1o that the state argued, namely, subsections (e) (2) and (h) of the statute. The court concluded that subsection (e) (2) did not apply because the state had failed to prove that recording was not feasible. Nevertheless, the court determined that the state had met its burden under subsection (h) to prove that the statement was voluntarily given and reliable under the totality of the circumstances. The court explained the basis for its decision in its oral ruling on the day of the hearing and elucidated further in response to multiple motions for

articulation filed by the parties during the pendency of the defendant's appeal to the Appellate Court.

As to the voluntariness inquiry, the trial court determined that the defendant's statement was given "pursuant to a knowing, intelligent, and voluntary waiver of the defendant's *Miranda* rights." Specifically, the court reasoned that the defendant had received and understood two *Miranda* warnings in a matter of hours before his interrogation, Merritt was not required to provide a third warning before the interrogation began, there was no evidence of improper or coercive interrogation methods by the police, there was no issue with respect to the defendant's mental state, the defendant made edits to the statement and signed it as his own, the interrogation took place in an open office area and lasted only one hour, and the statement itself said that the defendant understood his rights and gave the statement voluntarily.

As to reliability, the court concluded that the defendant's statement was reliable based on the totality of the circumstances. The court credited Merritt's testimony, noting that Merritt explained to the defendant that the written statement was intended to be "his statement . . . his words . . . what he believes happened . . . and, if there's anything that he wants . . . to add or take out of the statement, then we can do so." (Internal quotation marks omitted.) The defendant made multiple corrections, crossed things out, changed words, initialed his changes, and signed each page. The court further reasoned that the statement was taken "pursuant to standard police practices," and there was "no evidence of threats, promises, or coercive or deceptive measures by the police."

The case went to trial, and the state, during its case-in-chief, offered the defendant's statement into evidence. The jury ultimately found the defendant guilty

of assault in the third degree and strangulation in the second degree. It found him not guilty of kidnapping in the second degree and burglary in the first degree. The defendant was sentenced to a total effective term of three years incarceration and two years of special parole.

The defendant appealed to the Appellate Court, raising three claims: (1) the trial court erred in granting the state's motion to admit his unrecorded statement because the state failed to prove that the statement was voluntarily given and reliable; (2) the trial court abused its discretion by overruling the defense counsel's objection to an inaccurate argument made by the state; and (3) the Appellate Court should exercise its supervisory authority over the administration of justice and order a new trial for the defendant and require trial judges to give a particular jury instruction in cases in which the police violate § 54-1o. *State* v. *Spring*, supra, 186 Conn. App. 199–201. The Appellate Court rejected each of the defendant's arguments and affirmed the judgment of conviction. See id., 201, 220.

We thereafter granted the defendant's petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court properly uphold the trial court's determination that the state met its burden of proving that the defendant's statement obtained during a custodial interrogation, which was not recorded in accordance with . . . § 54-1o, was nonetheless admissible pursuant to the provisions of . . . § 54-1o (h)?" And (2) "[s]hould this court exercise its supervisory authority over the administration of justice to require that, when a custodial interrogation subject to the provisions of . . . § 54-1o . . . is not recorded in accordance with that statute, a jury be instructed that it may consider the noncompliance with the recording requirement in determining the weight to accord a statement that is the product of the unrecorded custodial

interrogation?" *State* v. *Spring*, 330 Conn. 963, 963–64, 199 A.3d 1079 (2019). Additional facts will be set forth as necessary.

I

We begin with the defendant's contention that the Appellate Court erred by upholding the trial court's decision to admit his unrecorded statement into evidence because the state failed to meet its burden of proving that the statement was voluntarily given and reliable under the totality of the circumstances, as required by the exception found in § 54-1o (h).

A

As an initial matter, the parties disagree as to whether the defendant's claim regarding subsection (h) of § 54-1o is constitutional or evidentiary. The defendant argues that the legislature's use of the word "voluntar[y]" in § 54-1o (h) refers to the preexisting constitutional requirements that a confession may be admitted against a criminal defendant only if it comports with due process and *Miranda*. The defendant contends that, because the voluntariness inquiry has constitutional implications, our review of the trial court's voluntariness determination is de novo. The state contends that the claim is purely evidentiary because this court has unequivocally stated that neither the federal nor the state constitution requires custodial interrogations to be recorded. The state thus asserts that our review is only for abuse of discretion, and the trial court's finding that the statement was voluntarily given is "entitled to substantial deference . . . ." We conclude that the defendant's claim is constitutional with respect to the voluntariness inquiry and evidentiary with respect to the reliability inquiry.

The Appellate Court concluded that the defendant's claim was not constitutional because this court has

made clear that the recording of custodial interrogations is not a constitutional concern. *State* v. *Spring*, supra, 186 Conn. App. 208; see, e.g., *State* v. *Edwards*, 299 Conn. 419, 443–44, 11 A.3d 116 (2011); *State* v. *Lockhart*, 298 Conn. 537, 542–44, 550 and n.6, 4 A.3d 1176 (2010); *State* v. *James*, 237 Conn. 390, 428–29, 678 A.2d 1338 (1996). Although we have stated that the constitution does not require the recording of custodial interrogations, we also stated in *Lockhart* that we were leaving to the legislature whether to require recording and how to balance competing interests to implement such a requirement. *State* v. *Lockhart*, supra, 574–75, 577. Our statement that a recording is not constitutionally mandated does not inform our consideration about whether the legislature's chosen framework for effectuating a recording requirement might incorporate constitutional norms.

The question of whether the legislature used the word "voluntar[y]" in § 54-1o (h) in the constitutional sense is a matter of statutory construction over which we exercise plenary review. See, e.g., *Lyme Land Conservation Trust, Inc.* v. *Platner*, 334 Conn. 279, 288, 221 A.3d 788 (2019). "When construing a statute, [o]ur fundamental objective is to ascertain and give effect to the apparent intent of the legislature. . . . In other words, we seek to determine, in a reasoned manner, the meaning of the statutory language as applied to the facts of [the] case . . . . [General Statutes] § 1-2z directs us first to consider the text of the statute itself and its relationship to other statutes. If, after examining such text and considering such relationship, the meaning of such text is plain and unambiguous and does not yield absurd or unworkable results, extratextual evidence of the meaning of the statute shall not be considered. . . . When a statute is not plain and unambiguous, we also look for interpretive guidance to the legislative history and circumstances surrounding its enactment, [includ-

ing] the legislative policy it was designed to implement . . . .'' (Internal quotation marks omitted.) Id., 288–89.

Section 54-1o (b) provides: ''An oral, written or sign language statement of a person under investigation for or accused of a capital felony or a class A or B felony made as a result of a custodial interrogation at a place of detention shall be presumed to be inadmissible as evidence against the person in any criminal proceeding unless: (1) An electronic recording is made of the custodial interrogation, and (2) such recording is substantially accurate and not intentionally altered.'' The presumption of inadmissibility may be overcome when the state proves, by a preponderance of the evidence, that ''the statement was voluntarily given and is reliable, based on the totality of the circumstances.'' General Statutes § 54-1o (h).

It is significant that the legislature chose to use the word ''voluntar[y]'' in a statute dealing with the admission of statements made by criminal defendants subject to custodial interrogation in places of detention because ''voluntary'' is a constitutional term of art in this context. In *State* v. *Piorkowski*, 236 Conn. 388, 672 A.2d 921 (1996), we explained that, ''[i]n the jurisprudence of statements made to the police by persons accused of crime, traditionally there are two types of 'voluntariness' inquiries. One, dating from before *Miranda* and emanating from principles of due process, involves essentially whether the defendant's will was overborne by the police in eliciting the statement. See, e.g., *Arizona* v. *Fulminante*, 499 U.S. 279, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991); *Colorado* v. *Spring*, 479 U.S. 564, 107 S. Ct. 851, 93 L. Ed. 2d 954 (1987); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 93 S. Ct. 2041, 36 L. Ed. 2d 854 (1973); *Lynumn* v. *Illinois*, 372 U.S. 528, 83 S. Ct. 917, 9 L. Ed. 2d 922 (1963). The other, deriving from *Miranda*, involves essentially whether, when the police interrogate a suspect who is in their custody, they prop-

erly administer the *Miranda* warnings to him and he waives the rights about which he was warned. See, e.g., *Powell* v. *Nevada*, 511 U.S. 79, 114 S. Ct. 1280, 128 L. Ed. 2d 1 (1994); *Colorado* v. *Connelly*, 479 U.S. 157, 107 S. Ct. 515, 93 L. Ed. 2d 473 (1986); *Moran* v. *Burbine*, 475 U.S. 412, 106 S. Ct. 1135, 89 L. Ed. 2d 410 (1986); *Fare* v. *Michael C.*, 442 U.S. 707, 99 S. Ct. 2560, 61 L. Ed. 2d 197 . . . (1979). Although *Miranda* is not itself a constitutional command; *Miranda* v. *Arizona*, 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966); it is nonetheless a judicially created prophylactic rule designed to safeguard the defendant's fifth amendment right to remain silent because of the inherently coercive quality of custodial interrogation. *Withrow* v. *Williams*, 507 U.S. 680, 691–92, 113 S. Ct. 1745, 123 L. Ed. 2d 407 (1993) . . . ." (Citations omitted.) *State* v. *Piorkowski*, supra, 404–405. The fact that the legislature chose to use this word to the exclusion of any other it could have chosen, and the fact that the legislature chose not to define it, despite having defined other words in the statute; see General Statutes § 54-1o (a) (1) through (5); suggests that it intended the word to have the constitutional meaning that the word carries in this context. See General Statutes § 1-1 (a) ("[i]n the construction of the statutes, words and phrases shall be construed according to the commonly approved usage of the language; and technical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly").

