CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

SAIFULLAH KHAN *v.* YALE UNIVERSITY ET AL.
(SC 20705)

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

Syllabus

The plaintiff, who was an undergraduate student at Yale College, sought to recover damages in the United States District Court for the District of Connecticut in connection with statements the defendant D, a classmate of the plaintiff, made during a disciplinary hearing conducted by the named defendant university's committee on sexual misconduct (committee). In 2015, D accused the plaintiff of sexually assaulting her in her dormitory, and the university suspended the plaintiff. The committee, however, stayed the disciplinary proceedings against the plaintiff pending the outcome of a criminal case that the state had filed against him. The plaintiff subsequently was acquitted on multiple counts of sexual assault, and, in 2018, he resumed full-time student status at Yale. Shortly thereafter, however, as a result of the reporting in a student newspaper of additional allegations of sexual assault involving the plaintiff, the plaintiff agreed to undergo a mental health consultation, but he refused a request that he meet with university administrators. Subsequently, the university again suspended the plaintiff on the ground that it was necessary for the safety and well-being of the plaintiff and the university community. Thereafter, the committee convened a hearing in connection with D's 2015 sexual assault complaint. At the hearing, D, who had since graduated, provided a statement via teleconference, but she did not testify under oath or provide any sworn statement. The plaintiff and his counsel were not permitted in the hearing room when the hearing panel questioned D and, instead, listened to an audio feed from an anteroom. The plaintiff's counsel was not permitted to speak, question D or any

other witness, or raise objections, and the hearing panel denied the plaintiff's request for a recording or transcript of the hearing. Additionally, the committee's procedures allowed the parties to submit questions that they wanted the hearing panel to ask and to request that the panel call witnesses to testify, but the panel had the sole discretion to reject the proposed questions or witnesses. The university ultimately expelled the plaintiff. In his complaint filed in the District Court, the plaintiff alleged, inter alia, defamation and tortious interference with business relations as to D in connection with the sexual assault allegations that she had made during the disciplinary proceedings. He also alleged that D had made false accusations in an effort to have him expelled as part of the #MeToo political movement and a personal vendetta stemming from D's alleged romantic advances toward the plaintiff. The District Court, however, granted D's motion to dismiss the plaintiff's claims, concluding that the disciplinary proceedings were quasi-judicial in nature and that D, therefore, enjoyed absolute immunity under Connecticut law for any statements that she had made in the course of those proceedings. The plaintiff appealed from the District Court's granting of D's motion to dismiss to the United States Court of Appeals for the Second Circuit, which concluded that the outcome of the plaintiff's appeal depended on whether the absolute immunity afforded in connection with quasi-judicial proceedings extends to proceedings of nongovernmental entities and certified certain questions to this court regarding the requirements that must be satisfied for a proceeding to be deemed quasi-judicial for the purpose of affording absolute immunity to proceeding participants, whether the disciplinary proceedings at issue properly were recognized as quasi-judicial, and, if not, whether Connecticut law extends qualified immunity to D for statements that she had made during the disciplinary proceedings. *Held*:

1. This court addressed the requirements that must be satisfied for an adjudicative proceeding to be recognized as quasi-judicial:

a. A proceeding is quasi-judicial for the purpose of affording its participants absolute immunity when the proceeding is specifically authorized by law, the entity conducting the proceeding applies law to fact in an adjudicatory manner, the proceeding contains adequate procedural safeguards, and there is a public policy justification for encouraging absolute immunity for proceeding participants:

A review of this court's case law revealed that a threshold requirement of any quasi-judicial proceeding is that the proceeding must be specifically authorized by law, meaning that the proceeding is governed by or conducted pursuant to a state or federal statute, and that requirement was consistent with the purposes of absolute immunity insofar as the imposition of absolute immunity is intended to be a public benefit and a societal necessity, and a proceeding that is not specifically authorized by or conducted pursuant to law provides little foundation for a court to

determine that the public has an interest in encouraging participation and unfettered candor in the proceeding.

Moreover, in *Priore* v. *Haig* (344 Conn. 636), which was decided after the Second Circuit certified questions to this court, this court explained that a quasi-judicial proceeding is one in which the entity conducting the proceeding has the power of discretion in applying the law to the facts within a framework that contains procedural protections against defamatory statements, and that courts charged with determining whether a proceeding is quasi-judicial in nature may consider, in addition to the six factors set forth in *Kelley* v. *Bonney* (221 Conn. 549), any other factors that are relevant to the particular proceeding, including whether there are procedural safeguards in place to ensure the reliability of the information presented at the proceeding and the authority of the entity to regulate the proceeding, and courts must carefully scrutinize whether there is a sound public policy justification for affording absolute immunity in any given context.

b. With respect to the law to fact requirement, the entity conducting the proceeding must apply some form of public law, rather than its own internal policies, to facts in rendering an adjudicatory decision:

The public law that the entity applies may be constitutional, statutory, administrative, municipal, or common law, so long as it is promulgated by a public official or entity, and the application of the law must either be subject to judicial review or to alteration or repeal by a public official or entity.

Accordingly, although a private entity may adopt publicly created law to govern its affairs, the law applied must be controlled and formulated by the public and be designed to benefit the greater public, and, when an entity creates and applies only its own internal policies, there is a lack of the necessary components of public participation and approval to characterize its proceedings as quasi-judicial for the purpose of affording participants absolute immunity.

c. A quasi-judicial proceeding, for the purpose of affording absolute immunity, requires sufficient procedural safeguards to ensure reliability and to promote fundamental fairness, and, the more robust the safeguards, the more likely the proceeding will be deemed quasi-judicial:

This court reviewed its case law, especially *Priore*, and identified various procedural safeguards that it has considered in determining whether a proceeding is quasi-judicial, including whether the declarant testifies under oath or certifies to the truth of his or her statements, whether there is an opportunity to cross-examine witnesses or to hold declarants accountable for false or misleading statements, whether the accused individual received notice, whether there is a right to appeal the adjudica-

tor's decision, and, relatedly, whether there is an adequate record of the proceeding.

d. In determining whether a proceeding is quasi-judicial, a court should consider the factors enumerated in *Kelley*, but it need not conclude that they are dispositive:

The *Kelley* factors, which concern the various powers of the entity conducting the proceeding and which were intended to assist in the determination of whether a proceeding is quasi-judicial in nature, are not exclusive and supplement and function in addition to the other procedural safeguards that this court identified in *Priore*.

e. In determining whether a proceeding is quasi-judicial, a court must always carefully scrutinize whether there is a sound public policy justification for the application of absolute immunity in any particular context:

Courts should consider public policy, and the attendant balancing of the public interest of encouraging public participation with the private interest of protecting individuals from false and malicious statements, in addition to the law to fact requirement and the *Kelley* factors, such that, even if an entity applies law to facts in a proceeding with adequate procedural safeguards, the proceeding should not be deemed quasi-judicial for purposes of conferring absolute immunity on its participants if there is no discernable public policy supporting absolute immunity for those participants.

2. The disciplinary proceeding at issue was not quasi-judicial for the purpose of affording absolute immunity to D's statements because it lacked sufficient procedural safeguards necessary to ensure the reliability of the information presented:

a. As a threshold matter, this court recognized that the disciplinary proceeding was specifically authorized by statute (§ 10a-55m (b)), pursuant to which each institution of higher education in Connecticut is required to adopt policies regarding sexual assault, including policies providing for an investigation and disciplinary proceedings for allegations of sexual violence, and policies requiring that, if a disciplinary hearing is held, certain procedures be followed.

b. Nonetheless, even if this court assumed that the hearing panel that conducted the plaintiff's disciplinary proceeding satisfied the law to fact requirement, the collective absence of certain features during the proceeding led this court to conclude that the proceeding did not have adequate safeguards to ensure reliability and promote fundamental fairness:

D did not testify under oath or certify to the truth of her statements, she could not have been disciplined for failing to testify truthfully because she had graduated from Yale before the hearing, and those shortcomings

undermined the reliability of D's statements in view of how fundamental the oath requirement is to the reliability of the information presented.

The committee's procedures, which vested the hearing panel with discretion to ask the questions submitted by the plaintiff, did not afford the plaintiff or his counsel a meaningful opportunity to cross-examine or otherwise to confront D in real time, there was nothing in the record to indicate that the hearing panel varied from its procedures in a manner that afforded the plaintiff fundamental fairness, those procedures hampered the plaintiff's ability to ask legitimate questions or sequence questions in a way that he believed would have tested the veracity of D's testimony, and, in view of the importance that the opportunity to meaningfully cross-examine adverse witnesses has to the truth-seeking function of any judicial or quasi-judicial proceeding, the plaintiff was denied a fundamental procedural protection inherent in such proceedings.

Likewise, the committee's procedures did not afford the parties a reasonable opportunity to call witnesses, insofar as the parties could not independently call a witness but were required to submit names to the hearing panel, which had the sole discretion to decide whether to call those proposed witnesses for questioning, and, therefore, failed to comport with the protections typical of quasi-judicial proceedings.

