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In re Ivory W.

IN RE IVORY W. ET AL.*
(SC 20624)

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

Syllabus

The respondent mother appealed from the judgments of the trial court terminating her parental rights with respect to her minor children, I and D. The petitioner, the Commissioner of Children and Families, had filed petitions to terminate the respondent's parental rights after she admitted that she had sent sexually explicit photographs of I to several persons and after the children were adjudicated neglected, committed to the petitioner's custody, and placed in a preadoptive foster home. During the proceedings on the petitions, the respondent filed four separate motions for a continuance of the termination proceedings, asserting, inter alia, that a continuance was required so that she could testify in defense of the termination of her parental rights without jeopardizing her fifth amendment right to avoid incriminating herself in connection with a pending federal criminal proceeding in which she had been charged with certain federal crimes related to her distribution of the photographs of I. The trial court granted the first three motions, but denied the fourth. Following the termination trial, at which the respondent did not testify and the trial court did not draw any adverse inference against her due to her silence, the court rendered judgments terminating her parental rights. With respect to both petitions, the court found that the petitioner proved by clear and convincing evidence that the respondent had failed to achieve a sufficient degree of personal rehabilitation, as required by the applicable statute (§ 17a-112 (j) (3) (B) (i)). With respect to the petition related to I, the court additionally found that, as the result of the respondent's conduct in distributing the sexually explicit photographs of I, I had been denied the care, guidance, or control necessary for that child's well-being for purposes of § 17a-112 (j) (3) (C). The court further found that the petitioner had established that the seven factors set forth in § 17a-112 (k) weighed in favor of terminating the respondent's parental rights and that doing so was in the children's best interests. On appeal, the respondent claimed, inter alia, that her right to due process was violated when the trial court

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

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denied her fourth motion for a continuance pending the conclusion of the federal criminal proceeding. *Held:*

1. The respondent was not deprived of her due process rights under the federal and state constitutions by virtue of the trial court's denial of her motion for a continuance of the termination proceeding:
 - a. The trial court correctly determined that it was not required to grant the respondent's motion for a continuance under the due process clause of the fourteenth amendment to the United States constitution: this court clarified that the specific analytical framework of the United States Supreme Court's "penalty" cases, in which that court concluded that certain penalties for remaining silent are severe enough to constitute compulsion to speak and violate the fifth amendment privilege against self-incrimination, governed this court's analysis; in the present case, the respondent did not suffer an automatic severe penalty, or even the penalty of an adverse inference, as a direct consequence of her decision not to testify at the termination proceeding, because the trial court's judgments terminating her parental rights were based exclusively on the petitioner's clear and convincing evidence that, with respect to both children, the respondent had failed to rehabilitate and that, with respect to I specifically, that child had been denied the care, guidance, or control necessary for her well-being, and the respondent was not prevented from presenting evidence in her own defense; moreover, the respondent did not cite to any case in which a court had concluded that, when the interests at stake in a civil proceeding are sufficiently important, such as in the respondent's termination proceeding, the frustration of an individual's desire to testify in his or her own defense as a result of the individual's choice to invoke the fifth amendment is a sufficiently severe penalty to constitute compulsion under the fifth amendment.
 - b. The respondent could not prevail on her claim that the trial court had violated her due process rights under the state constitution (art. I, §§ 8 and 10) when it denied her motion for a continuance; this court considered the factors set forth in *State v. Geisler* (222 Conn. 672) for construing state constitutional provisions and concluded that none of those factors supported the respondent's claim, as federal and state case law did not favor the respondent's position, the respondent had not explained why, under the specific circumstances of this case, the text of article first, §§ 8 and 10, warranted a broader reading, it was against public policy to allow children to remain in foster care for lengthy periods without achieving permanency, and, although the fundamental right of parents to raise their children had deep roots in Connecticut history and is entitled to heightened due process protections, it did not necessarily follow that the state constitution provided broader protections with respect to family integrity than the federal constitution.
2. The trial court did not abuse its discretion in denying the respondent's motion for a continuance: it was not unreasonable for that court to conclude that the interests of the children and the petitioner in having

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the matter resolved as soon as reasonably possible outweighed the respondent's interest in postponing the matter so that she could testify because, although granting the continuance would have allowed the respondent to testify in her own defense at a proceeding involving her fundamental liberty interest in parenting her children, that consideration had to be weighed against the countervailing facts that, at the time the respondent filed her motion, she had previously filed three motions for a continuance, which the trial court granted, the termination of parental rights trial already had been delayed for eighteen months, the children, who were then five and seven years old, had been in the petitioner's custody for more than three years and in a preadoptive foster home for more than two years, and the respondent sought an indefinite postponement, all of which impacted the children's important need for permanency; moreover, although the respondent contended that the children's needs were entitled to little or no weight because, at the time she filed her fourth motion for a continuance, the children were thriving in their foster home and presumably would have continued to do so during the period that the trial was delayed, a sense of permanency is crucial to a child's welfare, and delaying the trial indefinitely would have resulted in keeping the respondent's very young children in a state of limbo indefinitely; furthermore, it was not unreasonable for the court to consider the seriousness of the neglect allegations and the weight of the evidence supporting them in determining whether to grant the motion for a continuance, and, in the absence of any offer of proof as to the substance of the testimony that the respondent would have presented if a continuance were granted or any claim that her testimony could affect the outcome of the termination proceeding, the trial court was not required to grant the motion.

3. This court declined to exercise its supervisory authority over the administration of justice to require trial courts to grant a respondent's motion for a continuance of a termination of parental rights proceeding whenever the respondent has invoked his or her fifth amendment privilege against self-incrimination in connection with a related criminal proceeding, as such a rule was not required to ensure the fairness and integrity of the judicial system and would deprive trial courts of their ability to consider the fairness of their rulings by eliminating their discretion.

Argued December 13, 2021—officially released March 31, 2022**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior

** March 31, 2022, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

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Court in the judicial district of Middlesex, Juvenile Matters at Middletown, where the court, *Sanchez-Figueroa, J.*, denied the respondent mother's motion for a continuance; thereafter, the case was tried to the court, *Sanchez-Figueroa, J.*; judgments terminating the respondents' parental rights, from which the respondent mother appealed. *Affirmed.*

Dana M. Hrelac, with whom were *Johanna S. Katz* and, on the brief, *Michael S. Taylor*, for the appellant (respondent mother).

Evan O'Roark, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Frank LaMonaca, Nisa Khan*, and *Jillian Hira*, assistant attorneys general, for the appellee (petitioner).

Opinion

KELLER, J. The primary issue before us in this appeal is whether the trial court violated the constitutional due process rights of the respondent mother, Amber F.,¹ when it denied her motion for a continuance of the trial on petitions to terminate her parental rights pending the conclusion of a related criminal proceeding on the ground that she could not testify in her own defense in the termination proceeding without jeopardizing her fifth amendment right to avoid incriminating herself in the criminal proceeding. The petitioner, the Commissioner of Children and Families, filed these petitions to terminate the respondent's parental rights with respect to her children, Ivory W. and Darrick B., after the respondent admitted that she had sent explicitly sexual photographs of Ivory W. to several persons, including an individual who was a registered sex offender. The respondent was indicted in federal court on charges of distributing child pornography on the basis of the same conduct. During the proceedings on the petitions,

¹ We hereinafter refer to Amber F. as the respondent.

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the respondent filed four motions for a continuance of the trial, contending, among other things, that a continuance was required so that she could testify in defense of the termination of her parental rights without jeopardizing her fifth amendment right to avoid incriminating herself in the criminal proceeding. The trial court granted the first three motions, but denied the last one. After the trial, the trial court rendered judgments terminating the respondent's parental rights.² This appeal followed.³

The respondent claims that the trial court's denial of her motion for a continuance violated her due process right to present a defense to the termination of her parental rights under the federal and state constitutions. The respondent further claims that, if this court determines that the denial of her motion for a continuance was constitutional, the denial was an abuse of discretion. Finally, the respondent claims that, if this court determines that the denial of her motion for a continuance was neither unconstitutional nor an abuse of discretion, this court should exercise its supervisory authority over the administration of justice to direct our trial courts to grant motions for a continuance of termination of parental rights proceedings whenever related criminal proceedings against the parent are pending. We reject the respondent's claims and affirm the judgments of the trial court.

The record reveals the following relevant procedural history and facts. On October 2, 2017, the Department of Children and Families (department) received a referral from the Hartford Police Department indicating that it

² The trial court also terminated the parental rights of Ivory's father, David W., and Darrick's father, Darrick B. Neither father has participated in this appeal.

³ The respondent 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.

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had received a report from an individual that he had received sexually explicit photographs of a child from the respondent. The individual reported that he had met the respondent on a dating website and that they had been having explicit sexual conversations with each other for several days. On this particular day, the respondent had sent him photographs of her breasts and her vagina. In addition, the respondent had sent him photographs showing the vagina of a child, later determined to be Ivory, who was then four years old. The individual reported the matter because he was a registered sex offender and was worried that he might be criminally implicated.

On October 3, 2017, a social worker and a social work investigator employed by the department and several Meriden police detectives went to the respondent's residence in response to the referral. The respondent admitted to them that she had sent photographs of Ivory's vagina to multiple persons by cell phone. The respondent also indicated that she had photographs of then two year old Darrick's genitalia on her cell phone but denied sharing them with anyone.

During the October 3, 2017 visit, the social worker observed that the respondent's residence was extremely dirty and unkempt. The floors were dirty, and there were overflowing garbage bags on the kitchen floor, causing a strong odor to permeate the apartment, and bugs crawling on the countertops, walls, and ceiling. The children also were dirty and had a strong odor.

On October 12, 2017, the petitioner filed *ex parte* motions for orders of temporary custody and neglect petitions on behalf of Ivory and Darrick, which the trial court granted. On October 20, 2017, the court sustained the orders of temporary custody at a hearing at which the respondent appeared and ordered preliminary spe-

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cific steps to be taken by the respondent to regain custody of her children.

On January 23, 2018, the court adjudicated the children neglected and committed them to the care and custody of the petitioner. The respondent entered a plea of *nolo contendere* and did not contest the commitment. The court also ordered final specific steps⁴ and a psychological examination of the respondent.

After the initial removal of the children, the department referred the respondent to a licensed clinical social worker for individual therapy. The respondent was discharged within two weeks for failing to comply with the therapist's cancellation policy. When the department subsequently referred the respondent to another service provider for individual therapy and a psychosexual evaluation in accordance with the court-ordered specific steps, the respondent again missed numerous appointments and was unable to focus during the sessions that she did attend. She was therefore discharged from that treatment program.

On August 30, 2018, the trial court conducted a hearing on the petitioner's proposal for a permanency plan of termination of parental rights and adoption for the children.⁵ Although the respondent did not agree with the plan, she indicated through counsel that she was reserving her defenses for trial. After reviewing the department's social study in support of the plan, the

⁴ Among other things, the trial court ordered the respondent to keep appointments with and to cooperate with the department, to participate in counseling and to make progress toward treatment goals, including learning to make better choices for herself and her children, to cooperate with a specified service provider for parenting counseling, to cooperate with court-ordered evaluations or testing, and to sign releases allowing the department to communicate with service providers to check on her attendance, cooperation, and progress toward identified goals.

⁵ The petitioner was required, pursuant to General Statutes § 46b-129 (k) (1) (A), to submit a permanency plan for the children nine months after their removal from the respondent's custody.

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court, on that same date, approved the permanency plan, finding that it would be in the best interests of the children. On December 7, 2018, the children were placed in a preadoptive foster home.

Later that month, on December 12, 2018, the petitioner filed petitions seeking to terminate the respondent's parental rights as to Ivory and Darrick. Both petitions alleged that the children had been found to have been neglected, abused, or uncared for in a prior proceeding and that the respondent had failed to achieve such degree of personal rehabilitation as would encourage the belief that, within a reasonable time, she could assume a responsible position in the life of her children. See General Statutes § 17a-112 (j) (3) (B) (i). The petition regarding Ivory also alleged that she had been denied the care, guidance, or control necessary for her physical, educational, moral, or emotional well-being by reason of the respondent's acts of commission, including sexual exploitation.⁶ See General Statutes § 17a-112 (j) (3) (C). The trial court scheduled a trial on the termination petitions for May, 2019. Meanwhile, in December, 2018, the respondent was indicted in federal court on charges of engaging in sexually explicit conduct for the purposes of producing sexually explicit images of children that were then transmitted to others in violation of 18 U.S.C. § 2251 (a)⁷ and distributing child pornography in violation of 18 U.S.C. § 2252A (a) (2).⁸

⁶ Pursuant to General Statutes § 46b-129 (k) (6), the petitioner was required to file a petition for termination of parental rights not later than sixty days after the trial court approved the permanency plan of adoption.

⁷ Section 2251 (e) of title 18 of the 2018 edition of the United States Code provides in relevant part: "Any individual who violates, or attempts or conspires to violate, this section shall be fined under this title and imprisoned not less than [fifteen] years nor more than [thirty] years"

⁸ Section 2252A (b) (1) of title 18 of the 2018 edition of the United States Code provides in relevant part: "Whoever violates, or attempts or conspires to violate, paragraph (1), (2), (3), (4), or (6) of subsection (a) shall be fined under this title and imprisoned not less than [five] years and not more than [twenty] years"

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Three days before the scheduled trial date, the respondent's counsel filed a motion to withdraw and a motion for a continuance to allow the court to appoint new counsel. The court granted both motions. Two months later, on July 18, 2019, the trial court again approved the permanency plan of termination of parental rights and adoption on the basis of an updated social study from the department.⁹ The court rescheduled trial for August, 2019.

One week before the August, 2019 trial date, the respondent filed a second motion for a continuance in which she requested that the court reschedule the trial to a date after her criminal trial, which, according to the respondent, was scheduled for November, 2019. The respondent contended that the continuance was necessary so that she could testify in her own defense at the termination proceeding, as required by due process, while preserving her fifth amendment privilege against self-incrimination in connection with the criminal proceeding. The petitioner objected to the motion on the ground that it was unclear when the criminal trial would take place and that it would be detrimental to the children, who had been in foster care nearly two years, to delay a final disposition. The children's attorney also objected to the motion for a continuance out of concern that the children required permanency. The trial court initially denied the motion but, upon the respondent's motion for reconsideration, reversed itself, granted the motion, and rescheduled the trial for December 10, 2019.

On December 6, 2019, the respondent moved for a third continuance on the same ground as that asserted in the previous motion. The trial court granted the motion but indicated that it would not entertain any

⁹ Pursuant to General Statutes § 46b-129 (k) (1) (A), the petitioner must file a motion for review of a permanency plan nine months after the initial plan has been approved.

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further continuance requests. The court ultimately scheduled the trial for June 9, 2020. The trial was postponed, however, because of the COVID-19 pandemic, as was the criminal proceeding in federal court, and the trial court scheduled a new trial date of January 5, 2021. During that delay, the court approved for a third time the permanency plan of termination of parental rights and adoption for the children. The children's attorney indicated that she agreed with the permanency plan and that she thought that it was in the best interests of the children, noting in her court filing that the children were "comfortable and happy" in their foster home, they had become part of the family, and they wanted "the case to be closed so people do not have to ask them questions all the time." She also noted that the "trial ha[d] been scheduled/pending for about [one] year, and it [was] in the best interest[s] of the children to schedule the trial as soon as possible."

On December 30, 2020, the respondent filed a fourth motion for continuance in which she contended that her federal criminal trial had been continued indefinitely due to the COVID-19 pandemic, that she was prohibited from using any computer devices, making her ability to participate in a remote trial extremely difficult, and that her counsel required additional time to ensure that the respondent could participate. The trial court denied the respondent's motion and proceeded with the trial. By that time, the children had been in the petitioner's custody for more than three years and in the preadoptive foster home for more than two years.

At the outset of the trial on January 5, 2021, the trial court advised the respondent of her rights, including her right to testify "to tell [her] side of the story to the court" The court warned the respondent, however, that, if she chose not to testify, the court could draw an adverse inference against her. The petitioner's

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counsel then indicated that he did not intend to request an adverse inference if the respondent declined to testify, and the court ultimately did not draw any adverse inference against the respondent due to her silence.

After the advisement, the respondent's counsel renewed the respondent's objection to proceeding with the trial while her criminal case was pending. Counsel reiterated that doing so would either violate the respondent's due process rights if she declined to testify in order to preserve her fifth amendment rights in the criminal proceeding or jeopardize her fifth amendment rights if she chose to testify. The trial court noted the objection and proceeded with the trial.

