GREAT PLAINS LENDING, LLC, ET AL. *v.* DEPARTMENT OF BANKING ET AL.
(SC 20340)

Robinson, C. J., and Mullins, Kahn, Ecker, Keller and Vertefeuille, Js.

Syllabus

The plaintiffs, G Co., C Co., and S, appealed to the trial court from the decision of the defendant Commissioner of Banking, who ordered the plaintiffs to cease and desist and to pay certain civil penalties in connection with the commissioner's determination that G Co. and C Co. had violated Connecticut's banking and usury laws by making consumer loans to Connecticut residents without a license to do so. G Co. and C. Co. were created pursuant to the laws of a federally recognized Indian tribe, of which S is the chairman. S is also the secretary and treasurer of both G Co. and C Co. The plaintiffs had moved to dismiss the administrative proceedings initiated by the defendant Department of Banking, claiming that G Co. and C Co. were entitled to tribal sovereign immunity as arms of the tribe and that S shared in that immunity because his actions were undertaken on behalf of those entities in his official capacity. The commissioner denied the plaintiffs' motion to dismiss, concluding that, because G Co. and C Co. had failed to demonstrate that they were arms of the tribe, neither they nor S was entitled to tribal sovereign immunity. After the commissioner issued final orders requiring, inter alia, the plaintiffs to cease and desist from violating Connecticut law in connection with their lending activities and S to pay a civil penalty, the plaintiffs appealed to the trial court. The trial court determined that G Co. and C Co. bore the burden of proving that they were arms of the tribe entitled to tribal sovereign immunity, but the court disagreed with the test the commissioner used to determine whether a business entity should be considered an arm of an Indian tribe. Specifically, the test the commissioner had applied focused on the financial relationship between the tribe and the business entity. Instead, the trial court

employed a multifactor test that considered not only the legal or organizational relationship between the tribe and the entity but also the functional aspects of the entity's financial relationship with the tribe and the entity's stated purpose. Under that functional test, the court determined that, although the evidence was sufficient for G Co. and C Co. to meet most of the various factors, the plaintiffs failed to show how the entities actually functioned in relation to their stated purpose. The court also concluded that the viability of the claims against S depended on whether G Co. and C Co. were arms of the tribe. Accordingly, the court rendered judgment sustaining the appeal and remanding the case to the commissioner for further proceedings to consider whether G Co. and C Co. satisfied the functional test. Thereafter, the plaintiffs appealed and the defendants cross appealed. *Held*:

1. The trial court correctly determined that G Co. and C Co. bore the burden of proving, by a preponderance of the evidence, that they were entitled to tribal sovereign immunity as arms of the tribe; allocating the burden of proof to the entity claiming immunity was consistent with the decisions of state and federal courts in arm of the tribe cases, as well as the standard employed by this court with respect to whether a corporate entity is entitled to assert a sovereign immunity defense as an arm of the state, and the entity claiming arm of the tribe status likely will have the best access to the evidence needed to assume that burden of proof.
2. The trial court applied an improper test for determining whether an entity is entitled to sovereign immunity as an arm of the tribe by requiring proof of how the entities functioned in relation to their stated purpose and incorrectly determined that further proceedings were required to determine whether G Co. was an arm of the tribe: this court concluded that whether an entity shares a tribe's sovereign immunity as an arm of the tribe is a determination to be made in light of the federal laws and policies underlying tribal sovereign immunity and in view of five specific factors, namely, the method of the entity's creation, the purpose of the entity, the structure, ownership and management of the entity, including the amount of control the tribe has over it, the tribe's intent with respect to sharing its sovereign immunity, and the financial relationship between the tribe and the entity; in the present case, all five factors supported the determination that G Co. was entitled, as a matter of law, to share in the tribe's sovereign immunity as an arm of the tribe, as the record demonstrated that G Co. was created under tribal law and was controlled by directors appointed by the tribe's governing council for the purpose of promoting tribal economic development and welfare, and there was a significant financial relationship between the tribe and G Co. such that withholding immunity would interfere with the tribe's self-governance and economic development; moreover, the minimal evidence in the record, consisting only of a certificate of license, the tribal resolution creating C Co., and certain conclusory statements contained in the affidavit of the tribe's vice chairman about the purpose and

structure of C Co., was insufficient to conclude that C Co. was an arm of the tribe entitled to share in its sovereign immunity, and, accordingly the trial court correctly concluded that further proceedings were necessary to determine whether C Co. was an arm of the tribe.

3. The trial court correctly determined that S was immune from the civil penalty imposed on him but was not immune from the order of prospective injunctive relief in connection with his actions as an official of G Co.: tribal officials are entitled to an extension of tribal sovereign immunity if the tribe, rather than the individual officer, is the real party in interest and if the tribal official acted within the scope of his authority; in the present case, the department sought relief from S only nominally because of his policy-making role as a high ranking officer of the tribe and the entities, rather than as a result of his personal actions taken within the scope of his official capacity, and made only a conclusory and nominal allegation without referring to any specific actions taken by S, such that it was apparent that the tribe, rather than S, was the real party in interest and that S's actions were entirely within the scope of executing his duties as an officer of the tribe, G Co., and C Co., and, in the absence of any allegation that S acted beyond the scope of his authority, he was immune from the civil penalty imposed on him; moreover, tribal sovereign immunity does not extend to injunctive relief against tribal officers responsible for violating state law, and, therefore, S was not immune from the order enjoining him from violating Connecticut banking and usury laws.

Argued October 21, 2020—officially released May 20, 2021*

Procedural History

Appeal from the decision of the named defendant ordering the plaintiffs to cease and desist and to pay certain civil penalties and finding that the plaintiffs are not entitled to tribal sovereign immunity, brought to the Superior Court in the judicial district of New Britain, where the court, *Hon. Joseph M. Shortall*, judge trial referee, denied the defendants' motion to dismiss; thereafter, the case was tried to the court, *Hon. Joseph M. Shortall*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment vacating the orders of the named defendant that imposed certain financial penalties on the plaintiffs and remanding the case to the named defendant to hold an evidentiary

* May 20, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

hearing to reconsider the issue of whether the plaintiffs are entitled to tribal sovereign immunity, from which the plaintiffs appealed and the defendants cross appealed. *Reversed in part*; *judgment directed in part*; *further proceedings*.

Robert A. Rosette, pro hac vice, with whom were *Linda L. Morkan* and, on the brief, *Jeffrey J. White* and *Saba Bazzazieh*, pro hac vice, for the appellants-appellees (plaintiffs).

Clare E. Kindall, solicitor general, with whom were *John Langmaid*, *Joseph J. Chambers* and *Robert J. Deichert*, assistant attorneys general, and, on the brief, *William Tong*, attorney general, for the appellees-appellants (defendants).

Opinion

ROBINSON, C. J. This appeal presents three significant issues of first impression with respect to whether a business entity shares an Indian tribe's sovereign immunity as an "arm of the tribe," as we consider (1) which party bears the burden of proving the entity's status as an arm of the tribe, (2) the legal standard governing that inquiry, and (3) the extent to which a tribal officer shares in that immunity for his or her actions in connection with the business entity. The plaintiffs, Great Plains Lending, LLC (Great Plains), American Web Loan, Inc., doing business as Clear Creek Lending (Clear Creek) (collectively, entities), and John R. Shotton, chairman of the Otoe-Missouria Tribe of Indians (tribe), a federally recognized tribe, appeal[1] from the judgment of the trial court sustaining their administrative appeal and remanding this case to the defendant Commissioner of Banking (commissioner) for further proceedings with respect to the plaintiffs'

[1] The plaintiffs 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.

entitlement to tribal sovereign immunity in administrative proceedings. On appeal, the plaintiffs claim that the trial court should have rendered judgment in their favor as a matter of law, insofar as it improperly (1) allocated the burden of proving entitlement to tribal sovereign immunity to the plaintiffs, (2) required proof of a functioning relationship between the entities and the tribe, and (3) failed to find Shotton immune in further administrative proceedings. The defendants, the commissioner and the Department of Banking (department), cross appeal and similarly challenge the legal standard adopted by the trial court and its decision to remand the case for further administrative proceedings. We conclude that the entity claiming arm of the tribe status bears the burden of proving its entitlement to that status under the test articulated by the United States Court of Appeals for the Tenth Circuit in *Breakthrough Management Group, Inc.* v. *Chukchansi Gold Casino & Resort*, 629 F.3d 1173, 1187 (10th Cir. 2010) (*Breakthrough*), cert. dismissed, 564 U.S. 1061, 132 S. Ct. 64, 180 L. Ed. 2d 932 (2011). We further conclude, as a matter of law, that Great Plains is an arm of the tribe and that Shotton, with respect to his capacity as an officer of Great Plains and the tribe, is entitled to tribal sovereign immunity from civil penalties but not injunctive relief. We also conclude, however, that there is insufficient evidence to support a conclusion that Clear Creek is an arm of the tribe as a matter of law, which requires a remand to the commissioner for further administrative proceedings. Accordingly, we reverse in part the judgment of the trial court.

The record reveals the following undisputed facts and procedural history. The tribe adopted the constitution of the Otoe-Missouria Tribe of Indians on February 4, 1984. In accordance with article IV, § 1, of the tribe's constitution, the Tribal Council (council) adopted the Otoe-Missouria Tribe of Indians Limited Liability Com-

pany Act (LLC Act) and the Otoe-Missouria Tribe of Indians Corporation Act (Corporation Act) on May 4, 2011. Acting pursuant to the LLC Act, the council passed a resolution creating Great Plains on May 4, 2011. American Web Loan, Inc., was created in accordance with the Corporation Act on February 10, 2010, and did business as Clear Creek. Shotton, as chairman of the tribe, served as secretary and treasurer of both entities.

Following an investigation by the department, the commissioner found that the entities had violated Connecticut's banking and usury laws by making small consumer loans to Connecticut residents via the Internet without a license to do so. The commissioner also found that the interest rates on these loans exceeded those permitted under Connecticut's usury and banking laws. On October 24, 2014, the commissioner issued temporary cease and desist orders to the plaintiffs, orders that restitution be made to the Connecticut residents, and a notice of intent to issue permanent cease and desist orders, as well as to impose civil penalties. The plaintiffs timely filed a motion to dismiss the administrative proceedings for a lack of jurisdiction, asserting that (1) the entities are arms of the tribe entitled to tribal sovereign immunity, and (2) Shotton's involvement in the affairs of the entities was within his official capacity, entitling him to tribal sovereign immunity, as well. On January 6, 2015, the commissioner denied the motion to dismiss, concluding that the administrative action of the department was not a "suit" from which the plaintiffs enjoyed tribal sovereign immunity.

The plaintiffs filed an administrative appeal from the denial of the motion to dismiss in the trial court pursuant to the Uniform Administrative Procedure Act. See General Statutes § 4-183. The trial court, *Schuman*, *J.*, determined that "the better conclusion is that the tribe possesses sovereign immunity in [an] . . . administrative proceeding filed against [it] by a state commis-

sioner." The court then remanded the case to the commissioner pursuant to § 4-183 (k) in order to determine whether (1) the entities are "arms of the tribe" entitled to tribal sovereign immunity, and (2) Shotton, as a tribal official, shares in that immunity.

After remand, on June 14, 2017, the commissioner again denied the plaintiffs' motion to dismiss the administrative proceedings, concluding that the entities had failed to demonstrate they were arms of the tribe because "Clear Creek simply did not submit any relevant evidence, and Great Plains failed to demonstrate that its relationship with the tribe is meaningful enough [for it] to be considered an arm of the tribe." Because the commissioner found that the entities were not arms of the tribe, the commissioner further concluded that Shotton was not entitled to tribal sovereign immunity. The commissioner thereafter issued final orders requiring the plaintiffs (1) to "cease and desist from violating two specified sections of part III of chapter 668 of the General Statutes relating to 'small loan lending and related activities,' "[2] and (2) to "pay civil penalties to the department in the following amounts: Great Plains, $700,000; Clear Creek, $100,000; [Shotton], $700,000."

Pursuant to § 4-183 (a), the plaintiffs appealed from the commissioner's final orders to the trial court. The trial court, *Hon. Joseph M. Shortall*, judge trial referee,[3] first determined that the entities bore the burden of demonstrating that they were arms of the tribe entitled to tribal sovereign immunity. In so concluding, the court

[2] Specifically, the commissioner ordered the plaintiffs to cease and desist from violating General Statutes (Rev. to 2015) §§ 36a-555 (1) and (2) and 36a-573 (a). As the trial court noted, No. 16-65, §§ 19 through 36, of the 2016 Public Acts "extensively [revised] and reorganized the statutes regarding small loan lending. The comparable prohibitions now appear in General Statutes §§ 36a-556 and 36a-558."

[3] Unless otherwise noted, all subsequent references to the trial court are to Judge Shortall.

employed the analysis from *Rocky Hill* v. *SecureCare Realty, LLC*, 315 Conn. 265, 105 A.3d 857 (2015), with respect to corporate entities that claim state sovereign immunity from suit as an "arm of the state . . . ." (Internal quotation marks omitted.) Id., 279. The court then determined that the commissioner improperly relied on the finance oriented test outlined in *Sue/Perior Concrete & Paving, Inc.* v. *Lewiston Golf Course Corp.*, 24 N.Y.3d 538, 546–47, 25 N.E.3d 928, 2 N.Y.S.3d 15 (2014) (*Sue/Perior*), in finding that the entities were not arms of the tribe. Instead, the trial court deemed the multifactor test articulated in *People ex rel. Owen* v. *Miami Nation Enterprises*, 2 Cal. 5th 222, 236, 386 P.3d 357, 211 Cal. Rptr. 3d 837 (2016) (*Miami Nation*), to be the proper legal standard. Upon review of the record, the court concluded that, although the evidence presented by the plaintiffs was sufficient to meet most of the factors outlined in *Miami Nation*, it nevertheless was not sufficient to establish the entities' ultimate status as arms of the tribe because the plaintiffs had failed to show how the entities actually *functioned* in relation to their stated purpose.[4] The court further concluded that Shotton's liability "rises and falls with . . . whether [the entities] are arms of the tribe . . . ." Therefore, the trial court rendered judgment sustaining the appeal and remanded the case to the commissioner pursuant to § 4-183 (j) in order for the plaintiffs to "submit evidence addressing these practical considerations to support their claim of tribal sovereign immunity." This appeal and cross appeal followed.[5]

[4] In requiring a functional inquiry, the trial court followed the California Supreme Court's observation in *Miami Nation* that "it is common sense that if an entity provides a miniscule percentage of its revenue to the tribe, and the tribe is barely involved, the entity cannot be said to stand in the place of the tribe. Moreover, if a tribe retains only a minimal percentage of the profits from the enterprise, it would appear that the enterprise may not be truly controlled by the tribe." (Internal quotation marks omitted.) *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 2 Cal. 5th 249.

[5] We note that a remand to an agency pursuant to § 4-183 (j) is a final judgment for purposes of appeal. See, e.g., *Tilcon Connecticut, Inc.* v. *Com-*

On appeal, the plaintiffs claim that the trial court improperly (1) allocated to the entities the burden of proving entitlement to tribal sovereign immunity, (2) applied the tribal sovereign immunity test outlined in *Miami Nation*, (3) failed to deem Shotton entitled to tribal sovereign immunity, and (4) remanded the case to the commissioner rather than concluding that they were entitled to tribal sovereign immunity as a matter of law. In their cross appeal, the defendants argue that the trial court improperly (1) rejected the *Sue/Perior* test used by the commissioner, (2) found that the viability of the department's claims against Shotton depended on whether the entities were arms of the tribe, and (3) remanded the case to the commissioner for further proceedings. We address each claim in turn, setting forth additional relevant facts and procedural history as necessary.

I

Before we consider the parties' claims in detail, we note the following general principles concerning the law of tribal sovereign immunity. A claim of tribal sovereign immunity "implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss. . . . A determination regarding a trial court's subject matter jurisdiction is a question of law." (Internal quotation marks omitted.) *Lewis* v. *Clarke*, 320 Conn. 706, 710, 135 A.3d 677 (2016), rev'd on other grounds, U.S. , 137 S. Ct. 1285, 197 L. Ed. 2d 631 (2017). Accordingly, "[o]ur review of the court's ultimate legal conclusion[s] and resulting [determination] of the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Gold* v. *Rowland*, 296 Conn. 186, 200, 994 A.2d 106 (2010).

Our analysis is guided by core federal Indian law principles that are well established by the decisions of

missioner of Environmental Protection, 317 Conn. 628, 646–47, 119 A.3d 1158 (2015).

the United States Supreme Court. "Indian tribes are distinct, independent political communities, retaining their original natural rights in matters of local self-government. . . . Although no longer possessed of the full attributes of sovereignty, they remain a separate people, with the power of regulating their internal and social relations." (Citations omitted; internal quotation marks omitted.) *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 55, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978). "Indian tribes are 'domestic dependent nations' that exercise inherent sovereign authority over their members and territories." *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509, 111 S. Ct. 905, 112 L. Ed. 2d 1112 (1991), quoting *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17, 8 L. Ed. 25 (1831). Given tribes' sovereign status, they possess "common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo* v. *Martinez*, supra, 58. Such immunity extends to administrative agency actions. See, e.g., *Cash Advance & Preferred Cash Loans* v. *State ex rel. Suthers*, 242 P.3d 1099, 1104 (Colo. 2010) ("tribal sovereign immunity applies to state investigatory enforcement actions"). Tribes retain tribal sovereign immunity unless it is abrogated by Congress or waived by the tribe. See, e.g., *Michigan* v. *Bay Mills Indian Community*, 572 U.S. 782, 788, 134 S. Ct. 2024, 188 L. Ed. 2d 1071 (2014) (*Bay Mills*); *Kiowa Tribe* v. *Mfg. Technologies, Inc.*, 523 U.S. 751, 754, 118 S. Ct. 1700, 140 L. Ed. 2d 981 (1998).

Tribal sovereign immunity applies to tribal activities that occur both inside and outside of "Indian country."[6]

[6] For purposes of this opinion, we note that "Indian country" is a "term of art used to identify territory, specifically, lands on which tribal laws and customs—as well as federal laws relating to Indians—are applicable. Congress has defined Indian country as including three types of land: 'land within the limits of any Indian reservation,' 'dependent Indian communities,' and 'Indian allotments.' " (Footnote omitted.) R. Duncan & C. Martenson, "I Can See Clearly Now: The EPA's Authority to Regulate Indian Country Under the Clean Air Act," 41 Wm. Mitchell L. Rev. 488, 492 (2015). "Indian

See, e.g., *Michigan* v. *Bay Mills Indian Community*, supra, 572 U.S. 790; *Bassett* v. *Mashantucket Pequot Tribe*, 204 F.3d 343, 357 (2d Cir. 2000). Regardless of where the tribal activity takes place, tribal sovereign immunity applies in civil or administrative actions seeking damages or injunctive relief with respect to both the commercial and governmental conduct of the tribe. See *Kiowa Tribe* v. *Mfg. Technologies, Inc.*, supra, 523 U.S. 760; *Imperial Granite Co.* v. *Pala Band of Mission Indians*, 940 F.2d 1269, 1271 (9th Cir. 1991); Cohen's Handbook of Federal Indian Law (N. Newton et al. eds., 2012) § 7.05 [1] [a], p. 637.

In the present case, it is undisputed that the tribe itself is entitled to tribal sovereign immunity. The disputed issue is whether the plaintiffs are entitled to share in that immunity under the doctrine that extends tribal sovereign immunity to business entities or enterprises that act as arms of the tribe. See, e.g., *New York* v. *Golden Feather Smoke Shop, Inc.*, Docket No. 08-CV-3966 (CBA), 2009 WL 705815, *5 (E.D.N.Y. March 16, 2009); *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 2 Cal. 5th 250. Whether a business entity is an arm of the tribe entitled to share in tribal sovereign immunity depends not on "whether the activity may be characterized as a business . . . but [on] whether the entity acts as an arm of the tribe so that its activities are properly deemed to be those of the tribe." *Allen* v. *Gold Country Casino*, 464 F.3d 1044, 1046 (9th Cir. 2006), cert. denied, 549 U.S. 1231, 127 S. Ct. 1307, 167 L. Ed. 2d 119 (2007). Although the United States Supreme

country" is distinct from "Indian lands," which are defined as "lands within Indian reservations and any lands held in trust or restricted status by the United States for the benefit of a tribe or individual Indians . . . ." Cohen's Handbook of Federal Indian Law (N. Newton et al. eds., 2012) § 3.04 [1], p. 184. Finally, land not held in trust by the federal government is often referred to as "tribal land," which generally denotes direct tribal ownership of the land rather than a relationship to the land through allotment, trust, or treaty. Id., § 1.03 [6] [b], p. 61.

Court has recognized that wholly owned tribal corporations may be considered arms of the tribe, that court has not yet articulated a framework for how to make such a determination. See *Williams* v. *Big Picture Loans, LLC*, 929 F.3d 170, 176 (4th Cir. 2019), citing *Inyo County* v. *Paiute-Shoshone Indians of the Bishop Community of the Bishop Colony*, 538 U.S. 701, 704, 705 n.1, 123 S. Ct. 1887, 155 L. Ed. 2d 933 (2003). Determining the proper framework for the arm of the tribe inquiry is similarly an issue of first impression in Connecticut and is the central issue in this appeal.

II

As an initial matter, the parties dispute the proper allocation of the burden of proof in the arm of the tribe analysis. The plaintiffs rely on the Colorado Supreme Court's decision in *Cash Advance & Preferred Cash Loans* v. *State ex rel. Suthers*, supra, 242 P.3d 1099, and contend that the trial court improperly relied on our decision in *Rocky Hill* v. *SecureCare Realty, LLC*, supra, 315 Conn. 265, for the proposition that the "burden of proving by a preponderance of the evidence that [the tribal entities] are entitled to tribal sovereign immunity, i.e., the risk of nonpersuasion, is on the [entities], just as it is on corporate entities that claim entitlement to the state's sovereign immunity from suit as 'arms of the state.' " In response, the defendants argue that the trial court correctly relied on arm of the state analyses, such as that in *SecureCare Realty, LLC*, in concluding that the entities bore the burden of proving their arm of the tribe status. We agree with the defendants and conclude that the entity claiming arm of the tribe status bears the burden of proving its entitlement to that status.

Several state and federal courts have addressed the burden of proof when determining arm of the tribe status, and, like the trial court in the present case, they

have relied on arm of the state analyses in allocating the burden of proof to the entity. See, e.g., *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 176; *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 2 Cal. 5th 240–44. Those courts have consistently concluded that, although a tribe itself does not bear the ultimate burden of proving tribal sovereign immunity, an entity claiming to be an arm of that tribe bears the burden of demonstrating the existence of that relationship and the entity's ultimate entitlement to share in tribal sovereign immunity. See *Williams* v. *Big Picture Loans, LLC*, supra, 177 ("Unlike the tribe itself, an entity should not be given a presumption of immunity until it has demonstrated that it is in fact an extension of the tribe. Once [an entity] has done so, the burden to prove that immunity has been abrogated or waived would then fall to the plaintiff."); *Gristede's Foods, Inc.* v. *Unkechuage Nation*, 660 F. Supp. 2d 442, 466 (E.D.N.Y. 2009) ("the burden of proof for an entity asserting immunity as an arm of a sovereign tribe is on the entity to establish that it is, in fact, an arm of the tribe"); *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 236 ("an entity asserting immunity bears the burden of showing by a preponderance of the evidence that it is an 'arm of the tribe' entitled to tribal immunity"). Put differently, once the entity proves by a preponderance of the evidence that it is an arm of the tribe, the burden shifts back to the party seeking to overcome tribal sovereign immunity to prove that such immunity has been waived or abrogated as a matter of law.[7] See *Williams* v. *Big*

[7] We disagree with the plaintiffs' reliance on the Colorado Supreme Court's decision in *Cash Advance & Preferred Cash Loans* v. *State ex rel. Suthers*, supra, 242 P.3d 1099, for the proposition that the defendants bear the burden of proving that the entities are not arms of the tribe. In that case, the Colorado Supreme Court held that an assertion of tribal sovereign immunity is jurisdictional in nature and, therefore, properly raised in a motion to dismiss. Id., 1112–13. In making that determination, the court also stated that "the state bears the burden of proving, by a preponderance of the evidence, that [the tribal entities] are not entitled to tribal sovereign immunity." Id., 1113. This statement, however, referred to the state's obligation

Picture Loans, LLC, supra, 176–77; *Breakthrough Management Group, Inc.* v. *Chukchansi Gold Casino & Resort*, supra, 629 F.3d 1196 and n.17; *Gristede's Foods, Inc.* v. *Unkechuage Nation*, supra, 465; *Cash Advance & Preferred Cash Loans* v. *State ex rel. Suthers*, supra, 242 P.3d 1113–14.

We disagree with the plaintiffs' argument that placing the burden of proving arm of the tribe status on the business entity encroaches on tribal sovereignty. An otherwise private entity seeking the benefit of tribal sovereign immunity is distinct from the tribe itself, especially because tribal sovereign immunity "is a strong tonic . . . ." *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 2 Cal. 5th 244. Furthermore, consistent with the arm of the state analysis discussed in decisions such as *Rocky Hill* v. *SecureCare Realty, LLC*, supra, 315 Conn. 279,[8] placing the burden of proof on the entity claiming entitlement to tribal sovereign immu-

to prove the existence of jurisdiction in spite of tribal sovereign immunity, not to whether the business entities at issue in that case were arms of the tribe in the first place. After concluding that the state bore the burden of demonstrating jurisdiction, the court engaged in an analysis as to whether the state had proven the waiver of tribal sovereign immunity. See id., 1114. Significantly, the court engaged in this analysis only *after* determining the proper standard to deem an entity an arm of the tribe. See id., 1109–11.

[8] Although placing the burden on the entity is consistent with Connecticut's arm of the state analysis in *Rocky Hill* v. *SecureCare Realty, LLC*, supra, 315 Conn. 279, we note that the ultimate issue of tribal sovereign immunity itself "differs from state [sovereign immunity] in important respects." (Internal quotation marks omitted.) *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 2 Cal. 5th 240; see also *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 268, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997) (tribal immunity is distinct from state immunity because "the plan of the [constitutional] [c]onvention did not surrender Indian tribes' immunity for the benefit of the [s]tates"); *Blatchford* v. *Native Village of Noatak*, 501 U.S. 775, 782, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991) ("Indian tribes enjoy immunity against suits by [s]tates . . . as it would be absurd to suggest that the tribes surrendered immunity in a [constitutional] convention to which they were not even parties"); *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 240 (noting that states have consented to suit by other states but that tribes have never agreed to so limit their tribal sovereign immunity).

nity as an arm of the tribe is appropriate because, pragmatically, the entity claiming such immunity will have the best access to the evidence necessary to prove the existence of that relationship. See *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 177 ("as a practical matter, it makes sense to place the burden on [business entities] . . . as they will likely have the best access to the evidence needed to demonstrate immunity"); *New York* v. *Golden Feather Smoke Shop, Inc.*, supra, 2009 WL 705815, *4 ("the issue of whether an entity is an arm of the tribe may rest on nuances in the entity's ownership and control structure, corporate purpose, and relationship with the tribal government"). Having determined that the entities bear the burden of demonstrating they are arms of the tribe, we next turn to the appropriate legal standard for determining whether they are arms of the tribe.

III

A

With respect to the standard that guides the arm of the tribe analysis, the plaintiffs argue that the trial court properly rejected the nine factor test articulated in *Sue/Perior Concrete & Paving, Inc.* v. *Lewiston Golf Course Corp.*, supra, 24 N.Y.3d 546–47, but nevertheless improperly adopted the test outlined in *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 2 Cal. 5th 246–47. Instead, the plaintiffs assert that the trial court should have relied on the *Breakthrough* test; see *Breakthrough Management Group, Inc.* v. *Chukchansi Gold Casino & Resort*, supra, 629 F.3d 1187; to determine whether they are entitled to arm of the tribe status. In response, the defendants argue that the trial court improperly rejected the *Sue/Perior* test on which the commissioner relied, and, alternatively, that the trial court correctly applied the five factor test focusing on the function of the relationship between the entity and

the tribe, as set forth in *Miami Nation*, in determining that the entities are not arms of the tribe. We agree with the plaintiffs and conclude that the *Breakthrough* test governs the arm of the tribe inquiry.

A series of federal and state cases have attempted to outline an approach to determining whether an entity is an arm of the tribe. A review of the evolution of that line of cases is helpful in considering the parties' arguments in this appeal. In 2010, the United States Court of Appeals for the Tenth Circuit outlined a six factor test for considering arm of the tribe status in *Breakthrough Management Group, Inc.* v. *Chukchansi Gold Casino & Resort*, supra, 629 F.3d 1173. In *Breakthrough*, the court identified six factors to determine whether a relationship between a tribe and entity was close enough to allow that entity to share the tribe's sovereign immunity as an arm of the tribe, namely, (1) the method of creation of the economic entities, (2) the purpose of those entities, (3) the structure, ownership, and management of the entities, including the amount of control the tribe has over them, (4) the tribe's intent with respect to sharing its sovereign immunity, (5) "the financial relationship between the tribe and the entities," and (6) the "policies underlying tribal sovereign immunity and its connection to tribal economic development, and whether those policies are served by granting immunity to the economic entities." Id., 1187. The *Breakthrough* test has been implemented by a majority of the federal courts that have considered this issue. See, e.g., *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 177; *White* v. *University of California*, 765 F.3d 1010, 1025 (9th Cir. 2014), cert. denied sub nom. *White* v. *Regents of the University of California*, 577 U.S. 1124, 136 S. Ct. 983, 194 L. Ed. 2d 13 (2016); *Allen* v. *Gold Country Casino*, supra, 464 F.3d 1046–47; *Solomon* v. *American Web Loan*, 375 F. Supp. 3d 638, 653 (E.D. Va. 2019); *Johnson* v. *Harrah's Kansas*

Casino Corp., Docket No. 04-4142-JAR, 2006 WL 463138, *3–8 (D. Kan. February 23, 2006). But see *Somerlott* v. *Cherokee Nation Distributors, Inc.*, 686 F.3d 1144, 1149–50 (10th Cir. 2012) (declining to apply *Breakthrough* test when entity was incorporated under state law).

Subsequently, in 2014, the New York Court of Appeals articulated in *Sue/Perior* a slightly different version of the nine factor test that it had originally announced in 1995. See *Sue/Perior Concrete & Paving, Inc.* v. *Lewiston Golf Course Corp.*, supra, 24 N.Y.3d 546–47, citing *In re Ransom* v. *St. Regis Mohawk Education & Community Fund, Inc.*, 86 N.Y.2d 553, 559–60, 658 N.E.2d 989, 635 N.Y.S.2d 116 (1995).[9] In its analysis, the court focused closely on the financial relationship between the tribe and entity. See *Sue/Perior Concrete & Paving, Inc.* v. *Lewiston Golf Course Corp.*, supra, 549–51.

In 2016, the California Supreme Court rejected the emphasis that the New York Court of Appeals placed on the financial relationship between the tribe and the entity in *Sue/Perior*. See *People ex rel. Owen* v. *Miami*

[9] "Although no set formula is dispositive, in determining whether a particular tribal organization is an 'arm' of the tribe entitled to share the tribe's immunity from suit, courts generally consider such factors as whether: [1] the entity is organized under the tribe's laws or constitution rather than [f]ederal law; [2] the organization's purposes are similar to or serve those of the tribal government; [3] the organization's governing body is comprised mainly of tribal officials; [4] the tribe has legal title or ownership of property used by the organization; [5] tribal officials exercise control over the administration or accounting activities of the organization; and [6] the tribe's governing body has power to dismiss members of the organization's governing body. . . . More importantly, courts will consider whether [7] the corporate entity generates its own revenue, whether [8] a suit against the corporation will impact the tribe's fiscal resources, and whether [9] the subentity has the 'power to bind or obligate the funds of the [tribe]' . . . . The vulnerability of the tribe's coffers in defending a suit against the subentity indicates that the real party in interest is the tribe." (Citations omitted.) *In re Ransom* v. *St. Regis Mohawk Education & Community Fund, Inc.*, 86 N.Y. 2d 553, 559–60, 658 N.E.2d 989, 635 N.Y.S.2d 116 (1995).

Nation Enterprises, supra, 2 Cal. 5th 247. *Miami Nation* largely follows the *Breakthrough* test, with two significant differences. First, the California Supreme Court correctly noted that the sixth factor in *Breakthrough*, namely, whether federal Indian law policies underlying tribal sovereign immunity and its connection to tribal economic development are served by granting immunity to the economic entities, overlaps significantly with the first five factors; rather than serving as an independent factor, such policies should color the court's analysis of each of the other factors. Id., 245.

Second, the California Supreme Court supplemented the *Breakthrough* test by implementing a functional inquiry when considering both the entity's financial relationship with a tribe and the entity's stated purpose. The court explained: "[T]his test takes into account both formal and functional considerations—in other words, not only the legal or organizational relationship between the tribe and the entity, but also the practical operation of the entity in relation to the tribe." Id., 236. The court emphasized considering "the extent to which the entity *actually promotes* tribal self-governance . . . ." (Emphasis added.) Id., 245. In considering the entity's purpose, the court in *Miami Nation* went further than considering its *stated* purpose by examining the extent to which the entity was *achieving* that goal. Id., 246–47. The court explained that the "fit between [the] stated purpose and practical execution need not be exact, but the closer the fit, the more it will weigh in favor of immunity." Id., 247. The court noted that an entity with the stated purpose of furthering tribal economic development could demonstrate such purpose by demonstrating the jobs created for tribal members or the revenue generated for the tribe. Id. This factor, however, may weigh against establishing arm of the tribe status when an entity is engaging in activities unrelated to its stated goals or operating mainly to

enrich individuals outside of the tribe. Id. The California court justified this additional inquiry by highlighting that "[t]hese functional considerations illuminate the degree to which imposition of liability on the entity would practically impair tribal self-governance." Id., 245.

The United States Court of Appeals for the Fourth Circuit recently declined to engage as directly with the functional aspects of an entity's stated purpose and financial relationship. See *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 180. The Fourth Circuit stated that the functional analysis demands "a breakdown of exactly what percentage of the [t]ribe's budget went to each of [the tribal] activities [the entity's revenue had funded] and exactly what percentage of the funding for these activities constituted [entity] revenue. Such a requirement is at odds with policy considerations of tribal self-governance and economic development." Id.

We agree with the Fourth Circuit that an exacting inquiry into the operation of tribal treasuries goes too far. Although evidence of an entity's stated purpose may well include a showing of function, and such a showing would likely strengthen an entity's claim to arm of the tribe status, we would not mandate this additional functional inquiry, specifically, whether "the entity actually promotes tribal self-governance"; *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 2 Cal. 5th 245; because we consider the inquiry unworkable and potentially inimical to the principle of self-governance underlying tribal immunity.

First, we understand the functional inquiry prescribed by *Miami Nation* to require an analysis of the *tribe's* finances, as opposed to those of the entity; in essence, we understand it to ask whether the entity serves as a successful business venture for the tribe.

This becomes a nebulous, subjective, difficult to apply inquiry that may overlook or underestimate the value of certain business ventures to the tribe. For example, the inquiry might lead to the conclusion that fledgling business entities without a steady revenue stream are less deserving of tribal sovereign immunity than established ventures, potentially depriving tribal business entities of immunity during an especially vulnerable period at the beginning of the venture. Second, to the extent that the inquiry calls for an examination of the finances of the tribe, rather than those of the entity seeking the tribe's immunity, it could lead to an improper incursion into the financial affairs of a coordinate sovereign. See *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 179 ("the promotion of tribal self-governance . . . counsels against courts demanding exacting information about the minutiae of a tribe's budget"); *Altheimer & Gray* v. *Sioux Mfg. Corp.*, 983 F.2d 803, 815 (7th Cir.) ("economic independence is the foundation of a tribe's self-determination"), cert. denied, 510 U.S. 1019, 114 S. Ct. 621, 126 L. Ed. 2d 585 (1993).

Accordingly, like the Fourth, Ninth, and Tenth Circuits, we adopt the first five *Breakthrough* factors to analyze, in light of federal Indian law and policy, whether the entities constitute arms of the tribe for purposes of tribal sovereign immunity. See *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 177. We will consider the extent to which granting arm of the tribe status furthers the purposes of tribal sovereign immunity throughout the following analysis. See id. Considering the five factors outlined in *Breakthrough* and *Miami Nation*, the trial court in this case found sufficient evidence to satisfy each factor but ultimately determined that the evidence was insufficient to meet the additional functional inquiry prescribed by *Miami Nation*. We disagree with the trial court's reasoning to the extent

that it focused on the functional aspect of the tribe's relationship with the entities. Reviewing the trial court's decision de novo, we instead conclude that Great Plains is an arm of the tribe as a matter of law and is entitled to tribal sovereign immunity but that there is not enough evidence to conclude that Clear Creek is an arm of the tribe.

B

Having identified the proper standard for determining whether an entity is an arm of the tribe entitled to share in tribal sovereign immunity, we now apply those five factors to the factual record in this case and consider each entity in turn.

1

Method of Creation

The first factor, "the method of creation" of the entity, focuses on the law under which the entity was formed. (Internal quotation marks omitted.) *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 177; see, e.g., *Breakthrough Management Group, Inc.* v. *Chukchansi Gold Casino & Resort*, supra, 629 F.3d 1191–92; *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 2 Cal. 5th 245–46. Formation under tribal law weighs in favor of immunity. See *Breakthrough Management Group, Inc.* v. *Chukchansi Gold Casino & Resort*, supra, 1191. "The circumstances under which the entity's formation occurred, including whether the tribe initiated or simply absorbed an operational commercial enterprise, are also relevant." *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 246.