Moreover, although the plaintiff was accompanied by counsel at the disciplinary hearing, the committee's procedures prohibiting counsel from submitting documents or arguing on the plaintiff's behalf, raising objections, or participating in the questioning of witnesses materially limited the assistance of counsel to the point that counsel was effectively rendered irrelevant, and those restrictions, although not dispositive, also supported the conclusion that the disciplinary proceeding was not quasi-judicial.

Furthermore, there was no adequate record of the proceeding because the committee's procedures did not require the keeping of record statements, testimony, or questions, the hearing panel specifically denied the plaintiff's request that it make a transcript or other electronic recording of the hearing for the purpose of further review, the plaintiff's ability to appeal was severely constrained by the lack of a transcript or recording, and the restriction was especially prejudicial in light of the fact that the plaintiff's counsel was not permitted to object when members of the hearing panel allegedly assumed facts not in evidence or otherwise violated core evidentiary principles.

3. A qualified, rather than an absolute, privilege is available to alleged victims of sexual assault who report their abuse to proper authorities at institutions of higher education, but the allegations of malice in the plaintiff's complaint were sufficient to defeat D's entitlement to qualified immunity as a matter of law at the motion to dismiss stage of the proceeding:

a. The public policy of this state, as articulated in § 10a-55m, supported a qualified privilege for statements made by alleged victims of sexual assault to proper authorities at institutions of higher education:

The legislature had responded aggressively to address concerns surrounding the issue of hesitation by victims to report sexual misconduct on college campuses when it enacted a series of measures reflecting a strong public commitment to protecting such victims, those measures served to encourage alleged victims to report claims of sexual violence and to enable them to obtain justice with dignity and privacy, and, in view of the legitimate public interests articulated by the legislature, it was appropriate to afford a qualified privilege to the statements of alleged victims of sexual assault who report their abuse to proper authorities at institutions of higher education.

b. Accepting the factual allegations in the plaintiff's complaint as true and drawing all inferences in the plaintiff's favor, as the court was required to do at the motion to dismiss stage, this court concluded that the plaintiff alleged sufficient facts to establish that D acted with malice when making the statements at issue so as to defeat D's qualified privilege at this stage of the plaintiff's federal action:

The plaintiff alleged in his complaint that D had made romantic advances toward him, that she initially told a campus health care worker that she had engaged in consensual unprotected sex, that she reported a sexual assault only because she was ashamed of her sexual advances, and that she was encouraged by the larger political movement waged against the plaintiff, and, on the basis of those allegations, a reasonable inference could be drawn that D knowingly fabricated claims of sexual assault against the plaintiff.

Nevertheless, this court observed that a more complete factual record could warrant revisiting the issue of D's qualified privilege at a later stage of the proceedings, such as at the summary judgment stage or if and when the case is submitted to the jury.

Argued October 3, 2022—officially released June 27, 2023

Procedural History

Action to recover damages for, inter alia, defamation, and for other relief, brought to the United States District Court for the District of Connecticut, where the court, *Dooley*, *J.*, granted the motion to dismiss filed by the defendant Jane Doe and rendered partial judgment thereon, from which the plaintiff appealed to the United States Court of Appeals for the Second Circuit, which certified certain questions of law to this court.

Norman A. Pattis, with whom, on the brief, was *Cameron L. Atkinson*, for the appellant (plaintiff).

James M. Sconzo, with whom was *Brendan N. Gooley*, for the appellee (defendant Jane Doe).

Jennifer M. Becker filed a brief for Legal Momentum et al. as amici curiae.

Opinion

MULLINS, J. This case arises from disciplinary proceedings conducted in 2018 by the University-Wide Committee on Sexual Misconduct (UWC) of the named defendant, Yale University (Yale). In those proceedings, the defendant Jane Doe[1] accused another student, the plaintiff, Saifullah Khan, of sexual assault in violation of Yale's sexual misconduct policy, resulting in his expulsion from Yale. There is no question that, when Doe made those accusations during a criminal trial, an official governmental proceeding with inherent procedural safeguards, she enjoyed absolute immunity in any subsequent civil action challenging her testimony during the criminal proceeding as defamatory.[2] The primary question presented by this appeal, which reaches us in the form of questions of law certified by the United States Court of Appeals for the Second Circuit; see General Statutes § 51-199b (d);[3] is whether Doe should likewise be afforded abso-

[1] In accordance with our policy of protecting the privacy interests of the victims of sexual assault, we decline to identify the victim or others through whom the victim's identity may be ascertained. See General Statutes § 54-86e.

[2] As we discuss hereinafter, Khan was tried for and acquitted of criminal sexual assault charges arising from Doe's accusations. *Khan* v. *Yale University*, 27 F.4th 805, 811 (2d Cir. 2022). Khan has not raised any claims against Doe for her statements to law enforcement or her testimony at his criminal trial. See *Khan* v. *Yale University*, 511 F. Supp. 3d 213, 227 (D. Conn. 2021).

[3] General Statutes § 51-199b (d) provides in relevant part: "The Supreme Court may answer a question of law certified to it by a court of the United States . . . if the answer may be determinative of an issue in pending litigation in the certifying court and if there is no controlling appellate decision, constitutional provision or statute of this state."

lute immunity from suit for her statements made during the UWC proceeding.

As we explain in this opinion, absolute immunity attaches to statements made in judicial or quasi-judicial proceedings. Doe argues that the UWC proceeding is a quasi-judicial proceeding. Therefore, she contends, her statements made therein are entitled to absolute immunity because such immunity furthers the important public policy goal of permitting alleged victims of sexual assault to speak candidly and frankly with university officials without fear of retaliatory lawsuits.

Khan counters that the UWC proceeding is not quasi-judicial because it was neither a governmental proceeding nor a proceeding with sufficient judicial-like procedures to protect against malicious and defamatory state ments. Khan asserts that, if absolute immunity is afforded to testimony provided in proceedings such as that conducted by the UWC, individuals who are falsely accused will be left with no recourse or protection against malicious and defamatory allegations.

Both parties' arguments are compelling. Supporting Doe's position, the amici[4] indicate that one in four women, and one in fifteen men, will experience sexual assault while attending college. These victims are often reluctant to report such crimes. In one survey, for example, college men and women identified these concerns as affecting their decision to report sexual assaults: (1) "shame, guilt, embarrassment," and "not wanting friends and family to know," (2) "concerns about confidentiality," and (3) "fear of not being believed . . . ."

[4] After accepting the certified questions of law, we granted permission to Legal Momentum, Fierberg National Law Group and thirteen coamici to file an amici curiae brief in support of Doe's claim that statements made in the course of Title IX processes should be afforded absolute immunity.

Doe v. *Roe*, 295 F. Supp. 3d 664, 676 (E.D. Va. 2018).[5] We are mindful of these concerns and sensitive to the need to encourage alleged victims of sexual assault to report their abuse to the appropriate authority at any institution of higher education, free from fear of intimidation and retribution. More generally, we consider it foundational that all students must be able to attend school, move about campus, and enjoy the manifold privileges and benefits of their academic pursuits without fear of sexual harassment or assault by members of their own community. It is difficult to think of a right more fundamental than the right to physical safety. Indeed, the public policy of this state, established through General Statutes § 10a-55m,[6] demonstrates that sexual assault at institutions of higher education must be addressed by encouraging and supporting alleged victims of sexual assault to speak out, to vindicate their rights, and to bring the perpetrators to justice if the allegations are proven. Likewise, the remedial powers of our judicial system must not be used as a means of intimidation to enable the perpetrators of sexual assault to silence their accusers by using the threat of civil litigation and liability for damages.

At the same time, however, we must recognize a competing public policy that those accused of crimes, especially as serious a crime as sexual assault, are entitled to fundamental fairness before being labeled a sexual predator. Statements made in sexual misconduct disciplinary proceedings that are offered and accepted without adequate procedural safeguards carry too great

[5] The court cited to M. Sable et al., "Barriers to Reporting Sexual Assault for Women and Men: Perspectives of College Students," 55 J. Am. Coll. Health 157, 157–62 (2006).

[6] Although § 10a-55m was the subject of certain amendments since the events underlying this appeal; see, e.g., Public Acts 2021, No. 21-81, §§ 1 and 4; Public Acts 2019, No. 19-189, § 2; those amendments have no bearing on the merits of this appeal. In the interest of simplicity, unless otherwise indicated, we refer to the current revision of the statute.

a risk of unfair or unreliable outcomes. There is no benefit to society or the administration of fair and impartial disciplinary hearings in granting absolute immunity to those who make intentionally false and malicious accusations of sexual assault.[7] Those accused of sexual assault in the higher education context often face life altering and stigmatizing consequences, including suspension or expulsion, criminal referrals, lack or revocation of employment offers, loss of future academic opportunity, and deportation. In the face of these consequences, we must acknowledge that the accused's right to fundamental fairness is no less important than the right of the accuser or the larger community to achieve justice. Disciplinary proceedings that lack fundamental procedural safeguards "do not adequately protect a critical public policy undergirding the doctrine of absolute immunity—to encourage robust participation and candor in judicial and quasi-judicial proceedings while providing some deterrent against malicious falsehoods." *Priore* v. *Haig*, 344 Conn. 636, 651, 280 A.3d 402 (2022).