At trial, a department investigator testified that the respondent had confirmed to the investigator, at the time that the children were removed from the respondent's custody, that she had distributed pornographic photographs of Ivory. Other evidence established that the respondent admitted to federal agents and Meriden police detectives that she had taken sexually explicit photographs of Ivory and sent them to multiple men over the Internet. The petitioner also presented evidence that the respondent had failed to comply with her specific steps, including the requirement that she sign releases allowing the department to communicate with service providers to monitor her attendance, cooperation, and progress toward identified goals. Specifically, the respondent refused to sign a release allowing the department to communicate with a therapist with whom she claimed to have been in treatment since 2018. In addition, the petitioner presented evidence that the children remained in the preadoptive foster home where they had been placed at the end of 2018 and that they were doing well there. The respondent did not testify at trial, but she presented a stipulation of fact specifying the criminal charges that were pending against her in federal court and a handwritten statement in which she

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stated that she loved her children.¹⁰ She called no witnesses.

In its memorandum of decision, the trial court found with respect to both termination petitions that the petitioner had proved by clear and convincing evidence that the respondent had failed to rehabilitate for purposes of § 17a-112 (j) (3) (B) (i). In addition, with respect to the termination petition related to Ivory, the court found that, as the result of the respondent's conduct in distributing sexually explicit photographs of Ivory, the child had been denied the care, guidance, or control necessary for her well-being for purposes of § 17a-112 (j) (3) (C). The court further found that the petitioner had established that the seven factors set forth in § 17a-112 (k)¹¹ weighed in favor of terminating the respondent's

¹⁰ In the written statement, the respondent did not address her responsibility for the conduct that was the subject of the pending criminal charges.

¹¹ General Statutes § 17a-112 (k) provides: "Except in the case where termination of parental rights is based on consent, in determining whether to terminate parental rights under this section, the court shall consider and shall make written findings regarding: (1) The timeliness, nature and extent of services offered, provided and made available to the parent and the child by an agency to facilitate the reunion of the child with the parent; (2) whether the Department of Children and Families has made reasonable efforts to reunite the family pursuant to the federal Adoption and Safe Families Act of 1997, as amended from time to time; (3) the terms of any applicable court order entered into and agreed upon by any individual or agency and the parent, and the extent to which all parties have fulfilled their obligations under such order; (4) the feelings and emotional ties of the child with respect to the child's parents, any guardian of such child's person and any person who has exercised physical care, custody or control of the child for at least one year and with whom the child has developed significant emotional ties; (5) the age of the child; (6) the efforts the parent has made to adjust such parent's circumstances, conduct, or conditions to make it in the best interest of the child to return such child home in the foreseeable future, including, but not limited to, (A) the extent to which the parent has maintained contact with the child as part of an effort to reunite the child with the parent, provided the court may give weight to incidental visitations, communications or contributions, and (B) the maintenance of regular contact or communication with the guardian or other custodian of the child; and (7) the extent to which a parent has been prevented from maintaining a meaningful relationship with the child by the unreasonable act or conduct of the other parent of the child, or the

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parental rights and that doing so was in the best interests of the children. Accordingly, the court granted the petitions for termination of the respondent's parental rights.

Several weeks after the trial court issued its memorandum of decision, the respondent pleaded guilty in federal court to charges of distributing child pornography in violation of 18 U.S.C. § 2252A (a) (2). After the plea, she was remanded to federal detention, and, at sentencing, she faced a "binding incarceration range" of sixty to ninety months. This appeal followed.

The respondent claims that (1) the trial court deprived her of her due process right to a fair trial under both the federal and state constitutions when it denied her motion for a continuance of the termination of parental rights proceeding until the conclusion of the criminal proceeding, (2) if this court determines that the trial court did not violate her constitutional rights, the trial court abused its discretion when it denied the motion for a continuance, and (3) if this court determines that the trial court neither deprived her of her due process rights nor abused its discretion, this court should exercise its supervisory authority to require our trial courts to grant motions for a continuance in termination of parental rights proceedings when related criminal charges against the parent are pending. We reject all of these claims and affirm the judgments of the trial court.

I

We first address the respondent's claim that the trial court deprived her of her due process right to a fair trial under the federal and state constitutions when it denied her motion for a continuance of the termination of parental rights proceeding until the conclusion of the

unreasonable act of any other person or by the economic circumstances of the parent."

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federal criminal proceeding. Specifically, the respondent contends that the denial of her motion for a continuance unconstitutionally “precluded [her] from presenting a defense to the termination petition[s] because she was forced to exercise her [fifth amendment privilege against self-incrimination] in light of the concurrently pending criminal charges.” We conclude that the respondent was not deprived of her due process rights under either the federal or the state constitution.

A

We begin with the respondent’s claim under the federal constitution. This claim presents a question of law over which our review is plenary. See, e.g., *State v. Collymore*, 334 Conn. 431, 477, 223 A.3d 1, cert. denied, U.S. , 141 S. Ct. 433, 208 L. Ed. 2d 129 (2020).

At the outset, we review the governing constitutional principles. It is well established that “[t]he fifth amendment¹² privilege against self-incrimination not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, [when] the answers might incriminate him in future criminal proceedings.” (Footnote added; internal quotation marks omitted.) *In re Samantha C.*, 268 Conn. 614, 634, 847 A.2d 883 (2004). Although a defendant has the right to refuse to testify in a civil proceeding when doing so might be incriminatory, “[a] defendant has no absolute right not to be forced to choose between testifying in a civil matter and asserting his [f]ifth [a]mendment privilege.” *Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir.), cert.

¹² The fifth amendment privilege against self-incrimination is applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. See, e.g., *Malloy v. Hogan*, 378 U.S. 1, 6, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964).

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denied, 516 U.S. 827, 116 S. Ct. 94, 133 L. Ed. 2d 49 (1995); see also *McKune v. Lile*, 536 U.S. 24, 41, 122 S. Ct. 2017, 153 L. Ed. 2d 47 (2002) (“[a]lthough a defendant may have a right, even of constitutional dimensions, to follow whichever course he chooses, the [c]onstitution does not by that token always forbid requiring him to choose” (internal quotation marks omitted)); *Tyler v. Shenkman-Tyler*, 115 Conn. App. 521, 526–27, 973 A.2d 163 (“[s]o long as the defendant is neither forced to exercise nor prevented from exercising his right to testify, the right to present a defense is not burdened by the strategic choice or resulting adverse consequences” (internal quotation marks omitted)), cert. denied, 293 Conn. 920, 979 A.2d 493 (2009); *State v. Easton*, 111 Conn. App. 538, 543, 959 A.2d 1085 (2008) (“[t]he fact that the defendant had to make a difficult choice between [his fifth amendment right not to incriminate himself and his due process right to testify in his own defense] does not deprive him of due process”), cert. denied, 290 Conn. 916, 965 A.2d 555 (2009). Put another way, the fact that there may be adverse consequences when a defendant invokes the fifth amendment in a civil proceeding does not necessarily mean that the defendant is subject to unlawful compulsion for fifth amendment purposes. See *McKune v. Lile*, supra, 31, 45 (when inmate convicted of rape refused to sign admission of guilt form as condition of participating in sexual abuse treatment program on ground that doing so could lead to charges of perjury, resulting reduction of inmate’s privileges and his transfer to facility with poorer living conditions did not constitute compulsion for fifth amendment purposes); *Baxter v. Palmigiano*, 425 U.S. 308, 317–18, 96 S. Ct. 1551, 47 L. Ed. 2d 810 (1976) (when prison disciplinary board drew adverse inference from inmate’s invocation of fifth amendment rights at disciplinary proceeding, board’s action did not constitute “an invalid attempt by the [s]tate to compel

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testimony”). Accordingly, “the [c]onstitution . . . does not ordinarily require a stay of civil proceedings pending the outcome of criminal proceedings.” (Internal quotation marks omitted.) *Kashi v. Gratsos*, 790 F.2d 1050, 1057 (2d Cir. 1986); accord *Securities & Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375 (D.C. Cir.), cert. denied, 449 U.S. 993, 101 S. Ct. 529, 66 L. Ed. 2d 289 (1980); see also *United States Commodity Futures Trading Commission v. A.S. Templeton Group, Inc.*, 297 F. Supp. 2d 531, 534 (E.D.N.Y. 2003) (“[e]ven [when] there are parallel criminal and civil proceedings, a defendant [ordinarily] has no constitutional right to a stay pending the outcome of a related criminal case”); *State v. Easton*, supra, 111 Conn. App. 543 (trial court did not violate defendant’s due process rights by conducting probation and drug dependency hearings before defendant’s trial on related pending criminal charge).

There are limits, however, to the general rule that an individual constitutionally may be required to choose between accepting the consequences of testifying at a civil trial—namely, the potential for self-incrimination—and accepting the consequences of invoking his or her fifth amendment right to remain silent. The United States Supreme Court has held that “a [s]tate may not impose *substantial* penalties because a witness elects to exercise his [f]ifth [a]mendment right not to give incriminating testimony against himself.” (Emphasis added.) *Lefkowitz v. Cunningham*, 431 U.S. 801, 805, 97 S. Ct. 2132, 53 L. Ed. 2d 1 (1977); see also *In re Samantha C.*, supra, 268 Conn. 662 (“certain *severe* penalties may not be imposed as the cost of asserting one’s constitutional fifth amendment privilege to remain silent” (emphasis added)). Thus, “one cannot answer the question whether [a] person has been compelled to incriminate himself without first considering the sever-

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ity of the consequences.”¹³ *McKune v. Lile*, supra, 536 U.S. 44.

“[T]here have been several instances in which the [United States Supreme Court] has held that certain penalties, even those outside the criminal context, are severe enough to constitute compulsion to speak. See, e.g., *Lefkowitz v. Cunningham*, [supra, 431 U.S. 806] (scheme under which elected [political party] official who chose to remain silent at grand jury proceedings was automatically removed from office [and barred from holding office for five years] violated privilege against self-incrimination); *Lefkowitz v. Turley*, 414 U.S. 70, 82–83, 94 S. Ct. 316, 38 L. Ed. 2d 274 (1973) (scheme under which contractor who remained silent at grand jury proceeding was [automatically] disqualified from transacting with state violated privilege against self-incrimination); *Uniformed Sanitation Men Assn., Inc. v. Commissioner of Sanitation*, 392 U.S. 280, 284–85, 88 S. Ct. 1917, 20 L. Ed. 2d 1089 (1968) (scheme under which state workers’ refusal to sign waivers of immunity automatically resulted in termination of employment violated privilege against self-incrimination); *Gardner v. Broderick*, 392 U.S. 273, 279, 88 S. Ct. 1913, 20 L. Ed. 2d 1082 (1968) (same); *Spevack v. Klein*, 385 U.S. 511, 514, 87 S. Ct. 625, 17 L. Ed. 2d 574 (1967) (scheme under which attorney was disbarred for remaining silent [during disciplinary proceeding] violated privilege against self-incrimination); *Garrity v. New Jersey*, 385 U.S. 493, 497–98, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967) (police officers’ statements were compelled and, therefore, inadmissible against them because officers would have been [automatically] termi-

¹³ Although an individual who has been severely penalized for exercising the privilege against self-incrimination has not, in a literal sense, been compelled to speak, the cases addressing this issue treat the imposition of a severe penalty for exercising that privilege and being compelled to speak as equivalent for purposes of analyzing the constitutionality of the state action at issue.

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nated had they remained silent). These cases, also known as the penalty cases; *McKune v. Lile*, supra, 536 U.S. 50 (O'Connor, J., concurring); stand for the proposition that certain significant losses, even those financially oriented and noncriminal in nature, may nonetheless be severe enough to compel one to speak within the meaning of the fifth amendment." (Internal quotation marks omitted.) *In re Samantha C.*, supra, 268 Conn. 661–62.

In the present case, the respondent contends that the consequence that she incurred as the result of the trial court's denial of her motion for a continuance—namely, her inability to testify in her own defense at the termination of parental rights proceeding—was at least as severe a penalty as any of those at issue in the penalty cases. She points out that "[t]he rights to conceive and to raise one's children have been deemed essential, basic civil rights of man, and [r]ights far more precious . . . than property rights. It is cardinal with [the United States Supreme Court] that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder. The integrity of the family unit has found protection in the [d]ue [p]rocess [c]lause of the [f]ourteenth [a]mendment, the [e]qual [p]rotection [c]lause of the [f]ourteenth [a]mendment, and the [n]inth [a]mendment." (Internal quotation marks omitted.) *In re Juvenile Appeal (83-CD)*, 189 Conn. 276, 284, 455 A.2d 1313 (1983), quoting *Stanley v. Illinois*, 405 U.S. 645, 651, 92 S. Ct. 1208, 31 L. Ed. 2d 551 (1972). Moreover, "[t]he fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents or have lost temporary custody of their child to the [s]tate. . . . When the [s]tate moves to destroy weakened familial bonds, it must provide the parents

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with fundamentally fair procedures.” *Santosky v. Kramer*, 455 U.S. 745, 753–54, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982). The respondent contends that, because her fundamental constitutional right to raise her children is at least as important as any of the rights at issue in the penalty cases, the trial court’s denial of her motion for a continuance of the termination proceeding pending the conclusion of the criminal proceeding so that she could testify at the termination proceeding without incriminating herself was unconstitutional.

Before addressing the merits of the respondent’s claim, we pause to clarify the analytical framework that applies to it. The respondent frames her claim as implicating her due process right to present a defense and asks this court to apply the analysis developed in *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976), in which the United States Supreme Court “established a three part test to determine whether the actions of the court violated a party’s right to procedural due process.”¹⁴ *Foster v. Foster*, 84 Conn. App. 311, 319, 853 A.2d 588 (2004). We agree with the respondent that her claim implicates due process concerns as the “flip side” of the fifth amendment concerns implicated by compelled self-incrimination. See *Tyler v. Shenkman-Tyler*, supra, 115 Conn. App. 526 (applying due process analysis to defendant’s claim that his invocation of fifth amendment privilege prevented him from testifying at dissolution trial); see also *State v. Kirby*, 280 Conn.

¹⁴ “The three factors to be considered are (1) the private interest that will be affected by the state action, (2) the risk of an erroneous deprivation of such interest, given the existing procedures, and the value of any additional or alternate procedural safeguards, and (3) the government’s interest, including the fiscal and administrative burdens attendant to increased or substitute procedural requirements. . . . Due process analysis requires balancing the government’s interest in existing procedures against the risk of erroneous deprivation of a private interest inherent in those procedures.” (Citation omitted; internal quotation marks omitted.) *Foster v. Foster*, supra, 84 Conn. App. 319.

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361, 403, 908 A.2d 506 (2006) (“[a] defendant has a right under the compulsory process [clause of the sixth amendment] and due process [clause] to present [his] version of the facts as well as the prosecution’s to the jury so [that] it may decide where the truth lies” (internal quotation marks omitted)); *State v. Easton*, supra, 111 Conn. App. 541 (“The right to testify on one’s own behalf at a criminal trial has sources in several provisions of the [c]onstitution. It is one of the rights that are essential to due process of law in a fair adversary process.” (Internal quotation marks omitted.)). It is clear to us, however, that the dispositive issue before us is whether the consequences of the respondent’s invocation of her privilege against self-incrimination were sufficiently severe to constitute compulsion for purposes of the fifth amendment. See *McKune v. Lile*, supra, 536 U.S. 44 (“one cannot answer the question whether [a] person has been compelled to incriminate himself without first considering the severity of the consequences”). In other words, if the respondent can establish that the consequence that she incurred for invoking the fifth amendment was as severe a penalty as those imposed in the penalty cases, she would thereby establish that the trial court’s denial of her motion for a continuance unconstitutionally deprived her of her due process right to testify in her own defense. Accordingly, we conclude that the specific analytical framework of the penalty cases governs our analysis, rather than the more general procedural due process standard set forth in *Mathews v. Eldridge*, supra, 424 U.S. 335.

In addressing the question of whether the consequences of the respondent’s invocation of the fifth amendment at the termination proceeding were sufficiently severe that the trial court was constitutionally required to grant her motion for a continuance pending the resolution of the criminal proceeding, we do not write on a blank slate. In *In re Clark K.*, 70 Conn. App.

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665, 799 A.2d 1099, cert. denied, 261 Conn. 925, 806 A.2d 1059 (2002), the Appellate Court addressed the respondent's claim that the trial court should not have proceeded with the termination of parental rights hearing while related criminal charges were pending because her invocation of the fifth amendment "prevented her from fully explaining her actions" *Id.*, 673. The Appellate Court rejected this claim, concluding, in a somewhat cursory opinion, that, having chosen to remain silent at the termination of parental rights proceeding, the respondent could not then "complain that there was not a full and fair hearing based on the premise that she, herself, did not tell her side of the story." *Id.*, 674.