Relatedly, the statute's intended audience is significant. For example, in *State* v. *Piorkowski*, supra, 236 Conn. 388, we construed the word "involuntariness" as used in a prior version of General Statutes § 54-94a, and we explained that the statute was "intended for the ears and eyes of criminal lawyers—both prosecution and defense—and of judges, particularly appellate judges, who preside over criminal proceedings. That

circumstance reinforces the conclusion that, when the legislature used the phrase 'involuntariness of a statement' . . . the legislature intended the phrase to mean what those lawyers and judges would most naturally think it means, namely, what its meaning has long been in the law of confessions." Id., 409. The same is true here. Section 54-1o involves the admission of confessions made by criminal suspects during custodial interrogations at places of detention. It is self-evident that it falls squarely within the purview of criminal lawyers, judges, and law enforcement. In choosing the word "voluntar[y]," the legislature logically would have ascribed to it the meaning that its intended audience would assume—voluntary in the constitutional sense.

In view of the foregoing, we agree with the defendant that, in passing § 54-1o and including subsection (h), the legislature created a new procedure that references and involves an existing constitutional requirement. As the defendant notes, § 54-1o (h) makes it "procedurally necessary for the state to raise the voluntariness issue and then to meet its traditional burden in order to overcome the statutory presumption of inadmissibility applicable to a statement obtained in violation of the statute's recording requirement." In practical effect, in cases in which subsection (h) applies—because the police failed to record and there is no applicable exception under subsection (e)—a defendant need not file a motion to suppress to seek to exclude the defendant's statement from evidence. Rather, the statement is presumed to be inadmissible, and it is incumbent on the state to affirmatively seek to overcome the presumption by proving that, despite their failure to record, officers did not run afoul of the constitution. A trial court's ultimate, legal determination of voluntariness in this context is not entitled to deference.[3] The legislature also added

[3] The concurrence concludes that the voluntariness inquiry under § 54-1o is purely evidentiary because "the legislature does not establish constitutional requirements." Our conclusion that the voluntariness inquiry under

to the state's traditional, constitutional burden a new requirement—to prove that the defendant's statement is reliable based on the totality of the circumstances. Accordingly, we conclude that the defendant's claim with respect to voluntariness is constitutional.

As to reliability, however, the defendant's claim is evidentiary.[4] By requiring the state to prove that an unrecorded statement is reliable, the legislature sought to address the risk of false confessions. See *State* v. *Lockhart*, supra, 298 Conn. 589–95 (*Palmer*, *J.*, concur-

§ 54-1o (h) is constitutional does not suggest that the legislature has created a constitutional requirement. Specifically, we do not conclude that the legislature has created a constitutional right to the recording of a custodial interrogation. Nor do we conclude that recording a custodial interrogation is sufficient, in itself, to establish voluntariness. Rather, in passing § 54-1o, the legislature referenced and incorporated the previously existing voluntariness requirement that the state already had the burden of proving. The recording of the custodial interrogation is simply a means to prove or disprove voluntariness. As the concurrence notes, the voluntariness requirement contained in § 54-1o (h) "overlap[s] or track[s]" the due process requirement of voluntariness. The voluntariness requirement in the statute does track the traditional constitutional voluntariness requirement. It does not create a new constitutional right; it simply incorporates what the state was already required to prove. In short, the statute provides that no statement given during a custodial interrogation, obtained in violation of the recording mandate, could be admitted into evidence in the absence of a showing that the police followed the long recognized, constitutional requirement that such a statement be given voluntarily. The only requirement that the statute does create is that the state must also prove the reliability of such a statement. As we discuss, that requirement is an evidentiary inquiry.

Under the concurrence's interpretation of the statute, the state would have a lower, evidentiary burden with respect to proving voluntariness when the police fail to record a custodial interrogation in violation of the statute. We decline to construe the statute to create such an anomalous result. See, e.g., *Kelly* v. *New Haven*, 275 Conn. 580, 616, 881 A.2d 978 (2005). Just as the legislature cannot create a constitutional right, neither can it lower the state's burden of proof. Moreover, the consequence of concluding that the voluntariness inquiry is merely evidentiary is that a trial court's determination of voluntariness is entitled to substantial deference on appeal. We decline to create two different standards for reviewing the voluntariness of a statement given during a custodial interrogation.

[4] The defendant does not appear to dispute that the reliability inquiry under § 54-1o (h) is an evidentiary question.

ring) (explaining utility of recording in ensuring both that confessions are voluntarily given and that defendants do not confess falsely). In *State* v. *James*, supra, 237 Conn. 390, this court explained that, under a Connecticut common-law, evidentiary rule dating back to the mid-eighteenth century, the admissibility of a confession turned not on whether the statement was coerced but whether it was true. See id., 414–15. We further explained that, in *Rogers* v. *Richmond*, 365 U.S. 534, 81 S. Ct. 735, 5 L. Ed. 2d 760 (1961), the United States Supreme Court "rejected the [common-law] focus on reliability in determining whether a confession is admissible." *State* v. *James*, supra, 415. For purposes of the federal constitution, "in determining whether a confession should be excluded as involuntary, the test is whether the defendant's will was overborne, which is to be determined with complete disregard of whether . . . the [accused] in fact spoke the truth." (Internal quotation marks omitted.) Id.; see also *Rogers* v. *Richmond*, supra, 544. Thus, the reliability of a confession is not a constitutional matter under the federal constitution, and principles that govern evidentiary rulings apply to our review of this claim.[5] Accordingly, we conclude that the defendant's claim with respect to reliability is evidentiary.

B

We turn now to the defendant's claim that the state failed to meet its burden of proving that his statement was voluntarily given. The defendant argues that § 54-1o (h) imposes a burden on the state to meet both traditional, constitutional tests of voluntariness: (1) that the defendant's statement was taken in accordance with

[5] The defendant does not claim that reliability is a constitutional matter under the state constitution. Accordingly, we have no occasion to consider whether our state constitution provides greater protection than the federal constitution. See, e.g., *State* v. *Pinder*, 250 Conn. 385, 418 n.31, 736 A.2d 857 (1999).

the requirements of *Miranda*, and (2) that the police did not overbear the defendant's will in violation of his right to due process. The defendant acknowledges that the trial court did consider both *Miranda* and due process voluntariness in reaching its decision but contends that it came to the wrong conclusion. The state contends that the statute required it to prove only that the defendant's statement comported with due process and that, even if compliance with *Miranda* was required, the trial court correctly determined that the defendant knowingly and intelligently waived his rights. We need not decide whether the state was required to prove both due process voluntariness and compliance with *Miranda* because, even if we assume that the state did have to prove *Miranda* compliance, the record supports the trial court's determination that there was no *Miranda* violation and that the defendant's statement was voluntarily given under the totality of the circumstances.

The standard of review of a trial court's ruling on voluntariness in the context of the state's motion to admit a defendant's confession under § 54-1o (h) is the same as when a defendant moves to suppress a statement on the ground that it was given involuntarily. "[T]he trial court's findings as to the circumstances surrounding the defendant's interrogation and confession are findings of fact . . . which will not be overturned unless they are clearly erroneous. . . . [A]lthough we give deference to the trial court concerning these subsidiary factual determinations, such deference is not proper concerning the ultimate legal determination of voluntariness. . . . Consistent with the well established approach taken by the United States Supreme Court, we review the voluntariness of a confession independently, based on our own scrupulous examination of the record. . . . Accordingly, we conduct a plenary review of the record in order to

make an independent determination of voluntariness." (Citation omitted; internal quotation marks omitted.) *State* v. *Lawrence*, 282 Conn. 141, 153–54, 920 A.2d 236 (2007).

We begin with the defendant's claimed *Miranda* violations. The defendant contends that the police failed to comply with *Miranda* in three ways. First, the defendant argues that he did not receive a valid *Miranda* warning at the police station because the rights listed on the Notice of Rights—Bail form that Critz read to him at the station are materially different from those constituting a proper *Miranda* warning. This argument lacks merit.

After first being advised of his *Miranda* rights at the time of his arrest,[6] the defendant was again advised of his rights at the police station. At the station, Critz read the defendant his *Miranda* rights from a form titled Notice of Rights—Bail, which provides in relevant part that "[a]nything you say or any statements you make *may be used* against you." (Emphasis added.) The language the United States Supreme Court used in *Miranda* was that "anything said *can and will be used against the individual in court*." (Emphasis added.) *Miranda* v. *Arizona*, supra, 384 U.S. 469. The Notice of Rights—Bail form also provides in relevant part: "You have the right to not say anything about this offense you are charged with; you may remain silent. . . ." The defendant argues that, by contrast, "[s]tandard *Miranda* warnings are direct: 'You have the right to remain silent.' " The United States Supreme Court has made clear that *Miranda* warnings need not "be given in the exact form described in that decision. . . . [T]he rigidity of *Miranda* [does not] exten[d] to the precise formulation of the warnings given a criminal defendant

[6] The defendant does not challenge the validity of the *Miranda* warning he was given at the time of his arrest.

. . . and . . . no talismanic incantation [is] required to satisfy its strictures. . . . The inquiry is simply whether the warnings reasonably conve[y] to [a suspect] his rights as required by *Miranda*." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Duckworth* v. *Eagan*, 492 U.S. 195, 202–203, 109 S. Ct. 2875, 106 L. Ed. 2d 166 (1989). We conclude that the slight differences noted by the defendant are immaterial for the purpose of communicating the relevant rights to criminal suspects. The language used in the Notice of Rights—Bail form reasonably conveys a suspect's rights under *Miranda*.

The second *Miranda* issue that the defendant raises is that Merritt should have readvised the defendant of his rights before beginning his interrogation at 1:10 p.m. We disagree.