To balance and protect both of the aforementioned interests, we must clarify when a proceeding is quasi-judicial for the purpose of affording proceeding participants absolute immunity. As we explain hereinafter, we recognize a proceeding as quasi-judicial only when the proceeding at issue is specifically authorized by law, applies law to fact in an adjudicatory manner, contains adequate procedural safeguards, and is supported by a public policy encouraging absolute immunity for proceeding participants. In short, we accept the Second Circuit's invitation to clarify the scope of Connecticut's

[7] Although we do not doubt that false accusations of this nature are uncommon, they can be made, especially if certain fundamental procedural safeguards are not securely in place. See National Sexual Violence Resource Center, False Reporting: Overview (2012) pp. 2–3, available at https://www.nsvrc.org/sites/default/files/Publications_NSVRC_Overview_False-Reporting.pdf (last visited June 21, 2023) (estimating that prevalence of false reporting of sexual assaults is between 2 and 10 percent of total reports).

absolute immunity doctrine and conclude that the UWC proceeding did not meet the conditions necessary to be considered quasi-judicial. Consequently, Doe is not entitled to absolute immunity.

Nevertheless, because the public interest in encouraging the reporting of sexual assaults to the proper authorities at institutions of higher education is sufficiently compelling to warrant protection of a defamatory statement, a qualified privilege is appropriate for alleged victims of sexual assault in this context. Because this matter is only at the motion to dismiss stage, however, we must accept as true Khan's factual allegations in his complaint that Doe's statements were made with malice, which defeats Doe's asserted privilege at this stage of the proceedings. At a later stage of the proceedings, with a more complete factual record, it may be appropriate to revisit whether Doe's qualified privilege has been defeated.

I

Khan brought the underlying action in the United States District Court for the District of Connecticut, alleging, among other things, defamation and tortious interference with business relationships against Doe.[8] *Khan* v. *Yale University*, 511 F. Supp. 3d 213, 216, 219 (D. Conn. 2021). The District Court's memorandum of decision contains the following factual allegations, taken from Khan's complaint, which we are required to accept as true and construe in Khan's favor for pur-

[8] Khan also alleged violations of Title IX; see footnote 11 of this opinion; breach of contract, breach of the implied warranty of fair dealing, negligent infliction of emotional distress, intentional infliction of emotional distress, and breach of privacy against Yale and various employees of Yale. See *Khan* v. *Yale University*, 511 F. Supp. 3d 213, 216, 219 (D. Conn. 2021). Yale and its employees also were named as defendants, but they are not parties to this appeal. For the sake of simplicity, we refer to Doe by name throughout this opinion and to the other defendants by name when necessary.

poses of answering the certified questions of law.[9] See, e.g., *Littlejohn* v. *New York*, 795 F.3d 297, 306 (2d Cir. 2015) (on motion to dismiss pursuant to rule 12 (b) (6) of Federal Rules of Civil Procedure, court must accept complaint's factual allegations as true and draw inferences in plaintiff's favor); *Lunardini* v. *Massachusetts Mutual Life Ins. Co.*, 696 F. Supp. 2d 149, 155 (D. Conn. 2010) ("[a] motion to dismiss under [r]ule 12 (b) (6) must be decided on facts stated on the face of the complaint, in documents appended to the complaint or incorporated in the complaint by reference" (internal quotation marks omitted)), quoting *Leonard F.* v. *Israel Discount Bank of New York*, 199 F.3d 99, 107 (2d Cir. 1999).

"Khan is a [foreign national] who at all relevant times was enrolled as an undergraduate student at Yale. . . . [In the fall of 2012, he enrolled as an undergraduate at Yale.] He was expected to graduate Yale with the [c]lass of 2016. . . .

"[Doe] was a classmate of . . . Khan's and was likewise enrolled at all relevant times as an undergraduate student at Yale. . . . On Halloween night in 2015 . . . Khan and . . . Doe, who were familiar with one another from prior campus encounters, met at an [off campus] Halloween party before attending a musical performance at [Yale's] Woolsey Hall. . . . Doe was not feeling well and so the two left the performance early and walked on campus together before returning to Trumbull College, [a Yale residential college] where they both resided. . . . After . . . Khan escorted . . .

[9] Section 51-199b (g) directs that, "[i]f the parties cannot agree upon a statement of facts, then the certifying court shall determine the relevant facts and shall state them as a part of its certification order."

However, given the procedural posture of this case, no facts have yet been found because Khan appealed to the Second Circuit from the District Court's granting of Doe's motion to dismiss pursuant to rule 12 (b) (6) of the Federal Rules of Civil Procedure.

Doe to her room, she asked him to [enter] and the two . . . engaged in consensual sexual intercourse. . . . In the morning . . . Doe reported to friends that she had been raped, though she informed a health care worker that she had engaged in unprotected consensual sex when [she sought] contraception at the Yale [H]ealth [C]enter [later] that same day. . . .

"In the days that followed . . . Doe went public with her rape claim and issued a formal complaint against . . . Khan on the advice of the Yale Women's Center. . . . Khan was immediately suspended by Yale [College][10] Deputy Dean Joe Gordon based on . . . Doe's written complaint alone and was ordered to vacate campus, which rendered him homeless. . . . The Yale Police Department opened an investigation and by mid-November [of 2015] the [s]tate . . . filed criminal charges against . . . Khan for [first degree] sexual assault. . . . In the meantime [the UWC] . . . [stayed] any disciplinary proceedings pending the outcome of the prosecution. . . . Khan subsequently faced trial before a jury in early 2018 for first, second, third, and [fourth degree] sexual assault during a nearly [two week] trial and was acquitted on all counts after less than [one] day of deliberations. . . .

"Following his acquittal . . . Khan sought readmission [to] Yale, to which #MeToo activists galvanized an opposition, generating more than 77,000 signatures on a petition protesting his reenrollment. . . . Khan was eventually readmitted and resumed full-time student status in the fall of 2018, though he was denied [on campus] housing and treated as unwelcome[d] on campus. . . . In early October 2018, the Yale Daily News published an article relaying the allegations of a troubled young man who claimed that he had a romantic

[10] Yale College is the undergraduate branch of Yale University. We hereinafter refer to Yale College by its full name.

relationship with . . . Khan that included an episode in which . . . Khan sexually assaulted him during an act of role-playing with a woman in Washington, D.C., and an instance in which . . . Khan slapped him in the face while the two were together in [Indianapolis, Indiana]. . . . The article did not provide any indication that this young man had any affiliation with Yale or had ever been to the Yale campus. . . .

"Following publication of the article . . . Khan was contacted by members of the Yale Police Department and by two Yale administrators to inquire as to his well-being and to determine whether he needed professional help. . . . Khan agreed to undergo a mental health consultation but reported that he was fine and had not considered harming himself or others. . . . Khan was then asked to meet with Yale administrators and after indicating that he would not do so . . . Khan received a letter informing him that he was suspended [effective] immediately from Yale College . . . which Dean Marvin Chun described as necessary for [Khan's] physical and emotional safety and well-being and/or the safety and well-being of the university community. . . . Khan was thus barred from campus and prohibited from attending his classes; he was again rendered homeless without warning and informed that he would lose his health care coverage effective November 1, 2018. . . .

"[Khan] alleges that Yale's professed concern with his safety and with the safety of the Yale community [was] not credible, as there [was] no evidence that . . . Khan posed a danger to himself or to anyone else . . . . [Furthermore, Khan completed a psychiatric examination during his suspension, in which the evaluator concluded that Khan posed no threat.] Instead . . . Khan asserts that his suspension was pretextual and arose from a confluence of factors that included his unique history at Yale and the heightened sensibilities surrounding sexual assault claims, which were often cred-

ited without investigation or due process at Yale as a function of the university's pervasive #MeToo culture. . . . Following his suspension . . . Khan placed Yale on notice that he intended to seek judicial relief and open an investigation into Yale's alleged Title IX[11] violations in connection with his suspension and with the university's failure to convene a hearing on the claims of . . . Doe . . . . Khan also requested and was denied permission to attend his classes with an escort to address Yale's safety concerns, though Yale had afforded other male students accused of sexual misconduct the ability to complete their degrees off-site. . . .

"In November 2018 . . . Khan was permitted to return to campus for a hearing convened by the UWC on . . . Doe's 2015 sexual assault complaint. . . . Doe, who had since graduated from Yale, was not present and provided a statement via teleconference. . . . Khan was not permitted to be in the room when the UWC [hearing] panel questioned . . . Doe and was instead required to sit in an anteroom where he listened to an [audio feed] of the hearing; as a result . . . Khan [claims that he] was denied an opportunity to confront his accuser. . . . And although . . . Khan had counsel present, his attorney was not permitted to speak, question witnesses, or [raise] objections when panel members assumed facts not in evidence and asked compound questions. . . . A member of [Yale's Office of the General Counsel] was present throughout the proceedings to provide counsel to the UWC panel. . . . Khan also requested a transcript or recording of the

[11] Title IX was enacted as part of the Education Amendments of 1972. Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. § 1681 et seq.). Title IX provides in relevant part: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681 (a) (2018).

hearing, which the panel denied.[12] . . . The UWC panel decided to expel . . . Khan as a result of the hearing, which he contends failed to afford him the basic due process that Title IX demands. . . . As a result of losing his opportunity to complete his Yale education . . . Khan [was] subject to immediate deportation to [his country of citizenship], where he [faced] serious physical danger due to his family's decision to seek refuge in [another country]."[13] (Citations omitted; footnotes added; footnote altered; footnote omitted; internal quotation marks omitted.) *Khan* v. *Yale University*, supra, 511 F. Supp. 3d 216–18.