In *In re Samantha C.*, *supra*, 268 Conn. 614, this court considered the respondents' claim that the trial court had improperly drawn an adverse inference from their refusal to testify at the termination of parental rights proceeding pursuant to Practice Book (2001) § 34-1 (f), which provided in relevant part that "[n]o parent . . . shall be compelled to testify [at a termination of parental rights proceeding] if the testimony might tend . . . to establish the validity of the facts alleged in the petition."¹⁵ See *id.*, 633–34. The respondents contended that, "because the fifth amendment forbids an adverse inference to be drawn against a criminal defendant for electing not to testify, [Practice Book (2001)] § 34-1 (f)

¹⁵ Practice Book (2001) § 34-1 (f) "was [adopted] in order to implement [General Statutes] § 46b-137 (b) [now § 46b-137 (d)]" *In re Samantha C.* *supra*, 268 Conn. 647. General Statutes (Rev. to 2003) § 46b-137 (b) provides: "Any confession, admission or statement, written or oral, made by the parent or parents or guardian of the child or youth after the filing of a petition alleging such child or youth to be neglected, uncared-for or dependent, shall be inadmissible in any proceeding held upon such petition against the person making such admission or statement unless such person shall have been advised of his right to retain counsel, and that if he is unable to afford counsel, counsel will be appointed to represent him, that he has a right to refuse to make any statement and that any statements he makes may be introduced in evidence against him."

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similarly forbade an adverse inference to be drawn” Id., 657. Addressing the respondents’ claim that the drawing of an adverse inference constituted compulsion, this court observed that termination of parental rights decrees do not fit neatly into either the category of cases in which courts have held that it is not unconstitutional to force an individual to choose between invoking his fifth amendment right or testifying at a civil proceeding or the category of penalty cases in which courts have held that, when the consequences of invoking the fifth amendment at a civil proceeding are sufficiently severe, they constitute unconstitutional compulsion. See id., 662. On the one hand, this court observed that, unlike the consequences at issue in the penalty cases, “termination of parental rights proceedings are not designed to *punish* parents, but to *protect* children.” (Emphasis in original.) Id., 662–63. On the other hand, this court recognized that “the penalty that necessarily comes with a termination decree is arguably as severe as the penalties at issue in the penalty cases, for instance, the loss of one’s employment.” (Internal quotation marks omitted.) Id., 663. This court concluded that, “[u]nder the [United States] Supreme Court’s precedent . . . the respondents arguably might have had a right to be free from adverse inferences had they asserted their right not to testify *under the fifth amendment*.” (Emphasis in original.) Id. Because the respondents had not done so, but had relied only “on a rule of practice derived from our state’s already prophylactic body of juvenile law,” this court did not answer the question of whether the respondents’ constitutional rights would have been violated if they had invoked the fifth amendment at trial. Id., 663–64.

In the present case, the respondent contends that *In re Samantha C.* supports the proposition that, when a respondent in a termination of parental rights proceeding *has* invoked her fifth amendment right not to testify

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at trial—as the respondent here did—courts should find that the consequences of the respondent’s choice are sufficiently severe to amount to unconstitutional compulsion under the penalty cases. She further contends that *In re Clark K.* was wrongly decided because “[i]t is flatly at odds” with both the penalty cases and *In re Samantha C.* We are not persuaded.

Although this court in *In re Samantha C.* acknowledged the compelling “interest in remaining the parent of one’s children”; *In re Samantha C.*, supra, 268 Conn. 663; we also observed in dictum that “[t]hat does not necessarily mean . . . that suffering an adverse inference in a termination proceeding is . . . unconstitutional under the penalty cases, because those cases involved an *automatic, direct penalty* resulting from the assertion of the constitutional privilege against self-incrimination; whereas . . . the penalty of an adverse inference merely added to the weighing process. Put another way, the adverse inference . . . was one of many factors considered by the trier of fact; in the penalty cases, however, the assertion of the fifth amendment privilege was the only factor that led directly to the penalty.” (Emphasis added.) *Id.*, 663 n.45; see also *Baxter v. Palmigiano*, supra, 425 U.S. 317–18 (“It is . . . undisputed that an inmate’s silence in and of itself is insufficient to support an adverse decision by the [d]isciplinary [b]oard. In this respect, this case is very different from the circumstances before the [c]ourt in the [penalty cases], [in which] refusal to submit to interrogation and to waive the [f]ifth [a]mendment privilege, standing alone and without regard to the other evidence, resulted in loss of employment or opportunity to contract with the [s]tate.”); *Tyler v. Shenkman-Tyler*, supra, 115 Conn. App. 530 n.5 (trial court’s denial of motion for continuance of dissolution proceeding pending outcome of criminal proceeding on charges of arson and reckless endangerment arising from destruction by

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fire of vacation home owned by defendant's wife did not violate due process when "the defendant's blanket refusal to testify at the dissolution trial did not *automatically* result in his forfeiting the outcome of [that] proceeding" (emphasis added)).

In the present case, not only did the respondent not suffer an automatic severe penalty—the termination of her parental rights—as a direct consequence of her refusal to testify, she did not even suffer the penalty of an adverse inference.¹⁶ Rather, the trial court's judgments terminating the respondent's parental rights were based exclusively on the petitioner's clear and convincing evidence that, with respect to both children, the respondent had failed to rehabilitate and that, as the result of the respondent's conduct in distributing sexually explicit photographs of Ivory, the child had been denied the care, guidance, or control necessary for her well-being. Moreover, the respondent was not prevented from presenting evidence in her own defense and, in fact, did so, albeit somewhat marginally. The only penalty that the respondent suffered as the result of her choice to invoke her fifth amendment rights was her inability to testify in her own defense. Although the respondent was undoubtedly confronted with a difficult choice between invoking her fifth amendment rights and exercising her due process right to testify in her own defense, she has not cited a single case in which a court has concluded that, when the interests at stake in a civil proceeding are sufficiently important, the frustration of an individual's desire to testify in his or her own defense as the result of the individual's choice to invoke the fifth amendment, *in and of itself*, is a sufficiently severe penalty to constitute compulsion

¹⁶ Accordingly, we need not decide whether the trial court would have violated the respondent's constitutional rights if it had drawn an adverse inference.

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under the fifth amendment.¹⁷ Indeed, several of our sister states have held to the contrary. See *Ex parte K.G.*, Docket Nos. 2200547, 2200548, 2200549, 2200550, 2200551, 2200552 and 2200553, 2021 WL 2878696, *9 (Ala. Civ. App. July 9, 2021) (rejecting claim that trial court violated mother’s fifth amendment rights when it denied her motion to stay of termination of parental rights proceeding pending conclusion of related criminal proceedings); *Burkett v. Arkansas Dept. of Human Services*, 507 S.W.3d 530, 534 (Ark. App. 2016) (rejecting claim that trial court violated father’s fifth amendment rights when it denied his motion to stay termination of parental rights proceeding pending conclusion of related criminal proceedings); *In re D.P.*, 327 Ill. App. 3d 153, 160–61, 763 N.E.2d 351 (2001) (rejecting claim that trial court violated father’s fifth amendment rights when it denied his motion for continuance of termination of wardship proceeding pending resolution of related criminal proceeding), appeal denied, 198 Ill. 2d 615, 770 N.E.2d 219 (2002); *In re R.B.*, 832 N.W.2d 375, 379 (Iowa 2013) (rejecting claim that trial court violated father’s fifth amendment rights when it denied his motion for continuance of termination of parental rights proceeding pending conclusion of related criminal proceeding when state did not “insist on a course of action that would interfere with the father’s right against self-incrimination” and termination of parental rights was supported by ample evidence); *In re C.L.R.*, 211 Mont. 381, 387, 685 P.2d 926 (1984) (rejecting claim that trial court violated father’s fifth amendment rights when it

¹⁷ The respondent cites a number of state cases holding that, under the federal constitution, a trial court cannot automatically terminate an individual’s parental rights exclusively on the basis of the individual’s refusal to testify at the termination of parental rights proceeding on fifth amendment grounds. These cases, which we discuss more fully in part I B of this opinion, are distinguishable because the trial court in the present case did not rely on the respondent’s failure to testify to support its conclusion that the respondent’s parental rights should be terminated.

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denied his motion for stay of termination of parental rights proceeding pending conclusion of related criminal proceeding).

These cases find support in the decision of the United States Supreme Court in *McGautha v. California*, 402 U.S. 183, 91 S. Ct. 1454, 28 L. Ed. 2d 711 (1971), in which the defendant contended that the due process clause of the fourteenth amendment required the state of Ohio to bifurcate his capital felony trial into a guilt phase and a punishment phase. *Id.*, 210–11. Specifically, the defendant contended that, under the “single-trial procedure, he could remain silent on the issue of guilt only at the cost of surrendering any chance to plead his case on the issue of punishment.” *Id.*, 211. The United States Supreme Court acknowledged that “[i]t is undeniably hard to require a defendant on trial for his life and desirous of testifying on the issue of punishment to make nice calculations of the effect of his testimony on the jury’s determination of guilt.” *Id.*, 214. The court observed, however, that the defendant had not been precluded at trial from presenting evidence relevant to the issue of sentencing. *Id.*, 219. The court then stated that, “[a]ssuming that in this case there was relevant information solely within [the defendant’s] knowledge, we do not think the [c]onstitution forbids a requirement that such evidence be available to the jury on all issues to which it is relevant or not at all.” *Id.*, 220. Accordingly, the court rejected the defendant’s claim and concluded that it did not violate due process to require the defendant to choose between (1) testifying in his own defense on the issue of whether his crime warranted the imposition of the death penalty and waiving his fifth amendment right on the issue of guilt, and (2) invoking the fifth amendment to avoid incriminating himself on the issue of guilt and waiving his right to testify on the issue of whether the death penalty was warranted. *Id.*

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The inability to testify in one's own defense on the question of whether the death penalty is warranted is at least as severe a consequence of invoking the fifth amendment as the inability to testify in one's own defense on the issue of whether one's parental rights should be terminated. We therefore reject the respondent's claim that her inability to testify at the termination of parental rights proceeding was a sufficiently severe consequence of invoking her fifth amendment right to constitute compulsion. Accordingly, we conclude that the trial court correctly determined that it was not required to grant her motion for a continuance of the termination proceeding under the due process clause of the fourteenth amendment to the United States constitution.

B

We next address the respondent's claim that the trial court violated the due process provisions of the state constitution; see Conn. Const. art. I, §§ 8,¹⁸ and 10,¹⁹ when it denied her motion for a continuance of the termination of parental rights proceeding pending the conclusion of the criminal proceeding in federal court.²⁰ We disagree.

¹⁸ Article first, § 8, of the Connecticut constitution provides in relevant part: "In all criminal prosecutions, the accused shall have a right to be heard by himself and by counsel No person shall be compelled to give evidence against himself, nor be deprived of life, liberty or property without due process of law"

¹⁹ Article first, § 10, of the Connecticut constitution provides: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

²⁰ The respondent concedes that she did not raise this claim in the trial court and seeks review pursuant to *State v. Golding*, 213 Conn. 233, 239–40, 567 A.2d 823 (1989), as modified by *In re Yasiel R.*, 317 Conn. 773, 781, 120 A.3d 1188 (2015). "Under *Golding*, it is well settled that a defendant may prevail on an unpreserved claim when: '(1) the record is adequate to review the alleged claim of error; (2) the claim is of constitutional magnitude alleging the violation of a fundamental right; (3) the alleged constitutional violation . . . exists and . . . deprived the defendant of a fair trial; and (4) if subject to harmless error analysis, the state has failed to demonstrate

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It is well established that “federal constitutional . . . law establishes a minimum national standard for the exercise of individual rights and does not inhibit state governments from affording higher levels of protection for such rights.” (Internal quotation marks omitted.) *State v. Lockhart*, 298 Conn. 537, 546, 4 A.3d 1176 (2010). When the claimed state constitutional right “is absent from the plain text of our constitution, we must employ [t]he analytical framework by which we determine whether, in any given instance, our state constitution affords broader protection to our citizens than the federal constitutional minimum” (Internal quotation marks omitted.) *Id.*

“In *State v. Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), we enumerated the following six factors to be considered in construing the state constitution: (1) persuasive relevant federal precedents; (2) the text of the operative constitutional provisions; (3) historical insights into the intent of our constitutional forebears; (4) related Connecticut precedents; (5) persuasive precedents of other state courts; and (6) contemporary understandings of applicable economic and sociological norms, or as otherwise described, relevant public policies. . . .

“The *Geisler* factors serve a dual purpose: they encourage the raising of state constitutional issues in a manner to which the opposing party . . . can respond; and they encourage a principled development of our state constitutional jurisprudence. Although in *Geisler* we compartmentalized the factors that should be considered in order to stress that a systematic analysis is required, we recognize that they may be inextricably interwoven.

harmlessness of the alleged constitutional violation beyond a reasonable doubt.’ . . . *State v. Golding*, [supra, 239–40]; see *In re Yasiel R.*, [supra, 781] (modifying third prong of *Golding*).” *State v. McClain*, 324 Conn. 802, 809 n.5, 155 A.3d 209 (2017). We conclude that the conditions for reviewability of the respondent’s claim under the state constitution are met.

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. . . [N]ot every *Geisler* factor is relevant in all cases. . . . Moreover, a proper *Geisler* analysis does not require us simply to tally and follow the decisions favoring one party’s state constitutional claim; a deeper review of those decisions’ underpinnings is required because we follow only persuasive decisions.” (Internal quotation marks omitted.) *Feehan v. Marcone*, 331 Conn. 436, 449, 204 A.3d 666, cert. denied, U.S. , 140 S. Ct. 144, 205 L. Ed. 2d 35 (2019).

Relying on the same federal cases that she relied on in support of her claim under the federal constitution, the respondent contends that the first *Geisler* factor weighs in her favor. The respondent does not explain why, however, if we conclude that the federal cases on which she relies do *not* support her claim under the federal constitution—which we do—the same cases should nonetheless support her claim under the state constitution. We further note that, to the extent that the respondent relies on the cases recognizing that parents have a fundamental liberty interest in family integrity under the federal constitution, it is well established that “[t]here are . . . limitations on . . . parental rights. Some of these limitations arise out of an appreciation of the state’s long recognized interests as *parens patriae*. See *Reno v. Flores*, 507 U.S. 292, 303–304, 113 S. Ct. 1439, 123 L. Ed. 2d 1 (1993); *Santosky v. Kramer*, [supra, 455 U.S. 766]; *Parham v. J. R.*, 442 U.S. 584, 605, 99 S. Ct. 2493, 61 L. Ed. 2d 101 (1979); *Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S. Ct. 438, 88 L. Ed. 645 (1944); see also General Statutes § 10-204a (requiring parents to immunize children prior to school enrollment); General Statutes §§ 14-100a [and] 14-272a (requiring child restraint in vehicles); General Statutes § 17a-81 (authorizing emergency medical treatment [when] parent withholds consent); General Statutes §§ 31-23 [and] 31-24 (restricting child labor from certain occupations or workplaces); General Statutes § 53-21a

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(prohibiting parents from leaving child unsupervised in public accommodation or vehicle). Furthermore, it is unquestionable that in the face of allegations that parents are unfit, the state may intrude [on] a family's integrity." *Roth v. Weston*, 259 Conn. 202, 224, 789 A.2d 431 (2002). These cases support the view that any intrusion on the respondent's parental rights resulting from her choice to invoke the fifth amendment does not rise to the level of a federal constitutional violation. We conclude, therefore, that this factor weighs in favor of the petitioner.

With respect to the second factor—the text of the state constitutional provisions—although the respondent rightly points out that we *can* construe the text of our state constitutional due process provisions as providing broader protections than the due process provision of the fourteenth amendment; see, e.g., *In Re Taijha H.-B.*, 333 Conn. 297, 327 n.20, 216 A.3d 601 (2019); she has not explained why, under the specific circumstances of the present case, the text of either article first, § 8, or article first, § 10, warrants a broader reading. To the extent that she contends that the open courts provision of article first, § 10, which has no analogue in the federal constitution, is *inherently* broader than the federal constitution, we are not persuaded by her conclusory argument that requiring her to choose between her fifth amendment privilege against self-incrimination and her due process right to testify at the termination proceeding denied her access to the courts within the meaning of that provision.²¹ We conclude,

²¹ "Article first, § 10, [of the Connecticut constitution] has been viewed as a limitation [on] the legislature's ability to abolish [common-law] and statutory rights that existed in 1818, when article first, § 10, was adopted, and which were incorporated in that provision by virtue of being established by law as rights the breach of which precipitates a recognized injury Therefore, [when] a right existed at common law or by statute in 1818 and became incorporated into the Connecticut constitution by the adoption of article first, § 10, the legislature may restrict or abolish such incorporated right only [when] it provides a reasonable alternative to the enforcement of such right." (Citations omitted; internal quotation marks omitted.) *Ecker*

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therefore, that this factor does not support the respondent's claim.