In determining whether a defendant, who received a *Miranda* warning at an earlier time, is entitled to a new *Miranda* warning before a subsequent custodial interrogation, courts consider a nonexclusive list of eight factors: "(1) the length of time that has passed between the initial warnings and the subsequent interrogation, (2) whether the warnings and interrogation occurred in the same location, (3) whether the officers who gave the warnings were the same as those who conducted the subsequent interview, (4) whether the subsequent interview concerned the same or new offenses and facts, (5) the physical settings of the advisement and interviews, (6) whether the officer reminded the suspect of his rights before resuming questioning, (7) whether the suspect confirmed that he understood his rights or manifested an awareness of his rights, and (8) the apparent mental and emotional state of the suspect." *In re Kevin K.*, 299 Conn. 107, 123, 7 A.3d 898 (2010). No factor is dispositive; it is a totality of the circumstances inquiry. See id., 125–26.

We conclude that the relevant facts and circumstances support the trial court's conclusion that Merritt was not required to readvise the defendant before beginning his interrogation. Less than six hours had passed between the defendant's second *Miranda* warning and the interrogation. Although some courts have determined that readvisement was necessary after a shorter gap; see, e.g., *People* v. *Sanchez*, 88 Misc. 2d 929, 936, 391 N.Y.S.2d 513 (N.Y. Sup. 1977); others have determined that readvisement was unnecessary after a longer gap. See, e.g., *In re Interest of Miah S.*, 290 Neb. 607, 614, 861 N.W.2d 406 (2015) (citing cases); see also, e.g., *In re Kevin K.*, supra, 299 Conn. 125–26 (two day gap between warning and interrogation favored readvisement, but, in light of totality of circumstances, readvisement was unnecessary). We acknowledge that the officer who gave the warning was not the one who performed the interrogation, but we are unpersuaded by the defendant's argument that Merritt needed to readvise the defendant to show the defendant "that he was prepared to honor [the defendant's rights]." It is sufficient that Merritt reminded the defendant of his rights by expressly confirming with him that he had been advised of his rights earlier that day, and the interview concerned the same incident for which the defendant had been arrested and advised of his rights. Moreover, the trial court found that the defendant understood the warnings he received, and there is nothing in the record to suggest that his understanding would have disappeared or dissipated between the warnings and the interrogation. The trial court also found that there were "no issues in terms of the defendant being intoxicated or otherwise [mentally] incapacitated . . . ." In light of the foregoing factors, we conclude that Merritt's decision not to readvise the defendant of his rights did not violate *Miranda*.

The defendant's final *Miranda* claim is that he never gave a "knowing" and "voluntary" waiver of his *Miranda*

rights, without which his statement is inadmissible. We disagree.

"Even [in the absence of] the accused's invocation of the right to remain silent, the accused's statement during a custodial interrogation is inadmissible at trial unless the prosecution can establish that the accused in fact knowingly and voluntarily waived [*Miranda*] rights when making the statement. . . . The waiver . . . must be voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception, and made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." (Citation omitted; internal quotation marks omitted.) *Berghuis* v. *Thompkins*, 560 U.S. 370, 382–83, 130 S. Ct. 2250, 176 L. Ed. 2d 1098 (2010). Despite this seemingly difficult task, "[t]he prosecution . . . does not need to show that a waiver of *Miranda* rights was express. An implicit waiver of the right to remain silent is sufficient to admit a suspect's statement into evidence." (Internal quotation marks omitted.) Id., 384. "[When] the prosecution shows that a *Miranda* warning was given and that it was understood by the accused, an accused's uncoerced statement establishes an implied waiver of the right to remain silent." Id.; see also *State* v. *Shifflett*, 199 Conn. 718, 731–32, 508 A.2d 748 (1986) ("the state must demonstrate . . . (1) that the defendant *understood* his rights, and (2) that the defendant's *course of conduct* indicated that he did, in fact, waive those rights" (emphasis in original; internal quotation marks omitted)).

As we have explained, the defendant received two valid *Miranda* warnings from Critz, one at 5:30 a.m. and one at 7:23 a.m. Critz testified that, after he administered the first warning, the defendant "said . . . that he understood his rights." The defendant also adopted the statement that Merritt wrote during the interroga-

tion, which included the following: "When I was arrested earlier this date, I was advised of my rights. I understand those rights and give this statement voluntarily."[7] The defendant understood his rights when Merritt sought to interrogate him around 1:10 p.m.

The evidence presented at the hearing also established that the defendant's statements to Merritt during his interrogation were not coerced. Merritt testified that, before he began the questioning, he confirmed with the defendant that the defendant had "previously been advised of his rights" and was "willing to speak with" Merritt. The defendant then gave an account of the incident and read, made changes to, and signed Merritt's written summation of what the defendant had said. The statement itself expressly indicates that the defendant was giving the statement "voluntarily." There is nothing in the record to suggest that Merritt obtained the defendant's cooperation through physical or psychological coercion, trickery, threats, promises of leniency, or other questionable tactics. Accordingly, because the defendant received and understood valid *Miranda* warnings and voluntarily participated in Merritt's interrogation, he implicitly gave a knowing, voluntary waiver of his *Miranda* rights.

In sum, even if, as the defendant contends, the state had to prove that the police complied with the requirements of *Miranda*, the record supports the trial court's determination that there was no *Miranda* violation in this case.

[7] We acknowledge that this second acknowledgment of understanding did not occur until after the interrogation was under way, and thus it cannot, in and of itself, serve as the basis from which to conclude that the defendant understood and waived his rights. But the evidence establishes that the defendant acknowledged that he understood his rights at 5:30 a.m., and that he still understood his rights at approximately 1 p.m., and there is no evidence in the record to suggest that he suffered a lapse in that understanding at any point in between.

Finally, with respect to the second traditional voluntariness inquiry, the parties agree that the court must also look to the totality of the circumstances to determine whether a statement was voluntarily given. The defendant contends that the trial court failed to consider Merritt's conduct in its determination that the defendant's statement was voluntarily given under the totality of the circumstances. Specifically, the defendant argues that the court disregarded that Merritt (1) chose not to record the interrogation, (2) chose not to readvise the defendant of his *Miranda* rights, (3) chose not to have the defendant sign the waiver portion of the form on which his statement was written, and (4) ignored the defendant's "condition," which involved having blood on his mouth and clothing. The state argues that, to render a confession involuntary, the police misconduct must *cause* the suspect to confess, and there is no causal connection between Merritt's conduct and the defendant's will being overborne. The state also argues that the totality of the circumstances supports the trial court's determination that the defendant voluntarily gave his statement to Merritt. We agree with the state.

"Irrespective of *Miranda*, and the fifth amendment itself . . . any use in a criminal trial of an involuntary confession is a denial of due process of law." (Internal quotation marks omitted.) *State* v. *Hafford*, 252 Conn. 274, 298, 746 A.2d 150, cert. denied, 531 U.S. 855, 121 S. Ct. 136, 148 L. Ed. 2d 89 (2000). "The state has the burden of proving the voluntariness of the confession by a fair preponderance of the evidence. . . . [T]he test of voluntariness is whether an examination of all the circumstances discloses that the conduct of law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined . . . . The ultimate test remains . . . [i]s the confession the product of an

essentially free and unconstrained choice by its maker? If it is, if he has willed to confess, it may be used against him. If it is not, if his will has been overborne and his capacity for self-determination critically impaired, the use of his confession offends due process. . . . The determination, by the trial court, whether a confession is voluntary must be grounded upon a consideration of the circumstances surrounding it. . . . Factors that may be taken into account, upon a proper factual showing, include: the youth of the accused; his lack of education; his intelligence; the lack of any advice as to his constitutional rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food and sleep." (Internal quotation marks omitted.) *State* v. *Lawrence*, supra, 282 Conn. 153. Under the due process clause of the fourteenth amendment, however, in order for a confession to be deemed involuntary and thus inadmissible at trial, there must be "police conduct, or official coercion, causally related to the confession . . . ." (Citations omitted; internal quotation marks omitted.) Id., 175. In other words, there must be an "essential link between [the] coercive activity of the [s]tate, on the one hand, and a resulting confession by a defendant, on the other . . . ." (Citation omitted; internal quotation marks omitted.) *State* v. *Reynolds*, 264 Conn. 1, 54, 836 A.2d 224 (2003), cert. denied, 541 U.S. 908, 124 S. Ct. 1614, 158 L. Ed. 2d 254 (2004).

Here, the record supports the trial court's determination that the defendant voluntarily gave his statement to Merritt. The defendant was thirty-eight years old at the time of the interrogation. There was no indication that he was intoxicated or impaired. He was formally advised of his *Miranda* rights twice and reminded of them a third time just before the interrogation began, at which point he had been in police custody for less than six hours. The interrogation itself took place in

a large room with multiple cubicles. Questioning was conducted by only one official, with his supervisor checking in periodically. The interrogation took place in a single session, which lasted only one hour. The defendant took the opportunity to read and make multiple changes to the statement as written by Merritt, including that the defendant was giving his statement "voluntarily" and of his "own free will with no threats or promises made to" him. There is no evidence of physical or psychological punishment. There is no evidence that Merritt used any potentially coercive methods, such as threats, promises of leniency, or deception. Indeed, the defendant has not even argued that Merritt used any such tactics or that the defendant's will was actually overborne.

Even if we assume that the trial court failed to consider Merritt's conduct as part of the totality of the circumstances, the defendant has not attempted to explain how the specific circumstances that he lists, either in isolation or in the aggregate, could overbear a suspect's will and elicit an involuntary confession.[8] Although it is troubling that Merritt offered no satisfactory explanation as to why the interrogation was not recorded,[9] a failure to record does not itself bear on a suspect's will. Similarly, it is not clear how Merritt's failure to readvise the defendant of his *Miranda* rights, which we have concluded was not required, or his choice not to have the defendant sign the waiver portion of the form on which the statement was written, which

[8] The record does reflect, contrary to the defendant's assertions, that the trial court considered Merritt's conduct. For example, the court stated that, although Merritt was aware that the law required recording, he had not acted in bad faith.