The following additional procedural history is relevant. After Khan brought the federal action against Yale, various Yale employees, and Doe, the District Court granted Doe's motion to dismiss Khan's claims of defamation and tortious interference with business relationships. See id., 216, 219, 226, 228; see also footnote 8 of this opinion. Insofar as Khan sued Doe for defamation on the basis of her allegations of sexual assault in the UWC proceeding, the District Court concluded that the UWC proceeding was quasi-judicial in nature, and, therefore, under Connecticut law, Doe enjoyed absolute immunity for statements she made in that proceeding. See *Khan* v. *Yale University*, supra, 511 F. Supp. 3d 226. Although the District Court acknowledged that it was "reluctant to alter the landscape of Connecticut's immunity law" by extending absolute immunity to statements made during the proceedings of a nongovernmental entity—an area it said Connecticut courts have not resolved; id., 224; the court concluded that extending

[12] As we explain later, "[the UWC procedures] explicitly provide that '[t]he minutes [of the UWC hearing] do not record statements, testimony, or questions.' " Part III B 5 of this opinion.

[13] In his complaint, Khan alleges that he was born in a refugee camp in Pakistan after his family fled from the Taliban in Afghanistan and that he and his family subsequently fled from a Pakistani terrorist group to the United Arab Emirates.

such immunity in the present case was warranted, both as a matter of public policy; id., 225–26; and under the six factor test that this court had used to identify quasi-judicial proceedings in *Kelley* v. *Bonney*, 221 Conn. 549, 567, 606 A.2d 693 (1992). See *Khan* v. *Yale University*, supra, 220–22.

On appeal to the Second Circuit, "Khan argue[d] that the proceedings of [nongovernmental] entities cannot be quasi-judicial and, thus, Doe's accusations of sexual assault in a private university's disciplinary hearing are not shielded by absolute immunity." *Khan* v. *Yale University*, 27 F.4th 805, 810 (2d Cir. 2022). The Second Circuit concluded that the outcome of the appeal hinges on a question of Connecticut state law—namely, whether quasi-judicial immunity extends to proceedings like that of the 2018 Yale UWC proceeding—and that it could not predict how this court would resolve that question. See id., 833. Consequently, the Second Circuit certified the following questions of law, which we modify to address issues of Connecticut law pertinent to this appeal:[14]

(1) What requirements must be satisfied for a proceeding to be recognized as quasi-judicial for purposes of affording absolute immunity to proceeding participants? Specifically:

(a) Must an entity apply controlling law, and not simply its own rules, to the facts at issue in the proceeding? See *Petyan* v. *Ellis*, 200 Conn. 243, 246, 510 A.2d 1337 (1986); see also W. Keeton et al., Prosser and Keeton on the Law of Torts (5th Ed. 1984) § 114, pp. 818–19.

(b) How, if at all, do the power factors enumerated in *Kelley* v. *Bonney*, supra, 221 Conn. 567, and *Craig* v. *Stafford Construction, Inc.*, 271 Conn. 78, 85, 856

[14] *Khan* v. *Yale University*, supra, 27 F.4th 834 ("the Connecticut Supreme Court may modify or expand these certified questions or address any other issues of Connecticut law pertinent to this appeal").

A.2d 372 (2004), apply to the identification of a proceeding as quasi-judicial; and, if they do apply, are these factors in addition to; see id.; or independent of, a preliminary law to fact requirement?

(c) How, if at all, does public policy inform the identification of a proceeding as quasi-judicial, and, if it does, is this consideration in addition to, or independent of, a law to fact requirement and the *Kelley*/*Craig* factors?

(d) How, if at all, do procedures usually associated with traditional judicial proceedings—such as notice and the opportunity to be heard; the ability to be physically present throughout a proceeding; an oath requirement; the ability to call, examine, confront, and cross-examine witnesses; and the ability to be represented by counsel—inform the identification of a proceeding as quasi-judicial? See id., 87–88; *Kelley* v. *Bonney*, supra, 221 Conn. 568–70.[15]

(2) Was the 2018 Yale UWC proceeding at issue in the present appeal properly recognized as quasi-judicial?

(3) If the answer to the second question is yes, would Connecticut extend absolute quasi-judicial immunity to Doe for her statements in the Yale UWC proceeding?

(4) If the answer to the second question is no, would Connecticut afford Doe qualified immunity or no immunity at all? See *Khan* v. *Yale University*, supra, 27 F.4th 833–34.

Although the Second Circuit also asked us to answer whether, under Connecticut law, a proceeding before a nongovernmental entity could *ever* be deemed quasi-

[15] On September 7, 2022, after the parties filed briefs in this appeal, we released our decision in *Priore* v. *Haig*, supra, 344 Conn. 636, which addressed issues relating to quasi-judicial proceedings and absolute immunity. Accordingly, prior to oral arguments before this court, we ordered the parties to file supplemental briefs to address the applicability, if any, of *Priore*.

judicial for purposes of affording absolute immunity to proceeding participants; id., 833; we conclude that it is unnecessary to answer that question in order to resolve whether Yale's UWC proceeding was quasi-judicial. Instead, we answer the certified questions focusing on the requirements that any proceeding must satisfy to be considered quasi-judicial.

II

We first address what requirements must be satisfied for a proceeding to be recognized as quasi-judicial for purposes of affording absolute immunity to proceeding participants. See id. At the outset, we recognize that "the determination of whether [a proceeding] constitutes a quasi-judicial proceeding is a question of law over which our review is plenary." *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 83. "[W]hether a particular proceeding is quasi-judicial in nature, for the purposes of triggering absolute immunity, will depend on the particular facts and circumstances of each case." (Internal quotation marks omitted.) *Priore* v. *Haig*, supra, 344 Conn. 645.

The doctrine of absolute judicial immunity, or absolute privilege, which shields judges, parties, and witnesses from liability for their testimony in judicial and quasi-judicial proceedings, has its origins in English common law.[16] In Connecticut, we have long held that "communications uttered or published in the course of judicial proceedings are absolutely privileged [as] long as they are in some way pertinent to the subject of the controversy." (Internal quotation marks omitted.) *Gallo* v. *Barile*, 284 Conn. 459, 466, 935 A.2d 103 (2007); see

[16] See, e.g., *Briscoe* v. *LaHue*, 460 U.S. 325, 330–31, 103 S. Ct. 1108, 75 L. Ed. 2d 96 (1983) (tracing judicial immunity to sixteenth century); *Khan* v. *Yale University*, supra, 27 F.4th 818 (explaining origins of absolute immunity); see also, e.g., *Buckley* v. *Wood*, 76 Eng. Rep. 888, 889 (K.B. 1591) (holding that accused could not pursue defamation action because accuser's statements were made in "[the] course of justice").

also *Charles W. Blakeslee & Sons* v. *Carroll*, 64 Conn. 223, 232, 29 A. 473 (1894) (*Blakeslee*) (relying on English common law to first recognize privilege), overruled in part on other grounds by *Petyan* v. *Ellis*, 200 Conn. 243, 510 A.2d 1337 (1986).

Our earliest cases recognizing absolute immunity limited the privilege to official adjudicative proceedings, i.e., formal dispute resolution proceedings or forums, that were specifically authorized by law. In *Blakeslee*, for example, this court held that "[a] judicial proceeding within the meaning of the rule as to absolute privilege must . . . be *one carried on in a court of justice established or recognized by law*, [in which] the rights of parties which are recognized and protected by law are involved and may be determined." (Emphasis added.) *Charles W. Blakeslee & Sons* v. *Carroll*, supra, 64 Conn. 234.

Since *Blakeslee*, we have acknowledged that "[t]he judicial proceeding to which [absolute] immunity attaches has not been defined very exactly. [At the very least, it] includes any hearing before a tribunal [that] performs a judicial function, ex parte or otherwise, and whether the hearing is public or not. It includes . . . [competency], bankruptcy, or naturalization proceedings, and an election contest. It extends also to the proceedings of many administrative officers, such as boards and commissions, so far as they have powers of discretion in applying the law to the facts [that] are regarded as judicial or [quasi-judicial], in character."[17] (Internal quotation marks omitted.) *Kelley* v. *Bonney*, supra, 221

[17] *Kelley* further explained that "an absolute privilege also attaches to relevant statements made during administrative proceedings [that] are [quasi-judicial] in nature. . . . Once it is determined that a proceeding is [quasi-judicial] in nature, the absolute privilege that is granted to statements made in furtherance of it extends to every step of the proceeding until final disposition." (Citations omitted; internal quotation marks omitted.) *Kelley* v. *Bonney*, supra, 221 Conn. 566.