Here, as described in the affidavit of Ted Grant, vice chairman of the tribe, the tribe's constitution grants its council the power to "make all laws and ordinances for the benefit of the [t]ribe." It is undisputed that the entities at issue in this case were created under tribal

law, namely, the LLC Act and the Corporation Act. The record contains tribal resolutions creating the entities,[10] along with tribal certificates of license for both entities. Because both entities were created under tribal law on the tribe's own initiative, this factor weighs in favor of tribal sovereign immunity for both entities. See *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 177; *Breakthrough Management Group, Inc.* v. *Chukchansi Gold Casino & Resort*, supra, 629 F.3d 1191–92.

2

Purpose

The second factor "incorporates both the stated purpose for which the [e]ntities were created as well as evidence related to that purpose." *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 178; see, e.g., *Breakthrough Management Group, Inc.* v. *Chukchansi Gold Casino & Resort*, supra, 629 F.3d 1192–93. "The stated purpose need not be purely governmental to weigh in favor of immunity as long as it relates to broader goals of tribal self-governance." *Williams* v. *Big Picture Loans, LLC*, supra, 178. The entity's purpose is relevant because "[f]ew tribes have any significant tax base. Tribal business enterprises may be the only means by which a tribe can raise revenues—and thus such enterprises may be essential to the fulfillment of the tribe's governmental obligations." (Internal quotation marks omitted.) *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 2 Cal. 5th 247–48, quoting C. Struve, "Tribal Immunity and Tribal Courts," 36 Ariz. St. L.J. 137, 169 (2004).

Here, Grant describes in his affidavit the stated purpose of both entities as "to advance the [t]ribe's economic development and to aid in addressing issues of

[10] We note that the tribal ordinance created American Web Loan, Inc., which is a corporate entity that does business as Clear Creek.

public health, safety, and welfare." Grant's affidavit is consistent with and supported by the operating agreement for Great Plains, which provides that the tribe "desires to form a limited liability company for the purpose of carrying on a for-profit business and to further the economic goals and initiatives of the [t]ribe." By contrast, the record does not contain articles of incorporation or bylaws for American Web Loan, Inc., doing business as Clear Creek; the only evidence of Clear Creek's stated purpose is the council's resolution creating the entity, which states its determination "that the best interest of the [tribe] is best served by the adoption of the Otoe-Missouria Tribe American Web Loan Act . . . ."

The defendants urge us to uphold the trial court's decision to require, consistent with the California Supreme Court's reasoning in *Miami Nation*, a further showing of how the stated purpose is functioning in actuality in order to satisfy this factor. They claim that the record is insufficient to demonstrate that the entities have achieved their purpose. However, *Miami Nation* is distinguishable because, as the Fourth Circuit noted, the evidence in that case "indicated that the tribe received barely any revenue, and the entities could not identify the percentage of profits from the lending operations that flowed to the tribe or how those profits were used." *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 181; see *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 2 Cal. 5th 254–55. Furthermore, the entities in *Miami Nation* were engaging in profit sharing with apparently nontribal members, whereas the record in the present case indicates that both entities were created under tribal law for the sole purpose of generating revenue for the tribe, thus promoting tribal self-governance and economic development. See *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 254.

The record in the present case does not indicate, and the defendants do not allege, that proceeds from Great Plains or Clear Creek are going to nontribal members. Indeed, both Grant's affidavit and the operating agreement for Great Plains indicate that the tribe, as the sole member, is the sole recipient of any profits generated by Great Plains and that the purpose of Great Plains is to promote tribal self-governance and economic development. Imposing a more exacting standard that requires the opening and examination of a tribe's financial books and records in order to show the extent to which a tribal business enterprise is functionally achieving its purpose, in the absence of any indication that such proceeds are flowing to nontribal members or that the entities serve a purpose other than the one asserted by the tribe, would infringe too greatly on tribal self-governance and self-determination. See *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 180 ("[s]uch a requirement [of breaking down a tribe's budget into percentages] is at odds with policy considerations of tribal self-governance and economic development"). Because the stated purpose of Great Plains is to advance the tribe's "economic development to aid in addressing issues of public health, safety, and welfare," and the record provides evidence of such purpose in the tribal law and resolution creating Great Plains, as well as its operating agreement, with no evidence supporting a conclusion to the contrary, we conclude that this factor weighs in favor of immunity for Great Plains.

The record, however, does not contain evidence of Clear Creek's stated purpose beyond the resolution creating American Web Loan, Inc., and Grant's affidavit containing a single, conclusory statement. The plaintiffs bear the burden of establishing their arm of the tribe status, and, without further description or documentation linking the entity's stated purpose to the furtherance of tribal economic development, we conclude that

there is insufficient evidence for this factor to weigh in favor of finding Clear Creek to be an arm of the tribe. See, e.g., *Buell Industries, Inc.* v. *Greater New York Mutual Ins. Co.*, 259 Conn. 527, 557, 791 A.2d 489 (2002) ("conclusory affidavits, even from expert witnesses, do not provide a basis on which to deny [summary judgment motions]" (internal quotation marks omitted)); see also id., 557–58 (because "the plaintiff properly had the burden to establish the existence of these facts, it cannot avoid summary judgment . . . by the mere assertion of a conclusion").

3

Control

The third factor "examines the structure, ownership, and management of the entities, 'including the amount of control the [t]ribe has over the entities.' " *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 182, quoting *Breakthrough Management Group, Inc.* v. *Chukchansi Gold Casino & Resort*, supra, 629 F.3d 1191. In determining the existence of tribal control, courts consider "the entities' formal governance structure, the extent to which the entities are owned by the tribe, and the day-to-day management of the entities." *Williams* v. *Big Picture Loans, LLC*, supra, 182; see *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 2 Cal. 5th 247 (noting that control of entity does not require control of all business minutiae). The extent to which a tribe is actively involved in directing or overseeing the operation of the entity will affect the extent to which this factor weighs in favor of immunity. See *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 247. In considering the tribe's control over an entity, courts consider the totality of the circumstances to determine whether the tribe has sufficient operational control to

render an entity an arm of the tribe.[11] See *Williams* v. *Big Picture Loans, LLC*, supra, 183 (outsourcing of entity's day-to-day management did not outweigh other factors weighing in favor of immunity).

The trial court found the tribe's control of the entities evident from Grant's affidavit, which provides that Shotton, who is the chairman of the tribe, serves as secretary and treasurer of both entities and is responsible for "certain oversight" of the entities. Grant also states that both entities' officers are appointed by the council and may be removed by the council with or without cause. The operating agreement of Great Plains further provides that its board of directors is appointed by the council and any board member may be removed by the council with or without cause. Because there is no evidence that Great Plains is controlled in any way by nontribal members and, in fact, is ultimately controlled by tribal officials, this factor strongly weighs in favor of finding that Great Plains is an arm of the tribe. See id., 183–84 (concluding that this factor weighed against entity controlled in part by nontribal members when doing business off reservation). The record, however, does not contain evidence beyond Grant's affidavit of

[11] The control factor requires a balancing of various considerations. The court in *Williams* noted that the outsourcing of "day-to-day management to a [nontribal] entity . . . would not in itself weigh against immunity, given the other evidence of [t]ribal control." *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 183. The court deemed the control factor to weigh in favor of immunity, regardless of the outsourcing of day-to-day management, because the first entity it considered was otherwise managed by tribal members who were appointed by the council and empowered to run the business. Id. In contrast, the Fourth Circuit held that the control factor did not weigh in favor of immunity for the second entity it considered in *Williams*. Id., 183–84. The court came to this different conclusion because the second entity was not managed by tribal members on a daily basis, the tribal officers had little knowledge of the management practices and delegated strategic tasks to nontribal members, and the entity conducted most of its business off reservation with nontribal members. Id., 183. The culmination of these facts led the court to conclude that the control factor weighed slightly against immunity for the second entity. Id., 184.

the tribe's control of Clear Creek or of its structure or management. The affidavit merely describes the entity as wholly owned by the tribe, with officers appointed and removed by the tribal council. The affidavit does not provide information about the actual control and management that the tribe has over Clear Creek. Without further documentation or description, there is insufficient evidence in the record to determine whether this factor weighs in favor of Clear Creek being an arm of the tribe.

4

Tribal Intent

The fourth factor examines "solely" the tribe's intent to extend its sovereign immunity to the entities. *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 184. Tribal intent is often expressly stated in the tribal ordinance or articles of incorporation that create the entity, but it can also be inferred from "the tribe's actions or other sources." *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 2 Cal. 5th 246. It is not appropriate to consider the motives behind the tribe's intent, but only to consider whether any intent was expressed at all. See *Williams* v. *Big Picture Loans, LLC*, supra, 184 (holding that district court improperly considered "driving force for the [t]ribe's intent to share its immunity" (internal quotation marks omitted)).

Here, the tribe expressly and unequivocally indicated its intent to extend its immunity to Great Plains in the operating agreement, which supports Grant's statement in his affidavit that the "[t]ribe granted [the entities] all privileges and immunities enjoyed by the [t]ribe, including, but not limited to, immunities from suit as well as any [f]ederal, [s]tate, and local taxation or regulation." The tribe's LLC Act, under which Great Plains was formed, further evidences tribal intent to extend immunity to entities created thereunder when the tribe

is the sole member, as in the present case, by providing in relevant part: "Such [limited liability companies] . . . shall, therefore, be entitled to all of the privileges and immunities enjoyed by the [t]ribe, including, but not limited to, immunities from suit in [f]ederal, [s]tate, and [t]ribal courts and from [f]ederal, [s]tate, and local taxation or regulation . . . ." Because the record undisputedly indicates tribal intent to extend immunity to Great Plains, this factor weighs in favor of it being an arm of the tribe. Once again, however, the only evidence of tribal intent to extend immunity to Clear Creek is contained in Grant's affidavit in a single conclusory statement. Thus, without further information from articles of incorporation, bylaws, or the tribe's Corporation Act, there is insufficient evidence in the record for us to conclude that this factor weighs in favor of finding that Clear Creek is entitled to tribal sovereign immunity.

5

Financial Relationship

The fifth factor contemplates the financial relationship between the tribe and the entities. See, e.g., *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 184; *Breakthrough Management Group, Inc.* v. *Chukchansi Gold Casino & Resort*, supra, 629 F.3d 1194. One relevant consideration is whether a judgment against an entity would affect the tribe's assets, as well. See *Williams* v. *Big Picture Loans, LLC*, supra, 184. Although direct tribal liability "is neither a threshold requirement for immunity nor a predominant factor in the overall analysis," if a judgment against the entity would affect the tribe's assets, this factor will more likely weigh in favor of immunity, even if the tribe's liability is "formally limited." (Internal quotation marks omitted.) Id., quoting *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 2 Cal. 5th 247. Courts also examine "the extent to which a tribe 'depends . . . on the [entity] for reve-

nue to fund its governmental functions, its support of tribal members, and its search for other economic development opportunities.' " *Williams* v. *Big Picture Loans, LLC*, supra, 184, quoting *Breakthrough Management Group, Inc.* v. *Chukchansi Gold Casino & Resort*, supra, 1195. "If a judgment against the entity would significantly impact the tribal treasury, this factor will weigh in favor of immunity even if the tribe's liability for an entity's actions is formally limited." *Williams* v. *Big Picture Loans, LLC*, supra, 184.

Grant's affidavit clearly states that both entities are wholly owned by the tribe. Section 5.1 of the operating agreement of Great Plains provides that "[a]ll [p]rofits and [l]osses shall be allocated to the [t]ribe as the sole [m]ember," and § 5.2 provides that "[a]ll [c]ash [f]low shall be distributed to the [t]ribe, at least quarterly unless otherwise approved by the [t]ribal [c]ouncil." This language clearly indicates the financial interests of the tribe as the sole member and owner of Great Plains. Although there is no allegation or evidence that the profits generated by Clear Creek are being directed anywhere other than to the tribe, the record is less descriptive of any financial relationship between Clear Creek and the tribe because it does not include articles of incorporation, bylaws, or any other legal documents governing the structure and operation of Clear Creek.

Instead of challenging the existence of the financial relationship between the business entities and the tribe, the defendants argue that there is not enough information in the record to find that there is a *sufficiently* significant financial relationship to establish that the entities are arms of the tribe.[12] Similarly, the trial court

[12] Beyond arguing that the record is insufficient, the department emphasizes the nature of the harm in this case, namely, the high interest rates imposed on Connecticut residents who entered into loans with the entities. The department's point is well taken from the perspective of its responsibility of protecting Connecticut's citizens from predatory financial practices. An entity's entitlement to tribal sovereign immunity, however, is an inquiry distinct from the ethics of its business. Entitlement to tribal sovereign immu-

concluded that, although Grant's affidavit and the supporting documents addressed this factor to a certain extent, the record was insufficient to establish entitlement to tribal sovereign immunity. The trial court based its conclusion on the additional inquiry outlined in *Miami Nation*, namely, that the evidence failed to show that the entity *actually*, rather than just nominally, promoted tribal self-governance.

The record does not provide a detailed accounting of each entity's financial records or the degree to which each entity generates profits that support specific tribal activities. Although such an accounting would indeed provide clear evidence of a functioning financial relationship between the tribe and the entity, it is not a necessary factor. See *People ex rel. Owen* v. *Miami Nation Enterprises*, supra, 2 Cal. 5th 248 ("[d]etermining whether this factor weighs in favor of immunity requires a consideration of degree rather than a binary decision"). Just as a financial relationship in and of itself is not dispositive of the tribal arm analysis, we decline to require a sovereign to provide detailed information about the extent to which an entity supports its budget, when they otherwise furnish significant evidence that an entity is an arm of the tribe. See id., 247 (holding that whether judgment against entity would reach tribe's assets is relevant but "neither a threshold requirement for immunity nor a predominant factor in the overall analysis"). Because the record sufficiently demonstrates a financial relationship between the tribe and Great Plains, and there is no evidence to the contrary, we conclude that this factor, although perhaps the weakest of the five, also weighs in favor of arm of

nity "cannot and does not depend on a court's evaluation of the respectability of the business in which a tribe has chosen to engage." *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 185. Congress, rather than the courts, is responsible for abrogating tribal sovereign immunity. See, e.g., *Michigan* v. *Bay Mills Indian Community*, supra, 572 U.S. 800.

the tribe status for Great Plains. The record does not contain enough evidence to conclude that this factor weighs in favor of immunity for Clear Creek because the existence of a financial relationship is indicated only by Grant's conclusory affidavit stating that Clear Creek is a wholly owned entity of the tribe. The record does not specifically indicate whether any profits or funds from Clear Creek are directed to the tribe, although the fact that it is wholly owned by the tribe could support an inference that its profits are directed to the tribe. Without more detail on this point, however, we cannot conclude that this factor weighs in favor of Clear Creek being an arm of the tribe.

We have considered these factors in light of the underlying policies supporting tribal sovereign immunity, namely, the promotion of tribal self-governance and economic development, and the "protection of the tribe's monies and the promotion of commercial dealings between Indians and non-Indians." (Internal quotation marks omitted.) *Williams* v. *Big Picture Loans, LLC*, supra, 929 F.3d 185, quoting *Breakthrough Management Group, Inc.* v. *Chukchansi Gold Casino & Resort*, supra, 629 F.3d 1187–88. In regard to Great Plains, the record reflects that it was created under tribal law and is controlled by directors appointed by the council for the purpose of promoting tribal economic development and welfare. The record further indicates a significant financial relationship between the tribe and Great Plains, which leads us to conclude that withholding tribal sovereign immunity from Great Plains as an arm of the tribe would interfere with the tribe's self-governance and economic development. See *Williams* v. *Big Picture Loans, LLC*, supra, 185 (declining to find no immunity when that conclusion, even if made to protect tribe, would weaken tribe's ability to self-govern). Accordingly, we conclude that all five factors indicate that Great Plains is an arm of the tribe as

a matter of law. Because there is no indication that Congress abrogated immunity or any claim that the tribe has waived its immunity, we conclude that Great Plains is entitled to tribal sovereign immunity as an arm of the tribe. See, e.g., *Santa Clara Pueblo* v. *Martinez*, supra, 436 U.S. 58; *Williams* v. *Big Picture Loans, LLC*, supra, 185. We conclude, however, that the minimal evidence in the record in regard to Clear Creek, consisting of only a certificate of license, the resolution creating American Web Loan, Inc., and Grant's affidavit containing conclusory statements, is insufficient to support a similar conclusion for Clear Creek. Thus, because the record supports a conclusion of immunity as a matter of law only as to Great Plains, the trial court improperly remanded the case to the commissioner for further proceedings as to both entities, rather than directing judgment on this point in regard to Great Plains and remanding to the department for further proceedings as to Clear Creek.

IV

Having determined that Great Plains is an arm of the tribe entitled to tribal sovereign immunity, we now turn to the issue of whether Shotton similarly shares in that immunity.[13] The defendants imposed both civil penalties and injunctive relief against Shotton. The defendants argue that Shotton, rather than the tribe, is the real party in interest and that the department therefore took action against Shotton in his individual, rather than official capacity, precluding him from claiming immunity from civil penalties or injunctive relief. The defendants emphasize that the department took action

[13] We note that our discussion in this section regarding Shotton's immunity is applicable to his claimed immunity as an officer of both entities. However, because there is not enough evidence in the record to conclude that Clear Creek is an arm of the tribe, the ultimate determination of Shotton's immunity regarding his affiliation with Clear Creek remains a matter for the commissioner to determine on remand in accordance with this opinion.

against Shotton in his individual capacity due to "his personal participation in violations of the state's usury and banking laws." In response, the plaintiffs argue that the trial court correctly determined that the tribe is the real party in interest, rendering Shotton immune from civil penalties and injunctive relief. They contend that the tribe is the real party in interest because the defendants do not allege any specific actions taken by Shotton personally in relation to the lending activities of the entities, and they emphasize that any damages or injunctive relief against Shotton would affect the tribe's treasury. We conclude that the tribe is the real party in interest, rendering Shotton immune from civil penalties but not injunctive relief.

The following general background principles inform the extent to which Shotton is entitled to share in the tribe's immunity. Members of the tribe do not have tribal sovereign immunity simply by virtue of their status as members. Cohen's Handbook of Federal Indian Law, supra, § 7.05 [1] [a], p. 638 and n.13, citing *Puyallup Tribe, Inc.* v. *Dept. of Game*, 433 U.S. 165, 172–73, 97 S. Ct. 2616, 53 L. Ed. 2d 667 (1977). In the absence of tribal sovereign immunity or a federal law to the contrary, "Indians going beyond reservation boundaries have generally been held subject to nondiscriminatory state law otherwise applicable to all citizens of the [s]tate." *Mescalero Apache Tribe* v. *Jones*, 411 U.S. 145, 148–49, 93 S. Ct. 1267, 36 L. Ed. 2d 114 (1973). In determining whether a tribal official is protected by tribal sovereign immunity, the United States Supreme Court has extended the doctrines governing state and federal employee liability to the context of tribal sovereign immunity. See *Lewis* v. *Clarke*, supra, 137 S. Ct. 1290; see also Cohen's Handbook of Federal Indian law, supra, § 7.05 [1] [a], p. 638 n.18, citing *Regents of the University of California* v. *Doe*, 519 U.S. 425, 429, 117 S. Ct. 900, 137 L. Ed. 2d 55 (1997) (sovereign immunity

bars suit against state officers to recover money from state). Tribal officials are, therefore, entitled to an extension of tribal sovereign immunity if two conditions are met: (1) the tribe, rather than the individual officer, is the real party in interest, *and* (2) the tribal official acted within the scope of his or her authority. See *Lewis* v. *Clarke*, supra, 1290–91; see also *Chayoon* v. *Chao*, 355 F.3d 141, 143 (2d Cir.) ("[the plaintiff] cannot circumvent tribal immunity by merely naming officers or employees of the [t]ribe when the complaint concerns actions taken in [the] defendants' official or representative capacities and the complaint does not allege they acted outside the scope of their authority"), cert. denied, 543 U.S. 966, 125 S. Ct. 429, 160 L. Ed. 2d 336 (2004). We address each of these conditions in turn.

A

The United States Supreme Court has drawn a distinction between individual and official capacity suits for purposes of the immunity of tribal officers. See *Lewis* v. *Clarke*, supra, 137 S. Ct. 1292. In *Lewis*, the plaintiffs sued the defendant, a limousine driver employed by an arm of a tribe, in his individual capacity after his involvement in a car accident on an interstate highway away from the reservation. Id., 1290. The defendant asserted that he was protected by tribal sovereign immunity because of his employment for an arm of the tribe and that his conduct was within his official duties as an employee, namely, driving the limousine, thus entitling him to immunity. Id. The court disagreed with the defendant and concluded that tribal sovereign immunity did not extend to him because the remedy sought by the plaintiffs in *Lewis* would operate against the individual limousine driver, rather than the tribe, as a consequence of his *personal conduct* that resulted in a tort away from the reservation.[14] Id., 1292–93. The

[14] We note that whether there is an indemnification agreement between a tribal employee and the tribe does not ultimately determine whether the tribe's sovereign immunity will extend to that individual. See *Lewis* v. *Clarke*,

court noted that this result did not abrogate tribal sovereignty because the official was being sued in his personal rather than official capacity, and he was therefore subject to the same exposure to liability as state and federal officials under the same circumstances. Id., 1292–93. The court highlighted the distinction between official capacity claims when "the relief sought is only nominally against the official and in fact is against the official's office and thus the sovereign itself," and personal capacity claims which "seek to impose *individual* liability [on] a government officer for actions taken under color of state law." (Emphasis in original; internal quotation marks omitted.) Id., 1292. Such a distinction is critical because the "identity of the real party in interest dictates what immunities may be available." Id. We therefore address that distinction in detail.

"The general bar against [official capacity] claims . . . does not mean that tribal officials are immunized from [individual capacity] suits *arising out of* actions they took in their official capacities . . . . Rather, it means that tribal officials are immunized from suits brought against them because of their official capacities—that is, *because* the powers they possess in those capacities enable them to grant the plaintiffs relief on behalf of the tribe." (Citation omitted; emphasis altered.) *Native American Distributing* v. *Seneca-Cayuga Tobacco Co.*, 546 F.3d 1288, 1296 (10th Cir. 2008). Generally, individual or "[personal capacity] suits seek to impose personal liability [on] a government official for [wrongful] actions [that] he takes under color of . . . law" and in the course of his official duties. *Kentucky* v. *Graham*, 473 U.S. 159, 165, 105 S. Ct. 3099, 87 L. Ed. 2d 114 (1985). "By contrast, official capacity suits ultimately seek to hold the entity of which

supra, 137 S. Ct. 1293 ("an indemnification provision cannot, as a matter of law, extend sovereign immunity to individual employees who would otherwise not fall under its protective cloak").

the officer is an agent liable, rather than the official himself: they generally represent [merely] another way of pleading an action against an entity of which an officer is an agent." (Internal quotation marks omitted.) *Pistor* v. *Garcia*, 791 F.3d 1104, 1112 (9th Cir. 2015), quoting *Kentucky* v. *Graham*, supra, 165–66; see *Pistor* v. *Garcia*, supra, 1112 (focusing on plaintiffs' suit against individual tribal officers rather than against tribe's treasury).[15]

"To identify the real, substantial party in interest, one factor that the court examines is the substance of the claims stated in the complaint, positing inquiries such as . . . [whether] the actions of the state officials [were] taken to further personal interests distinct from the [s]tate's interests . . . . Other factors include . . . whether the unlawful actions of the officials were tied inextricably to their official duties, whether the burden of the relief would be borne by the sovereign if the official had authorized the relief at the outset, whether a judgment would be institutional and official in character so as to operate against the sovereign, and whether the official's actions were ultra vires." (Citation omitted; internal quotation marks omitted.) *Solomon* v. *American Web Loan*, supra, 375 F. Supp. 3d 661.

As an example of this often subtle distinction, the United States Court of Appeals for the Tenth Circuit held that the tribe, rather than an individual tribal officer, was the real party in interest when it rejected a breach of contract and civil conspiracy action against

[15] We note that the Ninth Circuit has taken a "[remedy focused]" approach to determine the real party in interest, asking "whether the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration, or if the effect of the judgment would be to restrain the [sovereign] from acting, or to compel it to act." (Internal quotation marks omitted.) *Maxwell* v. *San Diego*, 708 F.3d 1075, 1088 (9th Cir. 2013). Such an inquiry is consistent with the guidance provided by the United States Supreme Court in *Kentucky* v. *Graham*, supra, 473 U.S. 159.

a tribally owned entity and tribal officers. See *Native American Distributing* v. *Seneca-Cayuga Tobacco Co.*, supra, 546 F.3d 1290, 1297. After concluding that a corporate entity was an arm of the tribe and entitled to sovereign immunity, the court rejected the plaintiffs' suit against the individual tribal officials for civil conspiracy. Id., 1296–97. In doing so, the court held that the plaintiffs failed to state a claim against the tribal officers in their individual capacity because there were no allegations of specific conduct by the individuals, including the former chief of the tribe and managers of the entity, which would support a conclusion that any individual had engaged in civil conspiracy. See id., 1297 (noting that plaintiffs failed to seek money damages from officer for wrongful conduct "fairly attributable to the officer himself" (internal quotation marks omitted)). The court characterized the allegations in the complaint as having been "made against the [i]ndividual [d]efendants relat[ing] to decisions and actions taken by them as the principal managers of [the entity], not as individuals." (Internal quotation marks omitted.) Id., 1298. Instead, the court concluded that "[t]here [was] simply nothing more than conclusory allegations that a civil conspiracy exists, and this [was] not enough . . . ." Id.

The record in the present case is determinative of whether the defendants are taking administrative action against Shotton in his individual or official capacity. The department seeks relief from Shotton and the entities in a single proceeding. The record does not indicate, and the defendants do not allege, that Shotton personally engaged in any conduct giving rise to these proceedings. Instead, it appears that the department is seeking relief from Shotton nominally *because* of his official policy-making capacity as a high ranking officer of the tribe and an officer of the entities, rather than as a result of his personal actions taken within the scope of his official capacity. See id., 1297–98 (holding that tribal offi-

cials were sued in official capacity because plaintiffs failed to allege individual conduct by officers but made allegations against them only as "the principal managers of [the entity]" (internal quotation marks omitted)); cf. *Maxwell* v. *San Diego*, 708 F.3d 1075, 1087, 1089 (9th Cir. 2013) (tribal emergency employees were not entitled to tribal sovereign immunity when they were sued for personal actions resulting in gross negligence); *Solomon* v. *American Web Loan*, supra, 375 F. Supp. 3d 662 (holding that nontribal, corporate official who engaged in ultra vires conduct was not entitled to tribal immunity); *Williams & Cochrane, LLP* v. *Quechan Tribe of Fort Yuma Indian Reservation*, Docket No. 3:17-cv-01436-GPC-MDD, 2018 WL 2734946, *15–16 (S.D. Cal. June 7, 2018) (concluding that defendants who personally engaged in fraudulent conduct were not entitled to tribal sovereign immunity). Put differently, Shotton's status as a high ranking official of both the tribe and the entities is the sole reason he was a target of the department's administrative action; the department has not taken action against any other officials or employees involved with the entities' lending practices or management. This case, therefore, is distinguishable from those cited by the defendants in which courts deemed the tribal officers to be the real parties in interest when sued in their individual capacity for personal conduct.[16]

[16] The cases cited by the defendants are distinguishable because they do not concern actions by tribal employees acting in a leadership or policy-making capacity for a tribal entity that renders their actions inextricably bound with those of the entity; instead, they concern actions personally taken by tribal employees. See *Pistor* v. *Garcia*, supra, 791 F.3d 1108–1109, 1113–14 (tribe's chief of police was deemed unprotected by tribal sovereign immunity when he was sued in individual capacity for unconstitutionally detaining plaintiffs); *Maxwell* v. *San Diego*, supra, 708 F.3d 1087–89 (individual members of tribal fire department did not have immunity for gross negligence in providing emergency medical care); *JW Gaming Development, LLC* v. *James*, Docket No. 3:18-cv-02669-WHO, 2018 WL 4853222, *4 (N.D. Cal. October 5, 2018) (tribal employees were unprotected by tribal sovereign immunity when they were sued in individual capacity for fraudulent misconduct resulting in damages), aff'd, 778 Fed. Appx. 545 (9th Cir. 2019), cert. denied, U.S. , 140 S. Ct. 1297, 206 L. Ed. 2d 376 (2020); *Solomon* v.

Thus, we conclude that the tribe, rather than Shotton, is the real party in interest with respect to the administrative action in this case.

B

We next turn to whether Shotton's actions were within the scope of his official authority, thus entitling him to share in tribal sovereign immunity. See, e.g., *Bassett* v. *Mashantucket Pequot Tribe*, supra, 204 F.3d 359. The mere allegation that Shotton was acting in his capacity as a corporate official of entities allegedly violating Connecticut law does not alone establish that he was acting outside the scope of his authority. See *Bassett* v. *Mashantucket Pequot Museum & Research Center, Inc.*, 221 F. Supp. 2d 271, 280–81 (D. Conn. 2002) (alleging illegality of defendants' actions was insufficient to surmount immunity because actions must be " 'manifestly or palpably beyond his authority' "). Here, the defendants fail to allege, let alone prove, any actions by Shotton that are beyond the scope of his authority as an officer of the tribe and entities or that those actions were taken to further his personal interests as distinct from the tribe's interests. Indeed, the department fails to specifically allege any actions by Shotton personally at all. The entirety of Shotton's actions that allegedly violated Connecticut law took place solely within the context of the entities' lending

American Web Loan, supra, 375 F. Supp. 3d 661–62 (tribal sovereign immunity did not protect nontribal, corporate official who personally profited at rate that exceeded tribe's profits, did not act in interest of tribe, and was " 'architect' " of fraudulent lending scheme); *Williams & Cochrane, LLP* v. *Quechan Tribe of Fort Yuma Indian Reservation*, supra, 2018 WL 2734946, *15–16 (defendants were sued in individual capacity because they allegedly took part in creating fraudulent lending scheme); *Pennachietti* v. *Mansfield*, Docket No. 17-02582, 2017 WL 6311646, *2–4 (E.D. Pa. December 11, 2017) (tribal lending manager was not entitled to tribal immunity when he was sued in his individual capacity for usurious loans personally initiated by him when tribal entity was not named as defendant), appeal dismissed, Docket No. 18-1070, 2018 WL 3475602 (3d Cir. January 31, 2018).

operations. The record does not indicate that Shotton did anything outside the scope of executing his official duties as an officer of the tribe and of the entities.[17]

Having concluded the tribe is the real party in interest and that Shotton's actions were entirely within the scope of his duties for the tribe and the entities, we now determine whether the tribe's sovereign immunity extends to each form of relief sought by the defendants against Shotton in his capacity as an officer of Great Plains.

"In the tribal immunity context, a claim for damages against a tribal official lies outside the scope of tribal immunity only [when] the complaint pleads—and it is shown—that a tribal official acted beyond the scope of his authority to act on behalf of the [t]ribe. . . . Claimants may not simply describe their claims against a tribal official as in his individual capacity in order to eliminate tribal immunity. . . . [A] tribal official—even if sued in his individual capacity—is . . . stripped of tribal immunity [only] when he acts manifestly or palpably beyond his authority . . . . [I]n order to overcome sovereign immunity, the [plaintiff] must do more than allege that the defendants' conduct was in excess of their . . . authority; [the plaintiff] also must allege or otherwise establish facts that reasonably support those allegations." (Internal quotation marks omitted.) *Drabik* v. *Thomas*, 184 Conn. App. 238, 247, 194 A.3d 894, cert. denied, 330 Conn. 929, 194 A.3d 778 (2018); see also *Chayoon* v. *Chao*, supra, 355 F.3d 143 (there is no excep-

[17] We note that determining that the tribe, rather than Shotton, is the real party in interest is consistent with our analysis in *Spring* v. *Constantino*, 168 Conn. 563, 362 A.2d 871 (1975), in which we outlined the criteria for determining whether a suit is against the state as the real party interest: "(1) a state official has been sued; (2) the suit concerns some matter in which that official represents the state; (3) the state is the real party against whom relief is sought; and (4) the judgment, though nominally against the official, will operate to control the activities of the state or subject it to liability." Id., 568.

tion to sovereign immunity when only relief sought against tribal officials was damages).

Because the department fails to allege that Shotton acted beyond the scope of his authority as a tribal official, we conclude that the department's conclusory and nominal allegation, which does not allege specific actions taken by Shotton, is legally insufficient to surmount his immunity from civil penalties.[18] See *Lewis* v. *Clarke*, supra, 137 S. Ct. 1291.

C

The defendants contend that prospective injunctive relief is available, notwithstanding any tribal sovereign immunity, under *Ex parte Young*, 209 U.S. 123, 133, 28 S. Ct. 441, 52 L. Ed. 714 (1908), which allows plaintiffs to seek prospective, injunctive relief against state officials for violations of federal law. In response, the plaintiffs argue that Shotton is entitled to share in tribal sovereign immunity because the exception under *Ex parte Young* is limited to federal causes of action and does not extend to state causes of action against tribal officials. The plaintiffs further contend that *Ex parte Young* does not apply to Shotton because (1) any discussion of alternative avenues for relief against tribal officials by the United States Supreme Court in *Michigan* v. *Bay Mills Indian Community*, supra, 572 U.S. 782, was dictum, and (2) *Ex parte Young* does not extend to actions taken by the state against tribal officials for violations of state law. In response, the defendants cite the recent decision of the United States Court of Appeals for the Second Circuit in *Gingras* v. *Think Finance, Inc.*, 922 F.3d 112, 121 (2d Cir. 2019), cert. denied sub nom. *Sequoia Capital Operations, LLC* v. *Gingras*, U.S. , 140 S. Ct. 856, 205 L. Ed. 2d 458

[18] We note the department describes its claim against Shotton in a conclusory manner as arising from "his personal participation in violations of the state's usury and banking laws."

(2020), and argue that Shotton is not immune from injunctive relief for actions arising from violations of state law. We agree with the defendants and conclude that tribal sovereign immunity does not render Shotton immune from the injunctive relief ordered by the department.

The United States Supreme Court addressed a tribal official's entitlement to sovereign immunity from injunctive relief in *Michigan* v. *Bay Mills Indian Community*, supra, 572 U.S. 782. Relying on *Ex parte Young*, supra, 209 U.S. 123, the court held that tribal sovereign immunity does not bar suit for injunctive relief against tribal officers responsible for unlawful conduct. *Michigan* v. *Bay Mills Indian Community*, supra, 785, 796. *Bay Mills* concerned tribal sovereign immunity in the context of Indian gaming. Id., 790–93. The court held that the Indian Gaming Regulatory Act, 25 U.S.C. § 2710 et seq., did not abrogate tribal sovereign immunity for gaming violations taking place away from tribal land "because states already had other ways to vindicate state gaming law violations there." *Gingras* v. *Think Finance, Inc.*, supra, 922 F.3d 122, citing *Michigan* v. *Bay Mills Indian Community*, supra, 794–95. The court in *Bay Mills* noted that "Michigan could bring suit against tribal officials or employees (rather than the [t]ribe itself) [when] seeking an injunction . . . ." *Michigan* v. *Bay Mills Indian Community*, supra, 796.

The United States Court of Appeals for the Second Circuit, the decisions of which are particularly persuasive in resolving questions of federal law,[19] recently relied in part on *Bay Mills* and expressly concluded that the exception to sovereign immunity announced

[19] "In considering claims of federal law, it is well settled that, when the United States Supreme Court has not spoken, we find decisions of the Second Circuit particularly persuasive." *Feehan* v. *Marcone*, 331 Conn. 436, 478, 204 A.3d 666, cert. denied, U.S. , 140 S. Ct. 144, 205 L. Ed. 2d 35 (2019).

in *Ex parte Young* extended to injunctive relief to bar tribal officials from violating state law, in addition to federal law.[20] *Gingras* v. *Think Finance, Inc.*, supra, 922 F.3d 121. In *Gingras*, the Second Circuit emphasized that, in *Bay Mills*, the United States Supreme Court had "made clear . . . that Michigan could still 'resort to other mechanisms, including legal actions against the responsible individuals' to vindicate violations of Michigan state law."[21] Id., quoting *Michigan* v.

[20] The plaintiffs also contend that the *Ex parte Young* exception is not available to the defendants because the defendants took action against Shotton in his individual, rather than official, capacity, rendering *Bay Mills* and *Ex parte Young* inapplicable. However, as the Second Circuit stated in *Gingras*, "the only material difference between individual and official capacity suits for prospective, injunctive relief is that a judgment against the latter is enforceable against future successive officers whereas judgments against the former are not." *Gingras* v. *Think Finance, Inc.*, supra, 922 F.3d 123. Therefore, it is irrelevant for the purposes of determining immunity from injunctive relief whether the tribal official is being sued in his or her individual or official capacity.