[9] We emphasize the importance of recording custodial interrogations, as required by § 54-1o. Such recordings enable the fact finder to view the circumstances of the interrogation for himself or herself and provide strong evidence to determine both the voluntariness and reliability of a defendant's statement.

is irrelevant because we have concluded that the defendant implicitly waived his *Miranda* rights, affected the defendant's will. Nothing in the record suggests that the defendant was seriously injured or needed medical attention, and there is no connection between Merritt's "ignor[ing]" the defendant's bloodied gum and the defendant's will being overborne. Accordingly, we conclude that the defendant's statement was freely given and not the result of overbearing police conduct, and its admission into evidence did not violate the defendant's right to due process. Cf. *State* v. *Azukas*, 278 Conn. 267, 290–91, 897 A.2d 554 (2006) (confession was deemed voluntary when trial court found that police conduct was not coercive, defendant was twice advised of *Miranda* rights, detention was for few hours, and interrogation was not prolonged).

In sum, the Appellate Court properly upheld the trial court's determination that the state met its burden under § 54-1o (h) of proving that the defendant's statement was voluntarily given. As we have explained, assuming that the state had to prove that the police complied with *Miranda*, the record demonstrates that it did so. Additionally, looking to the totality of the circumstances surrounding the defendant's interrogation, aside from the failure to record, there is no indication that the police engaged in any misconduct that overbore the defendant's will and elicited an involuntary confession.

C

The defendant next claims that the Appellate Court improperly upheld the trial court's determination that the state met its burden of proving that the statement was reliable under the totality of the circumstances. Specifically, the defendant argues that, to prove reliability, the state must introduce independent, corroborating evidence that the statement itself is true, and, here, the

state relied only on evidence regarding the circumstances under which the statement was given. The state contends that all of the circumstances surrounding the giving of a statement are relevant to a reliability determination, but there is no requirement under our law that there be independent, corroborating evidence of the contents of the statement. Furthermore, the state argues that it did introduce substantial, independent evidence corroborating the truth of the defendant's statement.

As we explained in part I A of this opinion, the reliability inquiry is evidentiary in nature. "The standard that we apply in reviewing a trial court's evidentiary ruling depends on the context in which the ruling was made. . . . When a trial court's determination of admissibility is founded on an accurate understanding of the law, it must stand unless there is a showing of an abuse of discretion. . . . When the admissibility of the challenged testimony turns on the interpretation of an evidentiary rule, however, we are presented with a legal question and our review is plenary." (Citations omitted; footnote omitted.) *State* v. *Burney*, 288 Conn. 548, 555, 954 A.2d 793 (2008).

We begin by emphasizing the distinction between the voluntariness and reliability inquiries under § 54-1o (h). The voluntariness inquiry addresses a defendant's constitutional right to due process and, potentially, those rights protected by *Miranda*, without regard to whether a confession is true. Reliability, on the other hand, is concerned with whether a statement is true. See *State* v. *Lockhart*, supra, 298 Conn. 589–90 (*Palmer*, *J.*, concurring) ("[s]ometimes . . . the issue is not so much whether the confession was the product of police coercion but, rather, whether the interrogation methods used by the police . . . caused the suspect to admit to a crime that he did not commit"). Justice Palmer explained in his concurrence in *Lockhart* that we have

become increasingly aware that false confessions, despite being counterintuitive, occur with some regularity; id., 590–91 (*Palmer*, *J.*, concurring); and that "a recording requirement would dramatically reduce the number of wrongful convictions due to false confessions . . . ." Id., 595 (*Palmer*, *J.*, concurring). The legislative history of § 54-1o reveals that the legislature was also concerned with false confessions when it considered creating the recording requirement. See 54 H.R. Proc., Pt. 28, 2011 Sess., p. 9481, remarks of Representative Gary Holder-Winfield ("[M]ost false confessions stemming from an interrogation . . . come from the fact that there may be some intimidation, threats or coercion. This [b]ill seeks to put in place [an audiovisual] recording of the interrogation such that we can capture and see whether . . . those threats, coercions or intimidations happen[ed].").

Although voluntariness and reliability are distinct inquiries, evidence that is probative of voluntariness may also be probative of reliability. Specifically, evidence regarding the circumstances under which a statement was given can inform both determinations. See, e.g., *State* v. *Pierre*, 277 Conn. 42, 61–62, 890 A.2d 474 (fact that witness indicated he was giving statement freely, reviewed it with attorney, and signed it in eight places demonstrated lack of coercion, providing sufficient indicia of reliability for admission of statement under *State* v. *Whelan*, 200 Conn. 743, 753, 513 A.2d 86, cert. denied, 479 U.S. 994, 107 S. Ct. 597, 93 L. Ed. 2d 598 (1986)), cert. denied, 547 U.S. 1197, 126 S. Ct. 2873, 165 L. Ed. 2d 904 (2006); *State* v. *Collins*, 147 Conn. App. 584, 594–95, 82 A.3d 1208 (involuntariness of defendant's statements to police may undermine reliability of those statements), cert. denied, 311 Conn. 929, 86 A.3d 1057 (2014). Because the same evidence can be used as evidence of both requirements, courts must be careful not to conflate the two analyses. It is entirely

possible for a confession to be voluntary, yet false, or involuntary, yet true, and courts must not collapse voluntariness and reliability into a single inquiry. See, e.g., *United States* v. *Brown*, 617 F.3d 857, 860 (6th Cir. 2010) ("even voluntary 'inculpatory confessions . . . are frequently unreliable' ").

With these principles in mind, we turn to the dispute between the parties regarding the type of evidence that the state was either required or permitted to use to prove that the defendant's statement was reliable. Both parties acknowledge that independent evidence corroborating the truth of the defendant's statement and evidence regarding the circumstances under which the statement was given are relevant to reliability. We agree with this initial point of common ground.

This court has regularly relied on the circumstances under which a statement was given to determine whether it is reliable. See, e.g., *State* v. *Carrion*, 313 Conn. 823, 839–40, 100 A.3d 361 (2014) (listing among factors "particularly salient" to determination of reliability of child witness' prior out-of-court statement whether questions eliciting statement were leading or open and presence of authority figure during questioning); *State* v. *Pierre*, supra, 277 Conn. 61 ("[w]e emphasize . . . that the linchpin of admissibility is reliability: the statement may be excluded as substantive evidence only if the trial court is persuaded, in light of the circumstances under which the statement was made, that the statement is so untrustworthy that its admission into evidence would subvert the fairness of the fact-finding process" (internal quotation marks omitted)); *State* v. *Mukhtaar*, 253 Conn. 280, 306, 750 A.2d 1059 (2000) (witness' prior inconsistent statement to police that otherwise meets requirements for admissibility for substantive purposes "may have been made under circumstances so unduly coercive or extreme as to grievously undermine the reliability generally inher-

ent in such a statement, so as to render it, in effect, not that of the witness"); *State* v. *James*, supra, 237 Conn. 414–15 (general approach under Connecticut common-law, evidentiary rule intended to protect defendants from convictions based on false confessions was to "identify certain inducements [that] made a confession unreliable," such as whether it was "obtained as a result of a promise of a benefit or leniency or a threat of harm" (internal quotation marks omitted)).

Evidence that independently corroborates the substantive truth of a statement is also highly probative of a statement's reliability. As the amici point out, in questioning suspects, the police often hold back known details of the crime to see if the suspects independently mention details that could not be fabricated. In a related context, this court has also approved of the use of independent, corroborating evidence to establish the trustworthiness of a defendant's statement. See, e.g., *State* v. *Leniart*, 333 Conn. 88, 114, 215 A.3d 1104 (2019) (under "trustworthiness" doctrine, which grew out of and modified corpus delicti rule, state may generally rely on defendant's statements to establish all elements of crime "as long as there is sufficient, independent evidence to establish the trustworthiness of those statements"); *State* v. *Hafford*, supra, 252 Conn. 315 (under old version of corpus delicti rule, confessions were admissible only if state "demonstrate[d] through extrinsic evidence that the crime charged had been committed").

Although independent, corroborating evidence is highly probative of reliability, we are not persuaded that independent, corroborating evidence *is required* to prove reliability under § 54-1o (h). We first consider the plain language of the statute. The legislature chose to require the state to prove that an unrecorded statement is "reliable, based on the totality of the circumstances." General Statutes § 54-1o (h). The fact that the

statute calls for a "totality of the circumstances" inquiry and does not include the term "corroborating evidence" undermines the defendant's argument that any particular type of evidence—independent, corroborating or otherwise—is necessary to the inquiry. See, e.g., *Scholastic Book Clubs, Inc.* v. *Commissioner of Revenue Services*, 304 Conn. 204, 219, 38 A.3d 1183 ("it is a well settled principle of statutory construction that the legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so" (citation omitted)), cert. denied, 568 U.S. 940, 133 S. Ct. 425, 184 L. Ed. 2d 255 (2012).

In a related statute; see *Connecticut Podiatric Medical Assn.* v. *Health Net of Connecticut, Inc.*, 302 Conn. 464, 475–76, 28 A.3d 958 (2011) (looking to related statutes to construe meaning of statutory term); requiring the trial court to make a prima facie determination of the "reliability" of a jailhouse informant's testimony, the legislature set forth a number of "factors" that the court "may consider" in undertaking that inquiry. General Statutes § 54-86p (a). These factors include "(1) [t]he extent to which the . . . testimony is confirmed by other evidence"; "(2) [t]he specificity of the testimony"; "(3) [t]he extent to which the testimony contains details known only by the perpetrator of the alleged offense"; "(4) [t]he extent to which the details of the testimony could be obtained from a source other than the defendant"; and "(5) [t]he circumstances under which the jailhouse witness initially provided information supporting such testimony to . . . police . . . including whether the jailhouse witness was responding to a leading question." General Statutes § 54-86p (a). Although corroborating evidence is included in the list, it is only one factor that the court may consider. The fact that the legislature did not require corroborating evidence to prove reliability in that context supports

our conclusion that it is also just one factor to consider under § 54-1o (h).