Conn. 566; see also *Hopkins* v. *O'Connor*, 282 Conn. 821, 839, 925 A.2d 1030 (2007) (" 'judicial proceeding' has been defined liberally to encompass much more than civil litigation or criminal trials").

Although we have never expressly said so, a review of our case law demonstrates that a threshold requirement of any quasi-judicial proceeding is that the proceeding must be specifically authorized by law, meaning that the proceeding is governed by or conducted pursuant to a state or federal statute.[18] For example, in *Petyan* v. *Ellis*, supra, 200 Conn. 243, General Statutes (Rev. to 1979) §§ 31-241, 31-242 and 31-249 authorized officials of the Employment Security Division of the state Department of Labor to conduct reviews of unemployment compensation claims. See id., 248–49. In *Kelley* v. *Bonney*, supra, 221 Conn. 549, a state Board of Education's hearing to revoke a teaching certificate was prescribed by General Statutes (Rev. to 1987) § 10-145b (m). See id., 567. In *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 78, a proceeding by the Hartford Police Department was required by the department's official code of conduct, enacted pursuant to both city charter and a collective bargaining agreement in accordance with Connecticut's Municipal Employee Relations Act. See id., 86; see also General Statutes § 7-467 et seq.

Similarly, our appellate courts have recognized that arbitration proceedings, both contractual and court mandated, were specifically authorized by law and qual-

[18] Other courts have adhered to a similar requirement. See, e.g., *Overall* v. *University of Pennsylvania*, 412 F.3d 492, 497 (3d Cir. 2005) ("quasi-judicial privilege consistently involve[s] proceedings before federal, state, or local governmental bodies, *or proceedings held pursuant to a statute or administrative regulation*" (emphasis added)); see also, e.g., *Bose* v. *Bea*, 947 F.3d 983, 995 (6th Cir. 2020) ("[quasi-judicial proceedings must be] *tied to a statute* or to powers [that] the [state] legislature had specifically granted to the tribunal at issue" (emphasis added)), cert. denied, U.S. , 141 S. Ct. 1051, 208 L. Ed. 2d 521 (2021).

ified as quasi-judicial.[19] See *Larmel* v. *Metro North Commuter Railroad Co.*, 341 Conn. 332, 341, 267 A.3d 162 (2021) ("[court mandated] arbitration proceeding pursuant to [General Statutes] § 52-549u is, undoubtedly, a quasi-judicial examination of the parties' claims, as arbitrators are statutorily authorized to carry out functions that are judicial in nature"); *Preston* v. *O'Rourke*, 74 Conn. App. 301, 310–12, 314–15, 811 A.2d 753 (2002) (arbitration proceeding conducted pursuant to State Employee Relations Act and governed by General Statutes §§ 52-408 through 52-424 was quasi-judicial in nature).

Requiring that a proceeding be specifically authorized by or conducted pursuant to law is consistent with the purposes of absolute immunity because, among other things, the imposition of absolute immunity is intended to be a public benefit and a societal necessity. A proceeding that is not specifically authorized by or conducted pursuant to law provides little foundation for this court to determine that the public has an interest in encouraging participation and unfettered candor in the proceeding. See *Logan's Super Markets, Inc.* v. *McCalla*, 208 Tenn. 68, 72, 343 S.W.2d 892 (1961) ("[absolute immunity] belongs to the public, not to the individual, and the public should not stand to lose the benefit it derives"). Indeed, a proceeding that lacks authorization by law provides no assurance that the public interest in the proceeding is sufficiently vital to justify affording absolute immunity to its participants.

Beyond a specific authorization by law, our decision in *Priore*, which was released after the Second Circuit

[19] Although arbitration proceedings fall outside of the scope of traditional governmental proceedings and administrative hearings, we nonetheless recognize that arbitrations are statutorily authorized, designed to be an alternative dispute resolution forum to official judicial proceedings, contain procedural safeguards, and are subject to judicial review. Thus, we have concluded that arbitrations may be quasi-judicial. See *Larmel* v. *Metro North Commuter Railroad Co.*, 341 Conn. 332, 341, 267 A.3d 162 (2021).

certified this question, sets forth the general requirements that must be satisfied for any proceeding to be recognized as quasi-judicial: "[A] quasi-judicial proceeding is one in which the entity conducting the proceeding has the power of discretion in applying the law to the facts within a framework that contains procedural protections against defamatory statements. As part of their inquiry into whether a proceeding is truly quasi-judicial, courts may consider the relevant factors enumerated by this court in *Kelley* to determine whether the entity exercises powers akin to a judicial entity. . . . Courts may also consider other factors that are relevant to a given proceeding, including the procedural safeguards of the proceeding and the authority of the entity to regulate the proceeding. Finally, courts must always carefully scrutinize whether there is a sound public policy justification for the application of absolute immunity in any particular context." (Citation omitted.) *Priore* v. *Haig*, supra, 344 Conn. 652–53. We now discuss in greater detail how each of these requirements applies to adjudicative proceedings, in response to the auxiliary questions posed by the Second Circuit.

A

The Second Circuit asks whether the entity conducting a quasi-judicial proceeding must "apply controlling law, and not simply its own rules, to [the] facts at issue in the proceeding . . . ." *Khan* v. *Yale University*, supra, 27 F.4th 833. We have repeatedly held that "a quasi-judicial proceeding is one in which the entity conducting the proceeding has the power of discretion in applying the law to the facts . . . ." *Priore* v. *Haig*, supra, 344 Conn. 652. Although we have recognized various sources of official law—statutes, regulations, municipal codes—in each case in which we deemed the proceeding at issue to be quasi-judicial, the entity conducting the proceeding applied more than its own internal policies or rules of decision.

The law to fact requirement originated in judicial proceedings and was derived to distinguish proceedings involving mere investigatory powers from proceedings that involved investigation *and* adjudication of the matter.[20] In the nineteenth century, this court determined that a committee proceeding to investigate the truth of certain statements made by the New Haven Board of Aldermen did not constitute a judicial or quasi-judicial proceeding. See *Charles W. Blakeslee & Sons* v. *Carroll*, supra, 64 Conn. 234. The court explained that "the power and the duty of the committee were simply to obtain . . . information . . . . The persons who were to make the inquiry had no judicial character or office . . . had no settled jurisdiction or fixed mode of procedure . . . and they had no judicial function to exercise, for they could decide nothing, and could only report their action to a board [that] might altogether disregard what the committee had done." Id.

Nearly one century later, in *Petyan* v. *Ellis*, supra, 200 Conn. 243, this court clarified that a proceeding can be quasi-judicial if the entity conducting the proceeding "ha[s] powers of discretion in applying the law to the facts . . . ." (Internal quotation marks omitted.) Id.,

[20] We note that, "[a]lthough Connecticut appellate courts have not addressed [legislative immunity for witnesses], other jurisdictions have held that witnesses in a legislative proceeding are entitled to absolute immunity." *Priore* v. *Haig*, supra, 344 Conn. 670 (*D'Auria*, *J.*, concurring in part and concurring in the judgment); see, e.g., *Beverly Enterprises, Inc.* v. *Trump*, 1 F. Supp. 2d 489, 493 (W.D. Pa. 1998) ("the definition of a legislative proceeding is broad enough to encompass proceedings—including informal fact-finding, information gathering, or investigative activities—that are conducted by legislators with the objective purpose of aiding the legislators in the drafting, debating, or adopting of proposed legislation"), aff'd, 182 F.3d 183 (3d Cir. 1999), cert. denied, 528 U.S. 1078, 120 S. Ct. 795, 145 L. Ed. 2d 670 (2000); 3 Restatement (Second), Torts § 590A, p. 254 (1977) ("[a] witness is absolutely privileged to publish defamatory matter as part of a legislative proceeding in which he is testifying or in communications preliminary to the proceeding, if the matter has some relation to the proceeding"). In this matter, the doctrine of legislative immunity has no application.

246. Unlike in *Blakeslee*, the entity conducting the proceeding in *Petyan* "decide[d] the facts and then appl[ied] the appropriate law" to the facts to render a decision. Id., 248. At issue was whether statements provided by a defendant-employer on a " 'fact-finding supplement' " form of the Employment Security Division of the state Department of Labor were subject to absolute immunity. Id., 247–48. The court concluded that, because, "[i]n the processing of unemployment compensation claims, the administrator, the referee and the [E]mployment [S]ecurity [B]oard of [R]eview decide the facts and then apply the appropriate law . . . [t]he [E]mployment [S]ecurity [D]ivision . . . acts in a quasi-judicial capacity when it acts [on] claims for unemployment compensation." (Citation omitted; footnotes omitted.) Id., 248–49. Specifically, in *Petyan*, the adjudicators were authorized by statute to determine unemployment claims. See id.