[21] A recent Ninth Circuit decision, *Jamul Action Committee* v. *Simermeyer*, 974 F.3d 984 (9th Cir. 2020), petition for cert filed sub nom. *Jamul Action Committee* v. *Sequoyah* (U.S. May 11, 2021) (No. 20-1559), casts some doubt on the applicability of *Ex parte Young* when tribal officials are sued for injunctive relief but the nature of the relief indicates that the tribe is the real party in interest. In *Jamul Action Committee*, the court held that, although suits seeking prospective, injunctive relief against tribal officials in their official capacity are permissible under *Ex parte Young*, such suits are not permissible when a plaintiff seeks "to circumvent sovereign immunity by naming some arbitrarily chosen governmental officer or an officer with only general responsibility for governmental policy." Id., 994. The Ninth Circuit noted that the United States Supreme Court has limited the kind of relief a plaintiff may seek under *Ex parte Young* to prevent the suit from becoming one against the sovereign as the real party in interest. Id. For example, the Supreme Court has not extended *Ex parte Young* to instances in which plaintiffs sought to compel quiet title of a sovereign's property, compel payment of a sovereign's legal obligation, or to compel specific performance by the sovereign. Id., 994–95, citing *Idaho* v. *Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 117 S. Ct. 2028, 138 L. Ed. 2d 438 (1997), *Edelman* v. *Jordan*, 415 U.S. 651, 94 S. Ct. 1347, 39 L. Ed. 2d 662 (1974), and *Ex parte Ayers*, 123 U.S. 443, 8 S. Ct. 164, 31 L. Ed. 216 (1887). We nevertheless find *Ex parte Young* applicable in this case because *Jamul Action Committee* is distinguishable; enjoining Shotton's future actions with respect to payday lending operations does not operate against the tribe in

Bay Mills Indian Community, supra, 572 U.S. 785; see also *Alabama* v. *PCI Gaming Authority*, 801 F.3d 1278, 1290 (11th Cir. 2015) ("tribal officials may be subject to suit in federal court for violations of state law under the fiction of *Ex parte Young* when their conduct occurs outside of Indian lands"). We agree with the Second Circuit's conclusion that this statement by the United States Supreme Court was not dictum. See *Gingras* v. *Think Finance, Inc.*, supra, 122. The Second Circuit noted that the Supreme Court had issued "[t]hree distinct opinions in *Bay Mills* [that] recognized the availability of *Ex parte Young* actions for violations of state law." Id.; see *Michigan* v. *Bay Mills Indian Community*, supra, 796; *Michigan* v. *Bay Mills Indian Community*, supra, 809 (Sotomayor, J., concurring); *Michigan* v. *Bay Mills Indian Community*, supra, 822–24 (Thomas, J., dissenting). Accordingly, we follow the Second Circuit's decision in *Gingras* and conclude that Shotton is not entitled to tribal sovereign immunity from suit for prospective injunctive relief.[22]

Application of the *Ex parte Young* exception represents a balanced approach that accounts for the com-

the same way as would compelling payment directly from tribal coffers or surrendering tribal land. The department does not indicate the specific conduct taken by Shotton personally but, rather, proceeds against him in his official capacity to enjoin further unlawful practices. Such relief is appropriate under *Ex parte Young* and is consistent with the Second Circuit's decision in *Gingras* v. *Think Finance, Inc.*, supra, 922 F.3d 112.

[22] We note that "[a]n officer in an [individual capacity] action . . . may be able to assert *personal* immunity defenses, such as, for example, absolute prosecutorial immunity in certain circumstances." (Emphasis in original.) *Lewis* v. *Clarke*, supra, 137 S. Ct. 1292; see also *Pearson* v. *Callahan*, 555 U.S. 223, 231, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009) ("qualified immunity protects government officials from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known" (internal quotation marks omitted)). Here, the plaintiffs assert, for the first time on appeal, that Shotton is entitled to qualified immunity. However, such a claim was not presented to the commissioner or the trial court and, therefore, is not properly before this court. See, e.g., *Lewis* v. *Clarke*, supra, 1292 n.2 (declining to address official immunity defense that was raised for first time on appeal).

peting interests of two sovereigns, tribes and states, and allows the state to enforce its laws against tribal officials while "providing a neutral forum for the peaceful resolution of disputes between domestic sovereigns, and it fairly holds Indian tribes acting [off reservation] to their obligation to comply with generally applicable state law." *Gingras* v. *Think Finance, Inc.*, supra, 922 F.3d 124. Without such balancing via the provision of injunctive relief, the state would be left without any recourse to protect its citizens from tribal activities that run afoul of state laws. See id. Accordingly, although Shotton is immune from the civil penalties sought to be imposed by the department, we conclude that he is not immune from injunctive relief prospectively enjoining him from violating Connecticut usury and banking laws in connection with his duties for the tribe and the entities.

In summary, we conclude that the trial court incorrectly determined that further proceedings were required to determine whether Great Plains is an arm of the tribe. Instead, the record establishes that Great Plains is an arm of the tribe as a matter of law and, therefore, entitled to share in the tribe's sovereign immunity from administrative action. With respect to Shotton's individual immunity, we conclude that the trial court correctly determined that the tribe is the real party in interest, rendering Shotton immune from the civil penalties imposed by the department but not its order of prospective injunctive relief in regard to his actions as an official of Great Plains. We further hold that the trial court correctly concluded that further proceedings are required to determine whether Clear Creek is an arm of the tribe and, therefore, entitled to immunity from the order imposing civil money penalties against that entity, and also to determine whether Shotton is entitled to tribal sovereign immunity in regard to his actions taken as an official of Clear Creek.

The judgment is reversed insofar as the trial court concluded that further proceedings were required to determine whether Great Plains is an arm of the tribe and insofar as the trial court upheld the imposition of civil penalties against Shotton in his capacity as an officer of Great Plains, and the case is remanded with direction to render judgment sustaining the administrative appeal in part and directing the commissioner to dismiss the administrative proceedings against Great Plains, to vacate the imposition of civil penalties against Shotton in his capacity as an officer of Great Plains, and to remand the case to the commissioner for further proceedings to determine, in accordance with this opinion, whether Clear Creek is an arm of the tribe and whether Shotton is entitled to tribal sovereign immunity in regard to his actions taken as an official of Clear Creek; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

WILTON CAMPUS 1691, LLC *v.* TOWN OF WILTON

WILTON RIVER PARK 1688, LLC *v.* TOWN OF WILTON

WILTON RIVER PARK NORTH, LLC *v.* TOWN OF WILTON

(SC 20388)

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

Syllabus

Pursuant to statute (§ 12-55 (b)), an assessor, "[p]rior to taking and subscribing to the oath upon the grand list . . . shall equalize the assessments of the property in the town . . . and make any assessment omitted by mistake or required by law."

Pursuant further to statute (§ 12-63c (d)), a property owner required to submit information to an assessor for any assessment year who fails to submit such information shall be subject to a penalty equal to a 10

percent increase in the assessed value of the owner's property for such assessment year.

The plaintiffs, entities that owned commercial properties that operated together as a retail shopping center in the town of Wilton, appealed to the trial court from the decision of the Board of Assessment Appeals of the defendant town. The board had denied the plaintiffs' appeals from the allegedly improper assessment of penalties under § 12-63c (d) by the town assessor as a result of their late submission of certain annual income and expense reports. The trial court rendered judgments for the town, concluding that, although § 12-55 (b) required the assessor to impose the penalties before taking and subscribing to the oath upon the grand list, the only redress for the failure of the assessor to comply with § 12-55 (b) was to postpone the right of the plaintiffs to appeal from the action of the assessor until the succeeding grand list. The plaintiffs appealed to the Appellate Court, which reversed the trial court's judgments. The Appellate Court agreed with the trial court that § 12-55 (b) required the assessor to impose penalties under § 12-63c (d) before signing the grand list but concluded that tax penalties imposed without statutory authority are invalid. On the granting of certification, the town appealed to this court, claiming that the assessor was not bound by the requirement in § 12-55 (b) that assessments omitted by mistake or required by law must be made before the assessor signs the grand list for the applicable assessment year. *Held* that the Appellate Court correctly concluded that the assessor improperly imposed the late filing penalties under § 12-63c (d) on the plaintiffs after the assessor took and subscribed to the oath upon the grand list for the assessment year in question:

1. Penalties imposed pursuant to § 12-63c (d) are required by law within the meaning of § 12-55 (b); this court's reading of the language in § 12-63c (d) led it to conclude that the penalty imposed under that statute when a property owner fails to submit required information is mandatory unless one of two exceptions apply, and neither exception applied in the present case because it was undisputed that the plaintiffs owned the subject property at all relevant times and the town had not enacted an ordinance permitting the assessor to waive penalties under § 12-63c (d).
2. The town assessor lacked authority under § 12-55 (b) to impose the late filing penalties after signing the grand list; this court having concluded that the term "assessment" in § 12-55 (b) must be read to include penalties imposed under § 12-63c (d), the assessor was bound by the time limitations in § 12-55 (b) and was required to impose the late filing penalties under § 12-63c (d) prior to taking and subscribing to the oath upon the grand list.
3. The assessor lacked authority to impose the late filing penalties against the plaintiffs under the statute (§ 12-60) applicable to the correction of clerical errors or mistakes, as the assessor's intentional decision to delay

imposing the penalties until after he signed the grand list, although mistaken, was not a clerical error but, rather, was an error of substance.

(*One justice concurring in part and dissenting in part*)

Argued October 19, 2020—officially released May 26, 2021*

Procedural History

Appeals from the decisions of the defendant's Board of Assessment Appeals denying the plaintiffs' appeals from the allegedly improper assessment of tax penalties on certain of the plaintiffs' real property, brought to the Superior Court in the judicial district of Stamford-Norwalk and transferred to the judicial district of New Britain, Tax Session, where the appeals were consolidated and tried to the court, *Hon. Arnold W. Aronson*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgments for the defendant, from which the plaintiffs filed a joint appeal with the Appellate Court, *DiPentima*, *C. J.*, and *Moll* and *Bishop*, *Js.*, which reversed the judgments of the trial court and remanded the cases with direction to render judgments for the plaintiffs, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Jonathan S. Bowman, with whom were *Marc J. Herman* and, on the brief, *Barbara M. Schellenberg*, for the appellant (defendant).

Matthew T. Wax-Krell, with whom were *Marci Silverman* and, on the brief, *Denise P. Lucchio*, for the appellees (plaintiffs).

Opinion

D'AURIA, J. This appeal involves the temporal limits of a municipal assessor's authority to impose penalties on taxpayers. Specifically, we are asked to resolve a dispute over whether the assessor for the defendant, the town of Wilton (town), must impose late filing penal-

* May 26, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

ties on taxpayers pursuant to General Statutes § 12-63c (d), if at all, before taking and subscribing to the oath on the grand list for that assessment year pursuant to General Statutes § 12-55 (b), or may impose the penalties later. The town claims that the Appellate Court incorrectly concluded that the assessor improperly imposed late filing penalties on the plaintiffs, Wilton Campus 1691, LLC, Wilton River Park 1688, LLC, and Wilton River Park North, LLC, *after* taking and subscribing to the oath on the grand list for that assessment year. We disagree and therefore affirm the Appellate Court's judgment.

The following undisputed facts, as stipulated by the parties and contained in the record, and procedural history are relevant to our disposition of this appeal. The plaintiffs are related entities, each of which at all relevant times owned commercial properties that operate together as a retail shopping center located at 5 River Road in Wilton. Pursuant to § 12-63c (a),[1] the plaintiffs were required to submit annual income and expense reports for the year 2013 to the assessor on

[1] General Statutes § 12-63c (a) provides: "In determining the present true and actual value in any town of real property used primarily for purposes of producing rental income, the assessor, which term whenever used in this section shall include assessor or board of assessors, may require in the conduct of any appraisal of such property pursuant to the capitalization of net income method, as provided in section 12-63b, that the owner of such property annually submit to the assessor not later than the first day of June, on a form provided by the assessor not later than forty-five days before said first day of June, the best available information disclosing the actual rental and rental-related income and operating expenses applicable to such property. Submission of such information may be required whether or not the town is conducting a revaluation of all real property pursuant to section 12-62. Upon determination that there is good cause, the assessor may grant an extension of not more than thirty days to submit such information, if the owner of such property files a request for an extension with the assessor not later than May first."

or before June 1, 2014. The plaintiffs failed to submit the reports before the deadline passed. Instead, the plaintiffs sent the reports by overnight mail on June 2, 2014, and the assessor received them on June 3, 2014, two days after the deadline. The parties do not dispute that the late submission of the reports subjected the taxpayers to penalties under § 12-63c (d).[2] Rather, the dispute arose because the assessor signed the 2014 grand list on or before January 31, 2015, without imposing penalties on the plaintiffs. Instead, the assessor delayed imposing the penalties until April 29, 2015, when the assessor issued certificates of change pursuant to General Statutes § 12-60[3] for the properties that

[2] General Statutes § 12-63c (d) provides: "Any owner of such real property required to submit information to the assessor in accordance with subsection (a) of this section for any assessment year, who fails to submit such information as required under said subsection (a) or who submits information in incomplete or false form with intent to defraud, shall be subject to a penalty equal to a ten per cent increase in the assessed value of such property for such assessment year. Notwithstanding the provisions of this subsection, an assessor or board of assessment appeals shall waive such penalty if the owner of the real property required to submit the information is not the owner of such property on the assessment date for the grand list to which such penalty is added. Such assessor or board may waive such penalty upon receipt of such information in any town in which the legislative body adopts an ordinance allowing for such a waiver."

[3] General Statutes § 12-60 provides: "Any clerical omission or mistake in the assessment of taxes may be corrected according to the fact by the assessors or board of assessment appeals, not later than three years following the tax due date relative to which such omission or mistake occurred, and the tax shall be levied and collected according to such corrected assessment. In the event that the issuance of a certificate of correction results in an increase to the assessment list of any person, written notice of such increase shall be sent to such person's last-known address by the assessor or board of assessment appeals within ten days immediately following the date such correction is made. Such notice shall include, with respect to each assessment list corrected, the assessment prior to and after such increase and the reason for such increase. Any person claiming to be aggrieved by the action of the assessor under this section may appeal the doings of the assessor to the board of assessment appeals as otherwise provided in this chapter, provided such appeal shall be extended in time to the next succeeding board of assessment appeals if the meetings of such board for the grand list have passed. Any person intending to so appeal to the board of assessment appeals may indicate that taxes paid by him for any additional assessment added in accordance with this section, during

were the subjects of the penalties. It has been the town assessor's long-standing practice to impose § 12-63c (d) penalties retroactively under § 12-60 in order to allow for the correction of clerical omissions or mistakes.

The plaintiffs asserted claims in the trial court, challenging the penalties pursuant to General Statutes § 12-119. They also appealed to the Board of Assessment Appeals of the Town of Wilton (board) pursuant to General Statutes § 12-111. Following a hearing on April 5, 2016, the board denied the plaintiffs' appeals, and the plaintiffs appealed the board's decision to the trial court pursuant to General Statutes § 12-117a. *Wilton Campus 1691, LLC* v. *Wilton*, 191 Conn. App. 712, 719–20, 216 A.3d 653 (2019). The trial court consolidated these actions and adjudicated them together.

The trial court agreed with the plaintiffs that, because § 12-55 (b)[4] provides that the assessor, "[p]rior to taking and subscribing to the oath upon the grand list . . . make any assessment . . . required by law," and, because § 12-63c (d) penalties are mandatory, § 12-55 (b) requires the assessor to impose penalties under § 12-63c (d) *before* signing the grand list. Despite so holding, the trial court ruled in favor of the town, concluding that "the only redress for the assessor's failure to comply with the provisions of § 12-55 (b) is to postpone the right of the plaintiffs to appeal the action of the assessor until the succeeding grand list" and that "[t]he penalty

the pendency of such appeal, are paid 'under protest' and thereupon such person shall not be liable for any interest on the taxes based upon such additional assessment, provided (1) such person shall have paid not less than seventy-five per cent of the amount of such taxes within the time specified or (2) the board of assessment appeals reduces valuation or removes items of property from the list of such person so that there is no tax liability related to additional assessment."

[4] General Statutes § 12-55 (b) provides in relevant part: "Prior to taking and subscribing to the oath upon the grand list, the assessor or board of assessors shall equalize the assessments of property in the town, if necessary, and make any assessment omitted by mistake or required by law. . . ."

prescribed for in § 12-63c (d) makes no provision for the removal of the 10 [percent] penalty imposed by the legislature, regardless of the action taken by the assessor." The trial court therefore rendered judgments in the town's favor.

The plaintiffs appealed to the Appellate Court, which agreed with the trial court that § 12-55 (b) requires the assessor to impose penalties under § 12-63c (d) before signing the grand list. *Wilton Campus 1691, LLC* v. *Wilton*, supra, 191 Conn. App. 729–30. The Appellate Court reversed the trial court's judgments in favor of the town, however, holding that tax penalties imposed without statutory authority are invalid. Id., 715, 730.

The town petitioned for certification to appeal to this court, which we granted, limited to the issue of whether § 12-55 (b) limits the assessor's statutory authority to impose § 12-63c (d) penalties to the period before the assessor takes and subscribes to the oath on the grand list for the applicable assessment year.[5] See *Wilton Campus 1691, LLC* v. *Wilton*, 333 Conn. 934, 218 A.3d 592 (2019).

The town contends that both the Appellate Court and the trial court incorrectly determined that penalties imposed under § 12-63c (d) fall within the scope of the requirement in § 12-55 (b) that the assessor make all "assessment[s] omitted by mistake or required by law" before taking and subscribing to the oath upon the grand list for the applicable assessment year. The town appears instead to argue that "assessment" in § 12-55 (b) means "the present true and actual value" of prop-

[5] The town also sought certification, which we originally did not grant, on the issue of whether § 12-60 grants the assessor the authority to intentionally assess penalties retroactively. We thereafter saw fit to order supplemental briefing on the following issue: "If the [§] 12-63c (d) penalties were not timely imposed, did the Appellate Court properly conclude that the assessor's failure to timely impose those penalties was not a clerical omission or mistake under . . . [§] 12-60."

erty. As such, a penalty under § 12-63c (d) is not an "assessment omitted by mistake or required by law" within the meaning of § 12-55 (b), and, thus, the assessor is not bound by this deadline but, rather, is subject to no deadline.[6]

The plaintiffs, on the other hand, contend that the Appellate Court properly construed § 12-55 (b) to include the penalties at issue and correctly held that the assessor acted beyond his statutory authority by imposing the penalties after signing the grand list. They argue that the town's proposed construction misconstrues the statutory scheme because subsections (a) and (b) of § 12-55 govern different aspects of municipal taxation—publication of the grand list and the assessor's authority to make assessments, respectively. The plaintiffs also contend that an interpretation of § 12-55 (b) that excludes penalties under § 12-63c (d), thereby imposing no deadline on the imposition of these penalties, is untenable because of property owners' need for certainty regarding how much they owe to the municipality. Additional facts and procedural history will be set forth as required.

I

We begin our analysis with the text of the statutes at issue. Section 12-55 (b) provides in relevant part: "Prior to taking and subscribing to the oath upon the grand list, the assessor or board of assessors shall equalize the assessments of property in the town, if necessary, and make any assessment omitted by mistake or required by law. . . ." Section 12-63c (d) provides in relevant part: "Any owner . . . required to submit information to the assessor . . . who fails to submit such information . . . or who submits information in incomplete or false form with intent to defraud, shall be subject to a penalty equal to a ten per cent increase in

[6] See footnote 4 of this opinion.

the assessed value of such property for such assessment year. Notwithstanding the provisions of this subsection, an assessor or board of assessment appeals shall waive such penalty if the owner of the real property required to submit the information is not the owner of such property on the assessment date for the grand list to which such penalty is added. Such assessor or board may waive such penalty upon receipt of such information in any town in which the legislative body adopts an ordinance allowing for such a waiver."

We review these statutes in accordance with General Statutes § 1-2z and our familiar principles of statutory construction; questions of statutory construction are matters of law subject to plenary review. See, e.g., *Rutter* v. *Janis*, 334 Conn. 722, 730, 224 A.3d 525 (2020); see also *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45–46, 213 A.3d 1110 (2019).

There is no dispute that § 12-55 (b) clearly requires that "any assessment omitted by mistake or required by law" must be imposed before the assessor takes and subscribes to the oath upon the grand list. Our analysis focuses on whether the penalty imposed under § 12-63c (d) is (1) an assessment, and whether it was (2) omitted by mistake or required by law, thereby triggering the deadline contained in § 12-55 (b). We address these two requirements in reverse order.

A

We turn first to whether the § 12-63c (d) penalties in this case were either "omitted by mistake" or "required by law." Neither party appears to dispute that the penalties were "required by law," and we agree. Nevertheless, resolution of the dispute before us requires an understanding of the meaning of the statutes involved, and we therefore must undertake our statutory construction exercise. Because we conclude that the penalties imposed in this case were unambiguously "required by

law," we do not reach the question of whether the penalties were "omitted by mistake."

This court previously has interpreted the phrase "required by law" within § 12-55 (b) in *84 Century Ltd. Partnership* v. *Board of Tax Review*, 207 Conn. 250, 263, 541 A.2d 478 (1988), but the court's interpretation is of limited value in the present case. In *84 Century Ltd. Partnership*, we explained that "[a]ssessing property omitted by mistake is a [commonsense] administrative duty . . . . The same may be said of the added function of making any assessment 'required by law.' If it is required by law, the assessors are required to make it whether or not it is included in this section." Id. Our case law therefore suggests that an assessment "required by law" includes any assessment that the assessor is required to make.

There is no statutory definition of an assessment "required by law" for us to consult. When a statute does not define a term, General Statutes § 1-1 (a) directs us to use the "commonly approved usage" of the words at issue. "[T]echnical words and phrases, and such as have acquired a peculiar and appropriate meaning in the law, shall be construed and understood accordingly." General Statutes § 1-1 (a). "We may find evidence of such usage, and technical meaning, in dictionary definitions, as well as by reading the statutory language within the context of the broader legislative scheme." *State* v. *Menditto*, 315 Conn. 861, 866, 110 A.3d 410 (2015).

There is no dictionary definition of the phrase "required by law," so, instead, we must separate its component parts and examine their definitions to gain insight into the meaning of the phrase. Dictionaries in print at the time of the statute's enactment are the most instructive. See *State* v. *Menditto*, supra, 315 Conn. 866. The phrase at issue in this case, "any assessment omitted by mistake or required by law," or the nearly identical phrase,

"other assessments omitted by mistake or required by law," has been included in § 12-55 (b) and its predecessors since 1854. See General Statutes (1854 Rev.) tit. LV, c. 1, § 36. The earliest version of the statute, from 1849, similarly required the assessor to "make any other assessments required by law . . . ." General Statutes (1849 Rev.) tit. LV, c. 1, § 5.

An 1848 dictionary defines "required" as "demanded; needed; necessary." N. Webster, An American Dictionary of the English Language (1848) p. 941. A more recent legal dictionary notes that "[w]hen used in a statute the word 'required' may be equivalent to the word 'commanded;' as where commissioners were by statute not only authorized, but 'required' to levy a yearly tax." Ballentine's Law Dictionary (3d Ed. 1969) p. 1098.

An American Dictionary of the English Language in 1848 defines "law" as "[a] rule, particularly an established or permanent rule, prescribed by the supreme power of a state to its subjects, for regulating their actions, particularly their social actions. Laws are imperative or mandatory, commanding what shall be done; prohibitory, restraining from what is to be forborne; or permissive, declaring what may be done without incurring a penalty." (Emphasis omitted.) N. Webster, supra, p. 651. Black's Law Dictionary defines the word "law" as "[t]he aggregate of legislation, judicial precedents, and accepted legal principles; the body of authoritative grounds of judicial and administrative action . . . ." Black's Law Dictionary (8th Ed. 2004) p. 900.

Construing the phrase "required by law" by examining its individual components may not yield a clear definition of the phrase in all its applications. It does demonstrate clearly, however, that the phrase is commonly understood to include, at the very least, official actions "commanded" by a state statute. In other words,

if the state statute makes it mandatory that the assessor impose the penalty, it is "required by law."

We therefore must determine whether § 12-63c (d) penalties are mandatory, and thus "required by law," within the meaning of § 12-55 (b).[7] The plaintiffs argue that, because § 12-63c (d) provides that a property owner "shall be subject to a penalty" upon late filing, the penalty is mandatory. Of course, use of the word "shall" is not always dispositive of the question of whether a statutory requirement is mandatory or directory. See, e.g., *Doe* v. *West Hartford*, 328 Conn. 172, 184, 177 A.3d 1128 (2018). Nevertheless, "when the legislature opts to use the words shall and may in the same statute, they must then be assumed to have been used with discrimination and a full awareness of the difference in their ordinary meanings . . . ." (Citation omitted; internal quotation marks omitted.) *Meadowbrook Center, Inc.* v. *Buchman*, 328 Conn. 586, 597–98, 181 A.3d 550 (2018).

Indeed, § 12-63c (d) does use both "shall" and "may." First, the statute explains that owners who fail to submit

[7] In determining whether a statutory requirement using the word "shall' is mandatory or directory, this court considers a number of factors, including: "(1) whether the statute expressly invalidates actions that fail to comply with its requirements or, in the alternative, whether the statute by its terms imposes a different penalty; (2) whether the requirement is stated in affirmative terms, unaccompanied by negative language; (3) whether the requirement at issue relates to a matter of substance or one of convenience; (4) whether the legislative history, the circumstances surrounding the statute's enactment and amendment, and the full legislative scheme evince an intent to impose a mandatory requirement; (5) whether holding the requirement to be mandatory would result in an unjust windfall for the party seeking to enforce the duty or, in the alternative, whether holding it to be directory would deprive that party of any legal recourse; and (6) whether compliance is reasonably within the control of the party that bears the obligation, or whether the opposing party can stymie such compliance." (Internal quotation marks omitted.) *Doe* v. *West Hartford*, 328 Conn. 172, 185, 177 A.3d 1128 (2018). Because we find it dispositive that the language of the statute evinces a clear legislative intent to impose a mandatory requirement, we do not discuss each factor individually.

required information "*shall* be subject to a penalty equal to a ten per cent increase in the assessed value of such property for such assessment year." (Emphasis added.) General Statutes § 12-63c (d). The statute then continues: "Notwithstanding the provisions of this subsection, an assessor or board of assessment appeals *shall* waive such penalty if the owner of the real property required to submit the information is not the owner of such property on the assessment date for the grand list to which such penalty is added." (Emphasis added.) General Statutes § 12-63c (d). Finally, the statute indicates that "[s]uch assessor or board *may* waive such penalty upon receipt of such information in any town in which the legislative body adopts an ordinance allowing for such a waiver." (Emphasis added.) General Statutes § 12-63c (d). Although the use of both "shall" and "may" in § 12-63c (d) is not dispositive, it suggests that the penalty is mandatory.

The mandatory nature of the penalties imposed in this case becomes clearer when these three sentences of § 12-63c (d) are read together, as they must be. The statute lays out the general rule that property owners that miss the filing deadline "shall be subject to a penalty." The two sentences that follow articulate exceptions to this general rule. These exceptions prompt us to "consider the tenet of statutory construction referred to as expressio unius est exclusio alterius, which may be translated as the expression of one thing is the exclusion of another. . . . [When] express exceptions are made, the legal presumption is that the legislature did not intend to save other cases from the operation of the statute." (Internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, 284 Conn. 838, 850–51, 937 A.2d 39 (2008). We conclude that the penalty under § 12-63c (d) is mandatory when neither of the statute's two exceptions applies.

In the present case, the first exception does not apply because it is undisputed that the plaintiffs owned the subject property at all relevant times. The second exception also does not apply because the parties have not provided, and we have not found in our own research, any ordinance adopted by the town giving the assessor discretion to waive this penalty. Because neither exception is satisfied in this case, the Wilton assessor does not have discretion to waive § 12-63c (d) penalties, and, therefore, the penalties in this case are "required by law" within the meaning of § 12-55 (b).

B

Having determined that the penalties imposed on the plaintiffs under § 12-63c (d) were "required by law," we must next determine whether the penalties are considered an "assessment" within the meaning of § 12-55 (b).[8] The town appears to argue that these penalties are not assessments because assessments must be defined as only "the present true and actual value" of property. The plaintiffs do not offer a specific definition of assessment; they simply argue that whatever the definition, it includes penalties under § 12-63c (d).

If the penalties are considered an "assessment," as the plaintiffs argue, the assessor is bound by the time limitations in § 12-55 (b) and must impose the penalties prior to taking and subscribing to the oath on the grand list. If the penalties are not an "assessment" within the

[8] The Appellate Court did not consider whether the word "assessment" includes penalties imposed under § 12-63c (d) because it stated that "[t]he parties do not dispute that the imposition of the late filing penalties constitutes an 'assessment' for purposes of § 12-55 (b)." *Wilton Campus 1691, LLC* v. *Wilton*, supra, 191 Conn. App. 726. The town argues that it did in fact dispute this point and directs this court to the portions of its brief before the Appellate Court on this issue. The plaintiffs argue that the town failed to preserve the issue for appeal. We agree with the town that it raised this issue before the Appellate Court and that we therefore must consider the question.

meaning of § 12-55 (b), as the town argues, there is effectively no deadline for imposing penalties under § 12-63c (d), as the text of § 12-63c (d) contains no date by which the assessor must act.

Although the word "assessment" is perhaps susceptible to multiple interpretations in some contexts, we conclude that only the plaintiffs' interpretation is reasonable in this context. We find the statute's plain language unambiguous and that the § 12-63c (d) penalties in this case are "assessments" within the meaning of § 12-55 (b).

Consistent with the legal principles that govern construction of statutes, we begin our analysis with the statute's plain language to determine whether, when read in context, it is "susceptible to more than one reasonable interpretation." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, supra, 333 Conn. 46. Because the word "assessment" is not statutorily defined and this court never has interpreted its meaning within § 12-55 (b), we again turn to dictionaries for guidance. Dictionaries in print at the time the statute was enacted can be most instructive. See, e.g., *State* v. *Menditto*, supra, 315 Conn. 866.

As discussed in part I A of this opinion, the operative clause in what is now § 12-55 (b)—"any assessment omitted by mistake or required by law"—was first adopted by the legislature in the mid-nineteenth century. A dictionary from the time defines "assessment" as "[a] valuation of property or profits of business, for the purpose of taxation. An assessment is a valuation made by authorized persons according to their discretion, as opposed to a sum certain or determined by law. It is a valuation of the property of those who are to pay the tax, for the purpose of fixing the proportion which each man shall pay; on which valuation the law

imposes a specific sum upon a given amount. . . . A tax or specific sum charged on persons or property." (Emphasis omitted.) N. Webster, supra, p. 77. This definition contains no reference to fines or penalties, lending some support to the town's proposed definition. We do not find this definition alone conclusive, however.

Although, as stated previously, dictionaries from the time a statute was enacted are often considered the most persuasive; see *State* v. *Menditto*, supra, 315 Conn. 866; later editions also can be instructive, particularly those from the time when a statute is revised but retains the language at issue. The statute at issue here, § 12-55, which was originally enacted nearly two hundred years ago, has been amended a number of times over the years, most recently in 2003, when it underwent a substantial reconfiguration while retaining the clause at issue. See Public Acts 2003, No. 03-269, § 1. Therefore, we also consider the meaning of the word "assessment" at the time of this revision to understand whether the commonly understood meaning of the word may have evolved since the enactment of the statute. Legal dictionaries near the time of the 2003 revision define the noun "assessment" as both "1. [d]etermination of the rate or amount of something, such as a tax or damages," and "2. [i]mposition of something, such as a *tax or fine*, according to an established rate; the tax or fine so imposed . . . ." (Emphasis added.) Black's Law Dictionary (7th Ed. 1999) p. 111. Significantly, the Black's Law Dictionary definition includes both taxes and fines within the meaning of "assessment." As with the definition of "assessment" contemporaneous with the statute's enactment, this more recent definition also is not conclusive. Rather, it further demonstrates the multiple, ordinary meanings of the word.

Our case law also acknowledges that the word "assessment" is susceptible to multiple definitions and that its meaning in any given statute is context specific.

"The word 'assessment,' when used in connection with taxation, may have more than one meaning. The ultimate purpose of an assessment in such a connection is to ascertain the amount that each [taxpayer] is to pay. Sometimes this amount is called an assessment. More commonly the word 'assessment' means the official valuation of a [taxpayer's] property for the purpose of taxation." *State* v. *New York*, *New Haven & Hartford Railroad Co.*, 60 Conn. 326, 335, 22 A. 765 (1891), overruled in part on other grounds by *Hartford* v. *Faith Center*, *Inc.*, 196 Conn. 487, 493 A.2d 883 (1985). While acknowledging the multiple definitions of the word, this court never has discussed whether the definition of "assessment" may include fines or penalties.

Because neither dictionary definitions nor our case law conclusively reveals the plain meaning of the word "assessment" in § 12-55 (b), we also consider whether the proffered definitions are consistent with the broader statutory scheme and with our case law interpreting our taxing statutes. See *Nationwide Mutual Ins. Co.* v. *Pasiak*, 327 Conn. 225, 246, 173 A.3d 888 (2017); *State* v. *Menditto*, supra, 315 Conn. 866. Most significantly, the statutory time period for the performance of the assessor's duties is governed by § 12-55 unless another statute expressly extends this period. See *Reconstruction Finance Corp.* v. *Naugatuck*, 136 Conn. 29, 32, 68 A.2d 161 (1949) (explaining that assessors have authority to act only on or before January 31 of each year and citing predecessor of § 12-55, General Statutes (1949 Rev.) tit. XV, c. 86, § 1734). Put another way, the assessor's statutory authority to act generally expires when the assessor takes and subscribes to the oath on the grand list. See General Statutes § 12-55 (b). Our courts consistently have interpreted § 12-55 in this fashion, explaining that "[t]he power of assessors to alter assessments exists only during the lawful period for the performance of their duties, before the lists are

completed and filed. . . . Once the assessors have completed their duties as prescribed by statute, they have no authority to alter a list except to remedy a clerical omission or mistake." (Citation omitted.) *Empire Estates, Inc.* v. *Stamford*, 147 Conn. 262, 264–65, 159 A.2d 812 (1960); see also *National CSS, Inc.* v. *Stamford*, 195 Conn. 587, 594, 489 A.2d 1034 (1985) ("[b]efore the broad authority conferred on them by the [taxing] statutes is exhausted, assessors have abundant power to correct omissions or mistakes, clerical or otherwise, independently of [§ 12-60]" (internal quotation marks omitted)); see *United Illuminating Co.* v. *New Haven*, 240 Conn. 422, 432–35, 692 A.2d 742 (1997) (discussing general statutory scheme for taxation of personal property). Thus, our case law makes clear that, although a municipal assessor's powers are abundant during the statutory time period for performance of the assessor's duties, the assessor's authority to act is strictly time bound.

Our taxing statutes, however, do contain several provisions authorizing the assessor to act outside of the period prescribed by § 12-55. See General Statutes § 12-53 (c) (1) (assessor has three years following assessment date to audit and revalue omitted personal property); General Statutes § 12-57 (a) (three years following tax due date to correct overvaluation of personal property); General Statutes § 12-60 (three years following tax due date to remedy clerical omissions or mistakes in assessment of taxes); General Statutes § 12-117 (a) (allowing for limited extension of time to complete assessor's duties, not to exceed one month). These statutes demonstrate that, when the legislature chooses to extend the assessor's statutory authority beyond the limits of § 12-55, it does so expressly. See, e.g., *Rutter* v. *Janis*, supra, 334 Conn. 734 ("legislature knows how to convey its intent expressly . . . or to use broader or limiting terms when it chooses to do so" (internal

quotation marks omitted)). In the absence of such an expressed intent, the statutory period for the performance of the assessor's duties is governed by § 12-55 (b). See *Reconstruction Finance Corp.* v. *Naugatuck*, supra, 136 Conn. 31–32.

Section 12-63c (d) contains no such express extension of the assessor's statutory authority. In the absence of an express extension of the assessor's statutory authority, the deadline contained in § 12-55 (b) controls. We conclude that the deadline for imposing penalties under § 12-63c (d) must be the deadline articulated in § 12-55 (b)—i.e., the penalties must be imposed before the assessor signs the grand list for the applicable assessment year. This is the only reasonable interpretation of the term "assessment" in § 12-55 (b) because, if § 12-55 (b) does not include penalties imposed under § 12-63c (d), as the town contends, there would be no deadline for imposing these penalties. The town's interpretation would effectively give the assessor carte blanche to impose a penalty under § 12-63c (d) at any time after a taxpayer either files late or submits incomplete information. See General Statutes § 12-63c (d) ("[a]ny owner . . . who fails to submit such information as required . . . or who submits information in incomplete or false form . . . shall be subject to a penalty"). Such an interpretation would directly conflict with the statutory scheme as a whole, which we have interpreted as limiting the assessor's authority to the period before taking the oath and subscribing to the grand list, unless an extension of authority is expressly stated. We will not interpret a statute to create an absurd or unworkable result. See, e.g., *Tappin* v. *Homecomings Financial Network, Inc.*, 265 Conn. 741, 758–59, 830 A.2d 711 (2003). Therefore, we conclude that the term "assessment" in § 12-55 (b) must be read to include penalties imposed under § 12-63c (d). Because the statute, when read in context, has only one reasonable interpretation,

the statute is not ambiguous, and we therefore do not consider the town's arguments to the extent that they rely on legislative history or other extratextual sources.

The town also argues that, because § 12-55 (a)[9] specifically lists penalties imposed under different statutes (General Statutes §§ 12-41 and 12-57a) and does not list § 12-63c (d) penalties, the legislature also must not have intended that § 12-55 (b) include § 12-63c (d) penalties. In support of this argument, the town invokes the same canon of statutory construction we discussed in part I B of this opinion, expressio unius est exclusio alterius —"the expression of one thing is the exclusion of another." It is important to note, however, that the proposed uses of the canon are different in these different contexts. As the phrase, "the expression of one thing is the exclusion of another," was used in *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, supra, 284 Conn. 851, we reasoned that, if the legislature had expressed two statutory exceptions to the general rule of § 12-63c (d) that the taxpayer "shall be subject to a penalty," it followed logically that "the expression of [two] thing[s] is the exclusion of [any other]," that is, the penalty was mandatory unless one of the two exceptions applied. (Internal quotation marks omitted.) *Felician Sisters of St. Francis of Connecticut, Inc.* v. *Historic District Commission*, supra, 851.