We are also unpersuaded by the line of cases that the defendant cites for the proposition that independent, corroborating evidence is required to prove reliability. See *State* v. *Hafford*, supra, 252 Conn. 317; *State* v. *Harris*, 215 Conn. 189, 194–95, 575 A.2d 223 (1990); *State* v. *Doucette*, 147 Conn. 95, 98–106, 157 A.2d 487 (1959), overruled in part by *State* v. *Tillman*, 152 Conn. 15, 202 A.2d 494 (1964); *State* v. *LaLouche*, 116 Conn. 691, 694–95, 166 A. 252 (1933), overruled in part by *State* v. *Tillman*, 152 Conn. 15, 202 A.2d 494 (1964). These cases deal with a different doctrine—the corpus delicti rule and, relatedly, trustworthiness—which, despite dealing with the admissibility of confessions, address a different concern than we address in the cases implicated by and culminating in the legislature's passage of § 54-1o.[10] The defendant has not provided any reason for us to conclude that the legislature had those doctrines in mind when it required the state to

[10] The corpus delicti is "the occurrence of the specific kind of loss or injury embraced in the crime charged." (Internal quotation marks omitted.) *State* v. *Leniart*, supra, 333 Conn. 97. For instance, "[i]n a homicide case, the corpus delicti is the fact of the death, [regardless of whether] feloniously caused, of the person whom the accused is charged with having killed or murdered." (Internal quotation marks omitted.) Id. The corpus delicti rule, also known as the corroboration rule; id., 97 n.5; is a common-law rule that "generally prohibits a prosecutor from proving the [fact of a transgression] based solely on a defendant's extrajudicial statements." (Internal quotation marks omitted.) Id., 97. Thus, in a murder trial, for example, the rule would prevent the state from relying solely on the defendant's statement that he or she had killed a victim to prove that the victim was dead.

Although the corpus delicti rule, like § 54-1o, exists, in part, to prevent the admission of false confessions into evidence, the primary purpose of the corpus delicti rule is to "avoid the patent injustice of convicting an innocent person . . . *of an imaginary crime*." (Emphasis added.) Id., 105. That is, the rule requires independent evidence not to confirm that the defendant is the one who committed the crime, but to confirm that the crime charged actually occurred. It exists to provide reassurance that the crime took place, not that the defendant was the one responsible.

prove reliability under the totality of the circumstances. Accordingly, we are not persuaded that the requirement in the corpus delicti and trustworthiness context, that the state must introduce independent, corroborating evidence, mandates such a requirement in the context of § 54-1o (h).

Although we do not agree with the defendant that the statute requires the state to introduce independent, corroborating evidence to prove reliability, we do agree with the defendant and the amici that such evidence is preferable in view of the purpose of the statute. The presumption of inadmissibility under § 54-1o is designed to encourage the police to record custodial interrogations by creating a consequence for their failure to do so. As we noted in *State* v. *Lockhart*, supra, 298 Conn. 537, one of the benefits of recording is to avoid the "swearing contests" between law enforcement and defendants regarding what happened in the interrogation room. (Internal quotation marks omitted.) Id., 566. When officers fail to record, we return to that paradigm. By requiring the police to offer independent, corroborating evidence, we avoid the swearing contests because there is other evidence from which to evaluate the truth of a statement, beyond the competing testimonial versions of the interrogation.

Moreover, courts evaluating unrecorded statements under § 54-1o must be mindful that, even if evidence of the circumstances in which a statement is given is sufficient to conclude that the statement was voluntarily given, that conclusion does not necessarily compel the conclusion that the same evidence is sufficient to conclude that the statement is reliable. See *State* v. *James*, supra, 237 Conn. 424 (This court does not "perceive . . . that involuntariness necessarily equates with falsity. Although coercion is reasonably thought to create a reason to confess falsely, whether a particular coerced confession is also likely to be false depends

on many variables."). In the absence of independent, corroborating evidence of the statement's truth, the state's evidence regarding the circumstances in which the statement was given should be that much stronger for the purpose of proving reliability.

Having rejected the defendant's claim that independent, corroborating evidence is required to prove that a statement is reliable, we must now determine whether the trial court correctly concluded that the state met its burden of proving that the defendant's statement was reliable. We conclude that the trial court correctly determined that the statement was admissible as evidence at the defendant's criminal trial.

First, contrary to the defendant's assertion, the state did introduce independent evidence that corroborated certain important parts of the defendant's statement. In particular, the defendant's statement is consistent with Critz' testimony with respect to the circumstances of the arrest. The defendant's statement explains that, when the police arrived at the home of the defendant's ex-wife, the defendant "went for a walk. When [he] went for a walk, the police detained [him]." This is consistent with Critz' testimony that, while he was processing the scene, officers "noticed a man walking back toward [the police]. . . . [T]here was an exchange of words, [Critz was] not quite sure what it was, and [he] was notified by another officer . . . that it was [the defendant] . . . ." The defendant's statement also explains that, before the incident with the victim, the defendant was "watching the fight on TV" and that, after he was detained, he "talked to an officer about what had happened." This is consistent with Critz' testimony confirming, on cross-examination, that the defendant had told him that "he was at some kind of party, watching the Pacquiao fight." The defendant's statement also explains that the victim "punched [him] once in the face, causing [his] gum to be cut . . . ." This is

consistent with Critz' testimony confirming, on cross-examination, that Critz "noticed [that the defendant] apparently was bleeding from his mouth." Similarly, the defendant's statement notes that, after his altercation with the victim, "[w]e both had a lot of blood on us from the fighting." This is consistent with Critz' testimony that the defendant had "blood on his shirt and . . . blood on his phone." The blood on his shirt is also physical evidence, consistent with the defendant's statement, that an altercation had taken place. Critz' testimony also notes that the victim was questioned at the scene by other officers, which further suggests the occurrence of a violent, domestic dispute between the defendant and the victim, which is what the defendant's statement describes.[11]

In addition to this corroborating evidence, we also acknowledge all of the evidence set forth in part I B of this opinion that was credited by the trial court regarding the circumstances under which the statement was given, none of which suggests that Merritt coerced the defendant into giving a false confession. The defendant was advised of his *Miranda* rights, the interrogation lasted only one hour, the defendant made several corrections to his written statement, and Merritt did not use any potentially coercive interrogation methods. See, e.g., *State* v. *Carrion*, supra, 313 Conn. 841 (fact that

[11] To the extent that the defendant argues in his reply brief that the state was required to introduce independent evidence of the corpus delicti of strangulation and assault for the defendant's statement to be admissible, the defendant misinterprets the evolution of our corpus delicti rule into its modern form, the trustworthiness doctrine. Indeed, under the former rule, the state would have had to introduce independent evidence of the corpus delicti itself for the statement to be admissible. But under the modern rule, that is no longer the case. As we have previously explained, the state no longer must establish the corpus delicti of a crime through extrinsic evidence; it need only "introduce substantial independent evidence [that] would tend to establish the trustworthiness of the [defendant's] statement." (Internal quotation marks omitted.) *State* v. *Leniart*, supra, 333 Conn. 113. That independent evidence need not corroborate the corpus delicti itself.

child corrected interviewer on several points indicated reliability because child was not just giving interviewer what she thought interviewer wanted); *State* v. *Mukhtaar*, supra, 253 Conn. 305 (written, signed statement "provide[s] significant assurance of an accurate rendition of the statement and that the declarant realized it would be relied [on]" (internal quotation marks omitted)). Indeed, the defendant has not argued that any part of his statement was untrue.

In sum, we conclude that the defendant has failed to establish that the trial court incorrectly determined that the defendant's statement was reliable. Even if we were to require independent, corroborating evidence to prove the reliability of a statement, the totality of the circumstances in this case, including instances of corroboration, demonstrates that the trial court correctly concluded that the state met its burden. Accordingly, because the state successfully proved that the defendant's statement was both voluntarily given and reliable under the totality of the circumstances, we conclude that the trial court properly ruled that the statement was admissible as evidence at the defendant's criminal trial.

II

The defendant also claims that this court should exercise its supervisory authority over the administration of justice to require our trial courts to instruct juries to evaluate with "particular caution" statements obtained by custodial interrogation that are out of compliance with the recording mandate in § 54-1o (b), and should order that the defendant be given a new trial because the trial court did not give such an instruction in this case.[12] Specifically, the defendant contends that when,

[12] The defendant also mentions in his brief that, "[u]nder the circumstances here, it was plain error not to inform the . . . jury that the Enfield police violated the recording mandate . . . ." To the extent the defendant is asserting a claim under the plain error doctrine, we note that "[t]he plain error doctrine, which is codified at Practice Book § 60-5, is an extraordinary remedy used by appellate courts to rectify errors committed at trial that,

"as here, the court and the jury have only police assurances that they conducted a fair and proper custodial interrogation, the trial court should instruct the jury (1) that the law required that the police make a recording of the interrogation, (2) that the jury is authorized to draw an adverse inference against the state for failure to provide the jury with the required recording, and (3) that the jury must weigh testimony regarding the interrogation and statement obtained from it with special caution." We decline the defendant's invitation to invoke our supervisory authority to require trial courts to give a special instruction in all cases in which the police fail to record a custodial interrogation. In declining to do so, however, we emphasize that it is well within the trial court's discretion to give such an instruction in appropriate cases.