With respect to the third *Geisler* factor, the respondent contends that a review of the intent of our constitutional forebears reveals that they viewed the right to family integrity and the right to personal liberty as indistinguishable. In support of this contention, she points out that Connecticut's earliest extant compilation of statutes, Ludlow's Code of 1650, contained the following language in its introduction: "[N]o mans life shall bee taken away, no mans honor or good name shall bee stained, no mans person shall be arrested, restrained, banished, dismembered nor any way punished; *no man shall bee deprived of his wife or children*, no mans goods or estate shall bee taken away from him, nor any wayes indamaged, vnder colour of Law or countenance of Authority, vnless it bee by the vertue or equity of some express Law of the Country warranting the same, established by a Generall Courte, and sufficiently published, or in case of the defect of a Law in any perticular case, by the word of God.'" (Emphasis added.) W. Horton, *The Connecticut State Constitution* (2d Ed. 2012) p. 76.

We have no quarrel with the respondent's contention that the fundamental right of parents to raise their children has deep roots in Connecticut history and, like the right to personal liberty, is entitled to heightened due process protections under both the federal and state constitutions. It does not necessarily follow from these facts, however, that the state constitution provides *broader* protections to the right to family integrity than the federal constitution. We note that the United

v. *West Hartford*, 205 Conn. 219, 234, 530 A.2d 1056 (1987). Although we do not rule out the possibility that the provision may have other functions, we cannot conclude that it is implicated every time a litigant has a colorable claim that he or she was deprived of a procedural due process right during trial.

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States Supreme Court recognized almost 100 years ago that, for purposes of determining the scope of the due process protections provided by the federal constitution, the right “to marry, establish a home and bring up children” is one of the “privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.” *Meyer v. Nebraska*, 262 U.S. 390, 399, 43 S. Ct. 625, 67 L. Ed. 1042 (1923). The respondent has not provided a detailed historical review of the constitutional right to family integrity under either the federal or the state constitution, and conducting such a review is beyond the scope of this opinion. It is reasonable to assume, however, that the federal constitutional right to family integrity, like the right under the state constitution, can be traced to, among other sources, Connecticut’s Ludlow Code, and to earlier English common-law sources that are shared by the Ludlow Code. Thus, in the absence of any evidence to the contrary, it is reasonable to conclude that the right to family integrity under the federal constitution has roots that are as deep as the right under the state constitution.

Moreover, this court previously has recognized that “[t]he privilege against self-incrimination embodied in article first, § 8 [of the Connecticut constitution] has its genesis in the common law. Historically the privilege became part of the common law because of the experience with the oath *ex officio* as used originally in the ecclesiastical courts and later in the Court of the Star Chamber. 8 [J.] Wigmore, *Evidence* (McNaughton Rev. [1961]) § 2250. The seemingly innocuous oath which bound a person under examination to make a true answer to all questions that might be asked was used *to force him to destroy himself by his own testimony*. If his compelled testimony convicted him, he was punished. If he refused to take the oath, *he was subjected to torture*.” (Emphasis added.) *State v. Asherman*, 193

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Conn. 695, 711, 478 A.2d 227 (1984), cert. denied, 470 U.S. 1050, 105 S. Ct. 1749, 84 L. Ed. 2d 814 (1985). “The purpose of incorporating the privilege in our state constitution was to place this right as it was known at common law beyond legislative abolition.” *Id.*, 712. This history supports the view that the purpose of the portion of article first, § 8, providing that “[n]o person shall be compelled to give evidence against himself” was to prohibit the compulsion of self-incriminating punishment by an *immediate, severe, and automatic* punishment, not to prohibit the state from requiring an individual to make a choice between the right to remain silent and the right to testify. Accordingly, we conclude that the third *Geisler* factor does not support the conclusion that the due process provisions of the state constitution are more protective of a parent’s due process right to testify at proceedings to terminate parental rights than the due process provision of the fourteenth amendment.

With respect to the fourth *Geisler* factor—persuasive Connecticut precedents—the respondent essentially reiterates her contention under the second *Geisler* factor that our case law supports the notion that the due process provisions of the state constitution *can* provide broader protections than the due process clause of the fourteenth amendment. Having concluded that the second factor does not support the respondent’s claim, we reach the same conclusion here.

With respect to the fifth *Geisler* factor—persuasive precedents of other state courts—the respondent cites the following cases in support of her claim: *R.M. v. Elmore County Dept. of Human Resources*, 75 So. 3d 1195, 1205 (Ala. Civ. App. 2011) (juvenile court abused its discretion when it denied respondent parents’ motions to stay termination proceedings pending conclusion of related criminal proceedings); *In re A.W.*, 231 Ill. 2d 92, 108, 896 N.E.2d 316 (2008) (under federal constitution, “a juvenile court may not compel a parent

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to admit to a crime that could be used against him or her in a subsequent criminal proceeding by threatening the loss of parental rights”); *In re A.D.L.*, 133 Nev. 561, 568, 402 P.3d 1280 (2017) (trial court violated respondent mother’s federal due process rights when it terminated her parental rights solely because she had refused to admit intentionally abusing child); *In re Amanda W.*, 124 Ohio App. 3d 136, 141, 705 N.E.2d 724 (1997) (state violated parents’ rights under federal constitution when it terminated their parental rights for refusing to admit that father sexually abused daughter); *Dept. of Human Services v. K.L.R.*, 235 Or. App. 1, 10, 230 P.3d 49 (2010) (“requiring an admission of abuse as a condition of family reunification violates a parent’s [f]ifth [a]mendment rights”).

We conclude that none of these cases supports the proposition that requiring a parent to choose between testifying at a termination of parental rights proceeding and invoking his or her right not to testify to avoid self-incrimination is unconstitutional under either the federal or the state constitution. The respondent’s reliance on *R.M.* is misplaced because the court in that case did not conclude that the juvenile court had violated any provision of the Alabama constitution or the federal constitution when it denied the respondents’ motion to stay the termination proceedings but held only that the ruling was an abuse of discretion. See *R.M. v. Elmore County Dept. of Human Resources*, supra, 75 So. 3d 1205. Indeed, the Alabama Court of Civil Appeals expressly recognized that the federal constitution “does not require a stay of civil proceedings pending the outcome of potential criminal proceedings” (Internal quotation marks omitted.) *Id.*, 1201. In all of the other cases on which the respondent relies, the courts held that it violates the federal constitution to require a parent to choose between admitting to having abused a child or having his or her parental rights *automati-*

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cally terminated for failure to make such an admission. As we explained in part I A of this opinion, the trial court required the respondent to make no such choice in the present case but based its decision exclusively on the evidence presented by the respondent and by the petitioner. See *In re D.L.W.*, 413 S.W.3d 2, 9–10 (Mo. App. 2012) (finding no constitutional violation when termination of father’s parental rights was not based solely on his failure to admit to sexual abuse but was based on clear and convincing evidence that there were multiple grounds for termination). We conclude, therefore, that this *Geisler* factor does not support the respondent’s claim.

Finally, with respect to the sixth *Geisler* factor—contemporary understandings of applicable economic and sociological norms and relevant public policies—the respondent essentially reiterates her contention under the third *Geisler* factor that the right to family integrity has deep roots in this state. As we already explained, we do not agree that it follows from that fact that the protections afforded by the state constitution in this context are broader than those afforded by the federal constitution. Furthermore, it is against relevant public policy to allow children to remain in foster care for lengthy periods without achieving permanency. Permanency does not mean securing a stable foster placement but, rather, finding a child a permanent and stable home. “[No] child can grow emotionally while in limbo, never really belonging to anyone except on a temporary and ill-defined or partial basis.” (Internal quotation marks omitted.) *In re Davonta V.*, 285 Conn. 483, 495, 940 A.2d 733 (2008). To this end, General Statutes § 17a-111a *mandates* that, in the absence of the exceptional circumstances set forth in subsection (b) of that statute, the petitioner “shall file a petition to terminate parental right pursuant to section 17a-112 if (1) the child has been in the custody of the [petitioner] for at least fifteen

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consecutive months, or at least fifteen months during the twenty-two months, immediately preceding the filing of such petition”²² If the court approves a permanency plan of termination of parental rights and adoption, which first occurred in this case in August, 2018, General Statutes § 46b-129 (k) (6) requires the petitioner to file a petition for termination of parental rights “not later than sixty days after such approval if such petition has not previously been filed” In addition, General Statutes § 17a-111b (b) provides that a court, upon motion by the petitioner, may determine, by clear and convincing evidence, that the petitioner need not make reasonable efforts to reunify a parent with a child after removal if the parent has subjected the child to certain aggravated circumstances, including the infliction of sexual exploitation or severe physical abuse on the child or the deliberate, nonaccidental killing of the child.²³ If the court determines that reasonable efforts are not required, it must, within thirty days, approve a permanency plan for the child and, if the plan is adoption, require that the commissioner file a petition to terminate parental rights. Thus, as a matter of public policy, the statutory scheme contemplates the petitioner’s need to proceed quickly to achieve permanency for children who have been removed from their parents.²⁴ Indeed, although a parent’s fundamental lib-

²² This statutory requirement implements a federal regulation that, in turn, implements the federal Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115. See 45 C.F.R. § 1356.21 (i) (1) (i) and (2) (ii) (2020) (state agency must file petition to terminate the parental rights of parent “[w]hose child has been in foster care under the responsibility of the . . . agency for [fifteen] of the most recent [twenty-two] months” in absence of compelling reason for determining that filing petition would not be in best interests of child).

²³ Practice Book § 35a-3 permits the filing of coterminous neglect and termination of parental rights petitions in cases in which the severe nature of the neglect or abuse allegations warrant dispensing with reasonable efforts at reunification.

²⁴ See General Statutes § 45a-605, which provides: “(a) The provisions of sections 45a-603 to 45a-622, inclusive [governing, among other things, the appointment of a temporary guardian for the child when an application for

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erty interest in the care, custody, and management of his or her child has deep roots in this state's history, these statutory provisions demonstrate that, in more recent times, there has been a growing public recognition of the important interests of children who have been removed from their parents in achieving stability and permanency as quickly as reasonably possible.²⁵ A rule that the court is constitutionally required to await the outcome of any related criminal proceeding that may have been initiated against the parent before achieving permanency for the children would undermine this public policy.

Moreover, under such a rule, the termination of parental rights proceeding could be delayed whenever there was a *possibility* of related criminal charges. In some cases, the applicable statute of limitations could prolong the period of uncertainty for years. Similarly, an appeal from a criminal conviction or a petition for a writ of habeas corpus could mean years of delay. Such a delay would not only leave the children in limbo, in contravention of the statutory guidelines requiring the prompt resolution of such proceedings in the interests of permanency, but it could also mean that witnesses would become unavailable and memories would fade, thereby impeding the ability of the parties to fully and fairly present their case.

Because we conclude that none of the *Geisler* factors supports the respondent's claim that the trial court's

termination of parental rights has been made], shall be liberally construed in the best interests of any minor child affected by them, provided the requirements of such sections are otherwise satisfied.

"(b) All proceedings held under said sections shall, in the best interests of the minor child, be held without unreasonable delay."

²⁵ See, e.g., 115 Am. Jur. Trials 465, 477, § 3 (2010) ("the [federal Adoption Assistance and Child Welfare Act of 1980, Pub. L. No. 96-272, 94 Stat. 500] focused more on the preservation and reuniting of the family unit, with more deference to parental rights, whereas the [superseding federal Adoption and Safe Families Act of 1997, Pub. L. No. 105-89, 111 Stat. 2115] is more concerned with the rights of children to be healthy and to have a safe, permanent home").

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denial of her motion for a continuance of the termination of parental rights proceedings pending the conclusion of the criminal proceedings violated her due process rights under the Connecticut constitution, we reject this claim.

II

We next address the respondent's claim that the trial court abused its discretion when it denied her motion for a continuance of the termination of parental rights proceeding pending the conclusion of the criminal proceeding. We disagree.

"[W]hen there are parallel civil and criminal proceedings, the courts have discretion to stay discovery in a civil proceeding or to stay the action in its entirety if required by the interests of justice." *Tyler v. Shenkman-Tyler*, supra, 115 Conn. App. 528. "In determining whether to impose a stay . . . the court must balance the interests of the litigants, nonparties, the public and the court itself. . . . The factors a court should consider include: [1] the interests of the [nonmoving party] in an expeditious resolution and the prejudice to the [nonmoving party] in not proceeding; [2] the interests of and burdens on the [moving party]; [3] the convenience to the court in the management of its docket and in the efficient use of judicial resources; [4] the interests of other persons not parties to the civil litigation; and [5] the interests of the public in the pending civil and criminal actions." (Internal quotation marks omitted.) *Id.*, 529; see also *State v. Coney*, 266 Conn. 787, 802, 835 A.2d 977 (2003) (factors to be considered in determining whether continuance should be granted include "the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support of the request;

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[and] the [moving party's] personal responsibility for the timing of the request" (internal quotation marks omitted)).

"The determination of whether to grant a request for a continuance is within the discretion of the trial court, and will not be disturbed on appeal absent an abuse of discretion. . . . A reviewing court is bound by the principle that [e]very reasonable presumption in favor of the proper exercise of the trial court's discretion will be made. . . . To prove an abuse of discretion, an appellant must show that the trial court's denial of a request for a continuance was arbitrary." (Internal quotation marks omitted.) *State v. Coney*, supra, 266 Conn. 801.

With these principles in mind, we address the respondent's claim that the trial court abused its discretion when it denied her fourth motion for a continuance. The strongest consideration in the respondent's favor is that granting the continuance would have allowed her to testify in her own defense at a proceeding involving her fundamental liberty interest in parenting her children.

This consideration, however, must be weighed against the countervailing facts that, at the time that the respondent filed her fourth motion for a continuance on December 30, 2020, (1) the trial court already had granted three continuances and the trial had been delayed for more than eighteen months, (2) Ivory and Darrick, who were then, respectively, five and seven years old, had been in the petitioner's custody for more than three years and in a preadoptive foster home for more than two years, and (3) the criminal proceeding in federal court had been postponed indefinitely as the result of the COVID-19 pandemic. The trial court concluded, after granting the respondent's third motion for a continuance, that, at their young age, the two children

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“desperately need[ed] permanency.” See, e.g., *In re Davonta V.*, supra, 285 Conn. 494 (“[t]his court has noted consistently the importance of permanency in children’s lives” (internal quotation marks omitted)); see also *id.*, 495 (“[n]o child can grow emotionally while in limbo, never really belonging to anyone except on a temporary and ill-defined or partial basis” (internal quotation marks omitted)). We therefore conclude that it was not unreasonable for the trial court to conclude that the interests of the children and the petitioner in having the matter resolved as soon as reasonably possible outweighed the respondent’s interest in postponing the matter so that she could testify, especially when she was seeking a postponement for an indefinite period. See *Ex parte K.G.*, supra, 2021 WL 2878696, *7, *9 (trial court did not abuse its discretion when it denied mother’s motion to stay termination of parental rights proceeding pending conclusion of criminal proceedings when mother presented no evidence “regarding the length of time the mother [was] advocating that a permanency determination for the children be postponed”); *Burkett v. Arkansas Dept. of Human Services*, supra, 507 S.W.3d 534 (trial court did not abuse its discretion when it denied father’s motion to stay termination of parental rights proceeding pending conclusion of related criminal proceedings because “a child’s need for permanency and stability may override a parent’s request for additional time to improve the parent’s circumstances”); *In re Quinn*, 54 Mass. App. 117, 122, 763 N.E.2d 573 (2002) (trial court did not abuse its discretion when it denied request to continue “care and protection trial” pending resolution of related criminal proceeding because paramount interests of children in speedy resolution of case outweighed father’s interest in testifying in his own defense).