The canon is also employed to suggest that, when the legislature includes a group or a list of items in a statute,

[9] General Statutes § 12-55 (a) provides in relevant part: "On or before the thirty-first day of January of each year, except as otherwise specifically provided by law, the assessors or board of assessors shall publish the grand list for their respective towns. Each such grand list shall contain the assessed values of all property in the town, reflecting the statutory exemption or exemptions to which each property or property owner is entitled, and including, where applicable, any assessment penalty added in accordance with section 12-41 or 12-57a for the assessment year commencing on the October first immediately preceding. . . ."

an item not included must have been deliberately excluded. See, e.g., *DeNunzio* v. *DeNunzio*, 320 Conn. 178, 194, 128 A.3d 901 (2016). We have noted generally about statutory canons, however, and specifically about expressio unius est exclusio alterius, that canons are "merely guides drawn from experience, to be employed or not to be employed carefully and judiciously, depending on the circumstances." *Burke* v. *Fleet National Bank*, 252 Conn. 1, 23, 742 A.2d 293 (1999). We agree with the Appellate Court that the existence of a list in § 12-55 (a) does not require us to read that list into the text of § 12-55 (b). The two subsections have different purposes. Subsection (a) of § 12-55 lists what must be included in the grand list when it is published whereas subsection (b) of § 12-55 describes actions the assessor must take prior to the date the grand list is signed. In other words, whereas § 12-55 (a) describes the grand list, § 12-55 (b) prescribes the limits of the assessor's statutory authority (subject to the limited extensions of authority discussed previously). Because these two subsections have different purposes, we do not find the canon of expressio unius est exclusio alterius sufficiently persuasive to overcome the more apt interpretation of § 12-55 (b) we are persuaded applies.[10]

[10] Because we hold that the town's reliance on the list in § 12-55 (a) is misplaced, we specifically do not adopt the reasoning of the Appellate Court to the extent that it held that there was no "language, legislative history or statutory purpose suggesting" that it was appropriate to apply the canon of expressio unius est exclusio alterius to the text of § 12-55 (a). (Internal quotation marks omitted.) *Wilton Campus 1691, LLC* v. *Wilton*, supra, 191 Conn. App. 729. Similarly, because we hold that the statute's plain meaning is unambiguous, we do not consider whether the maxim that this court resolves any ambiguities in our taxing statutes in favor of the taxpayer applies to penalties and is not instead confined to statutes that impose taxes. See *Key Air, Inc.* v. *Commissioner of Revenue Services*, 294 Conn. 225, 241, 983 A.2d 1 (2009) (presumption of strict construction in favor of taxpayer does not apply when statute is not ambiguous); *Consolidated Diesel Electric Corp.* v. *Stamford*, 156 Conn. 33, 36, 238 A.2d 410 (1968) ("[w]hen a taxing statute is being considered, ambiguities are resolved in favor of the taxpayer").

The town argues that we should nonetheless apply the canon because January 31 is both the date of publication of the grand list and the date by which an assessor must swear the oath on the grand list pursuant to § 12-55 (a). The town argues that it logically follows that the timing in subsection (b) is relevant only for those items that must be included in the grand list pursuant to subsection (a). We disagree. The fact that both subsections share a common deadline does not compel the conclusion that the two subsections must refer to identical items. Such a conclusion would render the distinct language of § 12-55 (b) superfluous. See, e.g., *Lopa* v. *Brinker International, Inc.*, 296 Conn. 426, 433, 994 A.2d 1265 (2010) ("[b]ecause [e]very word and phrase [of a statute] is presumed to have meaning . . . [a statute] must be construed, if possible, such that no clause, sentence or word shall be superfluous, void or insignificant" (internal quotation marks omitted)).

II

Having determined that the assessor did not have the statutory authority under § 12-55 (b) to impose the late filing penalties after signing the grand list, we still must decide whether the assessor had authority to impose the penalties under § 12-60,[11] which provides for a limited extension of authority for the sole purpose of correcting "clerical omission[s] or mistake[s]."[12] Section 12-60 provides in relevant part: "Any clerical omission or mistake in the assessment of taxes may be corrected according to the fact by the assessors or board of assessment appeals, not later than three years following the tax due date relative to which such omission or mistake occurred, and the tax shall be levied and collected according to such corrected assessment. . . ."

[11] See footnote 5 of this opinion.

[12] In the interest of brevity, we refer to the decision not to impose the penalty before signing the grand list as a "mistake."

The following additional facts and procedural history are necessary to our review of this issue. The town concedes that the assessor intentionally did not impose the penalties until after signing the grand list and that it was the assessor's long-standing practice to impose § 12-63c (d) penalties after signing the grand list pursuant to § 12-60. The town argues, however, that any mistake was nonetheless a "clerical mistake" because it concerned the administrative procedure or method chosen to impose the penalties. Such a mistake, the town argues, is not substantive because it does not relate to the amount or propriety of the assessment.

The trial court agreed with the plaintiffs that the assessor in this case was not authorized under § 12-60 to impose the penalties after signing the grand list because § 12-60 applies only when there is a clerical omission or mistake, not when, as here, the assessor *intentionally* delays imposing the penalties. The Appellate Court agreed. See *Wilton Campus 1691, LLC* v. *Wilton*, supra, 191 Conn. App. 731. The Appellate Court noted that this court previously has interpreted "clerical omission or mistake" as distinct from intentional actions and "errors of substance, of judgment, or of law." (Internal quotation marks omitted.) Id., 732; see *Reconstruction Finance Corp.* v. *Naugatuck*, supra, 136 Conn. 31–32; see also *National CSS, Inc.* v. *Stamford*, supra, 195 Conn. 596 ("[when] an error is of a deliberate nature such that the party making it at the time actually intended the result that occurred, it cannot be said to be clerical . . . [b]ecause the plaintiff's action . . . although mistaken, was deliberate and intentional, [and thus] it is not clerical, but can only be characterized as an error of substance" (citation omitted)). In light of these decisions, the Appellate Court concluded that, "because the assessor's omission of the late filing penalties at issue from the 2014 grand list at the time he signed it was of a deliberate nature such that [the assessor]

at the time actually intended the results that occurred, it cannot be said to be clerical. . . . Because such omission, although mistaken, was deliberate and intentional, it is not clerical, but can only be characterized as an error of substance. . . . Accordingly, § 12-60 does not apply." (Citations omitted; internal quotation marks omitted.) *Wilton Campus 1691, LLC* v. *Wilton*, supra, 734.

For slightly different reasons, we agree that the assessor's intentional delay in imposing the penalties was not a clerical omission or mistake and that § 12-60 therefore does not apply. As a preliminary matter, we note that we have interpreted "clerical" to modify both "omission" and "mistake" within the meaning of § 12-60. See *Bridgeport Brass Co.* v. *Drew*, 102 Conn. 206, 212, 128 A. 413 (1925). Here, we need not decide whether the decision to impose the penalties after signing the grand list is best described as a mistake or as an omission; under our case law, whether the decision was "clerical" resolves the issue. Specifically, when the mistake consists of a deliberate action taken to effect a particular intended result, our cases make clear that the mistake cannot be clerical. See, e.g., *Reconstruction Finance Corp.* v. *Naugatuck*, supra, 136 Conn. 31–32; see also *National CSS, Inc.* v. *Stamford*, supra, 195 Conn. 596. *Reconstruction Finance Corp.* and *National CSS, Inc.*, both involved mistakes pertaining to the substance of the assessment, but our reasoning in these cases did not depend on that fact. See *Reconstruction Finance Corp.* v. *Naugatuck*, supra, 31–32 (borough's imposition of tax it was not entitled to impose was not clerical omission or mistake); *National CSS, Inc.* v. *Stamford*, supra, 589, 596 (property owner's intentional listing of personal property that was not, in fact, subject to taxation was not clerical omission or mistake). Under our case law, which the legislature has not seen fit to dis-

turb, § 12-60 is not available to remedy "errors of substance, of judgment, or of law." (Internal quotation marks omitted.) *Reconstruction Finance Corp.* v. *Naugatuck*, supra, 32; see also *National CSS, Inc.* v. *Stamford*, supra, 596. Here, we also need not decide whether the assessor's action was one of substance because the assessor's intentional decision to wait to impose the penalties for months after signing the grand list when the assessor had no authority to do so was certainly an error of judgment or of law. Under our case law, the assessor's mistake was therefore not a clerical mistake within the meaning of § 12-60.

Because we hold that the penalties imposed under § 12-63c (d) were "assessment[s] . . . required by law" within the meaning of § 12-55 (b), the assessor did not have the statutory authority to impose the penalties after taking the oath and subscribing to the 2014 grand list. And, because the assessor's decision to omit the penalties was deliberate and intentional, the assessor also lacked authority to impose the penalties under § 12-60. Penalties imposed without statutory authority are invalid, and, therefore, the town may not collect the penalties at issue in this case. See, e.g., *Empire Estates, Inc.* v. *Stamford*, supra, 147 Conn. 264 ("[m]unicipalities have no powers of taxation other than those specifically given by statute").

The judgment of the Appellate Court is affirmed.

In this opinion McDONALD, MULLINS, KAHN, ECKER and KELLER, Js., concurred.

ROBINSON, C. J., concurring in part and dissenting in part. I respectfully disagree with part II of the majority opinion, in which the majority concludes that a municipal assessor's untimely filing of statutory penalties under

General Statutes § 12-63c (d)[1] was not a clerical error subject to correction under General Statutes § 12-60.[2] Given this conclusion, the majority affirms the judgment of the Appellate Court, which reversed the judgment of the trial court and directed it to sustain the tax appeals filed by the plaintiffs, Wilton Campus 1691, LLC,

[1] General Statutes § 12-63c (d) provides: "Any owner of such real property required to submit information to the assessor in accordance with subsection (a) of this section for any assessment year, who fails to submit such information as required under said subsection (a) or who submits information in incomplete or false form with intent to defraud, shall be subject to a penalty equal to a ten per cent increase in the assessed value of such property for such assessment year. Notwithstanding the provisions of this subsection, an assessor or board of assessment appeals shall waive such penalty if the owner of the real property required to submit the information is not the owner of such property on the assessment date for the grand list to which such penalty is added. Such assessor or board may waive such penalty upon receipt of such information in any town in which the legislative body adopts an ordinance allowing for such a waiver."

[2] General Statutes § 12-60 provides: "Any clerical omission or mistake in the assessment of taxes may be corrected according to the fact by the assessors or board of assessment appeals, not later than three years following the tax due date relative to which such omission or mistake occurred, and the tax shall be levied and collected according to such corrected assessment. In the event that the issuance of a certificate of correction results in an increase to the assessment list of any person, written notice of such increase shall be sent to such person's last-known address by the assessor or board of assessment appeals within ten days immediately following the date such correction is made. Such notice shall include, with respect to each assessment list corrected, the assessment prior to and after such increase and the reason for such increase. Any person claiming to be aggrieved by the action of the assessor under this section may appeal the doings of the assessor to the board of assessment appeals as otherwise provided in this chapter, provided such appeal shall be extended in time to the next succeeding board of assessment appeals if the meetings of such board for the grand list have passed. Any person intending to so appeal to the board of assessment appeals may indicate that taxes paid by him for any additional assessment added in accordance with this section, during the pendency of such appeal, are paid 'under protest' and thereupon such person shall not be liable for any interest on the taxes based upon such additional assessment, provided (1) such person shall have paid not less than seventy-five per cent of the amount of such taxes within the time specified or (2) the board of assessment appeals reduces valuation or removes items of property from the list of such person so that there is no tax liability related to additional assessment."

Wilton River Park 1688, LLC, and Wilton River Park North, LLC, from the penalties imposed by the municipal assessor for the defendant, the town of Wilton, pursuant to § 12-63c (d). See *Wilton Campus 1691, LLC* v. *Wilton*, 191 Conn. App. 712, 731, 736, 216 A.3d 653 (2019). Given the distinction between clerical errors and errors of substance elucidated in case law from this court and sister state courts, I conclude that the assessor's delay in imposing the penalties under § 12-63c (d) was a clerical error for purposes of § 12-60, thus allowing him to correct it beyond the time limitation set forth in General Statutes § 12-55 (b).[3] Because I would reverse the judgment of the Appellate Court, I respectfully dissent in part.

I begin by noting my agreement with the facts and procedural history recited in the majority opinion. I also agree with part I of the majority opinion, in which the majority concludes that the penalties imposed under § 12-63c (d) are " 'assessment[s] . . . required by law' " within the meaning of § 12-55 (b). Part I of the majority opinion. I part company with the majority insofar as it concludes that the assessor did not have authority under § 12-60 to correct the grand list to reflect the imposition of the penalties because the assessor intentionally delayed imposing the penalties, which rendered his mistake substantive rather than clerical.

As the majority notes, whether the assessor's mistake is a clerical error for purposes of § 12-60 presents an issue of statutory construction, which is a question of law over which we exercise plenary review. See, e.g., *Boisvert* v. *Gavis*, 332 Conn. 115, 141, 210 A.3d 1 (2019). It is well settled that we follow the plain meaning rule pursuant to General Statutes § 1-2z in construing stat-

[3] General Statutes § 12-55 (b) provides in relevant part: "Prior to taking and subscribing to the oath upon the grand list, the assessor or board of assessors shall equalize the assessments of property in the town, if necessary, and make any assessment omitted by mistake or required by law. . . ."

utes "to ascertain and give effect to the apparent intent of the legislature." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 45, 213 A.3d 1110 (2019); see id., 45–46 (setting forth plain meaning rule). Beginning with the text, § 12-60 provides in relevant part: "Any clerical omission or mistake in the assessment of taxes may be corrected according to the fact by the assessors or board of assessment appeals, not later than three years following the tax due date relative to which such omission or mistake occurred, and the tax shall be levied and collected according to such corrected assessment. . . ."

In determining whether the assessor's action in this case was "clerical" for purposes of § 12-60, we do not write on a blank slate. See, e.g., *Commissioner of Emergency Services & Public Protection* v. *Freedom of Information Commission*, 330 Conn. 372, 384, 194 A.3d 759 (2018). As the majority observes, this court has considered the scope of § 12-60 in two venerable cases, *Reconstruction Finance Corp.* v. *Naugatuck*, 136 Conn. 29, 68 A.2d 161 (1949), and *National CSS, Inc.* v. *Stamford*, 195 Conn. 587, 489 A.2d 1034 (1985), which I read to hold that an error is not clerical when it pertains to the substance or subject of the assessment. For example, in *Reconstruction Finance Corp.*, this court concluded that an assessor's error as to which personal property owned by a taxpayer was subject to taxation was more than a clerical error because "it concerned the very substance and extent of the assessment." *Reconstruction Finance Corp.* v. *Naugatuck*, supra, 32. Similarly, in *National CSS, Inc.* v. *Stamford*, supra, 589–90, this court considered an instance in which a taxpayer came to realize that it was not actually required to pay personal property taxes on computer equipment after it had paid such taxes. There, this court held that the taxpayer's mistake was not clerical in nature because,

"although mistaken, [it] was deliberate and intentional . . . not clerical, [and could] only be characterized as an error of *substance*." (Emphasis added.) Id., 596.

I respectfully disagree with the majority's conclusion that *National CSS, Inc.*, and *Reconstruction Finance Corp.* control the present case. Neither contains a construction of the statute that limits the definition of clerical error as to exclude mistakes made during the execution of ministerial duties, such as filing an assessment. Both cases are distinguishable from the present case because they implicated situations in which the substance of the assessment—indeed, *its very subject*—was the subject of the mistake. This distinction is consistent with decisions of sister state courts construing similar statutes, which demonstrate that the subject of the mistake is a significant consideration in determining if an error is clerical or one of substance.[4] See *American Legion, Hanford Post 5* v. *Cedar Rapids Board of Review*, 646 N.W.2d 433, 439 (Iowa 2002) (mistake of writing or copying is clerical whereas mistake of law or judgment in assessing property is error of

[4] I also find instructive a line of cases from this court distinguishing between judicial errors and clerical errors in guiding our determination of whether an assessor's error is clerical or one of substance for purposes of § 12-60. We have held that filing mistakes that cause the judgment file to be inconsistent with the decision rendered are clerical rather than substantive errors. See *Brown* v. *Clark*, 81 Conn. 562, 569, 71 A. 727 (1909) (failing to properly include interest for certain period in filing judgment was clerical mistake and not judicial error). Similarly, when a court seeks to correct a phrasing mistake that does not affect the substance of the judgment itself, this court has held that such a change is not substantive in nature. See *Blake* v. *Blake*, 211 Conn. 485, 495–96, 560 A.2d 396 (1989) (trial court's changed characterization of judgment was not substantive change). When the court seeks to correct a mistake by altering the contents of the judgment itself, however, it makes a substantive rather than a clerical change. See *Morici* v. *Jarvie*, 137 Conn. 97, 104–105, 75 A.2d 47 (1950) (modification to foreclosure judgment sought to correct error of substance because it altered details of judgment); *Goldreyer* v. *Cronan*, 76 Conn. 113, 117–18, 55 A. 594 (1903) (failure to include interest in judgment as rendered, rather than as recorded, was error of substance).

substance); *Bridgewater Interiors* v. *Detroit*, Docket No. 241136, 2003 WL 22796986, *2 (Mich. App. November 25, 2003) (definition of clerical error was not restricted to only typographical errors, but does not include assessor's substantive decision after considering all relevant facts); *Collin County Appraisal District* v. *Northeast Dallas Associates*, 855 S.W.2d 843, 846–47 (Tex. App. 1993) (Texas property tax code defines clerical error as "an error . . . that is or results from a mistake or failure in writing, copying, transcribing, entering or retrieving computer data, computing, or calculating . . . [but] does not include an error that is or results from a mistake in judgment or reasoning in the making of the finding or determination" (internal quotation marks omitted)); *Commonwealth* v. *Richmond-Petersburg Bus Lines, Inc.*, 204 Va. 606, 610, 132 S.E.2d 728 (1963) (clerical errors usually involve mistake by clerk or agent that does not require judicial consideration or discretion); *Meckem* v. *Carter*, 323 P.3d 637, 643 (Wyo. 2014) ("[a] clerical error is a mistake or omission of a mechanical nature that prevents the judgment as entered from accurately reflecting the judgment that was rendered" (internal quotation marks omitted)). But see *St. Catherine Hospital* v. *Roop*, 34 Kan. App. 2d 638, 639–40, 645, 122 P.3d 414 (2005) (assessor's mistaken guess of building materials when evaluating property was clerical error).

In the present case, the Wilton assessor mistakenly delayed imposing the penalties until after the signing of the grand list. The majority agrees with the Appellate Court's conclusion that, "because the assessor's omission of the late filing penalties at issue from the 2014 grand list at the time he signed it was of a deliberate nature such that [the assessor] at the time actually intended the results that occurred, it cannot be said to be clerical." (Internal quotation marks omitted.) Part II of the majority opinion, quoting *Wilton Campus 1691*,

LLC v. *Wilton*, supra, 191 Conn. App. 734. I, however, agree with the defendant that the assessor's mistake is not substantive because it does not relate to the amount or propriety of the assessment *itself*. Unlike the assessments at issue in *Reconstruction Finance Corp.* v. *Naugatuck*, supra, 136 Conn. 31, and *National CSS, Inc.* v. *Stamford*, supra, 195 Conn. 589–90, the assessor's mistake was deliberate only as to the time of filing, and it did not relate to the substance of the penalties or the ultimate outcome of the assessment. Because the assessor's mistake was limited to the ministerial task of filing the assessment and did not alter the content of the assessment, I conclude that it was a clerical error subject to correction under § 12-60 and not an error of substance. Accordingly, I conclude that the Appellate Court improperly reversed the trial court's judgment and sustained the plaintiffs' tax appeals on the ground that "§ 12-60 does not apply so as to permit the retroactive adjustment to the assessments on the basis of the late filing penalties." *Wilton Campus 1691, LLC* v. *Wilton*, supra, 734.

Because I would reverse the judgment of the Appellate Court, I respectfully dissent in part.

STATE OF CONNECTICUT *v.* GREGORY L. WEATHERS (SC 20297)

Palmer, McDonald, D'Auria, Ecker and Vertefeuille, Js.*

Syllabus

Convicted, after a trial to a three judge panel, of the crimes of murder, criminal possession of a pistol or revolver, and carrying a pistol without a permit in connection with the shooting death of the victim, the defendant appealed. The defendant had approached the victim, who was working at a construction site, to ask whether the construction company was

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

hiring new employees. One of the victim's coworkers suggested that the defendant go to the company's office to fill out a job application. The defendant appeared to walk away but, shortly thereafter, again approached the victim and shot and killed him. At trial, the defendant raised the affirmative defense of mental disease or defect under the applicable statute ((Rev. to 2015) § 53a-13 (a)), claiming that he lacked substantial capacity to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of the law. According to the defendant, on the morning of the offense, he experienced auditory hallucinations and delusions that influenced his thinking and behavior. These included hearing voices and seeing flashing lights, which indicated to the defendant that the victim was dangerous and that he should be shot. The defendant presented the testimony of two expert witnesses, both of whom opined that the defendant's mental condition impaired his ability to control his conduct within the requirements of the law. The trial court, however, found that the state had met its burden of proof on the counts charged and that, although the defendant demonstrated that he suffered from an unspecified psychotic disorder at the time of the murder, he failed to prove his affirmative defense because he did not demonstrate the requisite connection between his condition and his criminal conduct. The Appellate Court upheld the defendant's conviction, and the defendant, on the granting of certification, appealed to this court. *Held* that the Appellate Court correctly concluded that the trial court had reasonably rejected the defendant's defense of mental disease or defect and the opinions of the defense experts related thereto: although the state did not present any rebuttal experts, the trial court was not bound to accept the opinions of the defense experts relating to the defendant's mental disease or defect, as long as the court's rejection of such testimony was not arbitrary; moreover, the trial court's principal findings in support of its determination that the defendant had not met his burden of proving the defense of mental disease or defect were largely related, were supported by the record, and provided a reasonable basis for that determination, as the defendant's conduct immediately following the shooting did not reflect an inability to control his conduct, the defendant's motivation for shooting the victim was not borne out of psychosis but out of frustration and anger, which was exacerbated by anxiety and stress relating to the situation, the testimony of the defendant's experts and their reports reflected considerable divergence in the bases for their opinions, and the trial court's determination that the defendant was malingering by exaggerating or fabricating symptoms was supported by the facts, including that the defendant had no prior history of mental health treatment other than for substance abuse, and the defendant never told anyone, prior to the shooting, that he had been experiencing hallucinations; furthermore, although it was undisputed that the defendant suffered from some form of psychosis at the time of the offense, the fact that the defendant violated the law did not

prove that his psychosis substantially impaired his ability to conform his conduct to the requirements of the law.

Argued May 8, 2020—officially released May 28, 2021**

Procedural History

Information charging the defendant with the crimes of murder, criminal possession of a firearm, stealing a firearm, and carrying a pistol or revolver without a permit, brought to the Superior Court in the judicial district of Fairfield and tried to a three judge court, *Kavanewsky*, *E. Richards* and *Pavia*, *Js.*; thereafter, the state entered a nolle prosequi as to the charge of stealing a firearm; finding and judgment of guilty, from which the defendant appealed to this court, which transferred the appeal to the Appellate Court, *Keller*, *Prescott* and *Harper*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Affirmed.*

Dina S. Fisher, assigned counsel, for the appellant (defendant).

Timothy F. Costello, senior assistant state's attorney, with whom, on the brief, were *John C. Smriga*, former state's attorney, and *Emily Dewey Trudeau*, assistant state's attorney, for the appellee (state).

Opinion

PALMER, J. Following his election of and trial to a three judge court empaneled in accordance with General Statutes § 54-82 (a) and (b), the defendant, Gregory L. Weathers, was found guilty of murder in violation of General Statutes § 53a-54a (a), criminal possession of a pistol or revolver in violation of General Statutes (Rev. to 2015) § 53a-217c (a) (1), and carrying a pistol without a permit in violation of General Statutes (Rev. to 2015) § 29-35 (a). In so finding, the trial court rejected the

** May 28, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

defendant's affirmative defense of mental disease or defect under General Statutes (Rev. to 2015) § 53a-13 (a)[1] (insanity defense), concluding that, although the defendant demonstrated that he suffered from an unspecified psychotic disorder at the time of the murder, he failed to prove the requisite connection between this condition and his criminal conduct. The trial court rendered judgment accordingly and sentenced the defendant to a total effective term of imprisonment of forty-five years. On appeal, the Appellate Court affirmed the judgment of conviction; see *State* v. *Weathers*, 188 Conn. App. 600, 635, 205 A.3d 614 (2019); and we granted the defendant's petition for certification to appeal, limited to the issue of whether the Appellate Court correctly concluded that the trial court's rejection of the defendant's insanity defense was reasonable. See *State* v. *Weathers*, 331 Conn. 927, 207 A.3d 518 (2019). The defendant claims that the state neither presented nor elicited evidence to undermine the consensus of his experts that the defendant, as the result of a mental disease, lacked substantial capacity to control his conduct within the requirements of the law, and, therefore, the trial court improperly rejected the experts' opinions arbitrarily. He contends that the Appellate Court's conclusion to the contrary was not supported by legitimate reasons or evidence. We affirm the Appellate Court's judgment.

I

Because of the fact intensive nature of the evidentiary insufficiency claim raised by the defendant on appeal, we, like the Appellate Court, find it necessary to set

[1] General Statutes (Rev. to 2015) § 53a-13 (a) provides: "In any prosecution for an offense, it shall be an affirmative defense that the defendant, at the time he committed the proscribed act or acts, lacked substantial capacity, as a result of mental disease or defect, either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law."

Hereinafter, all references to § 53a-13 are to the statutory revision of 2015.

forth the evidence adduced at trial in considerable detail. We begin with the Appellate Court's recitation of the facts that the trial court reasonably could have found in support of the judgment of conviction, which we have supplemented with additional relevant facts and procedural history. "On the morning of March 26, 2015, the victim, Jose Araujo, and several other individuals employed by Burns Construction were [in the process of backfilling a trench that had been dug along the side of the road for purposes of] installing an underground gas main on Pond Street in [the city of] Bridgeport. . . . Matthew Girdzis, one of the crew members, was seated in a dump truck positioned near the trench. The victim was standing on the driver's side of the truck, speaking with Girdzis . . . .

"While the victim and Girdzis were talking, the defendant walked into the work zone and approached the victim. Girdzis had never seen the defendant there before; he was not an employee of Burns Construction. The defendant greeted the victim with a seemingly amicable 'fist bump' and asked the victim whether the construction company was hiring. The victim, in turn, relayed the question to Girdzis. Speaking to the defendant directly, Girdzis suggested that he go to the construction company's office . . . to fill out an application and 'see what happens.' By all accounts, there was nothing unusual or remarkable about the defendant's demeanor during his initial interaction with the victim and Girdzis. There was nothing to suggest that . . . the defendant harbored any animosity toward the victim or Girdzis. The defendant did not appear to be acting strangely; he appeared to be rational and to understand what was being said. [As one of the construction workers observed, however, the defendant kept his right hand in his pocket throughout the encounter.]

"Following this encounter, the defendant walked away, seemingly leaving the work zone, but, in fact, he

merely walked around to the other side of the truck and stood near the passenger side door. Meanwhile, Girdzis and the victim had begun walking toward the trench. After a few seconds, the defendant looked up and down the street and, seeing the street empty, proceeded to walk back around the truck and reapproach the victim.[2] In a matter of seconds, the defendant, without saying a word, removed a revolver from his pocket and shot the victim several times. The victim ultimately died from gunshot wounds.

"Immediately after the shooting, the defendant began running up the street, zigzagging across it several times. Several of the victim's coworkers chased the defendant on foot. The defendant, seeing that he was being pursued, stopped momentarily at a parked pickup truck and opened its door but then quickly shut it again and resumed running up the street. The coworkers continued chasing the defendant until he ran in between two houses.

"Members of the Bridgeport Police Department soon arrived on the scene and began canvassing the area. The defendant eventually was located by Officer Darryl Wilson, who found the defendant hiding in some tall bushes in a backyard. Wilson ordered the defendant to show his hands, at which point the defendant began to run. Wilson ordered the defendant to stop and again demanded that he show his hands. The defendant complied. Upon observing the revolver in the defendant's hand, Wilson ordered the defendant . . . to drop the weapon and warned the defendant that he was prepared to shoot if the defendant did not comply. After [Wilson] repeat[ed] this order, the defendant dropped his weapon. Additional police units arrived a few seconds

[2] Shortly before the defendant arrived at the scene, a patrolman with the Bridgeport Police Department who was working overtime duty at the construction site left the site to get coffee for the construction crew. The patrolman was returning to the site and was within view of it when he heard shots fired.

later, and the defendant was arrested. As he was being arrested, the defendant mumbled something to the effect of, 'it's all messed up' or 'I messed up.'

"Following his arrest, the defendant was led out from behind the house and into the street, at which point Lieutenant Christopher LaMaine heard the defendant state spontaneously that he had been involved in a 'labor dispute.' When approached by LaMaine, the defendant again claimed that there had been a 'labor dispute.' After advising the defendant of his constitutional rights, which the defendant waived, LaMaine questioned him. The defendant seemed to have difficulty focusing, putting his thoughts together, and answering LaMaine's questions fully, and, at times, he rambled on incoherently, causing LaMaine to suspect that the defendant either had a mental illness or was under the influence of phencyclidine (PCP). Upon further questioning, the defendant stated that the victim was a foreman and was not 'letting anyone out here work' and that he had shot the victim to settle this dispute.

"[Thereafter] [t]he defendant . . . was transported to the police station, where he was interviewed by Detective Paul Ortiz and another detective. As Ortiz observed, there were numerous instances throughout the interview [when] the defendant either entirely failed to respond to questions or gave less than responsive answers, [which was not an uncommon occurrence during an interrogation, but] some of his statements seemed disorganized. [A couple of times during the interview, the defendant said that he was 'going crazy,' and, at the end of the interview, said 'I need help.'] Given his interactions with the defendant, Ortiz thought it was appropriate to have him evaluated at a hospital for possible mental health or drug problems.[3] Neverthe-

[3] The notes from Bridgeport Hospital indicate that the police brought the defendant to the hospital "after he expressed suicidal ideation while in police custody."

less, the defendant appeared to understand the detectives' questions.[4] He admitted to shooting the victim and expressed remorse for it. He stated that he had been looking for a job and felt that the victim had 'brushed [him] off.' [He stated that he had not been employed 'for a long time,' more than one year, and that he needed to feed his family. His response to a question asking why he had shot the victim was, 'I'm not working.' When asked what the victim had done to make the defendant so angry, he responded: 'Just . . . going through stress. I just can't take it anymore. Been rough. Trying to find work. Sorry.'] Following the interview, the defendant was transported to Bridgeport Hospital for evaluation and, the next day, was remanded to the custody of the Commissioner of Correction [where he received further psychiatric evaluation]." (Footnotes added; footnotes omitted.) *State* v. *Weathers*, supra, 188 Conn. App. 603–607.

The defendant subsequently raised the affirmative defense of insanity under § 53a-13 (a), claiming that he met both the volitional prong and the cognitive prong of that defense. "Under the cognitive prong [of the insanity defense], a person is considered legally insane if, as a result of mental disease or defect, he lacks substantial capacity . . . to appreciate the . . . [wrongfulness] of his conduct. . . . Under the volitional prong, a person also would be considered legally insane if he lacks substantial capacity . . . to conform his conduct to the requirements of law." (Internal quotation marks omitted.) *State* v. *Madigosky*, 291 Conn. 28, 39, 966 A.2d 730 (2009).

[4] The defendant was able to provide the detectives with some background information, including but not limited to the city and state where his mother then resided, the town where he grew up, the high school that he attended in a different city, his child's name and birthday, his wife's maiden name, the name of her employer, and her position at her place of employment. He also told the officers that he took the gun from his basement.

"In support of his affirmative defense, the defendant presented the testimony of two expert witnesses, David Lovejoy and Paul Amble, both of whom produced written evaluations that were admitted into evidence. Lovejoy, a board certified neuropsychologist hired by the defense, examined the defendant on three separate occasions in July, September, and November, 2015. Lovejoy also reviewed [records from Bridgeport Hospital and the Department of Correction and police reports], conducted interviews with the defendant's wife and two of his friends, and watched the video recording of the police interview.

"According to Lovejoy, the defendant and his wife reported that, in the two years leading up to the offense, the defendant had been experiencing multiple, ongoing stressors. Lovejoy's evaluation revealed that the defendant had lost his job as a truck driver in 2013 and that he had remained unemployed thereafter, despite continuing efforts to secure employment. Following the loss of his job, the defendant began drinking heavily, which resulted in criminal charges for operating a motor vehicle while under the influence of intoxicating liquor or drugs. In January, 2015, the defendant, aware that there was a warrant out for his arrest in connection with these charges, turned himself in to authorities. The defendant remained in prison until his wife was able to secure a bail bond in March, 2015—shortly before the offense in question took place. According to the defendant's representations to Lovejoy, after his release from prison, he began to worry about his family's finances and, over time, started to 'feel crazy' and experience thoughts of suicide. . . .

"According to Lovejoy, '[i]nformation collected during the clinical interviews with [the defendant] and the collateral interviews with his wife and friends indicated that [the defendant] began to decompensate psychiatrically, beginning on [March 22 or 23, 2015]. Strange

behaviors, disrupted sleep, ruminative pacing, tangential and confused thinking, and moments of appearing "spaced out" were observed by those who were with him.' The defendant's wife also indicated to Lovejoy that [on one occasion] . . . the defendant . . . espouse[d] paranoid thoughts related to a belief that she wanted to hurt or kill him.

"Regarding the defendant's conduct and state of mind later that week, Lovejoy's interviews with the defendant revealed that, '[b]y the evening [before and/or morning of the offense, the defendant] appeared to be under the influence of strong beliefs that were not based in reality (delusions).' More specifically, the defendant reported to Lovejoy that he had begun to believe that he was receiving messages via flashing lights emanating [from] his computer screen [and television]. In Lovejoy's view, '[t]hese beliefs had become a prominent part of [the defendant's] clinical presentation, at that time.' The defendant also reported to Lovejoy that he had begun to hear voices that made critical comments about him. He described these voices as sounding like 'me talking to myself from the inside.' . . . The defendant further represented to Lovejoy that, by the night before the offense, he had resolved to kill himself because he 'was tired of trying to get [his] thoughts together and . . . wanted the voices to go away,' but he decided against doing it at that time because he did not want his wife and daughter to have to find his body in the house. . . .

"Lovejoy's interviews with the defendant further revealed that, by the morning of the offense, 'auditory hallucinations, delusions and suicidal thinking were present and appeared to be overarching influences on [the defendant's] thinking and behavior.' More specifically, the defendant reported to Lovejoy that, on the morning of the offense, he believed that the flashing lights from his computer screen were sending him a message indicating, '[g]et your gun. You are worthless,

and others are evil.' . . . The defendant reported that the message also had indicated that he would receive additional messages from lights outside of his home. The defendant reported that, by this point, he had decided to kill himself at a local cemetery. He further reported, however, that he came upon a construction site displaying a range of colored lights that were flashing at him and that these lights and the voices inside of him told him to stop. According to the defendant, a person at the construction site fixed his eyes on him and then looked to another man with 'an evil intent,' at which time the lights conveyed to the defendant that this person was dangerous and that he should shoot him." (Footnote omitted.) *State* v. *Weathers*, supra, 188 Conn. App. 611–14.

"In addition to interviewing the defendant and collateral sources, Lovejoy also reviewed the defendant's medical records from after the offense. Regarding the defendant's Bridgeport Hospital records, which were admitted into evidence at trial, Lovejoy noted that mental health experts there had diagnosed him with 'psychosis not otherwise specified' and that his Global Assessment of Functioning score indicated 'the presence of very severe psychiatric symptoms and associated functional impairments.'[5] Lovejoy further noted

[5] The Bridgeport Hospital records reflected an assessment of the defendant as "severe" on Axis IV and an assignment of a "20" rating on Axis V (Global Assessment Functioning (GAF)). No staff from Bridgeport Hospital testified, and no evidence was presented to explain the basis for these ratings. Neither Lovejoy nor Amble indicated that either of them had spoken with hospital medical staff. Although the multi-axial system was abandoned in 2013 in the fifth edition of the Diagnostic and Statistical Manual of Mental Disorders (DSM-5); see, e.g., H. Ringeisen et al., Center for Behavioral Health Statistics and Quality, DSM-5 Changes: Implications for Child Serious Emotional Disturbance (2016) p. 5, available at https://www.ncbi.nlm.nih.gov/books/NBK519708/pdf/Bookshelf_NBK519708.pdf (last visited May 26, 2021); Axis IV "was used [in the fourth edition of DSM (DSM-IV)] to describe psychosocial and environmental factors affecting the person," including, among other factors, economic problems, occupational problems, and, most notably, "[p]roblems related to interaction with the legal system/crime . . . ." N. Schimelpfening, The 5 Axes of the DSM-IV Multi-Axial System (last updated

that the hospital records described a number of symptoms consistent with a thought disorder, including tangential think-ing, thought blocking, confused and disorganized thinking, the inaccurate interpretation of reality, suspicious and paranoid thinking, difficulty following conversations and responding to questions, a poverty of speech, and impaired impulse control. The defendant also was observed to be internally preoccupied and staring suspiciously. Regarding the defendant's medical records from the Department of Correction . . . Lovejoy testified that they were largely, but not entirely, consistent with the hospital records. Lovejoy testified that, early on in the defendant's treatment at the department, a psychiatrist, Allison Downer, had suspected that the defendant may have been exaggerating or fabricating his mental health symptoms.[6] Lovejoy surmised, however, that Downer

February 4, 2020), available at https://www.verywellmind.com/five-axes-of-the-dsm-iv-multi-axial-system-1067053 (last visited May 26, 2021). The defendant's rating of 20 on the GAF corresponded to "[s]ome danger of hurting self or others or . . . gross impairment in communication." Id. It is unclear whether these ratings stemmed principally or exclusively from the defendant's arrest for a homicide and the concern expressed by the police that the defendant presented a possible suicide risk. A similar question arises from the hospital notation of impaired impulse control.