At the outset, we note that the defendant did not request a jury instruction related to Merritt's failure to record the interrogation; nor did he object to the instructions that were given by the court, a copy of which he had been given in advance of the final charge

although unpreserved, are of such monumental proportion that they threaten to erode our system of justice and work a serious and manifest injustice on the aggrieved party. . . . In addition, the plain error doctrine is reserved for truly extraordinary situations [in which] *the existence of the error is so obvious* that it affects the fairness and integrity of and public confidence in the judicial proceedings. . . . Plain error is a doctrine that should be invoked sparingly. . . . Implicit in this very demanding standard is the notion . . . that invocation of the plain error doctrine is reserved for occasions requiring the reversal of the judgment under review. . . . [Thus, an appellant] cannot prevail under [the plain error doctrine] . . . unless he demonstrates that the claimed error is both *so clear* and so harmful that a failure to reverse the judgment would result in manifest injustice." (Emphasis added; internal quotation marks omitted.) *State* v. *Diaz*, 302 Conn. 93, 101, 25 A.3d 594 (2011). Given that the defendant is asking us to invoke our supervisory authority to require a jury instruction that was not previously required, we fail to see how the trial court's failure to sua sponte give that instruction constituted plain error. See, e.g., id., 104 n.8 ("[i]t is axiomatic that the trial court's proper application of the law existing at the time of trial cannot constitute reversible error under the plain error doctrine").

to the jury. As the Appellate Court noted, if this claim were of constitutional magnitude, it likely would have been deemed waived under *State* v. *Kitchens*, 299 Conn. 447, 482–83, 10 A.3d 942 (2011), but we have previously declined to apply the waiver rule to requests that we exercise our supervisory authority to adopt a new rule regarding a special jury instruction. See *State* v. *Diaz*, 302 Conn. 93, 100 n.5, 25 A.3d 594 (2011) (although state argued that defendant waived claim by failing to request special credibility instruction, claim was not waived because defendant was requesting adoption of new rule requiring trial courts to give special instruction, and, therefore, any such claim before trial court would have been futile).

Turning to the merits of the defendant's contention, we are mindful that, "[a]lthough [a]ppellate courts possess an inherent supervisory authority over the administration of justice . . . [that] authority . . . is not a form of free-floating justice, untethered to legal principle. . . . Our supervisory powers are not a last bastion of hope for every untenable appeal. They are an *extraordinary* remedy to be invoked only when circumstances are such that the issue at hand, [although] not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . . Constitutional, statutory and procedural limitations are generally adequate to protect the rights of the defendant and the integrity of the judicial system. Our supervisory powers are invoked only in the rare circumstance [when] these traditional protections are inadequate to ensure the fair and just administration of the courts." (Emphasis in original; internal quotation marks omitted.) *State* v. *Wade*, 297 Conn. 262, 296, 998 A.2d 1114 (2010).

In support of his argument, the defendant contends that we have previously adopted jury instructions that

require the fact finder to scrutinize certain testimony, such as that of complaining witnesses, accomplices, and informants. See, e.g., *State* v. *Arroyo*, 292 Conn. 558, 561, 973 A.2d 1254 (2009), cert. denied, 559 U.S. 911, 130 S. Ct. 1296, 175 L. Ed. 2d 1086 (2010); *State* v. *Patterson*, 276 Conn. 452, 469–70, 886 A.2d 777 (2005); *State* v. *Ortiz*, 252 Conn. 533, 561–63, 747 A.2d 487 (2000). The defendant contends that, as in those cases, when the police fail to record an interrogation in violation of § 54-1o, jurors would not be aware of the methods the state used to procure the evidence. As such, the defendant argues, the jury needs to be informed of the provenance of the evidence and to weigh its reliability in light of its source.

We are not persuaded that, in all cases in which the police fail to record a custodial interrogation, we should mandate such an instruction. As we have explained, "[g]enerally, a [criminal] defendant is not entitled to an instruction singling out any of the state's witnesses and highlighting his or her possible motive for testifying falsely." (Internal quotation marks omitted.) *State* v. *Baltas*, 311 Conn. 786, 820, 91 A.3d 384 (2014). Unlike the "inevitably suspect" testimony of an accomplice, complainant, or informant; *State* v. *Patterson*, supra, 276 Conn. 469; evidence of an unrecorded statement is put before the jury only after the trial court has determined that the statement is more likely than not reliable. An unrecorded statement already has a legislatively prescribed presumption of inadmissibility and is, therefore, substantially different from testimony of an accomplice, complainant, or informant. We do not believe that it is necessary to mandate a jury instruction in all cases, when the state must already overcome the presumption of inadmissibility. Cf. T. Sullivan & A. Vail, "The Consequences of Law Enforcement Officials' Failure To Record Custodial Interviews as Required by Law," 99 J. Crim. L. & Criminology 215, 215, 224–26

(2009) (authors removed presumption of inadmissibility of unrecorded interviews from model recording statute and provided instead for jury instruction). Indeed, prior to the enactment of § 54-1o, we declined to invoke our supervisory authority to address the admission of unrecorded confessions. See *State* v. *Lockhart*, supra, 298 Conn. 576–77. We explained that "the procedures already in place to prevent the admission into evidence of involuntary or untrustworthy confessions" are sufficient to protect the integrity of a trial. Id., 577. The enactment of § 54-1o has made those protections even stronger. Given the procedures already in place to prevent the admission into evidence of involuntary or untrustworthy confessions, we are not convinced that a jury instruction in all cases is necessary to guard against a threat to "the integrity of a particular trial . . . [or] the perceived fairness of the judicial system as a whole." (Internal quotation marks omitted.) Id.

The defendant also points to other jurisdictions that require special instructions when the police fail to follow laws requiring that custodial interrogations be recorded. For example, state recording statutes in Michigan, New York, North Carolina, and Wisconsin provide for a jury instruction requirement when the police fail to record certain custodial interrogations. See Mich. Comp. Laws Serv. § 763.9 (LexisNexis 2016) ("the jury shall be instructed that it is the law of this state to record statements of an individual in custodial detention who is under interrogation for a major felony and that the jury may consider the absence of a recording in evaluating the evidence relating to the individual's statement"); N.Y. Crim. Proc. Law § 60.45 3. (d) (McKinney 2019) ("upon request of the defendant, the court must instruct the jury that the people's failure to record the defendant's confession, admission or other statement as required . . . may be weighed as a factor, but not as the sole factor, in determining whether such confession,

admission or other statement was voluntarily made, or was made at all"); N.C. Gen. Stat. § 15A-211 (f) (3) (2019) ("[w]hen evidence of compliance or noncompliance with the requirements of this section has been presented at trial, the jury shall be instructed that it may consider credible evidence of compliance or noncompliance to determine whether the defendant's statement was voluntary and reliable"); Wis. Stat. Ann. § 972.115 (2) (a) (West 2007) ("upon a request made by the defendant . . . and unless the state asserts and the court finds that [certain conditions apply] or that good cause exists for not providing an instruction, the court shall instruct the jury that it is the policy of this state to make an audio or audio and visual recording of a custodial interrogation of a person suspected of committing a felony and that the jury may consider the absence of an audio or audio and visual recording of the interrogation in evaluating the evidence relating to the interrogation and the statement in the case").[13]

[13] The defendant also notes that New Jersey and Massachusetts require special instructions when the police fail to follow law requiring that custodial interrogations be recorded. New Jersey's electronic recordation law provides that "[t]he failure to electronically record a defendant's custodial interrogation in a place of detention shall be a factor for consideration by the trial court in determining the admissibility of a statement, and by the jury in determining whether the statement was made, and if so, what weight, if any, to give to the statement." N.J. Court Rules 3:17 (d); see *State* v. *Hubbard*, 222 N.J. 249, 263, 118 A.3d 314 (2015) ("[f]ollowing a comprehensive study of 'whether and how to implement the benefits of recording electronically part, or all, of custodial interrogations,' *State* v. *Cook*, 179 N.J. 533, 561, 847 A.2d 530 (2004), the [c]ourt adopted [r]ule 3:17 in 2005"). Subsection (e) of rule 3:17 provides in relevant part that, "[i]n the absence of an electronic recordation . . . the court shall, *upon request of the defendant*, provide the jury with a cautionary instruction." (Emphasis added.) N.J. Court Rules 3:17 (e). "[A] report issued by the New Jersey Supreme Court Special Committee on Recordation of Custodial Interrogations in 2005 recommended an instruction that the jury has 'not been provided with a complete picture of all of the facts surrounding the defendant's alleged statement and the precise details of that statement.' " *State* v. *Lockhart*, supra, 298 Conn. 564 n.11. Similarly, the Massachusetts Supreme Judicial Court has explained that defendants are "entitled *(on request)* to a jury instruction advising that the [s]tate's highest court has expressed a preference that such interroga-

Unlike the statutory provisions the defendant relies on that specifically provide for certain jury instructions, under § 54-1o, when the police fail to record a custodial interrogation, our legislature has provided that such statements are presumed inadmissible unless the state can establish, by a preponderance of the evidence, specific criteria to overcome the presumption. In *State* v. *Lockhart*, supra, 298 Conn. 537, we left for the legislature the "weighing and balancing [of] the benefits and drawbacks of an electronic recording requirement," and to create "the parameters of such a rule." Id., 570. The legislature did not include a requirement in § 54-1o that the trial court give a specific instruction when the state successfully overcomes the presumption of inadmissibility. See, e.g., *McCoy* v. *Commissioner of Public Safety*, 300 Conn. 144, 155, 12 A.3d 948 (2011) ("[o]ur case law is clear . . . that when the legislature chooses to act, it is presumed to know how to draft legislation consistent with its intent and to know of all other existing statutes" (internal quotation marks omitted)). We therefore decline the defendant's request that we exercise our supervisory authority to go beyond the legislature's prescribed sanction and require trial courts to give a special instruction in every case in which the police fail to record custodial interrogations. If the legislature's membership wants to revisit this issue and to incorporate a specific instruction along the lines that

tions be recorded whenever practicable, and cautioning the jury that, because of the absence of any recording of the interrogation in the case before [it], [it] should weigh evidence of the defendant's alleged statement with great caution and care." (Emphasis added.) *Commonwealth* v. *DiGiambattista*, 442 Mass. 423, 447–48, 813 N.E.2d 516 (2004).