We also find it significant that, by the time the respondent filed her fourth motion for a continuance, the trial

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court already had determined that the children had been neglected and had committed them to the petitioner's custody, partly on the basis of undisputed evidence that the respondent had admitted to Meriden police detectives and others that she had distributed sexually explicit photographs of Ivory to multiple persons. We further note that the respondent did not make an offer of proof indicating the nature of her testimony that she wanted to present if the continuance were granted.²⁶

²⁶ The respondent contends that, although “[s]he may not have contested the allegations [at the temporary custody hearing or during the neglect adjudication] . . . she certainly did not admit them.” She further contends that she “objected to every permanency plan . . . and consistently reserved her defenses for trial—reservations that the petitioner failed to object to even once.” (Emphasis omitted.) The fact remains, however, that, to this day, the respondent has not explained how the testimony that she would have given if the trial court had granted her motion for a continuance would have affected the outcome of the termination proceeding. On appeal, the respondent indicates that she was precluded from testifying regarding the timing of her engagement with therapy on her own initiative, but she makes no claim that this testimony could have turned the tide in her favor; nor does she claim that she was the exclusive source of this information. Indeed, in response to the petitioner's claim that any constitutional error was harmless, she claims that the trial court was required to grant the continuance *regardless* of whether her testimony would have affected the result because denying her the opportunity to testify in her own defense was structural error. See *State v. Brown*, 279 Conn. 493, 505, 903 A.2d 169 (2006) (structural error exists when “the error renders a trial fundamentally unfair and is not susceptible to a harmless error analysis . . . because of [t]he inability to assess the effect of [the] impropriety on the . . . trial” (citations omitted; internal quotation marks omitted)). The respondent cites no authority, however, for the proposition that a trial court's exclusion of evidence in any form or for any reason can constitute structural error. Cf. *Ray v. Commonwealth*, 55 Va. App. 647, 652, 688 S.E.2d 879 (2010) (“the exclusion of a [witness'] testimony could never defy the ordinary harmless error analysis”); *id.* (“Proffering the expected testimony of an excluded witness requires only that the litigant disclose what he in good faith believes the witness would likely say. No [litigant] could reasonably expect a trial judge to make a decision to admit or exclude challenged testimony without receiving such a proffer. Nor can a [litigant] expect an appellate court to vacate a criminal conviction and order a new trial without knowing whether the excluded testimony was admissible, relevant, or in the least bit probative. A trial court's exclusion of a witness, even if erroneous, does not constitute structural error and thus does not suspend the longstanding requirement of a proffer.”).

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We conclude that it was not unreasonable for the trial court to consider the seriousness of the established neglect allegations and the weight of the evidence supporting those allegations when determining whether a continuance should be granted to allow the respondent to testify in her own defense. We emphasize that we do not suggest that the respondent's right to testify in her own defense was diminished by these circumstances. We conclude, however, that, in the absence of any offer of proof as to the substance of the testimony that the respondent would present if her motion for a continuance were granted or any claim that her testimony could affect the outcome of the termination proceeding, the trial court was not required to grant the motion. See *In re Lukas K.*, 300 Conn. 463, 473, 14 A.3d 990 (2011) (trial court properly denied request for continuance of termination of parental rights proceeding when respondent father "gave no indication to the trial court . . . by offer of proof or otherwise, as to the specific nature of the additional evidence that he would have presented or attempted to elicit from the petitioner's witnesses" if continuance were to be granted). We conclude, therefore, that the trial court did not abuse its discretion when it denied the respondent's fourth motion for a continuance of the termination of parental rights proceeding pending the conclusion of the criminal proceedings.

In support of her claim to the contrary, the respondent contends that the children's needs were entitled

It may well be that there are circumstances under which a respondent in a termination of parental rights proceeding who is seeking a continuance pending the conclusion of a related criminal proceeding need not make a proffer of the specific testimony that he or she would give if the continuance were granted. As we discuss in this opinion, however, there were, in the present case, important interests weighing against the respondent's interest in postponing the termination proceeding, and the burden was on her to establish that a continuance was warranted. Under these circumstances, we conclude that, if the respondent believed that her testimony was so significant that it outweighed these competing interests and could affect the outcome of the termination proceeding, it was incumbent on her to explain why.

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to little or no weight because, at the time that she filed the fourth motion for a continuance, they were thriving in their foster home and they presumably would have continued to do so during the period that the trial was delayed. As we have explained, however, a sense of *permanency*, in and of itself, is crucial for a child's welfare. See *In re Davonta V.*, supra, 285 Conn. 495 (“[n]o child can grow emotionally while in limbo, never really belonging to anyone except on a temporary and ill-defined or partial basis” (internal quotation marks omitted)). Indeed, as we indicated, the children themselves had expressed a desire for permanency so that they would no longer have people “ask[ing] them questions all the time.” Delaying the trial indefinitely would have meant keeping these very young children in a state of limbo indefinitely. Accordingly, we reject the respondent's claim.

III

Finally, we address the respondent's claim that we should exercise our supervisory authority to require our trial courts to grant a respondent's motion for a continuance of a termination of parental rights proceeding whenever the respondent has invoked his or her fifth amendment privilege against self-incrimination in a criminal proceeding involving the same misconduct. We disagree.

“It is well settled that [a]ppellate courts possess an inherent supervisory authority over the administration of justice. . . . The exercise of our supervisory powers is an extraordinary remedy to be invoked only when circumstances are such that the issue at hand, while not rising to the level of a constitutional violation, is nonetheless of utmost seriousness, not only for the integrity of a particular trial but also for the perceived fairness of the judicial system as a whole. . . .

“We recognize that this court's supervisory authority is not a form of free-floating justice, untethered to legal

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principle. . . . Rather, the rule invoking our use of supervisory power is one that, as a matter of policy, is relevant to the perceived fairness of the judicial system as a whole, most typically in that it lends itself to the adoption of a procedural rule that will guide lower courts in the administration of justice in all aspects of the [adjudicatory] process. . . . Indeed, the integrity of the judicial system serves as a unifying principle behind the seemingly disparate use of [this court’s] supervisory powers.” (Citations omitted; internal quotation marks omitted.) *In re Yasiel R.*, 317 Conn. 773, 789–90, 120 A.3d 1188 (2015).

We conclude that a rule requiring trial courts to grant all requests for continuances by respondents in termination of parental rights proceedings when the respondent has invoked his or her fifth amendment privilege against self-incrimination in connection with a related criminal proceeding is not required to ensure the fairness and integrity of the judicial system. To the contrary, such a rule would *deprive* trial courts of their ability to consider the fairness of their rulings by eliminating their discretion to consider “[1] the interests of the [nonmoving party] in an expeditious resolution and the prejudice to the [nonmoving party] in not proceeding; [2] the interests of and burdens on the [moving party]; [3] the convenience to the court in the management of its docket and in the efficient use of judicial resources; [4] the interests of other persons not parties to the civil litigation; and [5] the interests of the public in the pending civil and criminal actions”; (internal quotation marks omitted) *Tyler v. Shenkman-Tyler*, *supra*, 115 Conn. App. 529; as well as “the timeliness of the request for continuance; the likely length of the delay; the age and complexity of the case; the granting of other continuances in the past; the impact of delay on the litigants, witnesses, opposing counsel and the court; the perceived legitimacy of the reasons proffered in support

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of the request; [and] the [moving party's] personal responsibility for the timing of the request" (Internal quotation marks omitted.) *State v. Coney*, supra, 266 Conn. 802. In reaching this conclusion, we emphasize that courts must consider a respondent's important interest in testifying in his or her own defense in a matter involving a fundamental liberty interest when ruling on a motion for a continuance pending the resolution of a related criminal proceeding. As the circumstances of the present case show, however, there are other weighty interests that also are entitled to consideration. Although there may be cases in which fairness requires the granting of a respondent's motion for a continuance when a criminal proceeding is pending, particularly when it is near resolution, we decline the respondent's invitation to deprive trial courts of their ability to consider and balance these important interests when determining whether a continuance should be granted to await the outcome of a pending or impending criminal proceeding.²⁷ Accordingly, we reject this claim.

The judgments are affirmed.

In this opinion the other justices concurred.

²⁷ As we explained in part II of this opinion, the factors that weighed in favor of denying the respondent's motion for a continuance in the present case included (1) the fact that the respondent had previously filed three motions for a continuance and the termination of parental rights trial already had been delayed for eighteen months, (2) the young age of the children, (3) the needs of the children, who had been in the petitioner's custody for more than three years and in a preadoptive foster home for more than two years, for permanency, (4) the fact that the respondent sought an indefinite postponement, (5) the seriousness of the allegations against the respondent and the weight of the evidence supporting them, and (6) the fact that the respondent did not indicate the nature of the testimony she would give if the motion for a continuance were granted. In the absence of any of these factors, our conclusion might be different.

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B. SHAWN MCMCLOUGHLIN ET AL. v. PLANNING
AND ZONING COMMISSION OF THE
TOWN OF BETHEL
(SC 20541)

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

Syllabus

The plaintiffs appealed to the trial court from the decision of the defendant planning and zoning commission, which had denied their application for a special permit to construct a crematory on property owned by one of the plaintiffs in a business park in the town of Bethel. The property is located in a business park in one of the town's two industrial zones. Prior to submitting their application, the plaintiffs proposed a text amendment to the town's zoning regulations that would make the operation of a crematory a specially permitted use in the town's industrial zones. The commission approved the text amendment, and the plaintiffs submitted their special permit application and an application to construct and operate a crematory on the property. After public hearings, the commission voted to deny both the plaintiffs' special permit application and their application to construct and operate a crematory. The commission reasoned that the plaintiffs had failed to meet their burden of demonstrating that their application satisfied the general standards for special permits set forth in the relevant provision (§ 8.5.E) of the town's zoning regulations. Relying on the Appellate Court's decision in *St. Joseph's High School, Inc. v. Planning & Zoning Commission* (176 Conn. App. 570), the trial court dismissed the plaintiffs' appeal, concluding that there was substantial evidence in the record to support the commission's denial of the plaintiffs' special permit application based on the general criteria for special permits set forth in § 8.5.E. The plaintiffs, on the granting of certification, appealed to the Appellate Court, which affirmed the trial court's judgment. On the granting of certification, the plaintiffs appealed to this court. *Held:*

1. The plaintiffs could not prevail on their claim that the Appellate Court misinterpreted and improperly expanded its holding in *St. Joseph's High School, Inc.*: the Appellate Court's holding in *St. Joseph's High School, Inc.*, that a planning and zoning commission may deny an application for a special permit on the basis of generalized considerations but must rely on specific evidence that relates directly to the site under consideration was consistent with this court's precedent requiring that the review of a special permit application must involve a fact specific inquiry related to the specific site proposed, and the Appellate Court correctly concluded that the trial court reliance on that case was proper; moreover, this court declined the plaintiffs' request to impose a rebuttable presumption that a specially permitted use in a zoning district is compatible with

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- other uses in the district, as the particularized, fact intensive scrutiny the plaintiffs proposed is embedded in the existing standard.
2. The Appellate Court incorrectly concluded that the commission's denial of the plaintiffs' special permit application was supported by substantial evidence, as the reasons enumerated by the commission for denying the application were not supported by site specific facts that pertained to the considerations enumerated in § 8.5.E of the town regulations but, rather, were grounded in facts regarding crematory operations generally, development decisions motivated by general objections, and evidence not pertinent to the required considerations, and, accordingly, this court reversed the Appellate Court's judgment and directed that court to reverse the trial court's judgment and to remand the case with direction to sustain the plaintiffs' appeal and to order the commission to approve the plaintiffs' special permit application:
- a. There was not substantial evidence of adverse environmental effects on which to deny the plaintiffs' application; the evidence and data purportedly demonstrating adverse environmental effects were not specific to the site of the proposed crematory or did not address the mode of operation proposed for the plaintiffs' crematory, and the only environmental evidence specific to the plaintiffs' proposed facility indicated that it would not likely have an adverse environmental effect.
- b. There was not substantial evidence that the proposed crematory would have a detrimental effect on neighboring properties and residences or the development of the district: in the absence of specific evidence that the proposed crematory negatively affected neighboring properties, various testimony elicited at the public hearings, including that of the president of a company located on property abutting the plaintiffs' property, that a crematory in the business park would place the park at a competitive disadvantage, decrease property values, and cause property and business owners to sell their properties, rethink expansion plans, or leave town, amounted to mere speculation, and those generalized concerns did not rise to the level of substantial evidence of adverse economic impact sufficient to support the commission's denial of the plaintiffs' special permit application; moreover, testimony from neighboring property owners that they would not have purchased their respective properties if they had known about the proposed crematory, and testimony from the owner of several properties in the business park that he had listed those properties for sale as a result of his emotional and psychological opposition to the crematory, reflected speculative concerns and a generalized "not in my backyard" objection that could not, by itself, serve as substantial evidence for denying the plaintiffs' special permit application.
- c. There was not substantial evidence to support the commission's determination that the proposed crematory did not comply with the town regulations because it would require an excessive amount of excavation and fill activity and would have a negative effect on commercial business: although the topography of the site required the plaintiffs to obtain an

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excavation and fill permit, the commission did not cite to any evidence, such as particular standards or measurements, to support its determination that the excavation and fill activity was excessive, and the fact that the plaintiffs originally preferred to locate the crematory in an existing building instead of constructing a new building was not relevant to the suitability of the location that was ultimately proposed; moreover, the commission did not cite to any evidence on which it relied in determining that businesses may have a decreased ability to attract and to retain customers, and a review of the record revealed no such evidence.

d. There was not substantial evidence to support the commission's conclusion that the proposed crematory did not comply with the general standards in the town regulations because of the plaintiffs' inability to screen the crematory from the view of neighboring properties; the evidence on which the commission relied, namely, testimony from individuals objecting to viewing or being exposed to the crematory and a study on the effect of a crematory on residential housing sales in a town in Wyoming, did not constitute substantial evidence insofar as the study was not specific to the site of the proposed crematory and in light of the absence of evidence as to how the proposed facility would be so stylistically inconsistent with the remainder of the business park as to affect property values.

Argued September 17, 2021—officially released April 5, 2022

Procedural History

Appeal from the decision of the defendant denying the plaintiffs' application for a special permit, brought to the Superior Court in the judicial district of Danbury and transferred to the judicial district of Hartford, Land Use Litigation Docket, where Connecticut Coining, Inc., was permitted to intervene as a defendant; thereafter, the case was tried to the court, *Hon. Marshall K. Berger, Jr.*, judge trial referee, who, exercising the powers of the Superior Court, rendered judgment dismissing the appeal, from which the plaintiffs, on the granting of certification, appealed to the Appellate Court, *Keller, Prescott and Devlin, Js.*, which affirmed the trial court's judgment, and the plaintiffs, on the granting of certification, appealed to this court. *Reversed; judgment directed.*

Daniel E. Casagrande, with whom was *Joseph Mortelliti*, for the appellants (plaintiffs).

Charles R. Andres, for the appellee (defendant).

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Opinion

ROBINSON, C. J. The principal issue in this certified appeal is whether the Appellate Court's decision in *St. Joseph's High School, Inc. v. Planning & Zoning Commission*, 176 Conn. App. 570, 170 A.3d 73 (2017) (*St. Joseph's*), allows a zoning commission to deny an application for a special use permit based on the applicant's noncompliance with the general standards enumerated in the zoning regulations, despite its full compliance with the technical requirements contained therein. The plaintiffs, B. Shawn McLoughlin and Mono-Crete Step Co. of CT, LLC (Mono-Crete), appeal, upon our grant of their petition for certification,¹ from the judgment of the Appellate Court, which affirmed the trial court's dismissal of their appeal from the decision of the defendant, the Planning and Zoning Commission of the Town of Bethel (commission), to deny their application for a special permit to construct a crematory on their property.² See *McLoughlin v. Planning & Zoning Commission*, 200 Conn. App. 307, 309, 334, 240 A.3d 709 (2020).

¹ We granted the plaintiffs' petition for certification to appeal, limited to the following issues: (1) "Did the Appellate Court correctly conclude that, under *St. Joseph's High School, Inc. v. Planning & Zoning Commission*, [supra, 176 Conn. App. 570], a zoning commission can deny a special use permit application based on noncompliance with the general standards enumerated in the zoning regulations despite full compliance with the technical requirements?" And (2) "If the answer to the first question is in the affirmative, did the Appellate Court correctly determine that substantial evidence supported the decision of the defendant planning and zoning commission to deny the plaintiffs' special use permit application?" *McLoughlin v. Planning & Zoning Commission*, 335 Conn. 978, 241 A.3d 131 (2020).

² "On March 9, 2016, Connecticut Coining, Inc., a business located near the proposed crematory, moved to intervene as a defendant in the plaintiffs' appeal pursuant to Practice Book § 9-6 and General Statutes § 8-8 (p). The trial court granted this motion on September 17, 2018." *McLoughlin v. Planning & Zoning Commission*, 200 Conn. App. 307, 309 n.1, 240 A.3d 709 (2020). We note that Connecticut Coining, Inc., filed a brief with and participated at oral argument before the Appellate Court. See *id.* It has not, however, filed a brief in this certified appeal. Accordingly, any references herein to the defendant are to the commission.