[6] "In his written evaluation, Amble provided excerpts of the relevant portions of the defendant's medical records from the [D]epartment [of Correction]. According to Amble, Downer completed an initial psychiatric evaluation of the defendant on March 31, 2015, and noted: 'While he presented as odd, [I believe] his behavior was intentional as he is trying to feign mental illness to avoid penalty for [the criminal] charges. He was avoidant of eye contact and while seated, [seemed] to be, "coming in and out" of different states of orientation and confusion. The mood is euthymic and with odd, bizarre affect. [He] [d]enies auditory or visual hallucinations, denies suicidal or homicidal ideation.' According to Amble, on April 6, 2015, Downer further noted: 'In light of collateral information, past custody records and presentation over his time in the infirmary, it can be stated with confidence [that the defendant] does not suffer [from] a mental illness and is not in acute risk of hurting himself or others. With the exception of the initial encounter, [the defendant] has been clear, logical and coherent, manifesting no symptoms of mood or psychotic disturbance. [I] [i]nformed him he would be discharged and he will continue to be seen by mental health [personnel] for supportive intervention with psychotropic intervention to

likely had not reviewed the defendant's hospital records or conducted any collateral interviews.

"Finally, as part of his evaluation, Lovejoy also conducted psychological and neuropsychological testing on the defendant. Lovejoy testified that this testing gave no indication that the defendant had been exaggerating his cognitive complaints or had been attempting to fabricate or exaggerate his psychiatric symptoms [at the time testing was undertaken]. According to Lovejoy, the testing revealed the presence of likely delusions, auditory hallucinations, and a tendency to experience confused thinking, which was consistent with the defendant's self-report of his psychological and psychiatric symptoms.

"On the basis of the foregoing information, Lovejoy testified that his overall opinion was that, at the time of the offense, the defendant had been suffering from a psychotic disturbance that significantly influenced his thinking and behavior, although he was not able to arrive at any specific diagnosis for the defendant.[7] Although he did not opine in his written evaluation as to whether this psychotic disturbance had impacted the defendant's ability to conform his conduct to the law, upon questioning by defense counsel, Lovejoy testified that the defendant's 'psychotic disorder did impact him in that way.' " (Footnotes added; footnote in original; footnote omitted.) Id., 614–15.

"Amble, a board certified forensic psychiatrist hired by the state, also testified for the defense. Amble evalu-

be employed if deemed necessary.' " *State* v. *Weathers*, supra, 188 Conn. App. 614–15 n.13.

[7] Lovejoy noted in his report: "Ongoing treatment with mental health specialists has resulted in diagnostic conceptualizations that would account for [the defendant's] psychotic symptoms. These diagnostic considerations have included psychotic disorder [not otherwise specified], brief psychotic disorder, schizophrenia and a mood disorder with psychotic features. This examiner is in agreement with the direction of the diagnostic workups. However, more time and a better understanding of ongoing symptoms [are] necessary before a final diagnosis can be obtained [and] confirmed."

ated the defendant for three and one-half hours in April, 2016. Amble reviewed the same reports, records, and video recording reviewed by Lovejoy and interviewed the same collateral sources. He also reviewed Lovejoy's written evaluation.

"Amble testified that the information he obtained during his interviews with the collateral sources was consistent with that reported by Lovejoy. The defendant's account of his symptoms and the circumstances surrounding the offense, as reported in Amble's written evaluation, were also generally consistent with that provided to Lovejoy, but it also included some additional information. Regarding his auditory hallucinations, the defendant reported to Amble that he had first begun to hear voices while still incarcerated on the operating a motor vehicle while under the influence charges. He also reported that these voices had indicated to him on multiple occasions that he should kill himself, and, on the morning of the offense, he heard his own voice confirming the plan. The defendant further reported that, in addition to the auditory hallucinations, he also had experienced visual hallucinations in the form of his deceased father. . . . [U]pon questioning by Amble as to what exactly had prompted him to shoot the victim, the defendant reported that, at the time of the offense, he [believed that he was] possessed by a demon and that, afterward, he had continued to be possessed until 'people in jail prayed over [him] and release[d] the demon.' . . .

"On the basis of his review of the records, Amble concluded that the [Department of Correction's] diagnosis of psychosis not otherwise specified was reasonable, although he was likewise unable to make his own diagnosis.[8] As to the defendant's insanity defense,

[8] Amble's report simply characterized the defendant as having a "psychiatric illness . . . ." On direct examination, he characterized the defendant as suffering from "a psychosis" or "a psychotic illness." He acknowledged on cross-examination that he had not come to any sort of diagnosis more

Amble [opined that, at the time of the incident, the defendant appreciated the wrongfulness of his conduct—the defendant conceded as much in his interview—but] 'had some impairments in his ability to conform his conduct to the law.' As Amble explained in more detail in his written evaluation, however, there were several pieces of countervailing information that militated against the veracity of the defendant's claim of insanity.

"First, Amble noted that the defendant had failed to share with anyone, including Lovejoy, that he was having severe visual hallucinations [of his father] and auditory hallucinations while incarcerated prior to the offense. Second, the defendant had never before claimed to have been possessed by a demon until after repeated questioning by Amble. . . . Third, the mental health evaluations by Downer at the [D]epartment [of Correction] drew clear conclusions that the defendant was fabricating symptoms of a mental illness [although this view was not shared by other department psychiatric staff]. Fourth, the defendant's account of his symptoms was not typical for individuals with a psychotic illness. Specifically, Amble stated that it was atypical for an individual to experience auditory hallucinations in one's own voice and to experience visual hallucinations as distinctive as those described by the defendant. [Amble opined that these four factors, taken together, strongly suggested the possibility that the defendant was embellishing his psychiatric symptoms.] Finally,

specific than overall psychosis and that he "took the diagnosis from the Department of Correction record that was generally a psychotic disorder not otherwise specified." He explained that psychosis not otherwise specified is "kind of a loose diagnosis . . . the kind of diagnosis you give when . . . [the subject] has got some impairment in thinking that may include delusions, and it may not; it may include paranoia and it may not; but it is substantial impairment in [his] reasoning abilities and in the clarity of [his] thinking . . . . I am not sure what it is, but the best diagnosis [I've] got out there is a psychotic disorder not otherwise specified."

Amble raised doubts about the claimed impulsivity of the shooting. He found it curious that, although the defendant purportedly had experienced auditory hallucinations telling him to kill himself on numerous occasions [he had never attempted to do so] and [then, when he] had intended to do so on the day of the offense, the single hallucination at the construction site was enough to cause him to change his plans and [to] kill somebody else. [Amble hypothesized several possible explanations for the shooting but noted that the defendant had denied each scenario.][9]

"Ultimately, Amble [opined that the defendant appeared to be providing a 'malingered explanation' for why he had shot the victim but] concluded that, despite these countervailing considerations, 'the sum of the evidence, including reports of the defendant's [wife] and friends, the illogical nature of the act, the lack of primary gain, and mental health assessments immediately after the crime [indicating] that he was suffering from a psychiatric illness, provide[s] a sufficient basis to conclude that the defendant lacked substantial capacity to control his conduct at the time of his crime.' In response to questioning by the court, Amble clarified that his conclusion was '[t]o some extent based on [the defendant's own] report' but also noted that the collateral information was 'very important.' He also attributed moderate weight to what he described as the seemingly illogical, senseless nature of the shooting." (Footnotes added; footnote omitted.) Id, 615–18.

[9] These explanations were: (1) the defendant was unable to kill himself and killed the victim to provoke the police to kill him; (2) the defendant "became suddenly angry with the individual who[m] he shot, and, since he was going to end his life anyway, there was little for him to lose by this action"; (3) the defendant was so distraught about his present circumstances and so depressed that he would rather spend time in prison than in the community; and (4) there was a prior conflict between the defendant and the victim that had not yet come to light.

"In rebuttal to the defendant's insanity defense, the state relied [exclusively] on its cross-examination of the defendant's two experts and the evidence adduced in its case-in-chief. A significant portion of the state's cross-examinations was focused on the possibility that the defendant's mental state had been caused by the use of PCP or 'bath salts.'[10] See General Statutes [Rev. to 2015] § 53a-13 (b) ('[i]t shall not be a defense under this section if such mental disease or defect was proximately caused by the voluntary ingestion, inhalation or injection of intoxicating liquor or any drug or substance, or any combination thereof'). Nevertheless, the state also challenged the experts' conclusions regarding the defendant's ability to control his conduct. On cross-examination, Lovejoy conceded that not all people who suffer from psychotic symptoms lose the ability to control their conduct within the requirements of the law and that the majority of people who suffer from some sort of psychosis do not come into contact with the law. . . . Lovejoy acknowledged that it was 'difficult for [him] to separate conceptually in [his] head' the cognitive and volitional prongs [of the statutory insanity defense] because, '[f]or [him], the notion of understanding the wrongfulness of your action and the notion of being in control of your actions when you are separated from reality are somewhat intertwined . . . .' " (Foot-

[10] According to Amble, bath salts are also known as synthetic marijuana, which " 'has a much more potent . . . psychogenic effect on individuals [than marijuana],' and . . . is commonly used by people who know that they are going to be subjected to drug testing because there is not a readily available, reliable test for it." *State* v. *Weathers*, supra, 188 Conn. App. 619 n.15. Amble noted the possibility that the defendant had been intoxicated by a substance that was not included in the toxicology test performed at Bridgeport Hospital but that this possibility remained speculative. Although the experts and police witnesses agreed that the defendant's presentation was consistent with someone who was under the influence of PCP or a similar substance, the trial court found that there was insufficient evidence to conclude that any such substance had caused the defendant's mental state. See id.

note altered.) *State* v. *Weathers*, supra, 188 Conn. App. 618–19.

"Amble likewise conceded on cross-examination that a psychosis does not necessarily impair a person's ability to control his or her conduct within the requirements of the law and that the majority of people experiencing their first episode of psychosis do not commit violent acts. Amble further conceded that the fact that a crime is poorly thought out does not necessarily indicate that it is a product of psychosis. Similarly, Amble agreed that the fact that someone may have reacted violently to an apparently minor slight does not necessarily indicate that he was operating under the influence of a psychosis. Moreover, in response to questioning by the court, Amble agreed that people who act illogically and commit illogical acts are not necessarily unable to conform their behavior to the requirements of the law. He also acknowledged that there was some evidence that the defendant had 'mention[ed] something about a labor dispute at the time of his arrest' but stated that, from the information that Amble had, this 'didn't seem to make sense.' "[11] Id., 619–20.

In a unanimous oral decision, the trial court found that the state had met its burden of proof on the three counts charged[12] and that the defendant had failed to prove his affirmative defense. With respect to that defense, the court found that there was credible evidence that the defendant suffered from a mental disease or defect—a psychosis of an unspecific nature—at the

[11] "Regarding the 'labor dispute' explanation [that] he had given to LaMaine, the defendant told Amble, '[i]t was like I was a mechanic and this was a labor dispute.' . . . When asked what was specifically in his mind at the time of the offense, he responded, 'I don't know where [this explanation] came from and why.' " *State* v. *Weathers*, supra, 188 Conn. App. 620 n.16.

[12] The defendant also had been charged in a fourth count with stealing a firearm in violation of General Statutes § 53a-212 (a), but the charge was dismissed after the state entered a nolle prosequi as to that charge at the close of its case-in-chief.

time of the offense. The court further found, however, that the defendant had failed to meet his burden of proving that, as a result of this mental disease, he lacked substantial capacity either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law. With regard to the latter, volitional prong—the only prong at issue on appeal—the court found that "the defendant's mental disease did not diminish his ability to conform his behavior. The defendant's actions in shooting [the victim] were not borne out of his psychosis. Simply put, he was acting out of frustration and anger. The defendant was faced with a multitude of stressful and emotional hurdles in his life not of a psychiatric nature, which motivated his actions that day. He had lost his job, he had not been able to gain employment for a substantial period of time . . . and was facing foreclosure on his home. . . . The evidence suggests that he made overtures for a job, and, when he was directed to make an application elsewhere, he felt rebuffed and, in his own words, felt that he had been brushed off." The court also pointed to the defendant's conduct immediately following the shooting, when confronted by the police near the scene and during the police interview, characterizing that conduct as compliant, unremarkable, and appropriate.

The trial court went on to explain why it had not found that the experts' opinions were sufficient to meet the defendant's burden of proof. It first noted that, although there was agreement on some points, the experts' testimony and reports "show[ed] at least as much divergence as they do uniformity in the [bases] for their opinions." The court also observed that, although the experts did agree that the defendant was unable to conform his conduct to the requirements of the law, it could not agree with that conclusion for the reasons it had previously articulated. The court further

explained that there was substantial, credible evidence that the defendant "was malingering and thus [found] that the defendant willingly either fabricated or embellished his symptoms selectively over time. . . . [T]he defendant had a perceived motivation, a reason to commit these crimes. The court's findings relating to his malingering . . . and his motivation [for] commit[ting] the crime . . . undermine the opinions of the [experts] that the defendant could not conform his conduct."

The defendant appealed to this court, and we transferred the appeal to the Appellate Court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1. Thereafter, the defendant sought an articulation from the trial court regarding the evidentiary basis on which each of the court's findings rested. The court denied the request, and the defendant did not seek review of that decision.

In his appeal to the Appellate Court, the defendant contended that (1) the trial court arbitrarily rejected the experts' opinions because there was no conflicting evidence on which to base such a conclusion; *State* v. *Weathers*, supra, 188 Conn. App. 620; and (2) certain of the court's findings were clearly erroneous, in particular, (a) the defendant shot the victim out of anger and frustration, (b) "there was nothing unremarkable, untoward or aberrant about the defendant's conduct [during the police interview]," and (c) the defendant fabricated or embellished his symptoms. (Internal quotation marks omitted.) Id., 626–27. In rejecting the first contention, the Appellate Court concluded, among other things, that the trial court was entitled to rely on its nonpsychiatric explanation for the defendant's conduct, and that it was reasonable for the trial court to conclude that the experts' opinions to the contrary were undermined by evidence that supported the trial court's finding that the defendant intentionally had either embellished or fabricated his psychiatric symp-

toms over time, especially in light of the experts' reliance on what the defendant himself had reported about his symptoms and the events surrounding the shooting. Id., 623–26. The Appellate Court identified particular facts on which each expert had relied or had failed to adequately consider as a reasonable basis for the trial court to have rejected the experts' opinions. See id., 624–26. The Appellate Court also identified evidence in the record that, in its view, supported the findings challenged by the defendant. Id., 627–33. Specifically with respect to the fabrication or embellishment of symptoms, the Appellate Court reasoned: "Because the defendant concedes that there is some evidence of malingering in the record—namely, Downer's notation in the defendant's medical records with the [D]epartment [of Correction] and Amble's conclusion in his written evaluation—[the court] cannot conclude that the [trial] court's finding [with respect to this issue] is clearly erroneous." Id., 633. The Appellate Court affirmed the judgment of the trial court; id., 635; and this certified appeal followed.

II

In his appeal to this court, the defendant contends that a trial court's discretion to reject expert opinion does not permit it to do so arbitrarily, and that the trial court's rejection of the unrebutted consensus of the only two experts to testify in the present case constituted precisely that. He contends that the Appellate Court's contrary conclusion rested on its improper endorsement of the trial court's irrelevant "motivation" theory and other considerations that did not legitimately undermine the experts' opinions.[13]

[13] Specifically, the defendant contends that (1) the trial court's disagreement with the expert testimony is not itself evidence and therefore cannot constitute conflicting evidence, (2) the Appellate Court incorrectly concluded that the experts' opinions were "[w]eakened" by the defendant's embellishment of symptoms over time, (3) Amble's failure to account for the defendant's irrational labor dispute statement to the police upon arrest did not " '[a]ttenuate' " Amble's opinion, (4) Amble was not equivocal in his

The state claims that the defendant's arguments are premised on an improper standard of review. It asserts that the question is not whether it was proper for the trier of fact to diverge from the experts' opinions given that the trier is free to reject such opinions; rather, it is whether there was sufficient evidence to support the trier's ultimate finding that the defendant's guilt had been proved beyond a reasonable doubt. The state contends that the record in the present case supports that finding.[14] It alternatively contends that, even if the

conclusions, (5) the Appellate Court improperly adopted the trial court's conclusion that Lovejoy was not worthy of belief, (6) the Appellate Court improperly rejected Lovejoy's opinion on the basis of his " '[p]hilosophical' " dispute with the distinctions between the volitional and cognitive prongs of § 53a-13, and (7) the experts' admissions on cross-examination that some persons suffering from psychotic disorders can control themselves did not undermine their opinion that "[t]his [p]sychotic" defendant could not control himself. We address these claims to the extent that we endorse the same reasoning as the Appellate Court.

[14] The state, in its brief to this court, appears to take the position that our review is not limited to whether there is evidentiary support for the specific reasons articulated by the trial court for rejecting the defendant's insanity defense. Although the defendant's brief to this court reflects the opposite approach, neither party's brief addressed this specific question in any detail; nor did either party provide this court with authority supporting their position when the issue was raised at oral argument. We note that, unlike in a case tried to a jury, the trial court is required to issue a decision that "shall encompass its conclusion as to each claim of law raised by the parties and the factual basis therefor." Practice Book § 64-1 (a). Because we conclude that the reasons articulated by the trial court properly support its decision, we need not consider whether the state's position is correct or whether the trial court's reasons should be treated like a special verdict. See *State* v. *Perez*, 182 Conn. 603, 606, 438 A.2d 1149 (1981) ("Our review of the conclusions of the trier of fact . . . is the same whether the trier is a judge, a panel of judges, or a jury. . . . Upon a verdict of guilty we review the evidence in the light most favorable to sustaining the verdict. . . . It is not necessary for us to determine the reasons [that] the trier had for concluding that the defendant had substantial capacity both to appreciate the wrongfulness of his conduct and to conform his conduct to the requirements of law. *Absent a special verdict*, we need not consider the route by which the trier arrived at its result." (Citations omitted; emphasis added.)); see also *State* v. *Quinet*, 253 Conn. 392, 410–11, 752 A.2d 490 (2000) ("[A]lthough it is true that the trial court underscored the fact that the defendant had carefully planned his course of conduct, the court did not indicate that it

proper standard requires us to consider whether the record contains a reasonable basis for rejecting the experts' opinions, that standard was met. We agree with the defendant's position as to the standard of review, insofar as it applies to expert testimony, but agree with the state that this standard was met in the present case.

Our review is governed by the following principles. Paramount among these is that, because insanity is an affirmative defense, the defendant bore the burden of proving by a preponderance of evidence that, as a result of his psychotic condition at the time of the offense, he "lacked substantial capacity, as a result of mental disease or defect . . . to control his conduct within the requirements of the law." General Statutes (Rev. to 2015) § 53a-13 (a); see also General Statutes § 53a-12 (b) ("[w]hen a defense declared to be an affirmative defense is raised at a trial, the defendant shall have the burden of establishing such defense by a preponderance of the evidence"). "Although this case presents an unusual procedural posture [insofar as] a [three judge] panel serves as the finder of facts (instead of a jury) and . . . the burden is on the defendant to prove his affirmative defense, the normal rules for appellate review of factual determinations apply and the evidence must be given a construction most favorable to sustaining the court's verdict." *State* v. *Zdanis*, 182 Conn. 388, 391, 438 A.2d 696 (1980), cert. denied, 450 U.S. 1003, 101 S. Ct. 1715, 68 L. Ed. 207 (1981).

had relied exclusively on such evidence in rejecting the defendant's insanity defense. Thus, we are free to examine the entire record to determine whether a fact finder reasonably could have concluded that the defendant had failed to establish that he lacked substantial capacity to control his desire to commit rape and murder." (Internal quotation marks omitted.)); *State* v. *Cobb*, 251 Conn. 285, 383, 743 A.2d 1 (1999) ("[f]urther articulation of a panel's criminal verdict is unnecessary [when] the verdict adequately states its factual basis, and [when] the record is adequate for informed appellate review of the verdict"), cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000).

The defendant's appeal relies heavily on the fact that both of his experts opined that his mental condition impaired his ability to control his conduct within the requirements of the law, whereas the state presented no expert opinion. Undoubtedly, "[o]pinion testimony from psychiatrists, psychologists, and other [mental health] experts is central to a determination of insanity. . . . Through examinations, interviews, and other sources, these experts gather facts from which they draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior. . . . At trial, they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. . . . Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, [mental health] experts can identify the elusive and often deceptive symptoms of insanity and tell the [trier of fact] why their observations are relevant. . . . In short, their goal is to assist [fact finders], who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant at the time of the offense." (Citations omitted; internal quotations marks omitted.) *Barcroft* v. *State*, 111 N.E.3d 997, 1003 (Ind. 2018), quoting *Ake* v. *Oklahoma*, 470 U.S. 68, 80–81, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985).

Well settled rules, however, dictate that the trier of fact is not bound to accept a defense expert's opinion on insanity, even when the state has presented no rebuttal expert. "The credibility of expert witnesses and the weight to be given to their testimony . . . on the issue of sanity is determined by the trier of fact. . . . *State* v. *Medina*, 228 Conn. 281, 309, 636 A.2d 351 (1994). . . . [I]n its consideration of the testimony of an expert witness, the [trier of fact] might weigh, as it sees fit, the expert's expertise, his opportunity to observe the defendant and to form an opinion, and his thorough-

ness. It might consider also the reasonableness of his judgments about the underlying facts and of the conclusions [that] he drew from them. . . . *State* v. *DeJesus*, 236 Conn. 189, 201, 672 A.2d 488 (1996); accord *State* v. *Patterson*, 229 Conn. 328, 339, 641 A.2d 123 (1994). . . . [A]lthough expert witnesses testified on behalf of the defendant and the state called none, that alone is not a sufficient basis to disturb the verdict on appeal . . . for the [trier of fact] can disbelieve any or all of the evidence on insanity and can construe that evidence in a manner different from the parties' assertions. . . . *State* v. *Medina*, supra, 309–10. It is the trier of fact's function to consider, sift and weigh all the evidence including a determination as to whether any opinions given concerning the defendant's sanity were undercut or attenuated under all the circumstances. *State* v. *Evans*, 203 Conn. 212, 242, 523 A.2d 1306 (1987); see also *State* v. *Cobb*, 251 Conn. 285, 490, 743 A.2d 1 (1999) (the state can weaken the force of the defendant's presentation by cross-examination and by pointing to inconsistencies in the evidence . . .) [cert. denied, 531 U.S. 841, 121 S. Ct. 106, 148 L. Ed. 2d 64 (2000)]." (Internal quotation marks omitted.) *State* v. *Quinet*, 253 Conn. 392, 407–408, 752 A.2d 490 (2000); see also, e.g., *State* v. *Blades*, 225 Conn. 609, 627, 626 A.2d 273 (1993) (rejecting claim that trial court was required to accept defense of extreme emotional disturbance in criminal case in which defendant had proffered expert testimony of psychiatrist and state did not present evidence to rebut defense). "The court might reject [uncontradicted expert testimony] entirely as not worthy of belief or find that the opinion was based on subordinate facts that were not proven." (Internal quotation marks omitted.) *State* v. *Morelli*, 293 Conn. 147, 160, 976 A.2d 678 (2009).

The trier's freedom to discount or reject expert testimony does not, however, allow it to "*arbitrarily* disregard, disbelieve or reject an expert's testimony in the

first instance. . . . [When] the [trier] rejects the testimony of [an] . . . expert, there must be some basis in the record to support the conclusion that the evidence of the [expert witness] is unworthy of belief." (Citations omitted; emphasis added; internal quotation marks omitted.) *Builders Service Corp.* v. *Planning & Zoning Commission*, 208 Conn. 267, 294, 545 A.2d 530 (1988); accord *Wyszomierski* v. *Siracusa*, 290 Conn. 225, 244, 963 A.2d 943 (2009); see *Wyszomierski* v. *Siracusa*, supra, 244 (applying rule but concluding that rejection of expert opinion was not arbitrary because opinion was based on fact that had no support in evidence); see also *Goldstar Medical Services, Inc.* v. *Dept. of Social Services*, 288 Conn. 790, 831, 955 A.2d 15 (2008) ("[n]umerous decisions in this court have upheld decisions in which the trier of fact has opted to reject the unrebutted testimony of an expert witness *under appropriate circumstances*" (emphasis added)).

We therefore reject the state's position that the trier of fact is free to reject expert opinion even arbitrarily, and, thus, as long as there is evidence to demonstrate that the state met its burden of proof with respect to the criminal charges, the verdict must be sustained. We simply see no basis in logic or reason for such a rule, which would effectively render a decision rejecting an insanity defense immune from appellate review.

Although the state correctly points out that our court has never applied this principle outside of the civil context, there is no legitimate justification not to apply it equally to criminal cases, as have many other jurisdictions, including in the context of an insanity defense.[15] We caution, however, that, given the myriad bases on

[15] See, e.g., *United States* v. *Hall*, 583 F.2d 1288, 1294 (5th Cir. 1978) ("A defendant is not entitled to a judgment of acquittal simply because he offers expert testimony on the issue of insanity and the [g]overnment attempts to rebut it without any expert witnesses. The expert's opinion, even if uncontradicted, is not conclusive. At the same time, it may not be arbitrarily ignored, and some reason must be objectively present for ignoring expert opinion testimony." (Footnote omitted.)); *Pickett* v. *State*, 37 Ala. App. 410,

which the trier properly may reject expert testimony and the reviewing court's obligation to construe all of the evidence in the light most favorable to sustaining the trier's verdict, it would be the rare case in which the reviewing court could conclude that the trier's rejection of the expert testimony was arbitrary.[16] See *Build-*

414, 71 So. 2d 102 (1953) ("Even undisputed expert medical evidence is not conclusive upon the jury, but must be weighed like other evidence, and may be rejected by the jury. . . . Even so, opinion evidence, even of experts in insanity cases, is to be weighed by the jury, and may not be arbitrarily ignored." (Citations omitted.)), cert. denied, 260 Ala. 699, 71 So. 2d 107 (1954); *People* v. *Kando*, 397 Ill. App. 3d 165, 196, 921 N.E.2d 1166 (2009) ("[T]he relative weight to be given an expert witness' opinion on sanity . . . cannot be arbitrarily made, but rather must be determined by the reasons given and the facts supporting the opinion. . . . Accordingly, while it is within the province of the trier of fact as the judge of the witness' credibility to reject or give little weight to . . . expert psychiatric testimony, this power is not an unbridled one . . . and a trial court may not simply draw different conclusions from the testimony of an otherwise credible and unimpeached expert witness . . . . (Citations omitted; internal quotation marks omitted.)); *State* v. *White*, 118 Ohio St. 3d 12, 23, 885 N.E.2d 905 (2008) ("the trial court failed to set forth any rational basis grounded in the evidence for rejecting the uncontradicted testimony of two qualified expert witnesses in the field of psychology"); *State* v. *Brown*, 5 Ohio St. 3d 133, 135, 449 N.E.2d 449 (1983) (expert's opinion on insanity defense, "even if uncontradicted, is not conclusive," but, "[a]t the same time, it may not be arbitrarily ignored, and some reasons must be objectively present for ignoring expert opinion testimony." (internal quotation marks omitted)).

[16] See, e.g., *State* v. *Patterson*, supra, 229 Conn. 338–39 ("The [trial] court . . . expressly discounted the testimony of the defendant's experts, noting that their diagnoses were based on the generally self-serving interview statements of the defendant and his family members. In the court's view, those experts had failed adequately to account for the defendant's apparently premeditated attack on the victim, his efforts thereafter to avoid detection and apprehension, and his equally calculated attempts to manipulate the diagnostic staff at Whiting [Forensic Institute]. The court also noted that the defendant's experts had agreed that persons suffering from paranoid schizophrenia are not necessarily unable to distinguish between right and wrong, and that the expert testimony had failed to demonstrate that the defendant, at the time of the fatal shooting, had been unable to do so."); *State* v. *Medina*, supra, 228 Conn. 305–306 (rejecting defendant's claim that evidence established, as matter of law, his affirmative defense of insanity by preponderance of the evidence and noting that "[a] review of the evidence introduced at trial . . . reveal[ed] a sufficient basis for the jury's rejection of the defendant's affirmative defense"); *State* v. *Smith*, 185 Conn. 63, 74,

ers Service Corp. v. *Planning & Zoning Commission*, supra, 208 Conn. 294, citing *Santana* v. *United States*, 572 F.2d 331, 335 (1st Cir. 1977). This is not such a case.

The trial court made four principal findings in support of its ultimate determination that the defendant had not met his burden of proving his insanity defense: (1) the defendant's conduct immediately following the shooting did not reflect an inability to control his conduct; (2) the defendant's conduct in shooting the victim was not borne out of psychosis but out of frustration and anger, stressful and emotional hurdles (that is, his motivation); (3) the experts' testimony and reports reflected considerable divergence in the bases for their opinions; and (4) the defendant was malingering by exaggerating or fabricating symptoms. We conclude that these findings are largely related rather than wholly independent, find support in the record, and provide a reasonable basis for the trial court's conclusion that the defendant did not meet his burden of proof.

Before turning to these findings, we make an observation regarding the record that colors the lens through which we review the evidence. It is undisputed that the defendant was suffering from some form of psychosis at the time of the offense. The disputed issue at trial and on appeal is whether the defendant proved that his psychosis substantially impaired his ability to conform his conduct to the requirements of the law. Neither

441 A.2d 84 (1981) (concluding that jury reasonably rejected expert opinion when "the testimony of the lay witnesses allowed the jury to conclude that the defendant had consumed less alcohol and valium than the amounts [on] which the experts based their opinions"); *State* v. *Campbell*, 169 Conn. App. 156, 167, 149 A.3d 1007 ("The court identified and analyzed evidence relating to [the expert's] opinion that tended to suggest it was unconvincing. Also, the court found that [the expert] appear[ed] to dismiss [differing analyses of the defendant] as just another opinion. Further, the court was convinced that the state undermined [the expert's] testimony through its cross-examination." (Internal quotation marks omitted.)), cert. denied, 324 Conn. 902, 151 A.3d 1288 (2016).

expert's report or testimony, however, made any analytical or evidentiary distinction between the question of whether the defendant suffered from a mental disease or defect and the question of whether that disease or defect substantially impaired his ability to act in conformity with the law. Any evidence specifically tied to either question related to the former. Both experts recited all of the evidence they had gleaned and drew from that evidence the *unified* conclusion that the defendant suffered from an unspecified psychotic disorder that substantially impaired his ability in this manner. The significance of failing to draw such a distinction was brought into focus by the concession of both experts, on cross-examination, that the majority of people who have a psychotic disorder or who first experience a psychotic episode do not commit acts of violence or come into contact with the law. Amble went so far as to say that acts of violence by a person having a sudden onset of psychosis—that is, no past history of psychosis, as in the present case—are "rare . . . ."[17] Neither expert, however, identified any particular feature of the defendant's psychosis, his history, or the circumstances of the offense that would explain why the defendant was this rare case. Cf. *State* v. *DeJesus*, supra, 236 Conn. 198–99 and n.11 (one defense expert, who diagnosed defendant with both psychotic depression that manifested itself in recurrent auditory hallucinations and borderline personality disorder, testified that, when these two mental ailments combine, they tend to weaken one's ability to control his or her behavior, and another defense expert, who diagnosed defendant with several syndromes, including organic personality syndrome, explosive type, testified that this syndrome "mean[t] that once the defendant los[t] con-

[17] The defendant quotes one statement from Lovejoy in which he states that "some" persons with psychotic disorders can control themselves but ignores the more sweeping admissions of both experts.

trol, he [was] unable to regain [it] until he ha[d] vented the rage in some manner"); *State* v. *Steiger*, 218 Conn. 349, 376, 590 A.2d 408 (1991) (Defense expert, who diagnosed the defendant as suffering from schizophrenia with paranoid trends at the time of the offense, explained: "[T]his illness was marked by the defendant's extreme use of fantasy as a retreat from reality and . . . his hold on reality was so tenuous that his fantasies could take on delusional qualities. . . . [T]he defendant was constantly on the defensive against personal insult . . . interpersonal conflict aroused overwhelming emotions in him, and . . . it was likely he would engage in impulsive behavior or disordered thought if he felt insulted, rejected or physically threatened." (Footnote omitted.)). This omission opened the door for the trial court to rely on evidence in the record that may have been intended to relate solely to the question of the presence of a mental disease or defect to support its conclusion that the defendant did not prove that it was more likely than not that his psychosis was the cause of his criminal conduct.

Our review of the record begins with the trial court's finding that the defendant's conduct immediately following the shooting did not reflect an inability to control his conduct. This finding is supported by the following evidence. Officer Wilson's testimony established that, when the defendant was found near the scene, he complied with Wilson's orders to show his hands, drop his weapon, lie down on the ground, and put his hands behind his back. Lieutenant LaMaine's testimony established that the defendant waived his *Miranda*[18] rights following his arrest. The video recording of the police interrogation established that the defendant provided rational responses to many of Detective Ortiz' questions, even if only to say that he did not know the answer to the question. He was exceedingly well man-

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

nered during the interview. At the beginning, when the defendant was asked, "[h]ow are you," he responded, "[g]ood, how you doing?" In response to a subsequent question that he apparently did not hear or understand, he asked, "[p]ardon me?" When the interview concluded, the defendant rose and shook Ortiz' hand.

We note that the video recording of the interview is the only piece of wholly objective evidence from which the experts could have drawn their own conclusions rather than rely on the conclusions drawn by other medical professionals as to the defendant's conduct and demeanor around the time of the offense. Neither expert, however, relied on this video recording to support his opinion. They were in fact unable to offer an opinion, when asked on cross-examination, that the defendant's demeanor and unresponsiveness to several questions were more indicative than not of an active psychosis. Amble responded: "That is such a nonspecific observation that, yes, it certainly could be, and then it might not be; it all depends." Lovejoy was similarly equivocal, stating: "I think you can infer things in a number of directions." The trial court was free, therefore, to conclude that this evidence did not support the defendant's affirmative defense.

Although the question, of course, is whether the defendant proved that he was insane when he committed the offense, his conduct and demeanor shortly before or after the crime are relevant, and no doubt necessary, to making that determination. See, e.g., *People* v. *McCullum*, 386 Ill. App. 3d 495, 504–505, 897 N.E.2d 787 (2008), appeal denied, 231 Ill. 2d 679, 904 N.E.2d 983 (2009); see also, e.g., *State* v. *Patterson*, supra, 229 Conn. 333–34 (detailing evidence relevant to sanity, including acts occurring before and after crime); *State* v. *Medina*, supra, 228 Conn. 305–307 (same). "[One] justification for considering a defendant's demeanor before and after the crime is that conduct

occurring in temporal proximity to the crime may be more indicative of actual mental health at [the] time of the crime than mental exams conducted weeks or months later." (Internal quotation marks omitted.) *Galloway* v. *State*, 938 N.E.2d 699, 715 (Ind. 2010). Indeed, both of the defendant's experts in the present case relied heavily on reports of the defendant's conduct and demeanor in the days shortly before and after the incident in reaching their conclusions.

With respect to the specific time of the offense, the trial court found that the shooting was precipitated by the defendant's anger and frustration at having his employment inquiry rebuffed, exacerbated by anxiety and stress relating to that situation, rather than by psychosis. The record provides unequivocal support for the trial court's conclusion that the defendant was suffering from intense levels of stress and anxiety as a result of his chronic unemployment and financial problems at the time of the offense. The defendant argues, however, that his motive for the shooting is relevant only to the question of intent, an element of the state's case, not to his insanity defense. We disagree with this assertion for several reasons.

Whether the defendant had a motive for the crime, unprecipitated by a psychotic delusion that compelled him to act, was made an issue in the case by one of the defendant's experts, Amble. His report and testimony took pains to consider various reasons for the defendant's action other than his claim of insanity in view of questions raised by his conduct. One reason considered by Amble, which he declined to adopt because the defendant denied it, was that the defendant "became suddenly angry with [the victim] . . . and since he was going to end his life anyway, there was little for him to lose by this action." Amble referred explicitly or implicitly to the defendant's motive several

times in his testimony, and his ultimate conclusion rested in part on the "illogical" nature of the act.

Other courts have recognized that motive or the absence thereof may be relevant to the question of whether the defendant has proved his insanity defense. See, e.g., *People* v. *Kando*, 397 Ill. App. 3d 165, 196, 921 N.E.2d 1166 (2009) ("[I]t is undisputed . . . that the incident for which [the] defendant was charged was conceived and took place in the grip of a psychotic delusion. No one suggested an alternative motive for [the] defendant's attack other than to eliminate Satan pursuant to a commandment from God. No one suggested or imputed any other design or motive to explain [the] defendant's actions other than his delusion, namely, that the victim was Satan whom he was determined to kill or incarcerate for [1000] years."); *Barcroft* v. *State*, supra, 111 N.E.3d 1007–1008 (court relied on fact that experts agreed that defendant could have had logical motivation for criminal act that could coexist with, and be independent of, psychotic and delusional behavior). In *State* v. *Quinet*, supra, 253 Conn. 392, this court addressed a related issue when it rejected the argument of the defendant in that case "that his ability to plan cannot be viewed as inconsistent with his claim that, due to the particular nature of his mental illness, he could not control his conduct within the requirements of the law." Id., 409–10. We explained: "[A]n accused who suffers from a mental disease or illness may be able to establish that he was unable to control his conduct according to law even though he had the capacity to plan that illegal conduct. Whether the capacity to plan a course of criminal conduct is probative of an accused's ability to control his behavior within legal requirements necessarily depends [on] the specific facts and circumstances of the case, and ultimately is a determination for the trier of fact. Indeed, we previously have indicated that an accused's ability to formulate a

plan to kill is relevant to a determination of whether the accused has the capability of conforming his conduct to the requirements of the law." Id., 410.

We recognize that there are circumstances in which motive would not tend to disprove the defendant's insanity defense. The motive itself may be a by-product or feature of the defendant's mental disease.[19] The motive may exist independently of the mental illness, but the illness prevents the defendant from resisting the impulse to act on that motive. The motive identified by the trial court does not fall into the first category. The trial court's findings are inconsistent with the second category.

It is at this point that the trial court's motive related finding intersects with its findings that the defendant likely was malingering and that the bases for the experts' opinions materially diverged. Lovejoy credited the defendant's account of experiencing auditory and visual hallucinations—voices in his head telling him that the victim was evil or dangerous and blinking lights at the construction site signaling him—that compelled the defendant to shoot the victim. The trial court's conclusion that the defendant's conduct was in reaction to having his employment inquiry brushed off, a tipping point in the defendant's emotional stress from his chronic unemployment and mounting financial pressures, means that it necessarily rejected the linchpin of Lovejoy's opinion.