We note that, in both New Jersey and Massachusetts, the defendant must request the jury instruction. In the present case, the defendant made no such request. Additionally, the instruction adopted in *DiGiambattista* was an effort by the Massachusetts high court to find a middle ground between excluding unrecorded confessions and doing nothing to ameliorate the harm to defendants. See id., 445–46.

other state legislatures have incorporated, they are, of course, free to do so.

We take this opportunity to emphasize, however, that it is well within the trial court's discretion to give a specific, cautionary instruction when the police fail to record a custodial interrogation in violation of § 54-1o (b). As we have explained, "[i]t is within the province, and may be within the duty, of the trial judge to not only call attention to the evidence adduced, but [also] to state to the jury in the charge his [or her] own opinion of the nature, bearing and force of such evidence." (Internal quotation marks omitted.) *State* v. *Lemoine*, 233 Conn. 502, 510–11, 659 A.2d 1194 (1995); see, e.g., id., 511 ("generally the extent to which the [trial] court should discuss the evidence in submitting a case to the jury is, so long as in criminal cases the jury [is] not directed how to find [its] verdict, within the discretion of the trial judge" (emphasis omitted; internal quotation marks omitted)); *State* v. *Anderson*, 212 Conn. 31, 49, 561 A.2d 897 (1989) ("[t]he trial court, like the jury, may assess a witness' credibility and, if relevant, may comment on it"); *State* v. *Cari*, 163 Conn. 174, 182, 303 A.2d 7 (1972) ("[o]n numerous occasions this court has stated that the trial court in a criminal case may, in its discretion, make fair comment on the evidence and particularly on the credibility of witnesses").

When the police fail to record a custodial interrogation in violation of § 54-1o (b), and the defendant requests it, the trial court would be acting within its discretion to instruct the jury that it is the law of this state to record statements made during a custodial interrogation of a person under investigation for or accused of a class A or B felony and that the jury may consider the absence of a recording in evaluating the evidence relating to the individual's statement obtained in violation of that law.

Because trial courts already have the discretion to give a cautionary instruction under existing case law, we decline to create a new supervisory rule requiring a special instruction in all cases in which the police fail to comply with the recording mandate in § 54-1o (b).

The judgment of the Appellate Court is affirmed.

In this opinion D'AURIA, ECKER and VERTEFEUILLE, Js., concurred.

MULLINS, J., with whom KAHN, J., joins, concurring. Respectfully, I concur in the result. I agree with the majority that the state met its burden under General Statutes § 54-1o (h) in the present case and, therefore, that the judgment of the Appellate Court should be affirmed. Where I part ways with the majority is in its conclusion "that the defendant's claim with respect to voluntariness is constitutional." I disagree that, by merely using the term "voluntarily" in that statute, the legislature intended to, or even properly could, create a constitutional claim for a violation of a statute governing the recording of statements taken in a place of detention. Although I agree that there may be overlap between the constitutional requirement for voluntariness and the statutory requirement in § 54-1o (h), that does not, in my view, render a claim made under the statute to be of constitutional magnitude. Thus, I would agree with the reasoning of the Appellate Court, which concluded that the claim of the defendant, Christopher S., under § 54-1o was a purely evidentiary claim and reviewable on appeal as such. See *State* v. *Spring*, 186 Conn. App. 197, 207–208, 199 A.3d 21 (2018).

First, this court clearly has explained that neither the federal constitution nor our state constitution requires the recording of custodial interrogations and the statements made therein. See, e.g., *State* v. *Lockhart*, 298 Conn. 537, 539–40, 575, 4 A.3d 1176 (2010). Indeed, we

repeatedly have rejected such a claim and declined to exercise our supervisory authority to mandate such a recording. See, e.g., *State* v. *Edwards*, 299 Conn. 419, 443–44, 11 A.3d 116 (2011); *State* v. *Lockhart*, supra, 543–44, 577; *State* v. *James*, 237 Conn. 390, 428–29, 434 and n.36, 678 A.2d 1338 (1996). As the majority points out, in *Lockhart*, we left it to the legislature to determine whether to establish any recording requirement. See *State* v. *Lockhart*, supra, 561, 574, 577; see also *State* v. *Edwards*, supra, 444. Our pronouncement in *Lockhart* cannot be read to mean that we left it to the legislature to establish any constitutional rights with respect to the recording of custodial interrogations. Indeed, the legislature simply does not have that power. See, e.g., *Boerne* v. *Flores*, 521 U.S. 507, 524, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997) ("[t]he power to interpret the [c]onstitution in a case or controversy remains in the [j]udiciary"). Like the Appellate Court, I am aware of no authority permitting the legislature to create constitutional rights by statute.

Thus, in light of our express rejection of the claim that there is a constitutional right to recorded interrogations, the legislature was not writing on a clean slate. To be sure, in developing § 54-1o, not only was the legislature operating with the knowledge that the recording requirement in § 54-1o was not constitutionally required, but also it is not clear to me that the legislature even could go beyond its legislative mandate of developing statutory rights to creating constitutional rights. Put differently, the requirements outlined in § 54-1o are statutory, not constitutional, because the legislature does not establish constitutional requirements. Therefore, I would conclude that any claim under § 54-1o is not of constitutional magnitude.

Second, although I disagree with the majority that the legislature's use of the term "voluntarily" incorporated a constitutional dimension into § 54-1o (h), I do agree

that the understanding of the term "voluntarily" in § 54-1o (h) is informed by how that term is used and defined in our law. In addition, by using this term in a criminal statute, I also agree that "the legislature intended the [term] to mean what [criminal] lawyers and judges [who preside over criminal proceedings] would most naturally think it means, namely, what its meaning has long been in the law of confessions." *State* v. *Piorkowski*, 236 Conn. 388, 409, 672 A.2d 921 (1996).[1] That meaning, for purposes of due process, is that "the defendant's will was overborne by the police in eliciting the statement." Id., 404.[2]

In order to determine whether a statement was, in fact, voluntary, this court has set forth several factors that may be considered. Specifically, we have explained that "[t]he determination of whether a confession is voluntary must be based on a consideration of the totality of circumstances surrounding it . . . including both the characteristics of the accused and the details of the interrogation. . . . Factors that may be taken into account, upon a proper factual showing, include: the youth of the accused; his lack of education; his intelligence; the lack of any advice as to his constitutional

[1] The majority relies on *State* v. *Piorkowski*, supra, 236 Conn. 409, and concludes that "[i]t is self-evident that [the admission of confessions made by criminal suspects during custodial interrogations] falls squarely within the purview of criminal lawyers, judges, and law enforcement. In choosing the word 'voluntar[y],' the legislature logically would have ascribed to it the meaning that its intended audience would assume—voluntary in the constitutional sense." *Piorkowski*, however, only concluded that the term "voluntary," when used in a statute, would have the same meaning that it has in the law of confessions, not that the use of that word creates a constitutional right through a statute.

[2] The term "voluntariness" is also understood, as deriving from *Miranda* v. *Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), to involve "essentially whether, when the police interrogate a suspect who is in their custody, they properly administer the *Miranda* warnings to him and he waives the rights about which he was warned." *State* v. *Piorkowski*, supra, 236 Conn. 405. In the present case, the defendant does not challenge his advisement or waiver of his *Miranda* rights.

rights; the length of detention; the repeated and prolonged nature of the questioning; and the use of physical punishment, such as the deprivation of food and sleep. . . . The state is required to prove the voluntariness of a confession by a preponderance of the evidence." (Internal quotation marks omitted.) *State* v. *Ramos*, 317 Conn. 19, 32, 114 A.3d 1202 (2015); see also *State* v. *Lawrence*, 282 Conn. 141, 153, 920 A.2d 236 (2007).

I agree with the Appellate Court that, in determining whether a statement is voluntary for purposes of § 54-1o (h), the factors used in the due process context for determining voluntariness are applicable. See *State* v. *Spring*, supra, 186 Conn. App. 211 ("[b]ecause the legislature has not provided a different test for determining voluntariness under the statute, we conclude that the same factors that traditionally are used under a due process analysis are relevant in determining voluntariness under § 54-1o (h)"). Indeed, I would conclude that, by its use of the term "voluntarily," the legislature meant for judges to use the factors traditionally used to determine voluntariness when evaluating a statutory claim under § 54-1o (h).

It is a different question, however, whether, by use of the term "voluntarily," the legislature intended to go beyond simply requiring that voluntariness be determined by our traditional factors to intending that the mere use of the term turns a claim under § 54-1o (h) into one of constitutional magnitude. I would conclude that the legislature did not intend to and, indeed, could not create a constitutional claim through the adoption of § 54-1o (h). Instead, it is clear to me that the legislature intended that the term "voluntarily" have the meaning it has long had in the law of confessions for purposes of the statutory protections provided by § 54-1o (h), but not that a claim under the statute is a constitutional claim, rather than a statutory one. Although the majority's position is tempting and provides § 54-1o with

stronger teeth, I would not ignore the well established separation of powers doctrine and allow constitutional rights to be created through legislative fiat.