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On appeal, the plaintiffs claim that the Appellate Court (1) improperly interpreted its decision in *St. Joseph's* to allow nonspecific objections to the crematory based on the general standards contained in the zoning regulations to serve as a basis for the denial of their application, and (2) incorrectly concluded that the commission's denial of their application was supported by substantial evidence. Although we conclude that the Appellate Court correctly determined that the precedent set by its holding in *St. Joseph's* permits objections based on the general standards in the zoning regulations to serve as the basis for the denial of a special permit application, we nevertheless agree with the plaintiffs' argument that the commission's denial of their application was not supported by substantial evidence. Accordingly, we reverse the judgment of the Appellate Court.

The record reveals the following relevant facts and procedural history, aptly set forth by the Appellate Court. "McLoughlin owns property located at 12 Trowbridge Drive (property) in the Clarke Business Park (park) in [the town of] Bethel [town]. The park is located in one of the town's two industrial zones. Mono-Crete, of which McLoughlin is the sole member, operates a business on the property. Mono-Crete produces precast concrete, which is used to make items such as burial vaults.

"Because Mono-Crete's business was declining and the number of cremations in the United States was increasing, McLoughlin decided to seek approval to operate a crematory on the property. In furtherance of that goal, the plaintiffs proposed a text amendment to the Bethel Zoning Regulations (regulations) that would make the operation of a crematory a specially permitted use within either of the two industrial zones in the town. Prior to the commission's voting on the proposed text amendment, the plaintiffs' counsel acknowledged, at two separate meetings of the commission, that the com-

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mission's decision on whether to approve the proposed text amendment and any future special permit application seeking site plan approval were mutually exclusive inquiries, each involving unique considerations.

“On July 22, 2014, the commission voted to approve the text amendment (July, 2014 text amendment) by a four to three vote. The notice of approval, dated August 5, 2014, stipulated that the commission would allow for the specially permitted use of crematories conditioned on the satisfaction of eight technical requirements. The commission also noted that ‘the proposed text amendment is . . . a reasonable request . . . in character with the uses in the [i]ndustrial [zone].’

“After the commission approved the July, 2014 text amendment, the plaintiffs submitted a special permit application but withdrew it in January, 2015. The plaintiffs then resubmitted their application on February 25, 2015. On May 7, 2015, the plaintiffs submitted to the commission an application to construct and operate a crematory as required by General Statutes § 19a-320.

“Prior to the plaintiffs’ resubmission of their special permit application, Connecticut Coining, Inc. (Connecticut Coining), on February 12, 2015, submitted an application for a text amendment to the commission. The proposed amendment would, in effect, repeal the July, 2014 text amendment and impose a one year moratorium on the commission’s entertaining applications for and permitting the construction of crematories in the town. At its May 12, 2015 meeting, the commission voted to adopt this amendment (May, 2015 amendment) by a four to three vote.³ The plaintiffs then appealed [from]

³The moratorium on crematory applications established by the May, 2015 amendment did not preclude the plaintiffs’ application from being considered. See General Statutes § 8-2h (a) (“[a]n application filed with a . . . planning and zoning commission . . . of a town . . . 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

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the commission's adoption of the May, 2015 amendment to the Superior Court.

“On June 17, 2015, Connecticut Coining filed an application for a new text amendment that purportedly sought to correct a procedural defect noted by the plaintiffs in their appeal [from] the May, 2015 text amendment (revised repeal amendment). The commission, at its September 22, 2015 meeting, voted to adopt the revised repeal amendment by the same margin that it voted to adopt the May, 2015 amendment.

“Despite its repeal of the July, 2014 text amendment, the commission, nevertheless, continued to deliberate on the plaintiffs' application. After holding four public hearings on the plaintiffs' application, the commission, at its September 8, 2015 deliberative session, voted to deny it by a four to three vote. Three of the four members who voted to approve the July, 2014 text amendment also voted to approve the plaintiffs' application. Meanwhile, the three members who voted against the July, 2014 text amendment also voted against the plaintiffs' application. The chairperson of the commission, however, voted to approve the July, 2014 text amendment but voted to deny the plaintiffs' application. After voting to deny the plaintiffs' application, the commission, by the same margin, later voted to deny their application to construct and operate a crematory pursuant to § 19a-320.

“At its September 22, 2015 meeting, the commission presented its formal resolution of denial of the plaintiffs' application . . . in which it set forth its reasoning for denying the plaintiffs' application. The commission gen-

boundaries of zoning districts of such town . . . taking effect after the filing of such application”). We note that the moratorium did not take effect until May 12, 2015, which was subsequent to the plaintiffs' resubmission of a special permit application on February 25, 2015, and their submission of an application to construct and operate a crematory on May 7, 2015.

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erally found that “[t]he [plaintiffs] ha[ve] not demonstrated that the proposed use in the proposed location will not cause harmful health effects to neighboring properties or their occupants and ha[ve] not demonstrated that the use will not cause a loss in value of property or economic development potential.’ Specifically, the commission stated that the plaintiffs failed to meet their burden of demonstrating that their application satisfied the criteria for special permits set forth in §§ 8.5.E.2, 8.5.E.3, 8.5.E.4, and 8.5.E.5 of the regulations. The plaintiffs filed an appeal from that decision with the Superior Court on October 13, 2015.” (Footnote added; footnotes omitted.) *McLoughlin v. Planning & Zoning Commission*, *supra*, 200 Conn. App. 309–14.

Relying on *St. Joseph’s High School, Inc. v. Planning & Zoning Commission*, *supra*, 176 Conn. App. 570, the trial court rendered judgment dismissing the plaintiffs’ appeal, concluding that there was substantial evidence in the record to support the commission’s denial of the application based on the general criteria for special permits set forth in §§ 8.5.E.3, 8.5.E.4 and 8.5.E.5 of the regulations. Subsequently, the Appellate Court granted the plaintiffs’ petition for certification to appeal from the judgment of the trial court. See General Statutes § 8-8 (o).

On appeal, the Appellate Court determined that the trial court (1) properly relied on its holding in *St. Joseph’s* in concluding that a zoning commission may deny a special permit application on the basis of general standards set forth in the zoning regulations; see *McLoughlin v. Planning & Zoning Commission*, *supra*, 200 Conn. App. 322; and (2) correctly concluded that there was substantial evidence on which the commission based its determination that the plaintiffs had failed to meet their burden of demonstrating that their application satisfied §§ 8.5.E.3 and 8.5.E.4 of the regulations. See *id.*, 327. Accordingly, the Appellate Court affirmed

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the judgment of the trial court. *Id.*, 334. This certified appeal followed. See footnote 1 of this opinion.

On appeal to this court, the plaintiffs claim that the Appellate Court (1) improperly expanded *St. Joseph's* and the discretion a zoning commission has to deny a special permit application by crediting general objections and evidence not specific to the proposed site, and (2) incorrectly determined that no substantial evidence supported the commission's denial of the plaintiffs' special permit application. We address each claim in turn, setting forth additional relevant facts and procedural history as necessary.

Providing context for our review of the plaintiffs' claims in this certified appeal, we note that "the goal of an application for a special [permit] is to seek permission to vary the use of a particular piece of property from that for which it is zoned, without offending the uses permitted as of right in the particular zoning district." (Internal quotation marks omitted.) *Municipal Funding, LLC v. Zoning Board of Appeals*, 270 Conn. 447, 454, 853 A.2d 511 (2004). "The rationale for special permits or special exceptions⁴ is that [although] certain uses are generally compatible with uses permitted as of right in particular zoning districts, their precise location and mode of operation must be regulated [by the special permit process] because of topography, traffic problems, neighboring uses, etc. of the site." (Footnote added.) R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 5:1, p. 191. The special permit approval function may be delegated to a zoning commission, planning commission, or a zoning board of appeals, and, "[i]n order for [that] administrative agency to approve a special permit, it must determine that (1) the proposed use of the property is expressly

⁴ "The terms 'special permit' and 'special exception' have the same meaning and can be used interchangeably." R. Fuller, 9 Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 5:1, p. 191.

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permitted under the zoning regulations, (2) the standards in the regulations are satisfied, (3) any conditions necessary to protect public health, safety, convenience, and property values as provided by General Statutes § 8-2 can be established.” *Id.*, p. 192.

I

We begin with the plaintiffs’ claim that the Appellate Court both misinterpreted and expanded the holding in *St. Joseph’s High School, Inc. v. Planning & Zoning Commission*, *supra*, 176 Conn. App. 570. By way of background, we note that, in resolving the present case, the Appellate Court stated: “[The trial court’s] reliance on *St. Joseph’s* was not based on the type of testimony that was offered in that case. Rather, in light of what [the Appellate] [C]ourt said in *St. Joseph’s* about general standards predicating a commission’s denial of a special permit application, the [trial] court concluded that it was compelled to uphold the commission’s denial of the plaintiffs’ application because the commission ‘based [its decision on] *general standards* concerning the nature of the use, the welfare of the town, and the harmony with other uses and the orderly development in the district.’ . . . Thus, [the Appellate Court] conclude[d] that the [trial] court properly relied on [its] decision in *St. Joseph’s*.” (Emphasis in original.) *McLoughlin v. Planning & Zoning Commission*, *supra*, 200 Conn. App. 322.

The plaintiffs contend that the Appellate Court improperly applied *St. Joseph’s* because the facts in the present case are distinguishable in that the evidence supporting the commission’s denial was not grounded on a fact based inquiry into the proposed use of the exact property at issue. They also ask us to impose a rebuttable presumption that, if a particular use is designated as a specially permitted use in a zoning district, then it is compatible with other uses in the district. In response, the commission argues that the plaintiffs’ argument is

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not a critique of the Appellate Court's reliance on its decision in *St. Joseph's* but, instead, is meritless opposition to the general objections made to the commission and considered as substantial evidence in the Appellate Court's analysis. It also contends that creating a new legal standard incorporating a rebuttable presumption is both unnecessary and a modification better suited for legislative consideration. Although the Appellate Court correctly concluded that the trial court properly relied on *St. Joseph's*, we agree with the plaintiffs that it improperly disregarded the significance of the factual, site specific testimony offered in that case. We also conclude, however, that it is not necessary to adopt the rebuttable presumption urged by the plaintiffs.

Whether the Appellate Court properly followed and applied the legal principles it articulated in *St. Joseph's* is a question of law, over which we exercise plenary review. See, e.g., *Gerlt v. Planning & Zoning Commission*, 290 Conn. 300, 311, 963 A.2d 24 (2009).

In *St. Joseph's High School, Inc. v. Planning & Zoning Commission*, supra, 176 Conn. App. 574, the Appellate Court reviewed a planning and zoning commission's denial of a special permit application to install four light poles to illuminate the athletic field at the plaintiff school. The defendants argued that the trial court incorrectly concluded that the planning and zoning commission was not permitted to deny the application based on noncompliance with general standards contained in the zoning regulations.⁵ *Id.*, 572. To determine whether

⁵ The general standard at issue in *St. Joseph's* provided: "The location and size of such [special permit] use, and the nature and intensity of operations involved in or conducted in connection therewith, shall be such that both pedestrian and vehicular traffic to and from and in the vicinity of the use will not be hazardous or inconvenient to, or detrimental to the character of the said residential district or conflict with the traffic characteristics of the neighborhood. . . . Access, parking, service areas, lighting, signs and landscaping shall be designed so as to protect the residential character of surrounding residential neighborhoods or residential zones." *St. Joseph's High School, Inc. v. Planning & Zoning Commission*, supra, 176 Conn. 581

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the denial was proper, the Appellate Court canvassed our prior opinions and concluded that, “[u]nder Connecticut law, a zoning commission may deny a special permit application due to noncompliance with general standards contained in the zoning regulations.” *Id.*, 599. The Appellate Court stated: “The exercise of [the planning and zoning commission’s] discretion ‘is inherently [*fact specific*], requiring an examination of the particular circumstances of the *precise site* for which the special permit is sought and the characteristics of the specific neighborhood in which the proposed [use] would [be made].’” (Emphasis added.) *Id.*, 600. Applying that standard, the Appellate Court then determined that the planning and zoning commission’s decision to deny the special permit application in *St. Joseph’s* was supported by substantial evidence because of the testimony regarding (1) current experiences with the school’s noise emissions; see *id.*, 603–607; (2) the temporary nature of the wooded buffers between the light poles and the neighboring properties; see *id.*, 607–608; and (3) personal experiences with loitering following sporting events at the school. See *id.*, 609–15.

The Appellate Court’s holding in *St. Joseph’s* thus permits a zoning commission to deny an application for a special permit based on generalized considerations but, at the same time, requires specific evidence that relates directly to the site under consideration. Requiring site specific evidence is consistent with previous decisions from this court in the special permit context. For example, in *Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Commission*, 285 Conn. 381, 439–446, 941 A.2d 868 (2008), this court upheld a planning and zoning commission’s denial of a religious society’s application for a special exception

n.12. In contrast to the general standard, the technical requirements included, *inter alia*, a maximum height for light poles, a minimum distance from abutting residential property lines, and a photometric plan submission. *Id.*, 573.

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to build a temple on its property based on evidence of (1) large attendance at the society's previous events on the property, (2) the effect of the society's past activities on neighboring properties, and (3) the failure of the society to obtain approval of its proposed septic and water supply systems. Similarly, in *Municipal Funding, LLC v. Zoning Board of Appeals*, supra, 270 Conn. 455–56, this court upheld a zoning board's denial of an application for a special exception to open a residential treatment facility based on the facts that the proposal (1) did not include a security force, (2) did not include any intention to secure its doors with locks, and (3) would have up to 125 residents supervised by only twenty staff members at a time. The court concluded that those facts constituted substantial evidence on which the board could have based its conclusion that the facility posed a safety threat.⁶ *Id.*, 456. Thus, the type of evidence deemed legally sufficient by this court in the aforementioned cases consisted of facts specific to the relevant sites and pertinent to the required review.⁷

⁶ Although this court's decision in *Municipal Funding, LLC* does mention the testimony of several neighbors who were fearful based on their personal perceptions of the proposed facility, the court clarified that "there [nevertheless] was a sufficient *factual* basis in the record to support a determination that a genuine threat to public safety had been demonstrated." (Emphasis added.) *Municipal Funding, LLC v. Zoning Board of Appeals*, supra, 270 Conn. 456 n.7.

⁷ Relying on *Irwin v. Planning & Zoning Commission*, 244 Conn. 619, 626–27, 711 A.2d 675 (1998), among other cases, the commission argues that requiring this type of site specific evidence precludes zoning commissions from denying applications for entirely new special permit uses. The commission's reliance on *Irwin* is misplaced because the evidence credited in that case was, inter alia, expert testimony as to the effect the proposed use would have on the specific site proposed. See *id.*, 632. *Irwin* provides an example of the fact specific, site specific testimony necessary to uphold the denial of a special permit application for a new use before the facility is constructed.

Consistent with *Irwin*, we note that another example of proper evidence for a new special permit use is the appraisal of properties neighboring the specific site to demonstrate whether the proposed use would affect their value, as the commission requested in the present case. See footnote 17 of this opinion.

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These precedents establish “that the special permit process is, in fact, discretionary” and “that general considerations such as public health, safety and welfare, which are enumerated in zoning regulations, may be the basis for the denial of a special permit.” *Irwin v. Planning & Zoning Commission*, 244 Conn. 619, 626–27, 711 A.2d 675 (1998); see *Whisper Wind Development Corp. v. Planning & Zoning Commission*, 32 Conn. App. 515, 522, 630 A.2d 108 (1993) (rejecting plaintiff’s argument that “the general health, safety and welfare requirements contained in the [zoning] regulations must be considered only for the purpose of placing conditions on a special permit and may not be considered in determining whether to deny or grant the permit”), *aff’d*, 229 Conn. 176, 640 A.2d 100 (1994). These cases also establish, however, that review of a special permit application must still be a fact specific inquiry related to the precise site proposed. See *Municipal Funding, LLC v. Zoning Board of Appeals*, *supra*, 270 Conn. 457. Put differently, although the considerations relevant to review of a special permit application can be general, the evidence bearing on those considerations cannot be.

We do, however, agree with the commission that we need not modify the standard set forth in *St. Joseph’s High School, Inc. v. Planning & Zoning Commission*, *supra*, 176 Conn. 599–600, as the plaintiffs suggest in asking us to impose a rebuttable presumption that specially permitted uses are compatible with other uses in the district. That modification is not necessary because the plaintiffs’ proposed standard of determining “whether the evidence in support of denial is based on a fact intensive scrutiny . . . into whether the ‘particular’ application . . . would be compatible with the ‘particular’ surrounding neighborhood” is embedded in the existing standard. (Emphasis in original.) Unless judicial review⁸ reveals substantial evidence to support

⁸ This standard is specific to judicial review, as the applicants’ burden before the commission was to persuade the commission that the application

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such a particularized finding, then nonparticularized, general objections will be an insufficient basis for upholding a zoning commission's denial of a special permit application. See *Samperi v. Inland Wetlands Agency*, 226 Conn. 579, 587, 628 A.2d 1286 (1993) (plaintiff meets burden in appeal by establishing "that substantial evidence does not exist in the record as a whole to support the agency's decision").