Similarly, in *Kelley*, this court placed special emphasis on the Board of Education's duty to apply Connecticut laws and regulations to its findings of fact in order to properly revoke a teaching certificate. See *Kelley* v. *Bonney*, supra, 221 Conn. 567–68. This court observed that the proceedings had to conform to statutory regulations that listed well delineated causes for a teacher's license revocation. Id., 568; see also *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 84–89 (Hartford Police Department applied its official code of conduct and collective bargaining agreement to facts, thus satisfying law to fact requirement).[21]

Most recently, in *Priore* v. *Haig*, supra, 344 Conn. 636, we likewise observed that "the [Greenwich Planning and Zoning Commission] has the discretion to

[21] The collective bargaining agreement in *Craig* was governed by the Municipal Employee Relations Act. See *Khan* v. *Yale University*, supra, 27 F.4th 822 n.22.

apply the law, [the Greenwich zoning regulations] . . . to the facts set forth in the application before it." Id., 654. We explained that, "when acting in this administrative capacity on a special permit application, a planning and zoning commission . . . decides [whether] all of the standards enumerated in the special permit regulations are met . . . ." (Internal quotation marks omitted.) Id., 653.[22]

A review of our cases thus demonstrates that the entity conducting a quasi-judicial proceeding must apply public law—whether it be constitutional, statutory, administrative, municipal, or common law—to facts for the purpose of rendering an adjudicatory decision. The law that is applied is promulgated by a public official or entity, and the application of the law is either subject to judicial review or may be altered or repealed by a public official or entity. In other words, although a private entity may adopt publicly created law to govern its affairs, the law applied is controlled and formulated by the public and is designed to benefit the greater public. Thus, an entity that creates and applies only its internal policies lacks the necessary components of public participation and approval to be considered quasi-judicial for the purpose of affording participants absolute immunity.

B

We next turn to the question of how "procedures usually associated with traditional judicial proceedings—such as notice and the opportunity to be heard; the ability to be physically present throughout a proceeding; an oath requirement; the ability to call, examine, confront, and cross-examine witnesses; [and] the

[22] Although we determined that the zoning commission applied law to fact, we concluded that the proceeding was not quasi-judicial for the reasons articulated in part II B of this opinion. See *Priore* v. *Haig*, supra, 344 Conn. 655, 661.

ability to be represented by counsel—inform the identification of a proceeding as quasi-judicial?" *Khan* v. *Yale University*, supra, 27 F.4th 833. Because the doctrine of absolute immunity has applied to statements made during official judicial proceedings, which feature all of these procedures, the extent to which these procedures are present will often be determinative of whether a proceeding qualifies as quasi-judicial. Our recent decision in *Priore* provides guidance.

In that case, we concluded that, in addition to the law to fact requirement, "our case law also looks to the procedural safeguards that attend to the proceeding . . . which promote reliability and due process, as part of the analysis to determine whether a proceeding is truly quasi-judicial in nature." *Priore* v. *Haig*, supra, 344 Conn. 648–49. We explained that "it [is] eminently reasonable for courts to consider the procedural safeguards attendant to a proceeding because [s]tatements made during proceedings that lack basic [due process] protections generally do not engender fair or reliable outcomes." (Internal quotation marks omitted.) Id., 651.

In *Priore*, we ultimately concluded that statements made during a town planning and zoning commission public hearing were not entitled to absolute immunity. See id., 661, 663. Although the commission applied law to fact and the public hearing satisfied many of the *Kelley* factors; see id., 654, 661; see also part II C of this opinion; we declined to recognize the hearing as quasi-judicial because, among other things, "the hearing before the commission had almost no procedural safeguards in place to ensure the reliability of the information presented at the proceeding." *Priore* v. *Haig*, supra, 344 Conn. 655. Specifically, we identified two significant procedural safeguards that were missing: (1) the declarant did not testify under oath or certify the truth of her statements, and (2) there was no practical opportunity to cross-examine witnesses or to hold declarants account-

able for false or misleading statements. See id., 655–57; see also id., 655 n.4.

We explained in *Priore* that it is important for any declarant receiving absolute immunity to make the statements under oath or otherwise certify that the information is true and correct because, without doing so, there is no judicial remedy available to deter a witness from giving false information. See id., 655. This is consistent with a long line of Connecticut cases holding that, for absolute immunity to apply, it is vitally important that statements be sworn, made under oath, or otherwise subject to the penalty of perjury. See, e.g., *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 87 (emphasizing that "witnesses [gave] sworn statements to the investigator during the investigation, and the form on which they sign[ed] their statement inform[ed] the witness that he or she [could] be criminally liable for filing a false statement"); *Kelley* v. *Bonney*, supra, 221 Conn. 568–69 (relying on fact that "a request for revok[ing] . . . [a teaching certificate had to be] made under oath"); *DeLaurentis* v. *New Haven*, 220 Conn. 225, 264, 597 A.2d 807 (1991) (holding that, "[although] no civil remedies can guard against lies, the oath and the fear of being charged with perjury are adequate to warrant an absolute privilege for a witness' statements"); *Petyan* v. *Ellis*, supra, 200 Conn. 250–51 (emphasizing that defendant was required to certify that information presented was true and correct and that she could have been summoned to testify under oath, subject to criminal penalties, if she perjured herself); see also *Larmel* v. *Metro North Commuter Railroad Co.*, supra, 341 Conn. 341 (relying on fact that arbitrators are statutorily authorized to administer oaths); *Preston* v. *O'Rourke*, supra, 74 Conn. App. 312 (noting that "witnesses [in contractual arbitration] testified under oath"). Because absolute immunity removes the threat of private defamation actions in order to incentivize witnesses to par-

ticipate candidly and willingly in the proceeding, it is crucial that there be some strong deterrent, such as the threat of a perjury prosecution, against abuse of the privilege by the giving of untruthful testimony.[23]

The second missing safeguard in *Priore* was the opportunity for parties to meaningfully challenge the veracity of participants' statements, whether through cross-examination or other comparable means. See *Priore* v. *Haig*, supra, 344 Conn. 657. "For two centuries, [common-law] judges and lawyers have regarded the opportunity of cross-examination as an essential safeguard of the accuracy and completeness of testimony." (Internal quotation marks omitted.) *Pagano* v. *Ippoliti*, 245 Conn. 640, 656, 716 A.2d 848 (1998) (*McDonald, J.*, dissenting). It has been said many times that "cross-examination is beyond any doubt the greatest legal engine ever invented for the discovery of truth." (Internal quotation marks omitted.) *State* v. *Ali*, 233 Conn. 403, 424, 660 A.2d 337 (1995). The procedure allows counsel to "expose [testimonial infirmities, such as forgetfulness, confusion, or evasion] . . . thereby calling to the attention of the [fact finder] the reasons for giving scant weight to the witness' testimony." (Internal quota-

[23] General Statutes § 53a-156 (a) provides that "[a] person is guilty of perjury if, in any official proceeding, such person intentionally, *under oath* or in an unsworn declaration under sections 1-65aa to 1-65hh, inclusive, makes a false statement, swears, affirms or testifies falsely, to a material statement which such person does not believe to be true." (Emphasis added.)

General Statutes § 53a-146 (1) defines an "official proceeding" as "any proceeding held or which may be held before any legislative, judicial, administrative or other agency or official authorized to take evidence *under oath*, including any referee, hearing examiner, commissioner or notary or other person taking evidence in connection with any proceeding." (Emphasis added.)

For purposes of this appeal, we need not decide whether it would ever be appropriate to afford absolute immunity to participants in a proceeding that did not qualify as official for purposes of §§ 53a-146 and 53a-156, or that did not provide explicit and meaningful penalties for false testimony made during the proceeding.

tion marks omitted.) *State* v. *Hutton*, 188 Conn. App. 481, 504, 205 A.3d 637 (2019).

It is not surprising, then, that, as we discussed in *Priore*, several of this court's prior cases recognizing quasi-judicial proceedings, including *Hopkins*, *Craig*, and *Kelley*, relied on the respondent's ability to cross-examine adverse witnesses or to otherwise challenge the credibility of witness testimony in quasi-judicial proceedings. See *Priore* v. *Haig*, supra, 344 Conn. 649–51; see, e.g., *Hopkins* v. *O'Connor*, supra, 282 Conn. 834–37 (patient confined to hospital under emergency certificate had right to cross-examine adverse witnesses); *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 88 (police officer who was under investigation had right to cross-examine adverse witnesses); *Kelley* v. *Bonney*, supra, 221 Conn. 570 n.14 (parties possessed right to cross-examine adverse witnesses); see also, e.g., *Spencer* v. *Klementi*, 136 Nev. 325, 332, 466 P.3d 1241 (2020) ("to qualify as a quasi-judicial proceeding for purposes of the absolute privilege, a proceeding must, at a minimum . . . allow opposing parties to cross-examine, impeach, or otherwise confront a witness"). The failure to provide a mechanism to challenge the veracity of testimony weighs heavily against the conclusion that a proceeding is quasi-judicial.