I fully acknowledge that there is overlap between what due process requires by way of voluntariness and what § 54-1o (h) requires for the state to rebut the presumption of inadmissibility of an unrecorded statement. But the overlap does not transform this statutory requirement into a constitutional right. In other words, a claim under subsection (h) of § 54-1o is a statutory claim, despite the fact that the requirements in that subsection may overlap with certain constitutional principles.[3]

[3] The majority asserts that, "[u]nder the concurrence's interpretation of the statute, the state would have a lower, evidentiary burden with respect to proving voluntariness when the police fail to record a custodial interrogation in violation of the statute." Footnote 3 of the majority opinion. The majority misapprehends my interpretation of § 54-1o. I do not contend that the state would have any lesser burden than the preponderance of the evidence burden identified in the statute when attempting to demonstrate that an unrecorded confession was, nonetheless, "voluntarily given . . . ." General Statutes § 54-1o (h). Indeed, I have explained that the standard for voluntariness and the factors used in determining voluntariness under § 54-1o are the same as the standard for voluntariness and the factors used in determining voluntariness in the due process context. That the majority sees my position as creating a separate, lower, evidentiary burden of proof is perplexing.

The source of the majority's misapprehension of my position appears to lie in how a statutory claim should be treated on appeal. In my view, this statutory claim should be reviewed, if it is preserved, under the standard of review applicable to statutory claims. Our appellate review does not hinge on whether the police record the custodial interrogation. Instead, the different standard of review on appeal hinges on whether a defendant chooses to make a statutory claim for a violation of § 54-1o, or to make a constitutional claim alleging that his confession was not voluntary. It is the defendant's choice whether to assert a statutory claim, a constitutional claim, or both. Critically, contrary to the majority's view of my position, the failure of the police to record the interrogation does not prohibit the defendant from bringing a constitutional claim alleging that his constitutional rights have been violated by the admission of an involuntary statement. That constitutional claim will be reviewed on appeal, even if it is not preserved, under the standard applicable to constitutional claims. Thus, to the extent that I advocate for two standards, it is simply to be consistent with

Indeed, § 54-1o is not the only statute in which constitutional and statutory protections overlap. For instance, in *State* v. *Urbanowski*, 163 Conn. App. 377, 136 A.3d 236 (2016), aff'd, 327 Conn. 169, 172 A.3d 201 (2017), the Appellate Court examined a claim under General Statutes (Rev. to 2011) § 53a-64bb (b),[4] which provides that "[n]o person shall be found guilty of strangulation in the second degree and unlawful restraint or assault upon the same incident, but such person may be charged and prosecuted for all three offenses upon the same information." See *State* v. *Urbanowski*, supra, 386 and n.4. The statutory protections in § 53a-64bb (b) clearly overlapped with the constitutional principle against double jeopardy. The same incident requirement under the statute is virtually indistinguishable from the same transaction or occurrence requirement under double jeopardy. See *State* v. *Miranda*, 142 Conn. App. 657, 665, 64 A.3d 1268 (2013) ("[o]nce it is determined that multiple convictions and sentences challenged on double jeopardy grounds are not, in fact, for the same offense, as the state has defined the offense in question, the federal constitutional inquiry under the double jeopardy clause is at an end"), appeal dismissed, 315 Conn. 540, 109 A.3d 452 (2015). The fact that the statute prohibited punishment for the identified crimes certainly overlapped with constitutional protections.

On appeal, the defendant in *Urbanowski* brought a claim under § 53a-64bb (b), alleging that his conviction

our jurisprudence, in that purely statutory claims are reviewed under the appellate standard applicable to statutory claims, and constitutional claims are reviewed under the standard applicable to constitutional claims. The majority has mixed and matched standards by acknowledging that no constitutional right was created under this statute but concluding that, simply because the statute uses the word "voluntarily," this purely statutory claim should be reviewed on appeal as if it is now a claim of constitutional magnitude.

[4] Hereinafter, all references to § 53a-64bb (b) in this opinion are to the 2011 revision of the statute.

for both assault in the second degree and strangulation in the second degree violated the protections provided in the statute. *State* v. *Urbanowski*, supra, 163 Conn. App. 383. The defendant had not clearly made a claim pursuant to § 53a-64bb (b) at trial. Id., 384. The Appellate Court explained that, "[i]nsofar as the defendant's claim is based on a violation of § 53a-64bb (b), the claim is not reviewable under *Golding*[5] because it alleges only a violation of statutory magnitude. . . . Insofar as the defendant's claim is based on a violation of the prohibition against double jeopardy afforded under the state and federal constitutions, however, the claim is reviewable under *Golding* because the record is adequate for review, and the claim is of constitutional magnitude." (Citation omitted; footnote added; footnote omitted.) Id., 386; see also, e.g., *State* v. *Graham S.*, 149 Conn. App. 334, 343, 87 A.3d 1182 (claim brought under § 53a-64bb (b) is statutory in nature), cert. denied, 312 Conn. 912, 93 A.3d 595 (2014).

I also find decisions of the Texas Court of Criminal Appeals consistent with my view and instructive in this case. In Texas, article 38.22 of the Texas Code of Criminal Procedure[6] prohibits the admission of statements

[5] *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).

[6] Article 38.22 of the Texas Code of Criminal Procedure provides in relevant part: "Sec. 2. No written statement made by an accused as a result of custodial interrogation is admissible as evidence against him in any criminal proceeding unless it is shown on the face of the statement that:

"(a) the accused, prior to making the statement, either received from a magistrate the warning provided in Article 15.17 of this code or received from the person to whom the statement is made a warning that:

"(1) he has the right to remain silent and not make any statement at all and that any statement he makes may be used against him at his trial;

"(2) any statement he makes may be used as evidence against him in court;

"(3) he has the right to have a lawyer present to advise him prior to and during any questioning;

"(4) if he is unable to employ a lawyer, he has the right to have a lawyer appointed to advise him prior to and during any questioning; and

"(5) he has the right to terminate the interview at any time; and

"(b) the accused, prior to and during the making of the statement, know-

made during custodial interrogations of individuals charged with a crime, unless such interrogations are recorded. Tex. Code Crim. Proc. Ann. art. 38.22, § 3 (a) (West Cum. Supp. 2017). In examining a claim that the warnings provided to the defendant did not comply with the requirements of the statute, the Texas Court of Criminal Appeals concluded that, despite the use of phrases in the statute such as "knowingly, intelligently, and voluntarily waives any rights set out in the warning"; Tex. Code Crim. Proc. Ann. art. 38.22, § 3 (a) (2) (West Cum. Supp. 2017); see also Tex. Code Crim. Proc. Ann. art. 38.22, § 2 (b) (West Cum. Supp. 2017); any claim under that statute was nonconstitutional. See *Nonn* v. *State*, 117 S.W.3d 874, 881 (Tex. Crim. App. 2003) ("the erroneous admission of [a statement taken in violation of article 38.22] is appropriately characterized as a [nonconstitutional] error" (internal quotation

ingly, intelligently, and voluntarily waived the rights set out in the warning prescribed by Subsection (a) of this section.

"Sec. 3. (a) No oral or sign language statement of an accused made as a result of custodial interrogation shall be admissible against the accused in a criminal proceeding unless:

"(1) an electronic recording, which may include motion picture, video tape, or other visual recording, is made of the statement;

"(2) prior to the statement but during the recording the accused is given the warning in Subsection (a) of Section 2 above and the accused knowingly, intelligently, and voluntarily waives any rights set out in the warning;

"(3) the recording device was capable of making an accurate recording, the operator was competent, and the recording is accurate and has not been altered;

"(4) all voices on the recording are identified; and

"(5) not later than the 20th day before the date of the proceeding, the attorney representing the defendant is provided with a true, complete, and accurate copy of all recordings of the defendant made under this article.

* * *

"(e) The courts of this state shall strictly construe Subsection (a) of this section and may not interpret Subsection (a) as making admissible a statement unless all requirements of the subsection have been satisfied by the state, except that:

"(1) only voices that are material are identified; and

"(2) the accused was given the warning in Subsection (a) of Section 2 above or its fully effective equivalent. . . ."

marks omitted)); see also *Davidson* v. *State*, 25 S.W.3d 183, 186 (Tex. Crim. App. 2000) ("[article] 38.22 is located in the [Texas] Code of Criminal Procedure and deals with an evidentiary matter").

Furthermore, the Texas Court of Appeals recognized that the statutory protections provided in article 38.22 overlapped with constitutional principles. In *Foyt* v. *State*, 602 S.W.3d 23 (Tex. App. 2020), the Texas Court of Appeals explained: "The erroneous admission of a statement in violation of article 38.22 amounts to [non-constitutional] error. . . . However, [the defendant] challenged the admission of his statement under *both* the [f]ifth [a]mendment [to the United States constitution] and article 38.22. Therefore, we address harm under the standard for constitutional error." (Citation omitted; emphasis added.) Id., 44 n.7.

Similarly, I would conclude that, in the present case, the defendant's claim under § 54-1o is statutory in nature. Indeed, the legislature can create only statutory rights, even if those statutory rights overlap or track constitutional ones. Of course, nothing prevents a defendant from challenging the failure to record as a statutory matter *and* moving to suppress a statement that he believes was given involuntarily in violation of due process. However, considering a challenge pursuant only to the statute to be a challenge of constitutional magnitude fails, in my view, to account for the fundamental limitations on what the legislature can do through the enactment of a statute. Construing legislative enactments to create constitutional rights simply because the legislature incorporated a constitutional term or phrase into the statute is a slippery slope and potentially runs afoul of the separation of powers doctrine in that legislatures do not establish constitutional rights. Thus, notwithstanding the overlap here between the statutory requirements and due process voluntariness considerations, I conclude that a claim under § 54-

1o is purely statutory and not of constitutional magnitude.

For the foregoing reasons, I concur in the result of the majority opinion.