Having concluded that the Appellate Court's holding in *St. Joseph's* allows a zoning commission to deny a special use permit based on facts specific to the proposed site that indicate incompatibility with general standards, we now turn to the commission's decision to deny the plaintiffs' application in the present case.

II

The plaintiffs next claim that the commission's decision was not supported by substantial evidence because general objections, objections based on mere visibility, and evidence not particular to the proposed site are improper bases for denying a special permit application. In response, the commission argues that there was substantial evidence in the record on which it based its denial of the plaintiffs' application because (1) the evidence in the record was, in fact, specific to the proposed use and location, and (2) "real human concerns" should not be discredited as mere speculation. Addressing each of these reasons in turn, we agree with the plaintiffs and conclude that the commission's decision was not supported by substantial evidence.

The applicable standard of review is well established. "In reviewing a decision of a zoning [commission], a

was compatible with the zoning regulations; see, e.g., *Upjohn Co. v. Planning & Zoning Commission*, 224 Conn. 82, 89, 616 A.2d 786 (1992); and, as discussed subsequently in this opinion, the plaintiffs' burden on appeal is to establish that there is no substantial evidence in the record to support the commission's decision. See, e.g., *Municipal Funding, LLC v. Zoning Board of Appeals*, *supra*, 270 Conn. 453; *Samperi v. Inland Wetlands Agency*, 226 Conn. 579, 587, 628 A.2d 1286 (1993).

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reviewing court is bound by the substantial evidence rule, according to which . . . [c]onclusions reached by [a zoning] commission must be upheld by the trial court if they are reasonably supported by the record. The credibility of the witnesses and the determination of issues of fact are matters solely within the province of the [commission]. . . . The question is not whether the trial court would have reached the same conclusion, but whether the record before the [commission] supports the decision reached.” (Internal quotation marks omitted.) *Municipal Funding, LLC v. Zoning Board of Appeals*, supra, 270 Conn. 453. “If there is conflicting evidence in support of the zoning commission’s stated rationale, the reviewing court . . . cannot substitute its judgment as to the weight of the evidence for that of the commission. . . . The [commission’s] decision must be sustained if an examination of the record discloses evidence that supports any one of the reasons given.” (Internal quotation marks omitted.) *Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Commission*, supra, 285 Conn. 427; see, e.g., *Caruso v. Zoning Board of Appeals*, 320 Conn. 315, 321, 130 A.3d 241 (2016).

“The substantial evidence rule is similar to the sufficiency of the evidence standard applied in judicial review of jury verdicts, and evidence is sufficient to sustain an agency finding if it affords a substantial basis of fact from which the fact in issue can be reasonably inferred. It must be enough to justify, if the trial were to a jury, a refusal to direct a verdict when the conclusion sought to be drawn from it is one of fact for the jury.” (Internal quotation marks omitted.) *Clifford v. Planning & Zoning Commission*, 280 Conn. 434, 452, 908 A.2d 1049 (2006). When a zoning commission has stated a reason for denying a special permit application, as the commission in the present case has done, “the question for the court to pass on is simply whether the

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reasons assigned are reasonably supported by the record and whether they are pertinent to the considerations [that] the commission is required to apply under the zoning regulations.” (Internal quotation marks omitted.) *Irwin v. Planning & Zoning Commission*, supra, 244 Conn. 629. In other words, we must uphold the decision of the commission if the record reveals that any one of its reasons for denying the special permit application is supported by facts that are specific to the proposed site and that pertain to the considerations enumerated in the regulations. Having set forth the proper standard, we address each of the commission’s reasons as they relate to each of the relevant regulations.

A

With respect to the commission’s conclusion that the plaintiffs’ proposed crematory did not comply with § 8.5.E.2⁹ of the regulations because of the potential adverse effects caused by emissions released into the environment, the trial court determined that the cited evidence reflected nothing more substantial than “ ‘mere worries and concerns.’ ” We agree and hold that there was not substantial evidence of adverse environmental effects on which to deny the plaintiffs’ application.

In determining that the plaintiffs failed to meet the criteria set forth in § 8.5.E.2 of the regulations, the commission stated that it “heard expert testimony and was provided studies, data and analyses [that] contradicted the [plaintiffs’] testimony. The analyses uncovered flaws in the methods used and revealed discrepancies in the data and outcomes presented by the [plaintiffs] and

⁹ Section 8.5.E.2 of the regulations requires the commission to evaluate “[w]hether appropriate consideration has been given to the protection, preservation, and/or enhancement of natural, scenic, historic, and unique resources including, where appropriate, the use of conservation restrictions to protect and permanently preserve natural, scenic, historic, or unique features which enhance the character and environment of the area.”

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concluded that emissions released into the atmosphere from the crematory facility can and will in fact carry several hazardous toxins at levels above allowable standards” During the commission’s May 12, 2015 public hearing on the special permit application, Mitchell Gross, an engineering expert and neighboring property owner, testified that “burning bodies and burning bodies that are embalmed produces great amounts of dioxin and furans. . . . [And] the subtle thing about dioxins is you don’t smell them. They just give you cancer.” Mitchell Gross referenced various studies and data in support of his testimony, although none of this information was site specific. For example, he discussed a 2010 journal article that described the effect of crematory operations on residential house sales in Rawlins, Wyoming, showed cadmium emissions exceeding the allowable limit under applicable environmental standards by 205 percent, and showed dioxin and furan emissions exceeding the allowable limit by 2200 percent. See M. Agee & T. Crocker, “Directional Heterogeneity of Environmental Disamenities: The Impact of Crematory Operations on Adjacent Residential Values,” 42 *Applied Economics* 1735, 1738–39 (2010) (Rawlins study). The Rawlins study, like the other studies mentioned in Mitchell Gross’ testimony, was not specific to the facility or site proposed and did not address the mode of operation proposed for this particular crematory facility. See *Municipal Funding, LLC v. Zoning Board of Appeals*, supra, 270 Conn. 457 (“[r]eview of a special permit application is inherently [fact specific], requiring an examination of the particular circumstances of the precise site for which the special permit is sought and the characteristics of the specific neighborhood in which the proposed [use] would be [made]”). Because the commission’s determination that the plaintiffs’ application did not comply with § 8.5.E.2 of the regulations is not supported by evidence pertaining to the

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particular circumstances of the precise site proposed, we conclude that this determination was not supported by substantial evidence.

Cambodian Buddhist Society of Connecticut, Inc. v. Planning & Zoning Commission, supra, 285 Conn. 381, provides an example of evidence that would have sufficed in supporting the commission's denial. Following testimony from an engineer that the proposed septic system would have no impact on neighboring properties, another engineer and an ecological consultant testified that the proposed septic system did not appear to comply with state requirements and would not function properly as designed. *Id.*, 444. We cited to this evidence in concluding that there was substantial evidence to support the determination of the planning and zoning commission in that case that the proposed use did not comply with the relevant general consideration. *Id.*, 446.

Indeed, the only site specific environmental evidence in the present case indicated that there were *no* likely adverse environmental effects. The Director of Health of the town's health department submitted a letter, read into the record at the April 14, 2015 public hearing, stating that Department of Public Health toxicologists advised that, "if a small source such as this proposal follows the requirements of its [Department of Energy and Environmental Protection] permit, there should *not* be significant air quality issues." (Emphasis added.) The letter also stated that, after reviewing the plaintiffs' application and proposed plans, the town's health department had no objection to the application, so long as the commission attached conditions to its approval to ensure that the state environmental and public health permit requirements and approvals were met and maintained. Unlike in *Cambodian Buddhist Society of Connecticut, Inc.*, there was no expert testimony in the present case that reviewed the plaintiffs' proposal and explained why the proposal did, in fact, present air

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quality issues out of compliance with the state environmental and public health permitting requirements.¹⁰

B

We next address the commission's conclusion that the proposed crematory did not comply with § 8.5.E.3¹¹ of the regulations because it would have a detrimental effect on the neighboring properties and residences, as well as the development of the district. We hold that there was not substantial evidence in the record supporting this reason for the commission's denial of the plaintiffs' special permit application. The commission cites to a great deal of evidence in support of its determination that the plaintiffs' application did not satisfy this regulation, and we will assess each item in turn to determine if it is, in fact, the substantial evidence necessary to support its decision during judicial review. Additional facts and procedural history are set forth as necessary.

1

The commission first cites to testimony from the town's Economic Development Commission (development commission), positing that plans to expand the park may be halted as a result of the crematory. The development commission also claimed that there was a concern about the potential reduced value of the park properties, as well as the loss of marketability and viability of land for development. The commission further cites to testimony from the development commission indicating that the crematory would put the park at a competitive disadvantage in recruiting businesses.

¹⁰ There was testimony in the record that the plaintiffs' ambient impact analysis was incorrect but no testimony that a proper analysis was conducted that evidenced environmental noncompliance.

¹¹ Section 8.5.E.3 of the regulations requires the commission to consider "[w]hether the proposed use will have a detrimental effect on neighboring properties and residences or the development of the district."

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In its March 24, 2014 letter to the commission, the development commission stated that “[a] cremator[y] may negatively impact [the development commission’s] ability to attract commercial businesses. . . . A cremator[y] in the park may discourage commercial business investment in the expansion area. . . . A cremator[y] in the park may discourage businesses from moving to or expanding within the park. . . . Studies have shown a crematory has a negative impact on surrounding home values. . . . A cremator[y] may have a negative impact on future development/ownership within the park.” In reference to this letter, a member of the commission stated at the April 22, 2014 public hearing on the plaintiffs’ text amendment that “there is no more general a statement than that” and that the commission needed “proof and facts of how [the crematory is] going to decrease economic activity” The development commission did not cite any specific facts as a basis for these conclusions. In the absence of actual facts, the development commission’s letter amounted to mere speculation that cannot provide support for the commission’s decision. See, e.g., *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission*, 269 Conn. 57, 71, 848 A.2d 395 (2004) (“[e]vidence of general environmental impacts, mere speculation, or general concerns do not qualify as substantial evidence”). As the plaintiffs argue, a challenge to “allowing a crematory anywhere in the . . . park may have been appropriate in the commission’s legislative consideration of the text amendment but had no proper place in the site specific inquiry required for the special permit application.”

The development commission attempted to remedy the speculative nature of its submission. On May 27, 2014, the commission held another public hearing, at which Johnny Choi, the owner of several properties in the park, testified that, if the crematory facility were

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approved, he would put the fifteen properties he owns in the town up for sale. On April 13, 2015, the town development commission sent another letter to the commission, stating that its “concerns recently became a reality when a property owner in [the] [p]ark, [Johnny] Choi . . . put all of his seven . . . properties (both commercial and residential) on the market.” Based on our review of the record, the development commission’s concerns remain generalized because, even in light of the sale, there was no evidence that the proposed crematory negatively affected those properties, by, for example, diminishing their value. Thus, there was nothing that actually rose to the level of substantial evidence of adverse economic impact sufficient to support the commission’s denial of the special permit application. See, e.g., *Lord Family of Windsor, LLC v. Inland Wetlands & Watercourses Commission*, 103 Conn. App. 354, 363, 928 A.2d 1237 (2007) (“[e]vidence of general environmental impacts, mere speculation, or general concerns” still do not qualify as substantial evidence even when testified to by expert (internal quotation marks omitted)), *aff’d*, 288 Conn. 669, 954 A.2d 133 (2008); see also *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission*, *supra*, 269 Conn. 71 (same).

Finally, in its July 13, 2015 letter to the commission, the development commission stated that it was “concerned that the proposed location of the site would be so close to the road that it would negatively impact [its] ability to sell the additional lots for a fair price.” Again, the development commission did not cite to any site specific studies, such as real estate appraisals, as a basis for its concern that lots would not sell at a fair price. Thus, none of the testimony from the development commission amounts to substantial evidence of the effect that the crematory would have on neighboring property and development.

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2

Next, the commission cites to testimony from Gregory Marciano—the president and owner of the intervening defendant, Connecticut Coining,¹² which is located on abutting property at 10 Trowbridge Drive—stating that (1) the proposed crematory would be visible from his property, (2) the proposed crematory would negatively affect his ability to retain employees, (3) he may rethink expanding his business, and (4) the approval of the crematory could influence his decision to leave the town.

At the commission’s April 14, 2015 public hearing, Marciano testified that, regardless of whether his employees’ concerns are real or perceived, he could lose them because of their perception of crematory operations, and that he might have to leave the town if that loss came to pass. At the July 15, 2015 public hearing, Attorney Neil Marcus, testifying on behalf of Marciano, reiterated that, if Connecticut Coining’s employees have a problem being next to a crematory, then Marciano will not look to expand his business in the town and may have to relocate when it comes time to expand.

Marciano’s testimony was grounded in speculative concerns regarding his ability to retain employees, which does not, by itself, amount to substantial evidence. Had Marciano’s concerns, or those of his employees, been based on a factual inquiry of the effects of the facility at the proposed site, rather than general objections to the crematory, his testimony might have sufficed as fact based and site specific evidence. As we have discussed, general concerns, speculation, and mere worry, without more, do not qualify as substantial evidence. See *River Bend Associates, Inc. v. Conservation & Inland Wetlands Commission*, supra, 269 Conn. 71; see also *American Institute for Neuro-Integrative Development, Inc.*

¹² See footnote 2 of this opinion.

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v. *Town Plan & Zoning Commission*, 189 Conn. App. 332, 349, 207 A.3d 1053 (2019) (“public testimony is not to be considered substantial evidence when it is not supported by anything other than speculation and conjecture on the part of those objecting to the [party’s] proposed activities” (internal quotation marks omitted)); *Lord Family of Windsor, LLC v. Inland Wetlands & Watercourses Commission*, supra, 103 Conn. App. 365 (“[a] mere worry is not substantial evidence”). And, if the commission cannot base its conclusion on general concerns, speculation, and mere worry, then it cannot base its conclusion on community members’ business development decisions, potential or actual, that are themselves reflections of concerns that are not site specific, speculation, and mere worry. If we were to hold otherwise, individual members of a community would be able to block any special use permit application by pausing current developments or even by mere reference to hypothetical future intentions to do so due to unsubstantiated fears about future events, an approach that is wholly inconsistent with the obligation of local land use authorities to exercise their authority for the benefit of the community as a whole.¹³ Further,

¹³ If a zoning commission credited this testimony, this court could not disturb that credibility determination, even if it seemed clear to us that the vow not to undergo expansion was an empty statement merely to derail an application. See *Municipal Funding, LLC v. Zoning Board of Appeals*, supra, 270 Conn. 453. Instead, because the commission cited this testimony as a reason for its denial, we assume that the commission found this testimony credible but nevertheless conclude that it does not constitute substantial evidence as a matter of law. To conclude otherwise would be inconsistent with the responsibility of local land use authorities, “[i]n exercising their zoning powers . . . [to] act for the benefit of the community as a whole following a calm and deliberate consideration of the alternatives, and not because of the whims of either an articulate minority or even majority of the community.” (Internal quotation marks omitted.) *North Haven Opportunity for Affordable Housing, Inc. v. Planning & Zoning Commission*, Docket No. CV-15-6058868-S, 2016 WL 1578379, *4 n.7 (Conn. Super. February 25, 2016). As one leading authority has stated: “Discretionary development review too often involves the ad hocery that . . . has [been] described as trial by neighborism. . . . A zoning ordinance cannot permit administrative

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citing such hypothetical intentions as substantial evidence would render the statutory right of appeal from the decision of local zoning authorities ineffectual, as the courts cannot disturb the decision of a zoning commission when evidence relevant to appropriate considerations is present. See R. Fuller, 9A Connecticut Practice Series: Land Use Law and Practice (4th Ed. 2015) § 34:3, p. 335. Put differently, Marciano's general concerns do not become substantial evidence at the mere mention of a possible development decision.

Because the only reason testified to by both Marciano and Marcus for the decision to rethink an expansion and relocate was grounded in Marciano's speculative concerns as to his employees' potentially abandoning their employment—specifically on the basis of their subjective perceptions of crematory operations—their testimony cannot be considered substantial evidence as to whether the proposed facility will have a detrimental effect on the development of the district, as it is nothing more than a general objection.