[19] For example, John W. Hinckley, Jr., was found not guilty by reason of insanity, even though he had a clear motive for his assassination attempt on President Ronald Reagan, namely, to impress actress Jodie Foster, a cast member of the film Taxi Driver, in which one of the characters stalks the president, and with whom Hinkley had become obsessed. See G. Harris, "Reagan's Assailant Is Ordered Released," N.Y. Times, July 27, 2016, p. A17; L. Kiernan, "Hinckley, Jury Watch 'Taxi Driver' Film," Wash. Post, May 29, 1982, p. A1. There was no evidence in the record in the present case that the defendant's anger and frustration from his chronic unemployment were caused by his psychosis.

Amble's report, by contrast, identified *numerous* reasons why the defendant's self-interested narrative did not ring true.[20] See *Brock* v. *United States*, 387 F.2d 254, 258 (5th Cir. 1967) ("in cases involving opinions of medical experts, the probative force of that character of testimony is lessened where it is predicated on subjective symptoms, or where it is based on narrative statements to the expert as to past events not in evidence at the trial"); see also *Mims* v. *United States*, 375 F.2d 135, 145 (5th Cir. 1967) (citing as reason weighing against conclusiveness of expert opinion that defendant and his common-law wife, who had provided narrative statements that formed basis of expert opinion, "were deeply interested in the outcome of the case"); *State* v. *Patterson*, supra, 229 Conn. 338 (upholding trial court's rejection of insanity defense when trial court "expressly discounted the testimony of the defendant's experts, noting that their diagnoses were based on the generally self-serving interview statements of the defendant and his family members").[21] One such reason that Amble

[20] One reason that Amble cited was Downer's conclusion in Department of Correction records that the defendant was fabricating symptoms of mental illness. Indeed, the Appellate Court cited Downer's opinion as support for the trial court's malingering finding. The defendant contends that Downer's opinion could not be used as substantive evidence because neither expert relied on it, her report was not admitted into evidence, it was hearsay, and her qualifications as an expert were not established. He further contends that he never made a concession that Downer's opinion was in evidence, as the Appellate Court indicated. We need not decide whether Downer's opinion could be used as substantive evidence. The trial court did not reference Downer's opinion in its decision—although it did ask Amble about his consideration of that opinion—and we do not rely on her opinion in reaching our conclusions. We note, however, our disagreement with the defendant's view that Amble did not rely on Downer's conclusions. Amble did not agree with Downer's ultimate conclusion that the defendant was feigning mental illness, but he appeared to give some weight to her opinion that the defendant was exaggerating his symptoms.

[21] The defendant contends that the trial court cannot discount statements provided to the experts on the ground that they were provided by interested parties unless the declarant of those statements testifies and thus affords the trial court an opportunity to assess his or her credibility. We note that the defendants in *Mims* v. *United States*, supra, 375 F.2d 135, and in *State*

cited was that the defendant's account of hearing his own voice coming from inside his head is "an atypical presentation for auditory hallucinations." Amble ultimately opined in his report that "the defendant is providing a malingered explanation for why he committed the act that resulted in his arrest" and that the rationale for his action was "a mystery." The basis of Amble's opinion, therefore, materially diverged from the basis of Lovejoy's opinion and provided a reasonable basis for the trial court to reject Lovejoy's opinion. See *Brock* v. *United States*, supra, 258 (citing "material variations between the experts themselves" as basis to reject expert testimony); see also *State* v. *Steiger*, supra, 218 Conn. 380–81 (noting that basis of state experts' disagreement with defense experts as to diagnosis of paranoid schizophrenia was "the lack of evidence that the defendant was preoccupied with 'systematized delusions' "); cf. *State* v. *Morelli*, supra, 293 Conn. 160 (trier properly may "find that the [expert] opinion was based on subordinate facts that were not proven" (internal quotation marks omitted)).

There is evidence in the record other than Amble's opinion that supports the trial court's conclusion that the defendant was exaggerating or fabricating certain symptoms. The defendant had no prior history of mental health treatment, other than for substance abuse. "The lack of a well-documented history of mental illness—whether schizophrenia or other acute psychiatric disorder—does not necessarily preclude a finding of insanity. But the lack of such history is a circumstance that a [fact finder] may consider in evaluating an insanity defense." (Internal quotation marks omitted.) *Barcroft* v. *State*, supra, 111 N.E.3d 1008. The defendant admitted to Amble that he had never told anyone, prior to the shooting, that he had been experiencing hallucinations,

v. *Patterson*, supra, 229 Conn. 328, did not testify, and there is no indication that the defendant's common-law wife in *Mims* testified.

although he claimed that he had been getting messages and light signals from his television for some time. In his encounters with the police, near the scene, and at the police station, the defendant never referred to the victim's being evil or dangerous, to lights signaling him, or to some person, entity, or thing compelling him to shoot the victim. Cf. *State* v. *Medina*, supra, 228 Conn. 285 (defendant told police officer who arrived on scene that "[t]he devil made me do it," "[I] killed the devil," and "I am God" (internal quotation marks omitted)); *State* v. *Campbell*, 169 Conn. App. 156, 162, 149 A.3d 1007 ("[Responding police officer] observed the defendant speaking to someone who was not there, and the defendant asked aloud, 'why did you make me do it?' [The officer] also testified that the defendant's overall demeanor was volatile; the defendant would be calm one moment, then the next moment, become angry and bang his head."), cert. denied, 324 Conn. 902, 151 A.3d 1288 (2016); *People* v. *Kando*, supra, 397 Ill. App. 3d 179, 181 (expert characterized defendant's statements reflected in police reports of incident as " 'delusional' " and as similar to his past statements that had been "documented as 'hyper-religious delusions' "). After the shooting, the defendant repeatedly denied that he was experiencing auditory or visual hallucinations, both to Bridgeport Hospital staff and to Downer upon his transfer to the Department of Correction.

Almost all of the defendant's comments in the immediate aftermath of the shooting bore some relationship to the subject of employment or his feelings of worthlessness. Amble's report notes that the defendant described his state of mind, immediately before he left his home on the day of the incident, as "becoming more *angry* at his situation." (Emphasis added.)

Finally, we would not characterize Amble's opinion, in which he acknowledged the defendant's malingering but nonetheless stated that the defendant's psychosis

impaired his ability to conform his conduct to the law, as reflecting a high degree of confidence or as highly persuasive. We recognize that the exaggeration or fabrication of symptoms does not necessarily negate the possibility that the defendant met the criteria for the insanity defense. See *State* v. *Steiger*, supra, 218 Conn. 365 n.16 ("Most defendants will understand that what they say and how they act during a psychiatric examination will affect their chances of successfully asserting an insanity defense. . . . The pressure on defendants to lie or to feign what they conceive of as insane symptoms will be intense, even for those whose insanity defenses are legitimate. Even the truly mentally ill person is likely to have some stereotyped conception of what distinguishes sanity from insanity and to manifest symptoms of the latter." (Citation omitted; internal quotation marks omitted.)). Amble's report and testimony, however, were quite tentative as to his conclusions, and he discounted statements attributing the murder to employment concerns for reasons—that they either "didn't seem to make sense" or that the defendant had denied this motivation—the trial court was fully entitled to find unpersuasive. Amble's opinion rested largely on reports from the defendant's wife and two friends that the defendant had engaged in bizarre behavior in the days before the incident, and that the act of shooting the victim seemed illogical, poorly planned, and devoid of any benefit to the defendant. Amble acknowledged, however, that a criminal act may have these features and yet not be the product of psychosis. Similarly, the strange conduct attributed to the defendant, if true, lent support to Amble's conclusion that the defendant suffered from some unspecified psychotic condition.[22] But none of these acts involved harm, or attempted

[22] The defendant did not offer his wife or either friend as witnesses. One of the two friends declined to give his legal name to the experts, providing only his nickname, and Amble was unable to make contact with this man to follow up on his initial statement.

harm, to another person or property, and, therefore, those acts do not tend to prove that the defendant's ability to conform his conduct to the requirements of the law was substantially impaired. This point brings us back to where we began: the experts agreed that a person may suffer from a psychotic condition and yet have the ability to conform their conduct to the requirements of the law. The mere fact that the defendant violated the law does not establish the requisite connection, and, for the foregoing reasons, the trial court was not bound to accept the opinions of the defendant's experts insofar as they purported to make that connection.

The judgment of the Appellate Court is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT *v.* MARK T.*
(SC 20242)

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

Syllabus

Convicted of the crime of risk of injury to a child, the defendant appealed to the Appellate Court. His conviction stemmed from an incident in which he dragged his daughter, A, down the hallway of the school that A was attending in an effort to take her, despite her protests, to a counseling appointment at a mental health facility. W, A's teacher, witnessed the incident. At trial, the defendant, who was self-represented, raised the defense of parental justification. In support of his defense, the defendant attempted to elicit testimony from W about A's history of aggressive behavior at school. He also attempted to testify directly about A's aggressive behavior at home, his difficulty managing that

* In accordance with our policy of protecting the privacy interests of the alleged victim of the crime of risk of injury to a child, we decline to identify the minor child or others through whom her identity may be ascertained. See General Statutes § 54-86e.

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

behavior, and his efforts to obtain mental health treatment for her leading up to the incident. The prosecutor, however, repeatedly objected to this line of questioning, and the trial court sustained many of the objections. On appeal to the Appellate Court, the defendant claimed, inter alia, that the trial court had violated his constitutional right to present a defense by limiting his cross-examination of W and his direct examination of himself. The defendant specifically contended that the trial court's evidentiary rulings precluded him from exploring information relevant to his parental justification defense. The Appellate Court affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court correctly determined that the trial court had not abused its discretion when it precluded the defendant from asking W, during cross-examination, whether she had ever seen A become physical with another person at school, as the trial court could have reasonably concluded that the defendant's question was beyond the scope of permissible examination; the trial court reasonably could have defined the scope of the prosecutor's preceding examination of W as being limited to rehabilitation, which the prosecutor sought after the defendant had elicited testimony from W that cast doubt on the accuracy of W's recollection about a certain incident, and the defendant's question about A's history of physical aggression would not have cast further doubt on the strength of W's recollection or otherwise have rebutted the inference that the incident in question was memorable.
2. The trial court abused its discretion by limiting the defendant's direct examination of himself, during which he attempted to testify about information crucial to his parental justification defense: the testimony that the defendant sought to elicit from himself would have tended to make certain important facts either more or less probable, including A's behavioral problems and history of violence, the urgency of the defendant's need to get help for her, and the time sensitive nature of A's departure from school, and those facts were material to the reasonableness of the defendant's use of physical force, which was the core of his defense; moreover, the trial court's error was harmful, as the jury's evaluation of the defendant's subjective belief that his actions were necessary to promote A's welfare was likely substantially impaired by the defendant's inability to testify regarding the specific circumstances that led to A's mental health appointment, the jury's ability to ascertain the objective reasonableness of the defendant's actions was similarly hampered because it could not extrapolate what a reasonable parent would have done in the defendant's position without fully comprehending the defendant's position, and, contrary to the state's claim, the precluded testimony would not have been cumulative of other admitted testimony because virtually no specific details about the nature of A's behavior in her interactions with the defendant were admitted into evidence.

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

Argued January 21, 2020—officially released June 7, 2021***

Procedural History

Substitute information charging the defendant with the crimes of risk of injury to a child and breach of the peace in the second degree, brought to the Superior Court in the judicial district of New London, geographical area number ten, where the court, *Jongbloed*, *J.*, granted in part the state's motion to preclude certain evidence and denied the defendant's motion to dismiss; thereafter, the case was tried to the jury before *Jongbloed*, *J.*; verdict and judgment of guilty of risk of injury to a child, from which the defendant appealed to the Appellate Court, *Keller*, *Bright* and *Pellegrino*, *Js.*, which affirmed the trial court's judgment, and the defendant, on the granting of certification, appealed to this court. *Reversed*; *new trial.*

Robert L. O'Brien, assigned counsel, with whom, on the brief, was *William A. Adsit*, assigned counsel, for the appellant (defendant).

Brett R. Aiello, deputy assistant state's attorney, with whom were *Sarah E. Steere*, senior assistant state's attorney, and, on the brief, *Michael L. Regan*, former state's attorney, for the appellee (state).

Opinion

McDONALD, J. This case requires us to evaluate several evidentiary rulings by the trial court, all of which excluded testimony pertaining to a criminal defendant's justification defense. The defendant, Mark T., who was self-represented at trial, claims that these evidentiary rulings violated his constitutional right to present a defense under the fifth, sixth, and fourteenth amend-

*** June 7, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

ments to the United States constitution.[1] The state contends that the trial court properly exercised its discretion to exclude the testimony and disputes the importance of the testimony to the defendant's defense. Regarding the first evidentiary issue, we agree with the state that the trial court did not abuse its discretion by excluding certain testimony during the defendant's cross-examination of the state's key eyewitness. However, we conclude that the trial court abused its discretion by limiting the defendant's direct examination of himself, during which he attempted to testify about information crucial to his justification defense. We also conclude that the trial court's error was harmful.

The Appellate Court's decision sets forth the facts and procedural history; *State* v. *Mark T.*, 186 Conn. App. 285, 287–90, 199 A.3d 35 (2018); which we summarize in relevant part and supplement with additional facts that the jury reasonably could have found. In September, 2015, the defendant maintained custody of his biological daughter, A, who was thirteen years old at the time, for about three weeks. He scheduled an appointment for her to receive counseling at a local mental health facility because he was experiencing significant difficulty managing her aggressive behavior. On the day of the appointment, the defendant arrived at the main office of A's school to pick her up. A's special education teacher, Monika Wilkos, escorted A to her locker to gather her belongings. While leaving the classroom and gathering her belongings, A repeatedly protested and stated that she did not want to go with the defendant.

[1] Although the defendant also claims that the trial court's evidentiary rulings violated his right to present a defense under article first, § 8, of the Connecticut constitution, he has provided no separate analysis of that issue. Accordingly, we limit our review to his federal constitutional claims. See, e.g., *Ramos* v. *Vernon*, 254 Conn. 799, 815, 761 A.2d 705 (2000) ("[w]ithout a separately briefed and analyzed state constitutional claim, we deem abandoned the [party's] claim" (internal quotation marks omitted)).

The defendant then approached A and Wilkos while they were on their way to the main office, and he calmly attempted to persuade A to go with him to the appointment. When those efforts proved unsuccessful, the defendant attempted to pick her up and carry her. A resisted, and a "tussle" ensued. Id., 288. After A fell to the ground, the defendant dragged her by her ankle down the hallway and through the main office. She continued to resist and protest. School personnel witnessing the incident called the police, attempted to assist A, and enacted a protocol to keep other students in their classrooms. When the police arrived, the defendant released A. The next day, the school psychologist and nurse spoke to A about the incident. They noticed bruising on her body and subsequently reported the incident to the Department of Children and Families.

Thereafter, the defendant was charged with one count each of breach of the peace in the second degree and risk of injury to a child. After being thoroughly canvassed by the trial court, the defendant chose to represent himself at trial, and the court appointed standby counsel in accordance with Practice Book § 44-4. Before trial, the state filed two motions in limine related to the minor child's privacy. The first motion sought to preclude the defendant from calling A as a witness, which the guardian ad litem supported on the basis that testifying would not be in A's best interest. The court declined to rule on the motion when it was filed, and the motion became moot when the state changed its position and called A to testify in its case-in-chief. The state's second motion requested that the court seal all references to information that would identify the minor child pursuant to General Statutes § 54-86e. The defendant did not oppose this motion, and the court granted it. For the remainder of the proceedings, the court struck from the record any statements identifying A by her full name and any references to the name

of the mental health facility at which A was scheduled for treatment on the day of the incident.

At trial, the defendant raised the defense of parental justification under General Statutes (Rev. to 2015) § 53a-18 (1) (now § 53a-18 (a) (1)).[2] In support of this defense, the defendant attempted to elicit testimony from Wilkos about A's history of aggressive behavior at school. He also attempted to testify directly about A's aggressive behavior at home, his difficulty managing that behavior, and his efforts to obtain mental health treatment for her leading up to the incident. The prosecutor, however, repeatedly objected to this line of questioning, and the court sustained many of the objections. The jury ultimately found the defendant guilty of risk of injury to a child but not guilty of breach of the peace in the second degree. The trial court imposed a total effective sentence of four years imprisonment, execution suspended, with three years of probation.

The defendant appealed from the judgment of conviction to the Appellate Court, claiming, among other things, that the trial court violated his constitutional right to present a defense. Specifically, the defendant challenged (1) the trial court's evidentiary ruling limiting his cross-examination of Wilkos, and (2) the series of evidentiary rulings limiting his direct examination of himself. He asserted that the precluded testimony was admissible and crucial to his parental justification defense. The Appellate Court subsequently affirmed the judgment of the trial court. Id., 299. Specifically, the Appellate Court concluded that the trial court acted within its discretion to limit the defendant's cross-examination of Wilkos because his question about A's history of aggressive behavior was outside the scope of the prosecutor's prior examination. Id., 295. The Appellate

[2] Hereinafter, all references to § 53a-18 in this opinion are to the 2015 revision of the statute.

Court also concluded that the trial court acted within its discretion to limit the defendant's direct examination of himself because the precluded testimony was not relevant and included information that was protected by the court's prior ruling on the state's second motion in limine related to A's privacy. Id., 298–99.

Thereafter, the defendant filed a petition for certification to appeal, which we granted, limited to the following issue: "Did the Appellate Court properly reject the defendant's claim that he is entitled to a new trial due to the trial court's rulings, in violation of his constitutional right to present the defense of parental justification, precluding certain testimony by the self-represented defendant and a key state's witness pertaining to that defense?" *State* v. *Mark T.*, 330 Conn. 962, 199 A.3d 561 (2019). Additional facts and procedural history will be set forth as necessary.

On appeal, the defendant contends that the trial court's evidentiary rulings prevented him from exploring relevant information about his daughter's history of aggressive behavior, the defendant's difficulty managing that behavior, and the urgency of her mental health appointment on the day of the incident. This information, the defendant asserts, was "critical to his [parental justification] defense." The state contends that the Appellate Court correctly concluded that the trial court acted within its discretion with regard to both challenged evidentiary rulings. Alternatively, the state asserts that any evidentiary error was harmless because, to the extent that A's history of aggressive behavior was relevant to the defendant's parental justification defense, there was sufficient evidence in the record to establish such history.

We begin with the legal principles governing the defendant's appeal. "A [criminal] defendant has a constitutional right to present a defense, but he is [nonethe-

less] bound by the rules of evidence in presenting a defense. . . . Although exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights, the constitution does not require that a defendant be permitted to present every piece of evidence he wishes. . . . Accordingly, [i]f the proffered evidence is not relevant [or is otherwise inadmissible], the defendant's right to [present a defense] is not affected, and the evidence was properly excluded." (Citation omitted; internal quotation marks omitted.) *State* v. *Bennett*, 324 Conn. 744, 760, 155 A.3d 188 (2017); see, e.g., *State* v. *Tutson*, 278 Conn. 715, 746–51, 899 A.2d 598 (2006) (no violation of constitutional right to present defense when trial court properly excluded evidence on hearsay grounds). Thus, "the question of the admissibility of the proffered evidence is one of evidentiary, but not constitutional, dimension." *State* v. *Shabazz*, 246 Conn. 746, 753 n.4, 719 A.2d 440 (1998), cert. denied, 525 U.S. 1179, 119 S. Ct. 1116, 143 L. Ed. 2d 111 (1999).

"It is axiomatic that [t]he trial court's ruling on the admissibility of evidence is entitled to great deference. . . . In this regard, the trial court is vested with wide discretion in determining the admissibility of evidence, including issues of relevance and the scope of cross-examination. . . . Accordingly, [t]he trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . In determining whether there has been an abuse of discretion, every reasonable presumption should be made in favor of the correctness of the trial court's ruling . . . ." (Internal quotation marks omitted.) *State* v. *Calabrese*, 279 Conn. 393, 406–407, 902 A.2d 1044 (2006).

In addition, because the defendant was self-represented at trial, we are mindful that "[i]t is the established policy of the Connecticut courts to be solicitous of [self-

represented] litigants and when it does not interfere with the rights of other parties to construe the rules of practice liberally in favor of the [self-represented] party." (Internal quotation marks omitted.) *New Haven* v. *Bonner*, 272 Conn. 489, 497–98, 863 A.2d 680 (2005). Although "the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law"; (internal quotation marks omitted) *Oliphant* v. *Commissioner of Correction*, 274 Conn. 563, 570, 877 A.2d 761 (2005); we, nevertheless, "give great latitude to [self-represented] litigants in order that justice may both be done and be seen to be done."[3] (Internal quotation marks omitted.) *Marlow* v. *Starkweather*, 113 Conn. App. 469, 473, 966 A.2d 770 (2009); see, e.g., *Travelers Property & Casualty Co.* v. *Christie*, 99 Conn. App. 747, 757–58 n.10, 916 A.2d 114 (2007) (noting that, if abuse of discretion standard was applicable, trial court abused discretion when, among other things, it failed to "apply the rules of procedure liberally in favor of the [self-represented] party, untrained in the law").

I

We first address the defendant's claim that the trial court improperly limited his cross-examination of Wilkos, the state's key eyewitness. Specifically, the defendant claims that the court improperly precluded him from asking Wilkos, during cross-examination, whether she had ever seen A become physical with

[3] The concurring and dissenting opinion observes many instances in which the trial court was appropriately solicitous of the defendant; see footnote 8 of the concurring and dissenting opinion; and notes that the defendant "was warned repeatedly about the dangers of self-representation . . . ." Text accompanying footnote 7 of the concurring and dissenting opinion. However, those instances when the trial court was appropriately solicitous do not excuse the few occasions when the court abused its discretion by excluding relevant and otherwise admissible evidence. Moreover, the propriety of a criminal defendant's decision to represent himself at trial does not alter an appellate court's analysis of that defendant's evidentiary claims.

another person at school. The state asserts that the court properly sustained the prosecutor's objection to the defendant's question because it was beyond the scope of the prosecutor's prior examination, which was limited to rehabilitating Wilkos' credibility.

The following additional procedural history is relevant to resolution of this claim. On direct examination, the prosecutor questioned Wilkos comprehensively about the facts surrounding the incident. In addition, Wilkos testified that A was enrolled in the school's intensive behavior support program, which was "a self-contained, educational, therapeutic program for students with emotional disturbance and behavior difficulties." Thereafter, the defendant conducted his cross-examination, the prosecutor conducted her redirect examination, and the defendant conducted his second cross-examination. In the course of those examinations, both parties questioned Wilkos about the escalation of the incident and the accuracy of her recollection. During the prosecutor's second redirect examination, she questioned Wilkos about her thirteen years of experience in a school:

"Q: How many incidents have you seen of parents dragging children out of a school?

"A: This is the only one.

"Q: So, is it—so, what you testified to today, was that a pretty vivid recollection of the day in question?

"A: Yes, it's a vivid recollection. Some of the specifics of which arm went where, in what sequence, isn't . . . clear, but it's a very clear recollection of the dragging and the route, the grabbing the door, all that stuff."

The defendant's third cross-examination included the following exchange:

"Q: Ms. Wilkos, was that the first time that [A] has gotten loud in your classroom?

"A: No.

"Q: Has [A] ever been physical with anybody else in the school?

"[The Prosecutor]: Objection, Your Honor; relevancy.

"The Court: All right, well, it's well outside the scope. So, I am going to sustain the objection to that."

The defendant contends that his question—"[h]as [A] ever been physical with anybody else in the school"—was not outside the scope of the prosecutor's second redirect examination[4] because "it was a direct response to the [prosecutor's] insinuation, through [her second] redirect examination, that no parent would reasonably handle their child in such a way." The state asserts that the Appellate Court correctly concluded that nothing elicited in the prosecutor's preceding examination pertained to A's past conduct at school. The state further contends that the prosecutor's motive during the preceding examination was to rehabilitate Wilkos after the defendant's cross-examinations elicited testimony that cast doubt on the credibility of her recollection.[5]

[4] We evaluate the propriety of the trial court's evidentiary ruling according to the basis on which it was sustained—namely, that the question was outside the scope of the prior examination. We briefly note, however, that the prosecutor actually objected to the defendant's question on relevance grounds. Because the defendant does not challenge this procedural irregularity—specifically, that the court sustained the prosecutor's objection on a different basis from the one asserted by the prosecutor—we have no occasion to address the propriety of this aspect of the ruling. See, e.g., *State* v. *Edwards*, 334 Conn. 688, 704, 224 A.3d 504 (2020) ("[i]t is incumbent on the parties, not the [trial] court, to properly articulate the present basis for an objection"); id. (trial court need not question whether party's failure to raise certain objection was "an inadvertent omission as opposed to an evolving strategy").

[5] In addition, the state asserts that the defendant's question was "aimed at smearing [A's] character." To the extent that this suggests that Wilkos' testimony in response to the defendant's question would have constituted inadmissible character evidence under § 4-4 (a) of the Connecticut Code of

Section 6-8 (a) of the Connecticut Code of Evidence provides: "Cross-examination and subsequent examinations shall be limited to the subject matter of the preceding examination and matters affecting the credibility of the witness, except in the discretion of the court." Accord *State* v. *Ireland*, 218 Conn. 447, 452, 590 A.2d 106 (1991) ("[i]t is well settled that our rule restricts cross-examination to matters covered in the direct examination, except as they involve credibility alone" (internal quotation marks omitted)). "Generally, a party who delves into a particular subject during the examination of a witness cannot object if the opposing party later questions the witness on the same subject. . . . The party who initiates discussion on the issue is said to have 'opened the door' to rebuttal by the opposing party." (Citations omitted.) *State* v. *Graham*, 200 Conn. 9, 13, 509 A.2d 493 (1986). "Although cross-examination is limited to the subject matter of the direct examination . . . the cross-examiner may elicit not only any fact that would tend to contradict or to qualify any particular fact stated on direct examination, but also anything that would tend to modify any conclusion or inference resulting from the facts so stated." (Internal quotation marks omitted.) *State* v. *Alvarez*, 95 Conn. App. 539, 552, 897 A.2d 669, cert. denied, 279 Conn. 910, 902 A.2d 1069 (2006). This rule of evidence "recognizes the discretion afforded the trial judge in determining the scope of cross-examination," including the discretion to permit "a broader scope of inquiry in certain circumstances, such as when a witness could be substantially inconvenienced by having to testify on two different occasions." Conn. Code Evid. § 6-8 (a), commentary. "The [trial] court has wide discretion to determine the scope of cross-examination. . . . Every reasonable presumption should be given in favor of the correctness

Evidence, we are not persuaded. The prosecutor did not object on that basis; nor did the trial court rule on that basis.

of the court's ruling in determining whether there has been an abuse of discretion." (Citations omitted; internal quotation marks omitted.) *State* v. *Hernandez*, 224 Conn. 196, 208, 618 A.2d 494 (1992).

The defendant's claim turns on the scope of the "subject matter of the preceding examination"; Conn. Code Evid. § 6-8 (a); which was the prosecutor's second redirect examination of Wilkos. Specifically, the prosecutor asked Wilkos two pertinent questions. First, the prosecutor asked, in Wilkos' thirteen years of experience, "[h]ow many incidents have you seen of parents dragging children out of a school?" After Wilkos replied that this was the only such incident, the prosecutor asked: "So, is it—so, what you testified to today, was that a pretty vivid recollection of the day in question?" Wilkos then replied: "Yes . . . ."

The point of disagreement between the state and the defendant is how they characterize the prosecutor's preceding examination. The state characterizes the scope of the examination according to the combined effect of both questions, whereas the defendant characterizes the scope of the examination according to the first question, standing alone. Specifically, the state asserts that the prosecutor's examination was limited to rehabilitating Wilkos after the defendant's cross-examination elicited testimony that cast doubt on the accuracy of her recollection. According to the state's characterization of the record, the two relevant questions, *read together*, serve only to rehabilitate Wilkos by reasonably raising an inference in the minds of the jurors that the incident was unique and, therefore, memorable. By contrast, the defendant asserts that the prosecutor's first question about similar conduct by other parents—*standing alone*, without any assumption regarding its purpose—insinuates that, because no parent *has* handled their child that way, no reasonable parent *would* handle their child that way. According to the

defendant's characterization of the record, his question about A's history of physical aggression at school would rebut the inference that his conduct was unreasonable by establishing that "no parent has had to deal with a child like his, who necessitates the use of physical force," and that "school officials . . . themselves had to [use reasonable force to restrain A] on prior occasions." In other words, the defendant maintains that the prosecutor's first question carried an adverse inference about the reasonableness of his conduct, which "opened the door" to the defendant's rebuttal on subsequent cross-examination.

We find the state's argument equally as plausible as the defendant's argument. The trial court could reasonably have defined the scope of the prosecutor's preceding examination in light of the prosecutor's second question about the strength of Wilkos' recollection, which establishes that the scope of the examination was limited to rehabilitation. The defendant's question about A's history of physical aggression would not have cast further doubt on the strength of Wilkos' recollection or otherwise rebutted the inference that the incident was memorable. Consequently, the trial court's ruling that the defendant's question was outside the scope of Wilkos' credibility did not constitute an abuse of discretion. See *State* v. *Moore*, 293 Conn. 781, 790, 981 A.2d 1030 (2009), cert. denied, 560 U.S. 954, 130 S. Ct. 3386, 177 L. Ed. 2d 306 (2010); *State* v. *Calabrese*, supra, 279 Conn. 407. Based on the record in this case, it was reasonable for the court to conclude that the prosecutor's examination was limited to Wilkos' credibility and did not "open the door" to the defendant's question about the reasonableness of his conduct. Therefore, we cannot conclude that the court's ruling constituted a manifest abuse of discretion. Accordingly, we conclude that the Appellate Court correctly deter-

mined that it was not an abuse of discretion for the trial court to exclude the defendant's question.

II

We now consider the defendant's claim that the trial court improperly limited his direct examination of himself. Specifically, the defendant contends that, "[b]efore [he] could begin to testify about why he felt it was reasonable and necessary to restrain his daughter," A, the court sustained the prosecutor's relevance objections, which "forced [the defendant] to stop any questioning related to his daughter's severe behavioral issues and history of physical combativeness." The following testimony from the defendant's direct examination of himself[6] and the subsequent exchange between the prosecutor, the court, and the defendant, are relevant to the resolution of this claim:

"Q: Mr. [T.], how long have you had custody of your daughter before the incident occurred?

"A: Well, I had custody of my daughter for less than [one] month.

"Q: Okay, Mr. [T.] What happened in that amount of time? How was you and your daughter's relationship?

"A: Well, when I got custody of my daughter, she had ran away every night—

"[The Prosecutor]: Objection, Your Honor.

"The Court: Well, sustained.

"[The Defendant]: Okay, on what basis is the objection?

"The Court: [Prosecutor?]

[6] For convenience and clarity, in part II of this opinion, we use the Q and A (question and answer) format only when the defendant questions himself during his direct examination.

"[The Prosecutor]: Relevance, Your Honor.

"The Court: Without getting into too much detail.

"[The Defendant]: Okay.

"The Court: We'll permit a certain amount, but I am going to ask you to stay away from certain things.

"[The Defendant]: I just want to, like—I want to show the urgency in my getting [A] the help that she needed.

"The Court: That's fine. You can state that without getting into a lot of underlying detail.

"[The Defendant]: Okay."

The defendant then testified, over the prosecutor's continued objections, that he "was in desperate search for help" for A "because every day the police were coming to [his] house," that he did not want A to "go into the foster care system," and that he did not receive help from the department, as promised. The defendant then continued his direct examination of himself:

"Q: So, Mr. [T.], what did you [do] to get your daughter help?

"[The Prosecutor]: Objection, Your Honor; relevancy to the case at hand.

"The Court: Well, I'll allow a limited amount of this.

"[The Defendant]: Okay, so, this isn't really allowed.

"Q: So, Mr. [T.], at almost the end of that month that you had your daughter, what happened that she was taken away from you again?

"A: Well, I needed help with her, and I made an appointment to get her the help that she needed, which was—

"[The Prosecutor]: Objection, Your Honor.

"The Court: Sustained.

"[The Defendant]: Okay. The help that she needed, which was not just some after-school program; it was much more significant.

"[The Prosecutor]: Objection, Your Honor.

"[The Defendant]: Okay.

"The Court: I'll allow that answer to stand."

On appeal, the defendant argues that the trial court prevented him from testifying further about "his daughter's severe behavioral issues and history of physical combativeness." He contends that this excluded testimony was relevant to his parental justification defense, which contains both objective and subjective elements of reasonableness. The state disagrees for two reasons. First, it contends that the court "did not completely preclude this line of inquiry" but merely limited it. Second, the state asserts that the court reasonably could have concluded that the defendant intended to testify about protected information, such as the name of the mental health facility, which the court had sealed prior to trial.

Section 4-1 of the Connecticut Code of Evidence provides: "Relevant evidence means evidence having any tendency to make the existence of any fact that is material to the determination of the proceeding more probable or less probable than it would be without the evidence." (Internal quotation marks omitted.) This concept embodies two components: (1) probative value, and (2) materiality. Conn. Code Evid. § 4-1, commentary; see also *State* v. *Jeffrey*, 220 Conn. 698, 709, 601 A.2d 993 (1991), cert. denied, 505 U.S. 1224, 112 S. Ct. 3041, 120 L. Ed. 2d 909 (1992). Regarding probative value, "[o]ne fact is relevant to another if in the common course of events the existence of one, alone or with other facts, renders the existence of the other either more certain or more probable. . . . Evidence is not

rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative." (Internal quotation marks omitted.) *State* v. *Kalil*, 314 Conn. 529, 540, 107 A.3d 343 (2014). Regarding the second component, "[t]he materiality of evidence turns [on] what is at issue in the case, which generally will be determined by the pleadings and the applicable substantive law." Conn. Code Evid. § 4-1, commentary; see also *State* v. *Wynne*, 182 Conn. App. 706, 721, 190 A.3d 955, cert. denied, 330 Conn. 911, 193 A.3d 50 (2018). "The degree to which any evidence is material and relevant must be assessed in light of the fact or issue that it was intended to prove." *State* v. *Geyer*, 194 Conn. 1, 7, 480 A.2d 489 (1984).

An examination of the parental justification defense, asserted by the defendant in this case, informs our consideration of whether the excluded evidence was relevant. General Statutes (Rev. to 2015) § 53a-18 provides in relevant part: "The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

"(1) A parent, guardian or other person entrusted with the care and supervision of a minor . . . *may use reasonable physical force upon such minor . . . when and to the extent that he reasonably believes such to be necessary* to maintain discipline or *to promote the welfare of such minor* . . . ." (Emphasis added.) This defense "provides that such force is not criminal, as long as it is reasonable . . . ." *State* v. *Nathan J.*, 294 Conn. 243, 260, 982 A.2d 1067 (2009). If, however, "the force is unreasonable . . . the parental justification [defense] does not apply . . . ." Id. The defense therefore "requires juries to distinguish . . . between reasonable and unreasonable force." Id. Moreover, "the defense of parental justification requires both subjec-

tive and objective reasonableness on behalf of the parent or guardian with respect to the use of physical force."[7] *State* v. *Mark T.*, supra, 186 Conn. App. 296–97.

We have held that "the parental justification defense may apply to a charge of risk of injury to a child . . . ." *State* v. *Nathan J.*, supra, 294 Conn. 260. The defendant, in the present case, was convicted of such a charge. Once a defendant meets the initial burden of producing sufficient evidence to warrant submitting the parental justification defense to the jury, the state bears the burden of disproving the defense beyond a reasonable doubt. Id., 261–62. "Significantly, the ultimate determination of whether the particular conduct of a parent is reasonable, and thus entitled to the protection of § 53a-18 (1), *is a factual determination to be made by the trier of fact.*" (Emphasis added; internal quotation marks omitted.) *Dubinsky* v. *Black*, 185 Conn. App. 53, 68, 196 A.3d 870 (2018); see also *State* v. *Brocuglio*, 56 Conn. App. 514, 518, 744 A.2d 448 ("whether the limit of 'reasonable' physical force [under § 53a-18 (1)] has been reached in any particular case is a factual determination to be made by the trier of fact"), cert. denied, 252 Conn. 950, 748 A.2d 874 (2000).

Throughout the pertinent exchange during the defendant's direct examination of himself, he was specifically precluded from fully testifying that his daughter ran away from home every night; testifying in any detail about the urgency with which he sought help for her or the reasons for such urgency; answering the question,

[7] We evaluate the trial court's evidentiary rulings pertaining to the defendant's parental justification defense as that defense was articulated in § 53a-18 (1) and *State* v. *Nathan J.*, supra, 294 Conn. 260. Specifically, in this case, the parental justification defense required, first, that the defendant subjectively believed that his actions were necessary to promote A's welfare and, second, that his belief was objectively reasonable. Contrary to the concurring and dissenting opinion's suggestion, nothing about this analysis injects a reasonableness requirement into the subjective component of the defense. See footnote 5 of the concurring and dissenting opinion.

"[s]o, Mr. [T.], what did you [do] to get your daughter help"; and testifying in any detail about the type of professional help he sought for her, particularly the appointment to which he was taking A on the day of the incident. All of this precluded testimony directly concerned A's behavioral problems outside of school.

This testimony was highly relevant to the defendant's parental justification defense. First, the excluded testimony would have supplied probative facts. Specifically, the facts concerning A's history of aggressive behavior would have rendered the urgency of the defendant's need to get help for her either more or less probable, depending on the jury's assessment of the defendant's credibility. The intensity of that urgency would have, in turn, supported the time sensitive nature of A's departure from school on the day of the incident. "Evidence is not rendered inadmissible because it is not conclusive. All that is required is that the evidence tend to support a relevant fact even to a slight degree, so long as it is not prejudicial or merely cumulative." (Internal quotation marks omitted.) *State* v. *Kalil*, supra, 314 Conn. 540.