In addition to these two key procedural protections that were absent from the town planning and zoning commission hearing in *Priore*, this court has frequently relied on the presence of other procedural protections in determining whether a proceeding qualifies as quasi-judicial. One threshold requirement is notice. Indeed, "[t]he essence of due process is the requirement that a person in jeopardy of a serious loss [be given] notice of the case against him and [an] opportunity to meet it." (Internal quotation marks omitted.) *State* v. *Lopez*, 235 Conn. 487, 493, 668 A.2d 360 (1995). Thus, notice to the accused, who may be subjected to serious loss,

is an important and necessary procedural safeguard that accompanies any quasi-judicial proceeding. See *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 88 (police officer must be given notice of charges against him and date of formal hearing); *Kelley* v. *Bonney*, supra, 221 Conn. 569 n.14 (teacher is required to be given notice of teaching certificate decertification proceeding); *Preston* v. *O'Rourke*, supra, 74 Conn. App. 310–11 (contractual arbitration proceedings require formal notice to parties).

This court has also stressed the importance of procedures such as the opportunity for parties to call witnesses or otherwise have them subpoenaed, to have the meaningful assistance of counsel during the proceeding, and to appeal on the record of the proceeding. Nearly all the proceedings recognized by this court as quasi-judicial have provided a reasonable opportunity for the decision makers or parties to subpoena or call witnesses. See, e.g., *Larmel* v. *Metro North Commuter Railroad Co.*, supra, 341 Conn. 341 (arbitrator authorized to issue subpoenas pursuant to General Statutes § 52-549w (c)); *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 88 (police department officials had subpoena power and officer being investigated could call witnesses on his or her own behalf at formal hearing); *Kelley* v. *Bonney*, supra, 221 Conn. 570 n.14 (counsel were granted reasonable opportunity to call witnesses); *Petyan* v. *Ellis*, supra, 200 Conn. 251 (officials of Employment Security Division of state Department of Labor possessed subpoena power); see also *Preston* v. *O'Rourke*, supra, 74 Conn. App. 312 (noting arbitrator's power to subpoena witnesses pursuant to General Statutes § 52-412). Thus, the ability of the entity conducting the proceeding to subpoena witnesses, or procedures that allow parties to call their own witnesses to testify; see *Kelley* v. *Bonney*, supra, 570 n.14; are procedural safeguards common to quasi-judicial proceedings.

This court also has recognized the opportunity for counsel to be present and meaningfully assist their client during

the proceeding as an important safeguard that helps to identify a quasi-judicial proceeding. The presence of counsel in adjudicatory proceedings serves to protect the parties from unfair or improper procedures and provides a means by which parties may effectively defend themselves. In concluding that the revocation hearing in *Kelley* was quasi-judicial, this court noted that the governing legislation specifically allowed for counsel to call witnesses, to cross-examine adverse witnesses, and to present oral argument. Id. (quoting provision in State Board of Education Regulations); see also id., 570. Indeed, many of the proceedings recognized by this court as quasi-judicial provided parties the same opportunity to have counsel present and to assist them during the proceeding. See, e.g., *Larmel* v. *Metro North Commuter Railroad Co.*, supra, 341 Conn. 336, 341 (plaintiff to arbitration proceeding was represented by counsel and could object to evidence); *Hopkins* v. *O'Connor*, supra, 282 Conn. 831 n.3 (respondents to commitment proceeding were entitled to representation by counsel, who could cross-examine adverse witnesses); *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 88 (police officer subject to internal affairs investigation had right to counsel).

Finally, this court frequently has recognized a party's right to appeal the adjudicator's decision as part of its conclusion that the proceeding at issue was quasi-judicial. In *Petyan*, the court relied on the fact that, "[a]t any time before the referee's decision [on an unemployment compensation claim] has become final within the periods of limitation . . . any party including the administrator, [could] appeal therefrom to the [Employment Security Board of Review]." (Internal quotation marks omitted.) *Petyan* v. *Ellis*, supra, 200 Conn. 249 n.4; see also *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 88 ("the [police] officer ha[d] a right to appeal to the personnel board of the city . . . [and] [t]hereafter . . . to the state labor board"); *Preston* v.

O'Rourke, supra, 74 Conn. App. 312 ("either party could appeal to the trial court to request an order confirming the arbitrator's award or to vacate, modify or correct the award").

The right to appeal, or to have the proceeding officially reviewed, requires that an adequate record of the proceeding be available. See *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 88 ("the hearing officer [took] notes on the testimony and evidence presented . . . which constitute[d] the record for the purposes of the hearing"); *Kelley* v. *Bonney*, supra, 221 Conn. 570 n.14 ("[a] verbatim transcript of the hearing shall be made and shall be supplied to all [parties and adjudicators]" (internal quotation marks omitted)); *Petyan* v. *Ellis*, supra, 200 Conn. 249 n.4 ("[any] appeal to the board shall be heard on the record of the hearing before the referee" (internal quotation marks omitted)). Therefore, when considering whether a proceeding is quasi-judicial in nature, we recognize a party's right to a meaningful appeal, which requires an adequate record of the proceeding, as an important procedural safeguard to ensure that facts were properly found and that law was appropriately applied.

In sum, there must be sufficient procedural safeguards to ensure reliability and to promote fundamental fairness. The more robust the procedural safeguards, the more likely a given proceeding will resemble a judicial proceeding and thereby be considered a quasi-judicial proceeding to which absolute immunity would apply.

C

The Second Circuit next asks us "[h]ow, if at all . . . the power factors enumerated in *Kelley* . . . and *Craig* . . . apply to the identification of a [proceeding] as quasi-judicial; and, if they do apply, are these factors in addition to . . . or independent of, a preliminary

[law to fact] requirement?" (Citations omitted; internal quotation marks omitted.) *Khan* v. *Yale University*, supra, 27 F.4th 833. *Kelley* established, and *Priore* affirmed, that the *Kelley* factors are in addition to, not in lieu of, the other criteria discussed in this part of the opinion.

In *Kelley*, we recognized "a number of factors that *assist* in determining whether a proceeding is [quasi-judicial] in nature. Among them are whether the body has the power to: (1) exercise judgment and discretion; (2) hear and determine or to ascertain facts and decide;[24] (3) make binding orders and judgments; (4) affect the personal or property rights of private persons; (5) examine witnesses and hear the litigation of the issues on a hearing; and (6) enforce decisions or impose penalties." (Emphasis added; footnote added.) *Kelley* v. *Bonney*, supra, 221 Conn. 567. *Kelley* explained that courts must consider whether the entity conducting the proceeding has the power to determine facts and to apply appropriate law and requires proceeding participants to certify that statements were true and correct and to determine if there are sound public policy reasons for permitting absolute immunity. See id.

Since *Kelley*, we have explained that the *Kelley* factors are not exclusive and that, for the most part, they supplement, and function in addition to, the criteria already discussed in this part of the opinion. See *Priore* v. *Haig*, supra, 344 Conn. 648. Accordingly, a court should consider the *Kelley* factors but need not conclude that they are dispositive. See id.

D

Next, the Second Circuit inquires "[h]ow, if at all, does public policy inform the identification of a [pro-

[24] We note that "the first two factors largely mirror *Petyan*'s law to fact requirement." *Priore* v. *Haig*, supra, 344 Conn. 648.

ceeding] as quasi-judicial and, if it does, is this consideration in addition to, or independent of, a [law to fact] requirement and the enumerated *Kelley/Craig* factors?" *Khan* v. *Yale University*, supra, 27 F.4th 833. In *Priore*, we clarified that "courts must always carefully scrutinize whether there is a sound public policy justification for the application of absolute immunity in any particular context." *Priore* v. *Haig*, supra, 344 Conn. 653.

We explained in *Priore* that, "[i]n most cases, the policy considerations require balancing the public interest of encouraging public participation and candor, on the one hand, and the private interest of protecting individuals from false and malicious statements, on the other." Id., 652. "The rationale underlying the [absolute] privilege is grounded [on] the proper and efficient administration of justice. . . . Participants in a judicial process must be able to testify or otherwise take part without being hampered by fear of [actions seeking damages for their statements]." (Internal quotation marks omitted.) Id., 646. However, because "[a]bsolute immunity . . . is strong medicine"; (internal quotation marks omitted) id., 652; it "must be reserved for those situations [in which] the public interest is so vital and apparent that it mandates complete freedom of expression without inquiry into a [speaker's] motives." (Internal quotation marks omitted.) Id., 663. It is only in these situations and judicial-like forums that "[t]he inconvenience of the individual [will] yield to a rule for the good of the general public." (Internal quotation marks omitted.) *Post* v. *Mendel*, 510 Pa. 213, 221, 507 A.2d 351 (1986).

Therefore, even if an entity applies law to facts in a proceeding with adequate procedural safeguards, the proceeding is not quasi-judicial if there is no discernable public policy supporting absolute immunity for proceeding participants. Likewise, public policy alone will not justify affording absolute immunity to proceeding

participants if the proceeding is devoid of the basic, fundamental procedural protections inherent in judicial and quasi-judicial proceedings. Rather, a proceeding is quasi-judicial if, in addition to satisfying the indicia of an official judicial proceeding, as discussed in part II A through C of this opinion, public policy favors providing absolute immunity for proceeding participants.