3

Next, the commission cites to testimony from Wendy Gross and Mitchell Gross, the coowners of 13 Trowbridge Drive, that (1) they would not have purchased their property had they known about the proposed crematory, (2) the proposed facility was not disclosed to them during their property negotiations, (3) they will not invest in their property as intended, and (4) they already placed one property up for sale.

officers or boards to pick and choose the recipients of their favors. One would hope that courts would apply procedural due process protections to local legislative zoning decisions on individual development applications [T]oday the question largely remains of how to confine and structure necessary discretionary power while providing for effective safeguards against the abuse of discretion in the development review process." (Footnotes omitted; internal quotation marks omitted.) 1 E. Ziegler, Rathkopf's The Law of Zoning and Planning (2011) § 11:4, pp. 11-10 through 11-11.

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At the April 14, 2015 hearing, Wendy Gross stated that, if she and Mitchell Gross had known about the proposed crematory, then they would not have purchased the property at 13 Trowbridge Drive, and that real estate agents' failure to tell anyone about the proposal evidences "how scared they are of the effect it's going to have on property values." Mitchell Gross stated in a letter to the commission that he had delayed approximately \$100,000 worth of planned construction on the property. Finally, at the June 16, 2015 public hearing, Mitchell Gross testified that he listed his property for sale at \$1.25 million, which was less than he paid for it, even without accounting for the improvements he had made to the building.

Wendy Gross' testimony as to the potential effect on property values is plainly speculative. Further, Wendy Gross cited to religious issues, personal repercussions, such as no longer being able to walk dogs in the park, and speculative concerns as to employees feeling "very upset and conflicted by [the proposed facility]" as the basis for opposition to the proposed facility. Because her declaration that she would not have purchased the property had she known of the proposed crematory was grounded in these speculative concerns, this testimony is also nothing more than a general objection accompanied by another hypothetical property decision. See footnote 13 of this opinion.

Moreover, if Mitchell Gross had sold his property at a loss as a direct result of the proposed crematory, the commission could have properly considered that as evidence of the detrimental effect of the proposed crematory. However, the record does not support that claim. Mitchell Gross' testimony was that "it cost [him] more than \$1.25 million to buy [the property], and [he had] added improvements to the building" According to testimony from the plaintiffs' counsel, the warranty deed submitted into the record reflected that

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Mitchell Gross purchased the property less than three months prior for \$1.075 million, and there is no evidence as to the value of the improvements he made. Even if the commission had credited testimony that Mitchell Gross sold his property at a loss,¹⁴ there was no evidence that any property values were negatively affected specifically as a result of the proposed crematory.

With respect to Mitchell Gross' decision to stop investing in the property and to put it on the market, in the absence of specific evidence about the detrimental effects of the proposed facility, a generalized "not in my backyard" (NIMBY)¹⁵ reaction cannot, by itself, serve as substantial evidence for denying the plaintiffs' application, even if that reaction motivated his investment and sale decisions.¹⁶ See, e.g., *T-Mobile Central, LLC v. West Bloomfield*, 691 F.3d 794, 801 (6th Cir. 2012) ("If . . . these generalized objections sufficed, any wireless

¹⁴ After citing to all of the public testimony on which it relied to determine that the plaintiffs' application did not comply with § 8.5.E.3 of the regulations, the commission stated that it found the public testimony to be credible and compelling evidence. Notably, Mitchell Gross' testimony that he listed his property for less than he paid for it was not among the testimony cited by the commission.

¹⁵ "NIMBY conflicts arise from projects that typically generate widely dispersed benefits while imposing concentrated costs, such as homeless shelters, prisons, airports, sports stadiums, and waste disposal sites. Despite the social desirability of such projects, they often provoke intense local resistance that harnesses the political process to block construction of the proposed facility." *Kennedy v. Zoning Hearing Board*, 575 Pa. 105, 126 n.27, 834 A.2d 1104 (2003), quoting B. Richman, "Mandating Negotiations to Solve the NIMBY Problem: A Creative Regulatory Response," 20 UCLA J. Environmental L. & Policy 223, 223 (2002). "[T]hey often deploy alternative regulatory rationales, such as environmental impact statements, historic districts, aboriginal burial sites, agricultural preservation, wetlands, flood plains, access for the disabled and protection of (often unidentified) endangered species at other local, state and federal government forums, including courts of law." *Kennedy v. Zoning Hearing Board*, supra, 125 n. 27, quoting W. Fischel, "Voting, Risk Aversion, and the NIMBY Syndrome: A Comment on Robert Nelson's 'Privatizing the Neighborhood,'" 7 Geo. Mason L. Rev. 881, 882 (1999).

¹⁶ See footnotes 13 and 15 of this opinion.

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facility could be rejected. Anyone who opposed a cell tower in their backyard could offer an excuse that it would be bad for the community, would not be aesthetically pleasing, or would be otherwise objectionable. But that by itself is not enough. There must be evidence. And not just any evidence—evidence that is *substantial*.” (Emphasis in original.); *Verizon Wireless (VAW), LLC v. Board of County Commissioners*, 544 F. Supp. 2d 1218, 1249 (D. Kan. 2008) (“[s]uch generalized ‘not in my backyard’ opposition does not, as a matter of law, constitute substantial evidence on which to deny a proposed wireless telecommunications facility on aesthetics grounds”); *Sprint Spectrum, L.P. v. St. Charles*, Docket No. 4:04CV1144 RWS, 2005 WL 1661496, *6 (E.D. Mo. July 6, 2005) (“None of the residents offered any evidence *in support of their opposition*. A ‘not in my backyard’ generalized objection does not constitute substantial evidence to support the denial of a . . . permit.” (Emphasis added.)). When Mitchell Gross announced at the June 16, 2015 hearing that his business put its property on the market, he plainly stated that they “certainly don’t want [the crematory] in [their] backyard,” which was one of many reactions evoking NIMBY concerns during the public hearings on the plaintiffs’ text amendment and special permit application. Mitchell Gross did not present any facts specific to the proposed site evidencing the detriment of the proposed facility, only what would result from his opposition to the crematory, supported by generalized NIMBY concerns. Members of the commission appeared to recognize this evidentiary gap during the April 14, 2015 hearing, when one commission member indicated the need for evidence showing a detrimental effect on neighboring properties, such as an appraisal showing that a property next to the proposed facility would be worth less.¹⁷ Accordingly, the testimony from Wendy

¹⁷ The commission member stated: “[N]ot once did somebody put on this desk, [as] part of the public record, some [evidence that a] real estate appraiser said that my property is going to be worth less than it is next

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and Mitchell Gross does not constitute substantial evidence of the proposed crematory's detrimental effect on surrounding properties or development.

4

Next, the commission cites to testimony from the owner of seven properties in the park, stating that he placed all seven up for sale and ceased expansion negotiations. The testimony in the record most similar to what the commission cites is that of Henry and Johnny Choi at the May 27, 2014 hearing, in which Henry Choi stated that they are "seriously considering" moving out of the town. Later, Johnny Choi discussed a number of business ventures he planned to bring to the town before stating that, if the plaintiffs' text amendment is approved, he would put his properties up for sale because he does not want his "business near any emotion or psychological feelings"

The testimony of Henry and Johnny Choi does not constitute substantial evidence, insofar as it is simply another NIMBY reaction that motivated their sale and development decisions. Again, there is no factual and site specific evidence that the proposed crematory had a detrimental effect on surrounding properties and development, only that Henry and Johnny Choi's opposition to the proposal motivated their development decision. As we discussed, opposition, and the results of such opposition, supported *only* by NIMBY sentiments is not substantial evidence justifying the denial of a special permit. Because Henry and Johnny Choi based their investment decisions on their fear of perceived emotions, rather than any factual concerns relating to the proposed facility, the listing and potential sale of their properties do not constitute substantial evidence.

door to a crematory. . . . [T]hey need to come up with a piece of paper that says absolutely, here it is . . . it's less."

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5

Finally, the commission cites to testimony from John Holbrook, the owner of an organic farm at 45 Turkey Plain Road, who claimed that his organic designation may be jeopardized by toxic particle emissions from the proposed crematory. At the April 14, 2015 hearing, Holbrook stated that the “threat of mercury poisoning [would] kill [his] business in a New York minute.” At the June 16, 2015 hearing, Holbrook also explained that his farm is currently not certified as organic because he does not “want the government coming [on] to [his] property.” If he were ever forced to become certified, he testified that he would not be able to because of the “dioxin, mercury and a number of other pollutants [on his] land.” The record reveals no evidence to support Holbrook’s concerns about the negative environmental effect of the crematory on his organic farming operation. Indeed, had there been evidence that the proximity of Holbrook’s farm to the proposed crematory would actually inhibit the operation of the organic farm, then this certainly would have been the type of testimony that evidences a detrimental effect on development and neighboring properties. But, on this record, not only is it speculative that Holbrook’s land will be polluted by the proposed crematory, it is speculative that he will one day be mandated to have his farm certified as organic, and it is entirely speculative that he would be unable to do so because of the crematory operations. To the extent that Holbrook’s testimony that the Northeast Organic Farming Association of Connecticut will close his farm if dioxins are present does confirm that Holbrook’s farm might one day be regulated, it still does not confirm whether the proposed crematory will itself result in dioxin emissions that negatively affect Holbrook’s farm. Thus, we conclude that Holbrook’s testimony does not amount to substantial evidence and, further, that the record as a whole reveals no substantial

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evidence for the commission's finding that the proposed facility will have a detrimental effect on neighboring properties and the development of the district.¹⁸

C

We next address the commission's determination that the proposed crematory did not comply with § 8.5.E.4¹⁹ of the regulations because of the excavation and fill activity the proposal requires and the potential effect on the increasingly commercial businesses surrounding the proposed location. We conclude that there is not substantial evidence to support this conclusion.

At the commission's April 22, 2014 meeting, the plaintiffs' counsel stated that their preference was to locate the crematory in their existing building but that the 500 foot requirement set forth in General Statutes § 8-2n²⁰ precluded them from doing so. The proposed site, the location of which complied with § 8-2n, contained moderate to severe topography, rendering an excavation and fill permit necessary to proceed with the development. Accordingly, the commission determined that the application did not comply with § 8.5.E.4 of the regulations because (1) it required an excessive amount of excavation and fill activity, as well as a series of retaining walls for level access, (2) the plaintiffs' coun-

¹⁸ In explaining why the plaintiffs did not satisfy § 8.5.E.3 of the regulations, the commission also referenced the reason cited for why the plaintiffs did not satisfy § 8.5.E.2 of the regulations. See part II A of this opinion. Because we conclude in part II A of this opinion that that reason does not constitute substantial evidence, we need not repeat that analysis here.

¹⁹ Section 8.5.E.4 of the regulations requires the commission to determine "[w]hether the location and size of the site, the nature and intensity of the operations involved in or conducted in connection with the use, and the location of the site with respect to streets giving access to it are such that the use will be in harmony with the appropriate and orderly development in the district in which it is located and shall promote the welfare of the [t]own."

²⁰ General Statutes § 8-2n provides in relevant part: "The zoning regulations adopted under section 8-2 or any special act shall not authorize the location of a crematory within five hundred feet of any residential structure or land zoned for residential purposes not owned by the owner of the crematory. . . ."

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sel had testified that the proposed site was not their ideal location, and (3) the proposed use may affect the ability of surrounding businesses to attract and retain customers.

Although the record supports the necessity of excavation and fill activity, along with the construction of retaining walls, the commission does not cite to any evidence on which it relied to determine that the activity was *excessive* in nature. Although the commission states that “[t]he grade must be lowered upwards of [eighteen] feet in some locations,” our review of the record does not reveal why, or by what standards, that particular measurement renders the excavation and fill activity excessive, or otherwise indicates a lack of suitability.

As to counsel’s testimony at the hearing, we fail to see how the plaintiffs’ original preference to place the crematory in their existing building rather than constructing a new building is at all relevant to whether the location ultimately proposed is itself suitable for the crematory. See *Irwin v. Planning & Zoning Commission*, supra, 244 Conn. 629. The existing location may be more desirable to the applicant, presumably due to cost considerations, but it does not follow that the proposed location is unsuitable.

Finally, the commission did not cite to any evidence in the record on which it relied in determining that businesses surrounding the proposed crematory may have a decreased ability to attract and retain customers. Our review of the record also reveals no such evidence. Accordingly, we conclude that there is not sufficient evidence in the record to support the commission’s determination that the plaintiffs’ application did not comply with § 8.5.E.4 of the regulations.²¹

²¹ In explaining why the plaintiffs did not satisfy § 8.5.E.4 of the regulations, the commission also referenced the reasons cited for why the plaintiffs did not satisfy §§ 8.5.E.2 and 8.5.E.3. See parts II A and B of this opinion. In light of our conclusion that those reasons are not supported by substantial evidence, we need not repeat that analysis here.

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D

Finally, we address the commission's conclusion that the proposed crematory did not comply with § 8.5.E.5 (a) and (b)²² of the regulations because of the plaintiffs' inability to screen the crematory from the view of neighboring properties, which the commission stated would likely result in a decline in their value. We conclude that there is not substantial evidence to support this determination.

In support of its determination, the commission cited to (1) testimony "from those who have expressed objection[s] to viewing or being exposed to the operation of a crematory facility," and (2) the Rawlins study. See part II A of this opinion. In regard to the testimony, we previously explained that general concerns do not qualify as substantial evidence. See, e.g., *American Institute for Neuro-Integrative Development, Inc. v. Town Plan & Zoning Commission*, supra, 189 Conn. App. 341; *Lord Family of Windsor, LLC v. Inland Wetlands & Watercourses Commission*, supra, 103 Conn. App. 365. Thus, general objections to viewing or being exposed to the proposed facility are not substantial evidence. Without evidence as to how the proposed facility is so stylistically inconsistent with the rest of the park that it would have a detrimental effect on property values therein, the fact that the proposed building and smoke stacks would be visible from the street does not support a finding that the proposed crematory is not suitable in relation to the rest of the

²² Section 8.5.E.5 (a) of the regulations requires the commission to consider "[w]hether the design elements of the proposed development will be attractive and suitable in relation to site characteristics, the style of other buildings in the immediate area, and the existing and probable future character of the neighborhood in which the use is located." Section 8.5.E.5 (b) of the regulations requires the commission to consider "[w]hether the location, nature and height of buildings, walls, and fences, planned activities and the nature and extent of landscaping on the site will be such that the use shall not hinder or discourage the appropriate development and use of adjacent land and buildings or impair the value thereof."

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park or that the visibility of that facility affects the value of the neighboring properties. Cf. *Mendonsa v. Corey*, 495 A.2d 257, 259, 261 (R.I. 1985) (holding that there was substantial evidence for zoning board of review to deny special exception permit on basis of, inter alia, testimony from qualified real estate expert that construction of fifty-one townhouse units on less than ten acres would increase density within neighborhood and diminish value of neighboring single family homes). Because there is no other evidence in the record to support the commission's determination that the plaintiffs' application did not comply with § 8.5.E.5 (a) and (b) of the regulations, insofar as the Rawlins study does not examine the specific site proposed, we conclude that there was no substantial evidence on which that conclusion could have been based.²³

In sum, the commission's decision to deny the plaintiffs' application for a special permit to construct a crematory on its property was based only on general facts regarding crematory operations not specific to the proposed site, development decisions motivated by general objections to the proposed facility, and evidence not pertinent to the required considerations. The record, therefore, does not reveal substantial evidence on which the commission based its decision. Accordingly, we conclude that the Appellate Court improperly affirmed the judgment of the trial court. Instead, it should have rendered judgment directing the trial court to order the commission to approve the plaintiffs' application under terms and conditions reasonable and necessary to protect the public, as permitted by § 8.5.F.4 (a)²⁴ of the regulations. See *Mobil Oil Corp. v. Zoning*

²³ In explaining why the plaintiffs did not satisfy § 8.5.E.5 (a) and (b) of the regulations, the commission also referenced the reasons cited for why the plaintiffs did not satisfy § 8.5.E.3. See part II B of this opinion. Because we conclude in this section that those reasons are not supported by substantial evidence, we need not repeat that analysis here.

²⁴ Section 8.5.F.4 of the regulations provides in relevant part: "In granting a Special Permit, the Commission may: (a) stipulate such conditions as are

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Commission, 30 Conn. App. 816, 821, 622 A.2d 1035 (1993) (concluding that, if there is no basis for zoning commission's denial of special permit application, trial court shall order commission to approve application).

The judgment of the Appellate Court is reversed and the case is remanded to that court with direction to reverse the judgment of the trial court and to remand the case to that court with direction to sustain the plaintiffs' appeal and to order the commission to approve the plaintiffs' application for a special permit.

In this opinion the other justices concurred.

reasonable and necessary to protect or promote the public health, safety or welfare; property values; the environment; sound planning and zoning principles; improved land use, site planning and land development; or better overall neighborhood compatibility”