Second, those probative facts supported by the precluded testimony were material to the subjective and objective reasonableness of the defendant's use of physical force. The nature and severity of the defendant's difficulty parenting his daughter were material to the strength of his subjective belief that his use of force was reasonable to get A to her mental health appointment. Similarly, the nature and severity of A's behavioral problems were material to the degree to which a reasonable parent in the defendant's position would agree that his use of force was reasonable under the circumstances. The parental justification defense turns on reasonableness; therefore, the defendant's inability to testify about facts that were material to the reasonableness of his

actions significantly hampered his ability to demonstrate his defense.

Additionally, as we have recognized across a myriad of legal contexts, reasonableness is an inherently fact driven inquiry into the specific circumstances of the case. Therefore, evidence concerning reasonableness tends toward admissibility to better aid the trier of fact. See, e.g., *Hall* v. *Burns*, 213 Conn. 446, 474, 569 A.2d 10 (1990) ("in order for the jury to determine whether [the defendant exercised the duty of reasonable care], it is only fair that the jury be made aware of all of the circumstances surrounding [the applicable statutory standard]"). In the context of the parental justification defense, § 53a-18 (1) and the common-law doctrine preceding it "recognize that any analysis of reasonableness *must consider a variety of factors* and that such an inquiry is case specific." (Emphasis added.) *State* v. *Nathan J.*, supra, 294 Conn. 256.

In sum, the precluded testimony would have tended to make certain important facts either more or less probable, including A's behavioral problems and history of violence, the urgency of the defendant's need to get help for her, and the time sensitive nature of A's departure from school. Those facts were material to the reasonableness of the defendant's use of physical force, which was the core of his defense. Finally, the jury's evaluation of reasonableness inherently required a comprehensive assessment of the surrounding facts and circumstances.

The state, however, contends that the trial court did not abuse its discretion when it precluded the testimony for two reasons. First, the state argues that the court's evidentiary rulings were proper because the court did not completely preclude the defendant from establishing A's history of aggression and behavioral problems to the jury. Rather, the state contends, the court "per-

mitted the defendant ample leeway to testify about these issues and establish other facts [about A's aggressive behavior],'' which the defendant did.[8] In other words, according to the state, other testimony "made it abundantly clear that the defendant struggled'' to control A's aggressive behavior.

We are not persuaded. The state's argument does not address whether the precluded testimony was *irrelevant*—i.e., whether the precluded testimony was immaterial or had low probative value. Rather, the state's argument is that the trial court permitted the defendant to otherwise establish A's behavioral problems, which suggests that the precluded testimony would have been cumulative. Section 4-3 of the Connecticut Code of Evidence permits a trial court to exclude evidence that is relevant "if its probative value is outweighed by the danger of . . . needless presentation of cumulative evidence." See, e.g., *State* v. *Little*, 138 Conn. App. 106, 123, 50 A.3d 360 ("[r]elevant cumulative evidence is properly excluded when, in the court's exercise of discretion, it is unfairly cumulative and, thus, is more prejudicial than probative"), cert. denied, 307 Conn. 935, 56 A.3d 713 (2012). Although related to relevance, the exclusion of cumulative evidence targets prejudicial overemphasis and inefficient judicial proceedings. These considerations are distinct from relevance, which operates to exclude evidence that will not meaningfully aid the trier of fact and evidence that is otherwise peripheral to the case. The state's argument that the

[8] The state further contends that the trial court's limitations on the defendant's testimony about A's behavioral problems prevented the trial from "devolv[ing] into a minitrial about [A's] general character." To the extent that this repeats the state's earlier suggestion that the disputed testimony would have constituted inadmissible character evidence under § 4-4 (a) of the Connecticut Code of Evidence, we are not persuaded. Again, the prosecutor did not object on that basis; nor did the trial court rule on that basis. See footnote 5 of this opinion.

precluded testimony was not relevant because it was cumulative conflates these considerations.

In addition, the precluded testimony was highly probative because it concerned the factual context that might have justified, both subjectively and objectively, the defendant's actions. The state does not explain how any prejudicial effect would have outweighed this high probative value such as to render the testimony cumulative. Moreover, and most noteworthy, the state never asserted to the trial court that the prosecutor's objection was based on cumulative evidence, and the court did not sustain it on that basis. See, e.g., *State* v. *Edwards*, 334 Conn. 688, 703, 224 A.3d 504 (2020) ("[a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one" (internal quotation marks omitted)).

Second, the state argues that the trial court's evidentiary rulings were proper because the court reasonably could have concluded that the defendant's testimony would have revealed protected information. As discussed previously in this opinion, before trial, the state filed a motion to seal all references to information that would identify A. The defendant did not oppose the motion, and the court granted it and proceeded to strike any identifying statements from the record. The state contends that the court reasonably could have concluded that the defendant, in his direct examination of himself at trial, intended to testify about the mental health facility and other details of A's treatment. Because the court had sealed that information before trial, the state argues, the court acted within its discretion to preclude the defendant from testifying about it.

Again, we are not persuaded. As an initial matter, the prosecutor did not base her objections on the prior motion in limine or the minor's privacy. At trial, the prosecutor expressly articulated that the basis of her

objections was relevance. The record does not demonstrate that the prosecutor's objections were based on an apprehension that the defendant's testimony would implicate protected information, rather than relevance, as asserted at trial. Likewise, the record does not demonstrate that the court sustained the prosecutor's objections on the basis of protecting the minor's privacy, rather than the prosecutor's articulated basis of relevance. Because the prosecutor's articulated basis for her objections was relevance, not protecting A's privacy, and because the court did not articulate any different basis for sustaining those objections, we are not persuaded that the trial court's ruling on the motion in limine supported its subsequent evidentiary rulings.

Moreover, the state's assertion on appeal—that the precluded testimony was otherwise inadmissible because it was protected by the trial court's ruling on the second motion in limine regarding A's privacy—does not address whether the testimony was relevant. As explained, a relevance objection concerns the probative value of the disputed testimony and its centrality to the material issues in the case. This limitation on the admissibility of evidence is distinct from the considerations that underlie a person's privacy interest and the mechanism to seal the record in protection of that privacy interest. The state's argument that the testimony was not relevant because it was rendered otherwise inadmissible by the court's prior ruling regarding A's privacy conflates these considerations. In other words, the state's argument on appeal does not squarely address the basis on which the prosecutor objected, namely, that the precluded testimony was irrelevant.

Even if the trial court had sustained the prosecutor's objections based on its prior ruling on the state's second motion in limine regarding A's privacy, we are not persuaded that the motion in limine would have supported the full scope of the court's subsequent evidentiary

rulings. With the exception of A's full name and the name of the facility where she was to receive treatment, the motion did not specifically challenge the admission of any substantive evidence related to A's history of aggression or behavioral problems. Testimony concerning the defendant's observations of his daughter's behavior at home, the nature of their relationship, his unsuccessful attempts at parental discipline, and the fact that the appointment concerned A's mental health would not have implicated the state's pretrial motion in limine. The motion was limited in scope to protect information through which A could be identified, specifically, her full name and the name of the treatment facility.[9] Stated differently, even if the trial court had concluded that the defendant's testimony would have revealed the name of the mental health facility, the scope of its evidentiary rulings would have been too broad because the court excluded otherwise relevant and admissible testimony that was not encompassed by its order granting the state's pretrial motion in limine.[10]

[9] In addition, the state argues that "the trial court did not actually preclude *anything*" concerning the defendant's testimony about A's mental health appointment because the sustained objection "did not deter the defendant from describing the type of appointment he set up." (Emphasis in original.) Specifically, the defendant testified: "Well, I needed help with her, and I made an appointment to get her the help that she needed, which was—"

At that point, the prosecutor objected, and the court sustained the objection. The defendant then continued: "Okay. The help that she needed, which was not just some after-school program; it was much more significant." The prosecutor renewed her objection, but the court overruled it. The state now argues that the defendant essentially disregarded the court's ruling sustaining the prosecutor's first objection, and, therefore, no testimony was actually excluded. We disagree. The defendant's rhetorical choice to resume his testimony in the same clause where it had been cut off does not establish that his substantive description of the appointment was unaffected by the trial court's ruling.

[10] The concurring and dissenting opinion raises two privacy related bases for the state's motion in limine which, it contends, reasonably could have supported the trial court's subsequent evidentiary rulings. First, the concurring and dissenting opinion posits that the court reasonably could have concluded that A had a generalized, freestanding privacy interest in "not having additional details of her behavioral problems and proposed treatment

Accordingly, we conclude that the trial court abused its discretion by precluding the defendant's testimony about A's ongoing aggression, the defendant's struggle with managing her behavior, and the measures the defendant had taken to care for her urgent mental health difficulties.

Having concluded that it was an abuse of discretion for the trial court to preclude this testimony, we must now determine whether that error was harmful. The defendant contends that the court's evidentiary rulings were harmful because the jury effectively "heard one side of this story because the defendant could not intro-

published in court . . . ." However, as with the state's argument, we disagree with the concurring and dissenting opinion's characterization of the scope of the state's second motion in limine, which sought to exclude only information through which A could be identified. The court's order granting this motion was too narrow in scope to support such a broad privacy interest. Moreover, the defendant's testimony would not have implicated any such privacy interest because all statements identifying A or the treatment facility were kept under seal or struck from the record.

Second, the concurring and dissenting opinion asserts that the trial court reasonably could have concluded that the defendant's testimony would have "reveal[ed] the content of confidential medical records," such as A's diagnosis and the identity of her treatment provider. Footnote 4 of the concurring and dissenting opinion. However, the record does not indicate that the guardian ad litem ever asserted A's privacy interest to specifically exclude testimony about her medical records, which is particularly significant given that the state's motions in limine were too limited in scope to support such a privacy interest. Moreover, in *State* v. *White*, 139 Conn. App. 430, 55 A.3d 818 (2012), cert. denied, 307 Conn. 953, 58 A.3d 975 (2013), on which the concurring and dissenting opinion relies; see footnote 4 of the concurring and dissenting opinion; the Appellate Court upheld the trial court's exclusion of medical records only after weighing the interest in the confidentiality of the records against their probative value. See *State* v. *White*, supra, 440. Contrary to the concurring and dissenting opinion's assertion, the precluded testimony in this case had very high probative value. Most important, even if we assume that the defendant's testimony would have included some medical information, the record does not indicate that it would have been so limited. For example, testimony concerning the defendant's observations of A's behavior, the nature of their relationship, his unsuccessful parental discipline, and the detail that the appointment concerned A's mental health and combative behavior—none of this testimony would have disclosed the content of any confidential medical record.

duce crucial evidence of why his actions were justified." Without this evidence, he argues, the jury was left with no basis to believe that the defendant's conduct could be subjectively or objectively reasonable. The state contends that the evidentiary rulings were harmless because the defendant's general testimony about his parenting difficulties, "in combination with [Wilkos'] undisputed [testimony] that [A] was in a special education program for children with behavioral issues, rendered cumulative any further detail about" A's behavior.

"The law governing harmless error for nonconstitutional evidentiary claims is well settled. When an improper evidentiary ruling is not constitutional in nature, the defendant bears the burden of demonstrating that the error was harmful. . . . [W]hether [an improper ruling] is harmless in a particular case depends [on] a number of factors, such as the importance of the witness' testimony in the [defendant's] case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case. . . . Most importantly, we must examine the impact of the . . . evidence on the trier of fact and the result of the trial. . . . [T]he proper standard for determining whether an erroneous evidentiary ruling is harmless should be whether the jury's verdict was substantially swayed by the error. . . . Accordingly, a nonconstitutional error is harmless when an appellate court has a fair assurance that the error did not substantially affect the verdict." (Internal quotation marks omitted.) *State* v. *Fernando V.*, 331 Conn. 201, 215, 202 A.3d 350 (2019).

The defendant's parental justification defense, on which he entirely relied, turned on the reasonableness of his actions, both subjectively and objectively. There can be no doubt that testimony concerning his difficulty

with his daughter's behavioral problems and the nature of the treatment he sought for her on the day of the incident would have been crucial to that defense. The reasonableness of a parent's conduct to restrain their child is defined, at least in part, by the child's actions necessitating such restraint. Specifically, it was the responsibility of the jury, as the finder of fact, to determine the defendant's subjective intent—for example, whether the defendant's conduct was the result of his assessment of A's recalcitrance or her history of violent behavior. But the jury's full and fair evaluation of the defendant's subjective belief that his actions were necessary to promote A's welfare was likely substantially impaired by the defendant's inability to testify regarding the specific circumstances that led to A's mental health appointment. It was also the responsibility of the jury to examine the objective reasonableness of the defendant's conduct in response to both A's recalcitrance and her history of aggression. But the jury's ability to ascertain the objective reasonableness of the defendant's actions was similarly hampered because it could not extrapolate what a reasonable parent would have done in the defendant's position without fully comprehending the defendant's position.

The state contends that any error was harmless because the precluded testimony would have been rendered cumulative by other, admitted testimony. Specifically, the state notes that there was sufficient, admitted testimony to establish A's behavioral problems to the jury, including the defendant's general testimony about his parenting difficulties; his request for assistance from the department; his fear that his daughter would be placed in foster care; and Wilkos' testimony that A was in a school program for students with behavioral problems.

We disagree. The precluded testimony would not have been cumulative because virtually no specific details

about the nature of A's behavior in her interactions with the defendant were admitted as evidence. The jury's determination of whether the defendant's actions were justifiable under the circumstances necessarily needed to be informed by the specific details of A's situation, not just generalized and oblique references to her behavioral issues. See, e.g., *State* v. *Nathan J.*, supra, 294 Conn. 256 ("any analysis of reasonableness [under the parental justification defense] *must consider a variety of factors* and . . . [the] inquiry is *case specific*" (emphasis added)).

For example, the admitted evidence about A's placement in the school program and the defendant's interactions with the department would not have rendered further evidence about A's behavior cumulative because this evidence contained no details establishing the *nature and degree* of both her participation in the school program and the defendant's interactions with the department. Moreover, that evidence was limited to the context of state institutions, which would not have rendered cumulative the precluded evidence about the defendant's difficulty managing A's behavior at home. Likewise, testimony by the defendant about the nature of the appointment would not have been cumulative because the only admitted testimony was that it was, in A's words, "outpatient"; in Wilkos' words, "an appointment for something [A] want[ed] to do; it was for an after-school program"; and, in the defendant's words, "much more significant" than an after-school program. These characterizations were too general to render further testimony about the specific nature of the appointment cumulative.

The concurring and dissenting opinion asserts that "[n]othing in the record . . . supports a conclusion that [A] was in imminent danger of serious harm such that it would have been detrimental to her welfare to postpone treatment until such time as [she] could be

. . . persuaded to go to treatment . . . .'' That is precisely the problem: the defendant was *precluded* from testifying about the nature and extent of any ongoing harm to his daughter's welfare associated with her behavioral problems. In the absence of such testimony, the defendant could not demonstrate *why*—why his need for help was so urgent; why he reached out to the department for aid; why the police were coming to his house every night; or why his fear that A would be placed in foster care was so acute. Consequently, the jury could not fully and fairly determine the subjective and objective reasonableness of the defendant's actions. This deficiency is particularly harmful given that the subjective and objective reasonableness of the defendant's actions was not collateral or peripheral to the case but, rather, the core of his parental justification defense. Accordingly, we cannot conclude, with a fair assurance, that the error did not substantially affect the verdict.[11] We therefore conclude that the evidentiary error was harmful, and the defendant is entitled to a new trial.

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

[11] The concurring and dissenting opinion notes that the defendant did not make an offer of proof regarding his direct examination of himself. It is true that ''the right of self-representation provides no attendant license not to comply with relevant rules of procedural and substantive law.'' (Internal quotation marks omitted.) *Oliphant* v. *Commissioner of Correction*, supra, 274 Conn. 570. However, this is a quintessential example of a situation in which our courts ought to be solicitous of self-represented defendants. It would not have interfered with any right of the state for the court to allow the defendant a moment outside the presence of the jury to fully develop his direct examination of himself and to create a record adequate for appellate review. In addition, the totality of the record in this case fairly apprised the trial court and the state about the type of testimony the defendant sought to offer—including, at the very least, A's aggressive behavior and the defendant's difficulty managing that behavior. Even without the specific words the defendant would have spoken at trial, we cannot conclude that we have a fair assurance that the jury's verdict was not substantially swayed given that the testimony would have been central to his defense.

reverse the judgment of the trial court and to remand the case to that court for a new trial.

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

KAHN, J., with whom ROBINSON, C. J., and MULLINS, J., join, concurring in part and dissenting in part. The majority concludes that the defendant, Mark T., is entitled to a new trial because the trial court improperly precluded him from testifying about his thirteen year old daughter's behavioral issues and the treatment program to which he was attempting to take her when he dragged her by her ankle through the corridors of her school, thereby causing her injury. According to the majority, it is impossible to "conclude, with a fair assurance, that the [exclusion of the defendant's testimony] did not substantially affect the verdict." Specifically, it concludes that the jury reasonably could have concluded that details of the victim's alleged behavior and the specific nature of the treatment that the defendant had arranged for her—which details he did not describe before the trial court or on appeal—might have caused him to have urgent concerns about the victim that, in turn, might have led him subjectively and reasonably to believe that his conduct was necessary to promote her welfare. I disagree.[1] I would conclude that the trial court correctly determined that the very slight probative value of the defendant's testimony on these issues was outweighed by the victim's privacy interests. Moreover, even if I were to agree that the exclusion of the testimony constituted an abuse of discretion, the defendant cannot establish that any impropriety was harmful because he did not make an offer of proof at trial as

[1] I agree with the majority's conclusion that the trial court properly precluded the defendant from questioning the victim's special education teacher, Monika Wilkos, as to whether the victim had "ever been physical with anybody else in the school . . . ."

to the testimony that he would have given if the trial court had allowed it; nor has he explained on appeal what that testimony would have been. Accordingly, I respectfully dissent in part.

Although the majority opinion accurately sets forth the facts and procedural history of this case, I would emphasize the following facts that have particular relevance to the issues before us on appeal. The victim's teacher, Monika Wilkos, testified at trial that the victim was enrolled in an "intensive behavior support program. So any student that is placed in that program has a history of just—it's not always disruptive, but behavioral issues that's keeping them from making progress in school. So it's a program designed to support students and teach coping skills, as well as academics; there's a whole therapeutic component to it. So, any student that would come to my classroom would, in my experience, would have incidents where they were yelling or upset about something during the school day."

Wilkos also testified that, when she informed the victim that the defendant had come to the school to take her to the treatment program, the victim became very upset and repeatedly yelled, "I'm not going . . . ." When the defendant arrived and tried to persuade her to go, the victim repeatedly screamed at him, "I'm not fucking going with you, you can't make me go . . . ." When the defendant attempted to take hold of the victim's arms from behind, she dropped to the floor and onto her back. At that point, the defendant grabbed her by her ankle and started dragging her.

Wilkos further testified that, while the defendant was dragging the victim through the corridors of the school by her ankle, she continued to struggle violently and to scream hysterically. Wilkos crouched over the victim and tried to find a way to help her get to her feet because she could see that the victim was being hurt. When the

victim attempted to stop the defendant's progress by grabbing onto door frames, bookcases and chairs, the defendant forcefully pried and yanked her hands off of them. A sixth grade student who witnessed the incident was terrified and crying. Because of the disturbance, school personnel called a "code yellow," meaning that students were instructed that they were not allowed to leave their classrooms.

With this background in mind, I begin with a review of the legal principles governing the defendant's claim. General Statutes (Rev. to 2015) § 53a-18 provides in relevant part: "The use of physical force upon another person which would otherwise constitute an offense is justifiable and not criminal under any of the following circumstances:

"(1) A parent, guardian or other person entrusted with the care and supervision of a minor . . . may use reasonable physical force upon such minor . . . when and to the extent that he reasonably believes such to be necessary to maintain discipline or to promote the welfare of such minor . . . ."

The trial court properly instructed the jury that, under this statute, it must find that the defendant did not act with parental justification if it found "any of the following: (1) The state has proved beyond a reasonable doubt that when the defendant used physical force, he did not actually believe that physical force was necessary to maintain discipline or to promote the welfare of the minor; (2) the state has proved beyond a reasonable doubt that the defendant's actual belief concerning the use of physical force was unreasonable, in the sense that a reasonable person, viewing all the circumstances from the defendant's point of view, would have not shared that belief; or (3) the state has proved beyond a reasonable doubt that, when the defendant used physical force to maintain discipline or to promote the wel-

fare of the minor, he did not actually believe that the degree of force he used was necessary for the purpose; here again, as with the first requirement, an actual belief is an honest, sincere belief; or (4) the state has proved beyond a reasonable doubt that, if the defendant did actually believe that the degree of force he used to maintain discipline or to promote the welfare of the minor was necessary for that purpose, that belief was unreasonable, in the sense that a reasonable person, viewing all the circumstances from the defendant's point of view, would not have shared that belief."

"A defendant has a constitutional right to present a defense, but he is [nonetheless] bound by the rules of evidence in presenting a defense. . . . Although exclusionary rules of evidence cannot be applied mechanistically to deprive a defendant of his rights, the constitution does not require that a defendant be permitted to present every piece of evidence he wishes. . . . *State* v. *Andrews*, 313 Conn. 266, 275, 96 A.3d 1199 (2014). Accordingly, [i]f the proffered evidence is not relevant [or is otherwise inadmissible], the defendant's right to [present a defense] is not affected, and the evidence was properly excluded. . . . *State* v. *Devalda*, 306 Conn. 494, 516, 50 A.3d 882 (2012); see also *State* v. *Hedge*, 297 Conn. 621, 634–36, 1 A.3d 1051 (2010) (defendant has constitutional right to introduce evidence of third-party culpability if it is relevant and directly connects third party to crime); *State* v. *Tutson*, 278 Conn. 715, 746–51, 899 A.2d 598 (2006) (no violation of constitutional right to present defense when trial court properly excluded evidence on hearsay grounds)." (Internal quotation marks omitted.) *State* v. *Bennett*, 324 Conn. 744, 760–61, 155 A.3d 188 (2017). Thus, "the question of the admissibility of the proffered evidence is one of evidentiary, but not constitutional, dimension." *State* v. *Shabazz*, 246 Conn. 746, 753 n.4, 719 A.2d 440

(1998), cert. denied, 525 U.S. 1179, 119 S. Ct. 1116, 143 L. Ed. 2d 111 (1999).

"The trial court's ruling on the admissibility of evidence is entitled to great deference. . . . [T]he trial court has broad discretion in ruling on the admissibility . . . of evidence. . . . The trial court's ruling on evidentiary matters will be overturned only upon a showing of a clear abuse of the court's discretion. . . . We will make every reasonable presumption in favor of upholding the trial court's ruling, and only upset it for a manifest abuse of discretion. . . . Moreover, evidentiary rulings will be overturned on appeal only where there was an abuse of discretion and a showing by the defendant of substantial prejudice or injustice." (Internal quotation marks omitted.) *State* v. *Colon*, 272 Conn. 106, 180, 864 A.2d 666 (2004), cert. denied, 546 U.S. 848, 126 S. Ct. 102, 163 L. Ed. 2d 116 (2005).

I begin my analysis with a review of the trial court's actual rulings. Although the court sustained the prosecutor's objection to the defendant's testimony that, after he obtained custody of his daughter, she ran away every night, the court immediately clarified that the defendant could testify about the victim's difficult behaviors "[w]ithout getting into too much detail." With respect to the prosecutor's objection to the defendant's testimony that he had reached out to the Department of Children and Families for help on many occasions, the defendant abandoned that topic without waiting for any ruling on the objection by the trial court. The court then overruled the prosecutor's objections to the defendant's testimony that he was desperate to get help for the victim because the police were coming to his house every day and that he was determined not to let the victim enter the foster care system, in which he had been raised. The court also allowed the defendant to testify that the people that he turned to for help refused to help him, so he was forced to get help himself. Although the

trial court sustained the prosecutor's objection to the defendant's attempt to testify as to the specific details of the help that he sought, the court allowed the defendant to testify that the "[t]he help that [the victim] needed . . . was not just some after-school program; it was much more significant."

Thus, the trial court permitted the defendant to testify that he was having severe difficulties with the victim's behavioral problems, which required daily police intervention, that he was "desperate" to obtain help for the victim, that he was trying to take her to obtain that help at the time of the incident, and that the nature of that help was significant. The jury was also informed through Wilkos' testimony that the victim was enrolled in an intensive support program at the school designed for students with significant behavioral issues, and that it was common for those students to engage in disruptive behavior, to yell, and to become upset. Finally, the jury was informed of the victim's conduct when the defendant came to take her to the treatment program, specifically, that she vigorously defied and swore at the defendant, that she physically resisted his initial attempts to persuade her to go with him and that she screamed and struggled during the entire incident. I do not believe that the excluded testimony regarding the victim's attempts to run away and the specific details of the treatment that the defendant had arranged for the victim would have added materially to the probative value of this evidence.

In this regard, I emphasize that the parental justification defense applies only to the *justified* use of physical force that is objectively necessary[2] to promote the welfare of a minor; it does not provide an *excuse* for the

[2] For purposes of this concurring and dissenting opinion, and consistent with the instructions provided to the jury, the term "objectively necessary means" refers to means that a reasonable person would believe are necessary to use under the circumstances.

unnecessary use of physical force by a parent who reasonably is suffering from extreme frustration or some other form of emotional distress. Although the defendant's past difficulties with the victim might tend to explain his emotional state during the encounter and to excuse his behavior, at least morally, it is, in my view, highly dubious that a jury could reasonably conclude that any sense of urgency short of a subjective and reasonable belief in the need for immediate treatment to save life or limb would justify dragging the recalcitrant victim by her ankle through the corridors of the school as she struggled and screamed, thereby causing physical injury to the victim and a serious and frightening disturbance in the school, as an objectively necessary means to promote her welfare. The record reveals that professionals, like Wilkos, were attempting to assist the victim and to prevent the violent removal of her from the school. Nothing in the record remotely supports a conclusion that the victim was in imminent danger of serious harm such that it would have been detrimental to her welfare to postpone treatment until such time as the victim could be either persuaded to go to treatment or, if necessary, constrained to go in a skillful and orderly manner. Indeed, if the defendant had information regarding the victim's behavior or the treatment program that was significantly different in quality or significantly more probative with respect to his justification defense than the information that was actually provided to the jury, it is difficult to understand why he would not have disclosed that information to the prosecutor or to the trial court at any point during pretrial proceedings or trial.[3] Thus, on the basis of the record before it, the trial court reasonably could have

[3] The only information that may be gleaned from a review of the trial court's hearings on the two motions in limine filed by the state and the eight separate pretrial motions filed by the defendant is that the defendant planned to take the victim to an intake appointment at a known mental health treatment facility for children.

concluded that additional evidence of the victim's past behavior would have been very weakly probative, at best.

Accordingly, the trial court reasonably could have concluded that the victim's privacy interest in not having additional details of her behavioral problems and proposed treatment published in court, which was the basis for the state's pretrial motion in limine, outweighed the merely incremental value to the defendant of providing the jury with those details.[4] I would conclude, therefore, that the Appellate Court correctly determined that it was not an abuse of discretion for

[4] At the hearing on the state's motion in limine, the guardian ad litem argued that the victim had a privacy interest in not revealing the name of the treatment facility at which she had an appointment on the day of the incident because it would tend to reveal the nature of the disorder for which the defendant sought treatment on the victim's behalf. It is well established that persons have a privacy interest in their medical treatment records that may justify the exclusion of relevant medical evidence. See *State* v. *White*, 139 Conn. App. 430, 440, 55 A.3d 818 (2012) (it was within trial court's discretion "to exclude the [complainant's] medical records, as they would not have disclosed material sufficiently probative of the defendant's theory of defense to justify breaching their confidentiality"), cert. denied, 307 Conn. 953, 58 A.3d 975 (2013). It follows that the trial court also has the discretion to exclude testimony that would reveal the content of confidential medical records, such as the nature of the disorder for which the person is being treated and the identity of the medical treatment provider.

The majority states that, because the articulated basis for the prosecutor's objections to the defendant's question was relevancy, the state cannot now claim that the testimony was properly excluded on the ground that the exclusion of the testimony would protect the victim's privacy. I would note that the prosecutor did not articulate the basis for several of her objections to the defendant's questions, including the questions specifically directed at the nature of the treatment that the defendant had arranged for the victim. In light of the subject matter of the defendant's testimony, the trial court reasonably could have concluded that the objections were based on its ruling on the pretrial motion in limine. The majority also states that the defendant's testimony about the specific nature of the treatment program was "too general" to render further testimony cumulative. The defendant does not challenge on appeal, however, the trial court's pretrial ruling precluding him from identifying the treatment facility *for the very reason* that it would tend to reveal the nature of the victim's disorder.

the trial court to exclude this evidence. Because I would conclude that the trial court properly excluded the testimony of Wilkos and the defendant, I would also conclude that the Appellate Court correctly concluded that the trial court did not violate the defendant's constitutional right to present a defense. See, e.g., *State* v. *Devalda*, supra, 306 Conn. 516 ("[i]f the proffered evidence is not relevant [or is otherwise inadmissible], the defendant's right to [present a defense] is not affected" by its exclusion (internal quotation marks omitted)).

The majority contends that, although the jury was informed that the victim was in a special program for students with serious behavioral problems, that the police were coming to the defendant's house every night to deal with the victim, that the defendant was acutely afraid that the victim would be placed in foster care if she continued to engage in such disturbing and disruptive behavior, that the defendant believed that getting treatment for the victim was urgent, that the treatment program he was trying to bring her to was significant, and that the victim was extremely upset, physically resistant and profanely defiant when informed that the defendant was going to take her to the treatment program, the excluded testimony was, nevertheless, "material to the subjective and objective reasonableness" of the defendant's conduct in dragging the victim through the school by her ankle as she struggled and screamed.[5]

[5] As the trial court properly instructed the jury, the subjective component of the parental justification defense requires that the defendant must *actually* believe that his conduct was *necessary* to promote the victim's welfare. The reasonableness requirement comes in through the objective component, under which the jury must be instructed that, if it finds that the defendant actually believed that his use of physical force was necessary, it still must find the defendant guilty if it determines that a reasonable person, viewing all the circumstances from the defendant's point of view, would not have shared that belief. Cf. *State* v. *Heinemann*, 282 Conn. 281, 301–302, 920 A.2d 278 (2007) (discussing difference between subjective component of duress defense, under which defendant in fact must believe that his life would be endangered, and objective component, under which defendant's belief must be reasonable). In apparent reliance on the Appellate Court's

Specifically, the majority contends that "[t]he nature and severity of the defendant's difficulty parenting his daughter were material to the strength of his subjective belief that his use of force was reasonable to get [the victim] to her mental health appointment." In addition, the majority contends that "the nature and severity of [the victim's] behavioral problems were material to the degree to which a reasonable parent in the defendant's position would agree that his use of force was reasonable under the circumstances." Accordingly, the majority states that it "cannot conclude, with a fair assurance, that the [exclusion of the defendant's testimony] did not substantially affect the verdict."

The fundamental flaw in this analysis is that, even if the majority were correct that the trial court improperly excluded the defendant's testimony because it was relevant to the defendant's justification defense, the defendant made no offer of proof before the trial court regarding the details of the victim's difficult behaviors

statement that "the defense of parental justification requires both subjective and objective reasonableness on behalf of the parent or guardian with respect to the use of physical force"; *State* v. *Mark T.*, 186 Conn. App. 285, 296–97, 199 A.3d 35 (2018); the majority on several occasions uses language that, contrary to the statutory language and the trial court's instruction, seems to inject a reasonableness requirement into the subjective component of the defense. Specifically, the majority refers to the "objective and subjective elements of reasonableness"; "subjective and objective reasonableness"; the jury's ability to determine whether "the defendant's conduct could be subjectively or objectively reasonable"; "the reasonableness of [the defendant's] actions, both subjectively and objectively"; and "the subjective and objective reasonableness of the defendant's actions." Although the majority states that "nothing about [its] analysis injects a reasonableness requirement into the subjective component of the defense"; footnote 7 of the majority opinion; the language it employs clearly suggests that, to the contrary, the subjective component may be satisfied if the jury finds that the defendant believed that the use of physical force was *reasonable*, rather than that it was *necessary*. The reference to the "subjective and objective reasonableness" language not only needlessly muddies the true focus of the subjective component of the defense of justification, it also erroneously suggests that the defendant, and not the jury, should be left to judge the objective reasonableness of his own beliefs and actions.

and the nature of the treatment program to which he would have testified if allowed, and he also did not provide those details on appeal to the Appellate Court or to this court. Accordingly, the majority has no basis for concluding that the exclusion of the testimony was harmful.[6] See, e.g., *Dinan* v. *Marchand*, 279 Conn. 558, 583, 903 A.2d 201 (2006) ("[b]ecause at trial the plaintiff made no offer of proof regarding the specific substance of the excluded testimony . . . it is not possible to evaluate the harmfulness of the exclusion, if improper, in light of the record"); *Burns* v. *Hanson*, 249 Conn. 809, 824, 734 A.2d 964 (1999) ("[t]he absence of an offer of proof may create a gap in the record that would invite inappropriate speculation on appeal about the possible substance of the excluded testimony"). Although the defendant's failure to make an offer of proof is arguably excusable in light of the fact that he was self-represented, he is represented by counsel on appeal, and he still has not specified the additional facts to which he would have testified if the trial court had permitted such testimony or explained how those facts could have affected the verdict. Cf. *In re Lukas K.*, 300 Conn. 463, 465, 473–74, 14 A.3d 990 (2011) (trial court properly denied request for continuance in termination of parental rights proceeding when respondent father had "not identified on appeal any additional evidence or arguments that he could have presented if the trial court had granted his request"); *State* v. *Lopez*, 280 Conn. 779, 790, 911 A.2d 1099 (2007) (when defendant did not identify on appeal any arguments that defense counsel would have made at sentencing hearing if trial court had granted defendant's request for continuance

[6] The majority faults the state for conflating relevance with cumulativeness with respect to its argument that the trial court properly excluded the defendant's testimony. Even if there were some merit to that contention, the majority overlooks the defendant's failure to establish that any additional evidence would not have been merely cumulative when considering whether the trial court's ruling was harmful.

so that new counsel could review trial transcript, any impropriety in denying request for continuance was deemed harmless). In light of these well established principles of appellate review, there is no basis to conclude, on this record, that the defendant is entitled to a new trial.

Like the majority, I, too, recognize that this was a trial involving a self-represented defendant who, at the time of the incident, had recently obtained custody of his troubled young daughter. I believe, however, that the majority has given that consideration far too much weight. The defendant was warned repeatedly about the dangers of self-representation,[7] and my review of the record satisfies me that the trial court patiently explained and assisted the defendant with the trial process and gave him wide latitude on many occasions, consistent with the court's duty to be solicitous of the rights of self-represented parties.[8] See, e.g., *Marlow* v.

[7] As the Appellate Court observed, "[o]n more than one occasion, the [trial] court canvassed the defendant in accord[ance] with Practice Book § 44-3 (4), ensuring that he was aware of the dangers and disadvantages of self-representation." *State* v. *Mark T.*, 186 Conn. App. 285, 288 n.1, 199 A.3d 35 (2018). The record also reveals that the trial judge appointed standby counsel for the defendant on July 28, 2016, approximately six weeks prior to the start of trial. In addition to attending pretrial hearings and jury selection, standby counsel was present during the entire duration of the trial and was available to the defendant, should he have opted to seek his assistance or advice.

[8] For example, in response to numerous valid objections by the prosecutor that the defendant was making arguments instead of asking witnesses questions, the court suggested that the defendant rephrase his statements by asking specific questions and explained that he would have a chance to make arguments and to tell the jury the significance of the particular exhibits to which he was referring during his closing argument. The court took no action when the defendant told the jury during a witnesses' testimony that he was "fighting for [his] life." When the defendant asked the victim during cross-examination how she had managed to flip over while he was holding her right leg and left arm, she stated, "I don't know, I just did." The trial court took no action when the defendant responded to this testimony with sarcastic disbelief, stating, "[y]ou just did. That is . . . amazing . . . that's amazing." Nor did the court take any action when, also during his questioning of the victim, the defendant stated sarcastically, "[s]o, now we're in the middle of such a horrendous event . . . ." Later, the court gave the defen-

Starkweather, 113 Conn. App. 469, 473, 966 A.2d 770 (2009) (The courts should be "solicitous of the rights of [self-represented] litigants and . . . endeavor to see that such a litigant shall have the opportunity to have his case fully and fairly heard so far as such latitude is consistent with the just rights of any adverse party. . . . Although [the trial courts may] not entirely disregard our rules of practice, [they should] give great latitude to [self-represented] litigants in order that justice may both be done and be seen to be done." (Internal quotation marks omitted.)). Placing too much emphasis on a defendant's self-representation sends the message that a defendant can ignore repeated warnings about the real and serious dangers of self-representation, roll the dice on representing himself in a jury trial and, if he is convicted, get a second bite at the apple.[9]

dant an opportunity to reconsider his decision to testify and carefully warned him of the dangers of doing so. The court also gave the defendant a detailed explanation of the jury instructions when it became apparent that he had misunderstood them. In addition, the court took no action when the defendant argued to the jury that he was trying to take the victim to the hospital for services during the incident, despite the fact that the court previously had prevented the defendant from testifying to that effect.

[9] Having said this, I acknowledge that additional steps could have been taken to allow the self-represented defendant to present a more detailed picture of the context of the incident to the jury. For example, although the issue was squarely raised before trial, the court and the parties apparently reached no pretrial understanding as to the precise level of detail regarding the treatment facility and the nature of the appointment to which the defendant was attempting to take the victim that he would be allowed to present. Nor was there an understanding as to the level of detail regarding the victim's difficult behaviors that would be permitted. It would have been helpful if the court had explained, outside of the presence of the jury, the parameters of the evidence that would be permitted relating to this issue. In addition, although the prosecutor did not engage in any improper conduct, she repeatedly objected during the defendant's examination of witnesses, sometimes without stating on the record the basis for objecting to the admission of the evidence. Accordingly, it would have been helpful for the trial court to explain the reasons for its evidentiary rulings on the record. Nevertheless, although the trial may not have been a perfect one, it was a fair one. Cf. *State* v. *Anderson*, 255 Conn. 425, 435, 773 A.2d 287 (2001) ("[d]ue process seeks to assure a defendant a fair trial, not a perfect one" (internal quotation marks omitted)).

Finally, there is no question that a reasonable person, including a member of a jury, would be sympathetic to the challenges presented in raising a child with significant behavioral issues. However, our job is to determine whether the trial court properly excluded the defendant's testimony. I would conclude that it did and that, even if it did not, the defendant cannot establish that any impropriety was harmful.

Because I disagree with the majority's conclusion that a new trial is warranted, I respectfully dissent in part.

FARMINGTON-GIRARD, LLC *v.* PLANNING AND ZONING COMMISSION OF THE CITY OF HARTFORD

THE PAMELA CORPORATION ET AL. *v.* PLANNING AND ZONING COMMISSION OF THE CITY OF HARTFORD

(SC 20374)

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

Syllabus

The plaintiff property owner, F Co., appealed to the trial court from the decisions of the defendant, the Planning and Zoning Commission of the City of Hartford, adopting certain amendments to the city's zoning regulations and changes to the zoning map. In 2012, shortly after F Co. submitted a special permit application to the commission to construct a fast-food restaurant with a drive-through window on its property, the commission approved a zone change that placed the property in a different zoning district and effectively prohibited F Co.'s proposed use. F Co. was then notified that its application was incomplete and that it needed to submit additional information if it wished to proceed. F Co. appealed to the trial court from the commission's adoption of the zone change, and the court sustained F Co.'s appeal. Subsequently, in 2014, F Co.'s lessee, M Co., began to prepare the materials required to complete the special permit application and attempted to schedule a meeting to

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

review the application with D, the city's zoning administrator. Two days before the meeting, however, certain amendments to the zoning regulations that had been adopted by the commission in 2014, which prohibited fast-food restaurants with drive-through window service adjacent to residential zones, went into effect. At the meeting, representatives of M Co. delivered the materials needs to complete F Co.'s initial application for a special permit, but D informed them that the proposed use of the property was then prohibited by virtue of the 2014 amendments. D then sent a letter to M Co. stating that F Co.'s application was void on the ground that it was incomplete. On the same day, the commission readopted the 2012 zone change to F Co.'s property. F Co. filed separate appeals from the commission's adoption of the amendments and the readoption of the zone change. Thereafter, the commission readopted the zone change and the amendments to the zoning regulations, and F Co. filed separate appeals from those two actions. The trial court consolidated the four appeals and, following a hearing, rendered judgments dismissing the appeals. The trial court concluded that, although the amendments and zone changes at issue were void due to defective notice, F Co. had failed to exhaust its administrative remedies insofar as it failed to appeal to the city's Zoning Board of Appeals from D's decision voiding its application for a special permit. F Co. appealed to the Appellate Court, which affirmed the judgments of the trial court, and F Co., on the granting of certification, appealed to this court. *Held*:

1. The Appellate Court incorrectly determined that D had the authority to determine that F Co.'s application for a special permit was void under the city's zoning regulations; the relevant provisions (§§ 913 (a) and 163 (h)) of the zoning regulations required the zoning administrator to refer each special permit application for a fast-food restaurant with a drive-through window, and all projects requiring a special permit as outlined in a table of permitted uses, respectively, to the commission for review, that procedure was consistent with the provision in the enabling statute (§ 8-3c (b)) authorizing only zoning commissions and certain other bodies to act on applications for special permits, and the provision (§ 68 (a)) of the zoning regulations requiring the zoning administrator to find that applications for zoning permits conform to all provisions of the regulations applies only to applications for general zoning permits and not to applications for special permits.
2. The Appellate Court incorrectly determined that F Co. was required to appeal to the city's Zoning Board of Appeals from D's decision purporting to void F Co.'s application for a special permit, and, accordingly, the Appellate Court improperly upheld the trial court's dismissal of F Co.'s consolidated appeals on the basis of F Co.'s failure to exhaust its administrative remedies: because only the commission, and not D, had the authority to act on the application for a special permit, D's letter purporting to void F Co.'s application was a null and void ultra vires act

rather than a legal decision from which F Co. could have appealed; accordingly, F Co.'s failure to pursue an administrative appeal from D's decision did not render moot F Co.'s consolidated appeals; moreover, because the commission did not cross appeal from the trial court's determination that the commission's adoption of the amendments and zone changes were void as a result of defective notice, that determination was upheld.

Argued May 1, 2020—officially released June 7, 2021**

Procedural History

Appeals from the decisions of the defendant adopting certain amendments to the zoning regulations and changes to the zoning map of the city of Hartford, brought to the Superior Court in the judicial district of Hartford and transferred to the Land Use Litigation Docket, where the appeals were consolidated; thereafter, the court, *Berger*, *J.*, granted the motions to withdraw filed by the plaintiff The Pamela Corporation; subsequently, the cases were tried to the court; judgments dismissing the appeals, from which the plaintiff Farmington-Girard, LLC, on the granting of certification, appealed to the Appellate Court, *Lavine*, *Bright* and *Alexander*, *Js.*, which affirmed the judgments of the trial court, and the plaintiff Farmington-Girard, LLC, on the granting of certification, appealed to this court. *Reversed*; *judgments directed.*

David F. Sherwood, for the appellant (plaintiff Farmington-Girard, LLC).

Daniel J. Krisch, with whom, on the brief, was *Matthew J. Willis*, for the appellee (defendant).

Opinion

McDONALD, J. The primary issues that are before us in this appeal are (1) whether a zoning administrator has the authority to take conclusive action on an application for a special permit, and (2) whether an applicant

** June 7, 2021, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

whose special permit application is rejected as void by a zoning administrator on the ground that it was incomplete must exhaust its administrative remedies by appealing that action to a zoning board of appeals.

After the plaintiff Farmington-Girard, LLC,[1] applied for a special permit to construct a fast-food restaurant on property that it owns in the city of Hartford (city), it filed four separate appeals challenging various text amendments to the Hartford Zoning Regulations and zoning map changes made by the defendant, the city's Planning and Zoning Commission (commission), which, if properly adopted, would effectively preclude the plaintiff from obtaining the special permit. The trial court subsequently dismissed the appeals on the ground that the plaintiff had failed to exhaust its administrative remedies when it did not appeal to the city's Zoning Board of Appeals (board) the decision of the city's zoning administrator to reject, as void, the plaintiff's special permit application on the ground that it was incomplete. The plaintiff appealed to the Appellate Court, which affirmed the judgments of the trial court. *Farmington-Girard, LLC* v. *Planning & Zoning Commission*, 190 Conn. App. 743, 760, 212 A.3d 776 (2019). We conclude that the Appellate Court incorrectly determined that the city's zoning administrator had the authority to void the plaintiff's application for a special permit. We further conclude that the plaintiff could not have appealed to the board from the action of the zoning administrator because it was not a legal decision for purposes of General Statutes § 8-6, which governs such

[1] "The Pamela Corporation, the owner of 255 Farmington Avenue [in Hartford], was a coplaintiff in two of the four appeals [brought] to the trial court in the present matter. The Pamela Corporation filed motions to withdraw, however, which the trial court granted, thus leaving Farmington-Girard, LLC, as the sole plaintiff." *Farmington-Girard, LLC* v. *Planning & Zoning Commission*, 190 Conn. App. 743, 745 n.1, 212 A.3d 776 (2019). Therefore, for convenience, we refer to Farmington-Girard, LLC, as the plaintiff in this opinion.

appeals. Accordingly, we reverse the judgment of the Appellate Court.

The record reveals the following facts, which were either found by the trial court or are undisputed, and procedural history. The plaintiff owns property located at 510 Farmington Avenue in Hartford, which it has marketed as a location for a fast-food restaurant with a drive-through window. In late 2012, the plaintiff became aware that the commission was proposing to rezone the property from the B-3 zoning district, linear business, to the B-4 zoning district, neighborhood business, a change that would effectively prohibit the use of the property as a fast-food restaurant with a drive-through. On December 10, 2012, the plaintiff submitted a special permit application to the commission to construct a fast-food restaurant on the property.

The next day, December 11, 2012, the commission approved the zone change that placed the property in a B-4 zoning district. On December 19, 2012, Kim Holden, the city's chief staff planner, wrote a letter to the plaintiff advising it that the special permit application filed by the plaintiff was "considered incomplete and, as such, the time clock on the application has been stopped." Holden told the plaintiff that, if it wished to proceed with the application, it should submit certain additional required information.

Meanwhile, the plaintiff appealed to the Superior Court from the commission's December 11, 2012 adoption of the zone change. While that appeal was pending, the plaintiff negotiated a ground lease with McDonald's USA, LLC, which lapsed before the appeal was resolved. When the court sustained the plaintiff's appeal on August 19, 2014,[2] McDonald's reinstated the lease,

[2] The trial court explained that, "in light of the defects in the commission's notice of the proposed zoning boundary change prehearing and the zoning boundary change of December 11, 2012 posthearing, the appeals of the [plaintiff] are hereby sustained, and the zoning boundary change from B-3 to B-4 is hereby deemed invalid."

began to prepare the materials required to complete the special permit application and attempted to schedule a meeting to review the application with Khara Dodds, the director of the city's planning division and its zoning administrator.

On September 23, 2014, the commission adopted certain text amendments to the zoning regulations that, among other things, prohibited fast-food restaurants with drive-through window service adjacent to residential zones. The text amendments, which were to become effective on October 18, 2014, would have prohibited the proposed restaurant on the plaintiff's property.

After Dodds postponed the meeting several times, a meeting between Dodds and the representatives of McDonald's, Daniel E. Kleinman, an attorney, and Michelle Carlson, a professional engineer, finally took place on October 20, 2014. At that meeting, Kleinman and Carlson delivered a set of materials that, according to their understanding, completed the application for a special permit that the plaintiff had first submitted on December 10, 2012. Dodds informed them that, as the result of the text amendments that took effect two days previously, the proposed use of the property had become prohibited.

On October 28, 2014, Dodds wrote a letter to Kleinman, stating that, "[a]fter our initial review, it was clear [that] the original site plan application . . . filed in December, 2012, lacked the required materials to be considered valid. The application was submitted without site and architectural elevation plans; as a result, the application is void. A new site plan application with the required materials must be submitted. Please note [that] several changes to the [city's] [z]oning [r]egulations have occurred since your last submittal. Please review these changes to ensure [that] all required mate-

rials are submitted with your new application."[3] That same day, the commission readopted the change rezoning the plaintiff's property from the B-3 to the B-4 district.[4]

The plaintiff separately appealed from the commission's adoption of both the September 23, 2014 text amendments and the October 28, 2014 zone change. Thereafter, on December 9, 2014, the commission readopted the zone change, and, on April 14, 2015, the commission readopted the September 23, 2014 text amendments. The plaintiff also filed separate appeals from those two actions. The four administrative appeals, which are the subject of the appeal before us now, were consolidated for trial. More zoning changes were yet to come. In 2016, the city adopted "form based" zoning regulations that superseded all prior amendments. As a result, the plaintiff's property was placed in the MS-1 zone, in which restaurants with drive-through windows are prohibited.

Thereafter, the commission filed a motion to dismiss the consolidated appeals on the ground that they had become moot in light of the new form based zoning scheme. In its opposition to the motion, the plaintiff contended that, although the form based zoning regulations were legally adopted, the commission was estopped from applying them to the plaintiff's property because of its ongoing efforts to block the development

[3] As we noted, Dodds' letter purporting to void the December, 2012 application of the plaintiff was addressed to Kleinman, the attorney for McDonald's. The letter does not indicate that a copy of it was sent to the plaintiff. There is no indication in the record that Dodds ever directly notified the plaintiff of her purported decision to void its application. Because the plaintiff has not claimed that Dodds' letter to an attorney for McDonald's was improper notice to it, we have no occasion to address that matter.

[4] As we indicated, the commission initially adopted this zoning change on December 11, 2012, but the change was invalid after the Superior Court sustained the plaintiff's appeal from the commission's December 11, 2012 adoption of the zone change.

of the property. The plaintiff also contended that the commission could and should consider the application for a special permit that it had submitted years before the adoption of the form based zoning regulations.

The trial court denied the motion to dismiss without prejudice because it concluded that it required more information before it could decide the mootness issue. The court reasoned that the appeals would not be moot if the plaintiff's application for a special permit was complete when it submitted the supplemental materials to Dodds on October 20, 2014, which, in turn, depended on whether the application complied with all valid zoning regulations at that time. See General Statutes § 8-2h (a) ("[a]n application filed with a zoning commission, planning and zoning commission, zoning board of appeals or agency exercising zoning authority of a town, city or borough which is in conformance with the applicable zoning regulations as of the time of filing shall not be required to comply with, nor shall it be disapproved for the reason that it does not comply with, any change in the zoning regulations or the boundaries of zoning districts of such town, city or borough taking effect after the filing of such application"). Because the court was unable to determine at that time whether the application was compliant as of October 20, 2014, it denied the motion to dismiss without prejudice to raising the claim again at trial.

Before trial, the court ordered the parties to submit briefs on the following issue: "Was the plaintiff required to appeal [Dodds'] decision concerning the completeness of its October, 2014 application in order to preserve its rights under that application?" In its brief responding to that question, the plaintiff contended that it was not required to appeal from the decision because Dodds had no authority to void the application and the plaintiff had no avenue of appeal from the decision. The commission contended that, to the contrary, the plaintiff was

required to appeal from Dodds' decision to the board pursuant to § 8-6 (a) (1). In addition, the commission contended that it was unfair to allow the plaintiff to claim for the first time at that late date in the proceedings that the commission could consider on remand the application that the plaintiff had already filed on the ground that Dodds had no authority to void it.

At trial, the commission did not contest the merits of the plaintiff's claims in the consolidated appeals but contended only that the appeals were moot as the result of the commission's adoption of the form based zoning regulations in 2016. The court asserted that the mootness question turned on a separate matter—whether the plaintiff was required to challenge Dodds' decision voiding its application for a special permit. The court reasoned that, even if the plaintiff was correct that Dodds lacked the authority to void the application, if the plaintiff was required to exhaust its administrative remedies by taking an appeal from her decision to the board and failed to do so, Dodds' decision would stand, the application would be void, and § 8-2h (a) would not apply. Accordingly, the court concluded that whether the plaintiff needed to exhaust its administrative remedies by appealing Dodds' decision to the board was the sole and dispositive issue before it.

The trial court ultimately concluded that the text amendments and zone changes that were the subject of the plaintiff's consolidated appeals were void as the result of defective notices.[5] The court also concluded,

[5] Specifically, as to the December, 2014 and April, 2015 public hearings, the trial court concluded that the commission failed to comply with the prehearing notice requirements of General Statutes § 8-3 (a), which requires that a copy of the proposed boundary change be filed with the city clerk at least ten days before the hearing. The court explained that the record contained no filing for the December, 2014 public hearing. As to the April, 2015 public hearing, the proposed text amendment was not filed until four days before the hearing. The court also concluded that the commission failed to comply with § 8-3 (d) by not filing a copy of the map changes in the city clerk's office after the approval. Similarly, with respect to the

however, that the plaintiff had failed to exhaust its administrative remedies when it failed to appeal Dodds' decision voiding its application for a special permit to the board pursuant to § 8-6. As a result, the court dismissed the appeals.

The plaintiff then appealed to the Appellate Court. Its central contention on appeal was that Dodds lacked the authority to declare the plaintiff's application for a special permit void because the commission has the exclusive authority to act on such applications. See *Farmington-Girard, LLC* v. *Planning & Zoning Commission*, supra, 190 Conn. App. 753. The Appellate Court disagreed. Id., 756. Specifically, the Appellate Court concluded that Dodds had the authority under the city's zoning regulations to declare the application void. Id. The Appellate Court then rejected the plaintiff's claim that it could not have appealed to the board from Dodds' determination because Dodds was not "the official charged with the enforcement"; General Statutes § 8-6 (a) (1); of the city's zoning regulations within the meaning of § 8-6.[6] *Farmington-Girard, LLC* v. *Planning & Zoning Commission*, supra, 756. The court concluded that Dodds' letter was appealable to the board because it was "a clear and definitive interpretation of the regulations regarding an application's required materials . . . that . . . had a legal effect on the plaintiff . . . ." Id., 757–58. Accordingly, the Appellate Court affirmed the judgments of the trial court. Id., 760.

September and October, 2014 public hearings, the court concluded that the commission violated certain statutory notice provisions. The court concluded that the failure to comply with the statutory publication requirements renders any zoning map change void.

[6] General Statutes § 8-6 provides in relevant part: "(a) The zoning board of appeals shall have the following powers and duties: (1) To hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement of this chapter or any bylaw, ordinance or regulation adopted under the provisions of this chapter . . . ."

The plaintiff filed a petition for certification to appeal, which we granted, limited to the following issue: "Did the Appellate Court properly hold that the plaintiff failed to exhaust its administrative remedies when it did not appeal an unfavorable 'requirement or decision' of the zoning administrator to the [board] concerning the plaintiff's application for a special permit?" *Farmington-Girard, LLC* v. *Planning & Zoning Commission*, 333 Conn. 917, 217 A.3d 2 (2019).

On appeal, the plaintiff contends that the Appellate Court incorrectly determined that (1) the city's zoning regulations conferred authority on Dodds to act on the plaintiff's application for a special permit, and (2) Dodds' determination that the application was void was appealable to the board. We agree with the plaintiff that Dodds lacked the authority to void its application for a special permit. We also conclude that the plaintiff was not required to appeal to the board from Dodds' letter voiding the special permit application because it was not a legal decision within the meaning of § 8-6. Accordingly, we reverse the judgment of the Appellate Court.

Before addressing the merits of the plaintiff's claims, it is necessary to clarify the nature of the issue before this court. As we have explained, both the trial court and the Appellate Court concluded that the trial court lacked jurisdiction over the plaintiff's consolidated appeals from the text amendments and zone changes because the plaintiff failed to exhaust its administrative remedies by not appealing to the board from Dodds' separate determination that the plaintiff's application for a special permit was void.[7] The exhaustion doctrine,

[7] As we noted, the commission actually filed its motion to dismiss the consolidated appeals on the ground that they had become *moot* in light of the commission's adoption of "form based" zoning regulations in 2016 that precluded the plaintiff from constructing a restaurant with a drive-through window on the property. The commission argued that, because the plaintiff did not appeal from this approval, its appeal was moot. In its opposition to the motion, the plaintiff contended that, although the form based zoning

however, could not form a proper basis for the trial court to conclude that it lacked jurisdiction. The case before the trial court was on the four consolidated appeals dealing with the commission's adoption of the text amendments and zone changes, not the plaintiff's application for a special permit that Dodds had rejected. There is no contention that the plaintiff had failed to exhaust available administrative remedies with respect to the actions by the commission that are the subject of these appeals. Rather, the issue is whether the present consolidated appeals were moot because there would be no practical relief that the trial court could order in those appeals based on the occurrence of an event that is separate from the appeals pending before the trial court. That is, the question is whether the plaintiff's failure to pursue any administrative remedy *in the separate matter* relating to Dodds' decision prevented the trial court from granting relief in these appeals relating to text and zone changes, thereby rendering these appeals moot. See, e.g., *Sweeney* v. *Sweeney*, 271 Conn. 193, 201, 856 A.2d 997 (2004) ("[w]hen, during the pendency of an appeal, events have occurred that preclude an appellate court from granting any practical relief through its disposition of the merits, a case has become moot" (internal quotation marks omitted)). Accordingly, although it does not affect the substance of our analysis of the plaintiff's claims, we clarify that the issues before this court implicate the mootness doctrine, not the exhaustion doctrine.

We now turn to the merits of the plaintiff's claim that the Appellate Court incorrectly concluded that Dodds had the authority to determine that the plaintiff's application for a special permit was void under the city's zoning regulations. As we have explained, the Appellate

regulations were legally adopted, the commission was estopped from applying them to the plaintiff's property because of its ongoing efforts to block the development of the property.

Court determined that the Hartford Zoning Regulations, as amended to November 12, 2013 (regulations),[8] conferred authority on the city's zoning administrator, Dodds, to determine that the plaintiff's application for a zoning permit was void because it was incomplete. Specifically, the Appellate Court concluded that "[article II, division 1, §§] 66[9] and 67[10] of the regulations . . . give[s] the director of the city's planning division the 'overall responsibility for the administration of the regulations,' and designate[s] the director 'the zoning administrator.' Furthermore, [article II, division 1] § 68[11] of the regulations explicitly provides that a permit may

[8] All references to the city's regulations in this opinion are to the version of the regulations amended to November 12, 2013.

[9] Article II, division 1, § 66, of the regulations provides in relevant part: "(b) The director of planning shall have overall responsibility for the administration of the regulations, and shall be the zoning administrator. . . ."

[10] Article II, division 1, § 67, of the regulations provides in relevant part: "(a) The zoning administrator shall designate an individual to be the zoning enforcement officer. The zoning enforcement officer shall be responsible for enforcement of these regulations, and shall have such powers and duties as are set forth in this article and the general statutes.

"(b) Zoning permits shall be issued by the zoning enforcement officer acting on behalf of the zoning administrator. . . ."

[11] Article II, division 1, § 68, of the regulations provides in relevant part: "(a) Zoning permits shall be required: (1) prior to the issuance of a building permit, by notation on the building permit form, or (2) if no building permit is required, at the time of a change of use. . . . Prior to issuance, the zoning administrator must find that the application and plans conform to all provisions of these regulations. . . .

* * *

"(c) Every application for a zoning permit shall be accompanied by an administrative review plan as well as such information and exhibits as are required in these regulations or may be reasonably required by the zoning administrator in order that the proposal of the applicant may be adequately interpreted and judged as to its conformity with the provisions set forth in these regulations.

* * *

"(e) Every application for a zoning permit, including those associated with an application for a variance or a special permit, shall include the following information and exhibits, which shall constitute the administrative review plan:

"(1) A site plan of the property . . . ."

not issue until the *zoning administrator* finds that the application and plans conform to all provisions of the regulations. Finally, [article IV, division 2] § 913[12] of the regulations, on which the plaintiff relies, requires compliance with § 68." (Emphasis in original; footnotes added.) *Farmington-Girard, LLC* v. *Planning & Zoning Commission*, supra, 190 Conn. App. 755–56.

"Because the interpretation of the regulations presents a question of law, our review is plenary. . . . We also recognize that the zoning regulations are local legislative enactments . . . and, therefore, their interpretation is governed by the same principles that apply to the construction of statutes. . . . Whenever possible, the language of zoning regulations will be construed so that no clause is deemed superfluous, void or insignificant. . . . The regulations must be interpreted so as to reconcile their provisions and make them operative so far as possible. . . . When more than one construction is possible, we adopt the one that renders the enactment effective and workable and reject any that might lead to unreasonable or bizarre results." (Citations omitted; footnote omitted; internal quotation marks omitted.) *Heim* v. *Zoning Board of Appeals*, 289 Conn. 709, 715–16, 960 A.2d 1018 (2008).

We conclude for the following reasons that the regulations did not authorize Dodds to determine that the plaintiff's application for a special permit was void.

[12] Article IV, division 2, § 913, of the regulations provides in relevant part: "(a) The zoning administrator shall refer each application for an eating place with drive-in or curb service in the B-3 zoning district to the commission. The application shall be filed and acted on in accordance with the procedures set forth in section 68 (relating to applications for zoning permits). . . .

* * *

"(c) In receiving such proposal the commission shall consider all aspects of the proposal as set forth in this section . . . .

"(d) Every application for a special permit for a restaurant with drive-in or curb service shall be filed and acted on in accordance with the provisions of section 68 (relating to applications for zoning permits)."

Under the regulations, restaurants with drive-in or curbside service were authorized as a special permit use in the B-3 zone. In turn, once such a special permit application is filed by an applicant, § 913 (a) of the regulations provides in relevant part that "[t]he zoning administrator shall refer each application for an eating place with drive-in or curb service in the B-3 zoning district to the commission. . . ." Similarly, article II, division 4, § 163 (h), of the regulations provides in relevant part that "[a]ll projects requiring a special permit as outlined in the table of permitted uses shall be referred to the [c]ommission for review." As the Appellate Court observed, § 913 (a) also provides that special permit applications for eating places with drive-in services "shall be filed and acted on in accordance with the procedures set forth in section 68 (relating to applications for zoning permits)." See *Farmington-Girard, LLC* v. *Planning & Zoning Commission*, supra, 190 Conn. App. 754. Section 68 of the regulations governs not only applications for zoning permits generally, but also, in a separate subsection, applications for special permits. See Hartford Zoning Regs., art. II, div. 1, § 68 (g) (amended to November 12, 2013) ("Special permit applications. Whenever a special permit is applied for under these regulations, the following procedures shall govern the application and decision process . . . ."). Applications for special permits are a distinct category from applications for zoning permits, and different standards apply to them. See R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 6:6, p. 216 ("zoning permit is required for any land use project or construction," and, if application meets requirements of zoning regulations, such as setback requirements, zoning enforcement officer has no discretion to deny permit); see also id., § 3:8, p. 41 (special permits allow "some individual treatment of applications, by allowing particular types of uses only after a

special permit has been obtained from the agency, guided by standards contained in the zoning regulations"); id., § 5:4, p. 197 (agency charged with reviewing special permit application "has reasonable discretion to decide whether a particular section of the zoning regulations applies in a given situation and how it applies").

"[I]t is a [well settled] principle of construction that specific terms covering the given subject matter will prevail over general language of the same or another statute which might otherwise prove controlling." (Internal quotation marks omitted.) *Housatonic Railroad Co.* v. *Commissioner of Revenue Services*, 301 Conn. 268, 302, 21 A.3d 759 (2011). We conclude, therefore, that the provision of § 68 (a) of the regulations—which applies to "zoning permits"—requiring the zoning administrator to "find that the application and plans conform to all provisions of these regulations," applies *only* to applications for general zoning permits, which must be granted as of right if they conform to all existing regulations, and not to applications for special permits, which require the exercise of some discretion by the board or commission charged with acting on such applications. Indeed, when the drafters of the regulations intended to make the provisions governing applications for zoning permits applicable to applications for special permits, they knew how to make that intention clear. See, e.g., Hartford Zoning Regs., art. II, div. 1, § 68 (e) (amended to November 12, 2013) ("[e]very application for a zoning permit, *including those associated with an application for . . . a special permit*, shall include the following information and exhibits" (emphasis added)).

As we explained, § 163 (h) of the regulations provides that "[a]ll projects requiring a special permit as outlined in the table of permitted uses shall be referred to the [c]ommission for review" pursuant to the procedures

set forth in § 68 (g) of the regulations. This procedure is consistent with the enabling statutes, which authorize only zoning commissions and certain other specifically enumerated bodies to act on applications for special permits. See, e.g., General Statutes § 8-3c (b) ("The zoning commission or combined planning and zoning commission of any municipality shall hold a public hearing on an application or request for a special permit . . . as provided in section 8-2 . . . . Such commission shall decide upon such application or request within the period of time permitted under section 8-7d. Whenever a commission grants or denies a special permit . . . it shall state upon its records the reason for its decision."); see also, e.g., General Statutes (Rev. to 2013) § 8-2 (a) ("[the zoning] regulations . . . may provide that certain classes or kinds of buildings, structures or uses of land are permitted only after obtaining a special permit . . . from a zoning commission, planning commission, combined planning and zoning commission or zoning board of appeals, whichever commission or board the regulations may, notwithstanding any special act to the contrary, designate, subject to standards set forth in the regulations and to conditions necessary to protect the public health, safety, convenience and property values"). Nothing in § 68 (g) of the regulations or the enabling statutes suggests that zoning administrators have any authority to act, authoritatively, definitively, or for any reason, on an application for a special permit. We conclude, therefore, that Dodds did not have the authority to determine that the plaintiff's application for a special permit was void because it was incomplete.[13]

[13] We note that the commission has cited no authority that would support the assertion that an incomplete application for a special permit is necessarily a void one. Should an applicant choose not to provide any supplemental information as identified by the zoning administrator, it may do so at its own risk that the commission may ultimately agree with the zoning administrator. Regardless, the final dispositive action on an incomplete application is the legal duty of the commission, not the administrator.

We next address the question of whether the plaintiff was required to appeal to the board from Dodds' letter purporting to void the application for a special permit. We conclude that it was not.

Whether § 8-6 authorized the plaintiff to appeal to the board from Dodds' action is a question of statutory interpretation over which our review is plenary. See, e.g., *Trinity Christian School* v. *Commission on Human Rights & Opportunities*, 329 Conn. 684, 694, 189 A.3d 79 (2018). We review § 8-6 in accordance with General Statutes § 1-2z and our familiar principles of statutory construction. See, e.g., id.

We begin with the language of § 8-6. Section 8-6 (a) provides in relevant part: "The zoning board of appeals shall have the following powers and duties: (1) To hear and decide appeals where it is alleged that there is an error in any order, requirement or decision made by the official charged with the enforcement of this chapter or any bylaw, ordinance or regulation adopted under the provisions of this chapter . . . ."

The plaintiff contends that it was not required, or, indeed, authorized, to appeal to the board from Dodds' determination that its application for a special permit was void because § 8-6 applies only to *enforcement decisions*, and a decision voiding a special permit application is not an enforcement decision. In support of this contention, the plaintiff relies on a number of cases holding that a decision by a zoning commission or combined planning and zoning commission that enforces the zoning laws is appealable to the board pursuant to § 8-6, in contrast to decisions made by a commission in its legislative capacity, or on applications for special permits, which are appealable directly to the Superior Court pursuant to General Statutes § 8-8.[14] See, e.g.,

[14] General Statutes § 8-8 provides in relevant part: "(b) Except as provided in subsections (c), (d) and (r) of this section and sections 7-147 and 7-147i, any person aggrieved by any decision of a board, including a decision to approve or deny a site plan pursuant to subsection (g) of section 8-3 or a

Conto v. *Zoning Commission*, 186 Conn. 106, 110–11, 117, 439 A.2d 441 (1982) (because town's zoning regulations required zoning commission to act on applications for permitted use, except for single family residences, and because commission's function was "to determine whether the applicant's proposed use [was] one which satisfies the standards set forth in the regulations and the statutes," commission's decision approving application was enforcement decision appealable to board (internal quotation marks omitted)); *Borden* v. *Planning & Zoning Commission*, 58 Conn. App. 399, 408–409, 755 A.2d 224 (because agency considering site plan application "has no independent discretion beyond determining whether the plan complies with the site plan regulations and applicable zoning regulations incorporated into the site plan regulations by reference," planning and zoning commission's grant of application constituted enforcement of regulations and was appealable to board), cert. denied, 254 Conn. 921, 759 A.2d 1023 (2000);[15] *Leo Fedus & Sons Construction Co.* v. *Zoning Board of Appeals*, 27 Conn. App. 412, 416–17, 606 A.2d 725 (1992) (because zoning regulations "may be enforced by a refusal of a building or occupancy permit [when] the construction or use of the land in question is not in compliance with the pertinent regulations," planning and zoning commission's refusal to approve site plan was appealable to board pursuant to

special permit or special exception pursuant to section 8-3c, may take an appeal to the superior court for the judicial district in which the municipality is located . . . ."

Although § 8-8 was the subject of certain amendments in 2015; see Public Acts 2015, No. 15-85, § 2 (amending subsection (*l*)); and 2019; see Public Acts 2019, No. 19-64, § 24 (amending subsection (o)); those amendments have no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

[15] We note that the legislature amended § 8-8 (b) in 2002 to provide that an aggrieved person may appeal to the Superior Court from the decision of a planning and zoning commission to approve or deny a site plan. See Public Acts 2002, No. 02-74, § 2.

town regulation analogous to § 8-6 (internal quotation marks omitted)), rev'd on other grounds, 225 Conn. 432, 623 A.2d 1007 (1993). Because rulings on special permit applications are appealable to the Superior Court, the plaintiff argues, they are not "enforcement decisions" subject to § 8-6. The plaintiff further contends that it did not appeal from Dodds' letter purporting to void the plaintiff's application to the Superior Court pursuant to § 8-8 because "the letter had no legal effect."[16]

Although we do not entirely agree with the plaintiff's analysis, we conclude that Dodds' letter was not appealable to the board. Contrary to the plaintiff's contention that action on a special permit application is not an "enforcement decision," this court held in *Jewett City Savings Bank* v. *Franklin*, 280 Conn. 274, 277–78, 285, 907 A.2d 67 (2006), that a decision by a planning and zoning commission approving or denying an application for a special permit is appealable to the board pursuant to § 8-6 because the commission is acting pursuant to its capacity as a zoning enforcement agency when it makes that decision. See id., 283, 285 (when planning and zoning commission acted on application for special permit, "commission was enforcing its regulations," and decision was, therefore, appealable to board).[17]

[16] We further note that § 8-8 does not authorize appeals from decisions of zoning administrators. See General Statutes § 8-8 (a) (1) (defining "aggrieved person" in relevant part as "a person aggrieved by a decision of a board"); General Statutes § 8-8 (a) (2) (defining "board" in relevant part as "a municipal zoning commission, planning commission, combined planning and zoning commission, zoning board of appeals or other board or commission the decision of which may be appealed pursuant to this section").

[17] In response to this decision, the legislature amended § 8-8 (b) in 2007 to provide in relevant part that an aggrieved person may appeal to the Superior Court from "a decision to approve or deny . . . a special permit . . . pursuant to section 8-3c . . . notwithstanding any right to appeal to a municipal zoning board of appeals under section 8-6. . . ." Public Acts 2007, No. 07-60, § 1 (P.A. 07-60), codified at General Statutes (Supp. 2008) § 8-8 (b); see also Conn. Joint Standing Committee Hearings, Planning and Development, Pt. 3, 2007 Sess., p. 766, remarks of Charles Andres, Chairman of the Planning and Zoning Section of the Connecticut Bar Association (proposed legislation was result of decision in *Jewett City Savings Bank*).

We agree with the plaintiff, however, that Dodds' letter purporting to void the plaintiff's application for a special permit was not appealable either to the board or to the Superior Court because it was not a legal decision made by the official charged with the enforcement of the city's regulations governing applications for special permits but, rather, a null and void ultra vires act.[18] See *Wellswood Columbia, LLC* v. *Hebron*, 295 Conn. 802, 824, 992 A.2d 1120 (2010) ("ultra vires acts . . . are void ab initio"); see also *Walgreen Eastern Co.* v. *Zoning Board of Appeals*, 130 Conn. App. 422, 426, 24 A.3d 27 ("appeals under § 8-6 may be taken from decisions made by someone other than the designated zoning enforcement officer, if that other person in fact exercised, *and was authorized to exercise*, the relevant authority" (emphasis added)), cert. denied, 302 Conn. 930, 28 A.3d 346 (2011). As we explained, under both the applicable regulations and associated enabling

The legislature did not, however, prohibit appeals to the board pursuant to § 8-6 from decisions by planning and zoning commissions on applications for special permits. See General Statutes § 8-8 (b) (person aggrieved by commission's decision on special permit application may appeal to Superior Court pursuant to § 8-8 "notwithstanding any right to appeal to a municipal zoning board of appeals under section 8-6"). Thus, contrary to the plaintiff's contention, P.A. 07-60 did not overrule our holding in *Jewett City Savings Bank* that a decision by a planning and zoning commission approving or denying a special permit application is made in the commission's capacity as an enforcement agency. Rather, the legislature provided only that that particular enforcement decision may be appealed directly to the Superior Court pursuant to § 8-8 without first appealing to the board.

[18] Specifically, article II, division 1, § 67 (a), of the regulations provides that the zoning administrator, in this case Dodds, "shall designate an individual to be the zoning enforcement officer." Subsection (a) of § 67 goes on to explain that "[t]he zoning enforcement officer shall be responsible for enforcement of these regulations . . . ." Section 8-6 (a) (1), in turn, provides that the board has the power to hear and decide appeals only when "it is alleged that there is an error in any order, requirement or decision *made by the official charged with the enforcement* of this chapter or any bylaw, ordinance or regulation adopted under the provisions of this chapter . . . ." (Emphasis added.) Because it was the zoning enforcement officer, and not Dodds, who was charged with the enforcement of the regulations, the board had no authority to consider an appeal from Dodds' ultra vires act.

statutes, only the commission has the authority to act on such applications. Thus, there has not yet been a legal decision on the application from which the plaintiff could have appealed.[19]

Because Dodds' letter purporting to void the plaintiff's special permit application had no legal effect, we conclude that the plaintiff's consolidated appeals are not moot and that the Appellate Court incorrectly determined that the trial court properly dismissed the plaintiff's appeals for lack of subject matter jurisdiction. In addition, because the commission has not cross appealed from the trial court's holding that the commission's adoption of the text amendments and zone changes were void as the result of defective notice, that decision stands.

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to remand the case to the trial court with direction to render judgments sustaining the plaintiff's consolidated appeals.

In this opinion the other justices concurred.

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[19] We further note that § 8-3c (b) requires that notice of a decision on a special permit application "shall be published in a newspaper having a substantial circulation in the municipality and addressed by certified mail to the person who requested or applied for [the] special permit . . . ." In the present case, Dodds sent the letter to Kleinman, an attorney for McDonald's. There is no evidence that notice was sent to the plaintiff or published in a newspaper. Moreover, the commission has cited no authority for the proposition that the incompleteness of a special permit application is grounds for unilaterally voiding it without a hearing. We recognize that such defects in a decision *by the commission* might be grounds for an appeal pursuant to § 8-6 or § 8-8, but, in the present case, there was no such decision.