III

Next, we are asked whether, in light of our responses to the above questions, the 2018 Yale UWC proceeding at issue was properly recognized as quasi-judicial. See *Khan* v. *Yale University*, supra, 27 F.4th 833. We answer that question in the negative; the UWC proceeding cannot properly be recognized as quasi-judicial because it lacked the adequate procedural safeguards necessary for absolute immunity to apply.[25]

A

As a threshold matter, we recognize that disciplinary proceedings in response to allegations of sexual assault at institutions of higher education are specifically authorized by Connecticut law. Section 10a-55m (b) requires each Connecticut institution of higher education to adopt policies regarding sexual assault.[26] Such

[25] We need not consider whether participants to a proceeding may receive absolute immunity on some ground other than quasi-judicial immunity, as "the only question before [this] court is whether the UWC disciplinary proceeding itself is quasi-judicial. Doe does not assert, and the [D]istrict [C]ourt did not find, that, even if that proceeding was not quasi-judicial, there was some other basis for extending absolute immunity to Doe's statements at the proceeding." *Khan* v. *Yale University*, supra, 27 F.4th 830.

[26] General Statutes § 10a-55m (b) provides in relevant part: "Each institution of higher education shall adopt and disclose in such institution's annual uniform campus crime report one or more policies regarding sexual assault . . . . Such policy or policies shall include provisions for:

"(1) Informing students and employees that . . . (A) affirmative consent is the standard . . .

* * *

"(6) Disclosing a summary of such institution's student investigation and disciplinary procedures, including clear statements advising that (A) a student or employee who reports or discloses being a victim of sexual assault

policies provide for, among other requirements, an investigation and disciplinary proceedings related to allegations of sexual violence. See General Statutes § 10a-55m (b) (6). If a disciplinary hearing is held, certain procedures and substantive requirements must be followed as specifically governed by state law. See General Statutes § 10a-55m (b) (6) (mandating procedural requirements and affirmative consent standards). Therefore, because the UWC proceeding was specifically authorized by law,[27] we now analyze whether it satisfies the requirements necessary for a proceeding to be recognized as quasi-judicial under Connecticut law.

B

Khan asserts that the UWC proceeding should not be recognized as quasi-judicial because the proceeding

. . . shall have the opportunity to request that an investigation begin promptly, (B) the investigation and any disciplinary proceedings shall be conducted by an official trained annually . . . (C) both the student or employee who reports or discloses the alleged assault . . . and the student responding to such report or disclosure (i) are entitled to be accompanied to any meeting or proceeding relating to the allegation of such assault . . . by an advisor or support person of their choice, provided the involvement of such advisor or support person does not result in the postponement or delay of such meeting as scheduled, and (ii) shall have the opportunity to present evidence and witnesses on their behalf during any disciplinary proceeding, (D) both the student or employee reporting or disclosing the alleged assault . . . and such responding student are entitled to be informed in writing of the results of any disciplinary proceeding not later than one business day after the conclusion of such proceeding, (E) the institution of higher education shall not disclose the identity of any party to an investigation or disciplinary proceeding, except as necessary to carry out the investigation or disciplinary proceeding or as permitted under state or federal law, (F) a standard of affirmative consent is used in determining whether consent to engage in sexual activity was given by all persons who engaged in the sexual activity, and . . .

* * *

"(8) Disclosing the range of sanctions that may be imposed following the implementation of such institution's student and employee disciplinary procedures in response to such assault . . . ."

[27] We need not address whether the UWC proceeding was specifically authorized by federal law because it was specifically authorized by state law. Nonetheless, we note that many of the Title IX disciplinary procedures

lacked judicial-like procedures and other indicia of reliability. Doe responds that the proceeding provided more than the minimum procedural safeguards that fundamental fairness requires. We agree with Khan and conclude that, even if the UWC hearing panel applied law to fact,[28] that the UWC proceeding did not have adequate procedural safeguards to be recognized as quasi-judicial for the purpose of affording absolute immunity to Doe. In reaching this conclusion, we reiterate that, in light of the procedural posture in which this case reaches us, we are obliged to accept the factual allegations as true and to draw all inferences in Khan's favor, and that we have considered in that light the complaint and all the documents appended to the complaint or incorporated in the complaint by reference, including the UWC procedures. See part I of this opinion.

After reviewing the record before us, we conclude that the UWC proceeding did not incorporate sufficient

for sexual assault at the time of Khan's hearing were guidance and not yet codified at 34 C.F.R. § 106.45 (b) (6) (i) (2020).

[28] The parties disagree as to whether the UWC hearing panel had the power of discretion to apply law to fact. Doe argues that the UWC panel applied both Title IX regulations and § 10a-55m, which mandated that the panel determine whether she affirmatively consented to the parties' sexual encounter. Khan argues that Title IX simply requires the development and application of a sexual misconduct policy, whereas § 10a-55m only mandated the application of an affirmative consent standard. Therefore, he argues that the only authority being applied is university policy, not the law. Beyond the dispute about whether the UWC panel applied established law, we have doubts regarding whether the panel functioned in an adjudicatory manner, or had the power to apply law to fact, considering that the panel merely penned a recommendation to the dean of Yale College, who ultimately decided the fate of Khan without conducting a fact-finding inquiry. See UWC Procedures § 7.5, p. 107 (October 26, 2015) ("the [dean of Yale College] will . . . accept the panel's findings of fact, but may accept, reject, or modify the panel's conclusions or recommendations, in whole or in part"). Nonetheless, because we conclude that minimum procedural safeguards were lacking, we need not resolve this dispute and determine whether the proceeding satisfied the law to fact requirement.

procedural safeguards to be considered quasi-judicial. Specifically, the UWC proceeding failed (1) to require complainants to testify under oath or to subject them to explicit and meaningful penalties for untruthful statements, (2) to provide Khan, or his counsel, the meaningful opportunity to cross-examine adverse witnesses in real time, (3) to provide parties a reasonable opportunity to call witnesses to testify, (4) to afford Khan the opportunity to have the active assistance of counsel during the UWC hearing, and (5) to provide Khan any record or transcript of the proceeding that would assist him in obtaining adequate review of the UWC decision or to expose the legitimacy or fairness of the proceeding to public scrutiny. Although we do not maintain that all of these procedural features are required for our recognition of a quasi-judicial proceeding, we conclude that the collective absence of such features militates against a determination that the proceeding had adequate safeguards to ensure reliability and promote fundamental fairness.

1

First, witnesses in the UWC proceeding did not testify under oath, provide sworn statements, or certify to the truth of their statements. The UWC's only protection against false statements is the threat that the "[f]ailure to provide truthful information . . . may result in a recommendation for a more severe penalty or a referral for discipline." Because Doe had graduated from Yale by the time of the proceedings; *Khan* v. *Yale University*, supra, 511 F. Supp. 3d 218; she presumably could not be subject to any disciplinary consequences for failing to testify truthfully.

The failure of the UWC to place Doe under oath or otherwise have her certify to the truth of her statements, subject to a penalty for untruthfulness, undermined the reliability of Doe's statements. See *Priore* v. *Haig*,

supra, 344 Conn. 655 (declining to recognize town planning and zoning commission's public hearing as quasi-judicial in part because declarants were not under oath or required to certify truth of statements). As we explained in *Petyan*, the penalty of perjury is "simply part of the price that is paid for witnesses who are free from intimidation by the possibility of civil liability for what they say." (Internal quotation marks omitted.) *Petyan* v. *Ellis*, supra, 200 Conn. 251; see *Priore* v. *Haig*, supra, 655 n.4 ("[a] witness' reliability is ensured by his [or her] oath, the hazard of cross-examination and the threat of prosecution for perjury" (internal quotation marks omitted)). The oath or certification requirement is fundamental to the reliability of the information presented. Yale's failure to display any means of holding witnesses accountable for untruthful statements significantly weakens Doe's contention that the UWC proceeding is quasi-judicial.

2

Second, the UWC proceeding did not permit live, real-time cross-examination of witnesses or any reasonable opportunity for parties to confront witnesses. In fact, neither Khan nor his counsel was permitted to be in the hearing room when Doe was questioned. Rather, they were required to sit in an anteroom, where they could only listen to an audio feed of the hearing and could not see or be seen by Doe. Khan claims that he and his counsel were denied the opportunity to ask *any* questions of Doe or to cross-examine her in *any* way.[29] As a result, Khan alleges that he was "denied any reason-

[29] Doe argues that the UWC procedures allowed Khan to submit questions to the UWC panel, but neither the policies nor Doe specified the timing of when those questions could be submitted. Khan argues that neither he nor his counsel had any opportunity to ask Doe questions because the UWC procedures permitted only the UWC panel to ask questions and provided the panel with sole discretion to reject or not to ask any questions.

able opportunity to confront, question, or otherwise face his accuser."

The opportunity to meaningfully cross-examine adverse witnesses is vitally important to the truth seeking function of any judicial or quasi-judicial proceeding and is necessary if a university's disciplinary proceeding is to be considered quasi-judicial. In *Doe* v. *Baum*, 903 F.3d 575 (6th Cir. 2018), the United States Court of Appeals for the Sixth Circuit concluded that due process required that universities allow for some form of live cross-examination when a witness' "credibility" is at issue in a school disciplinary hearing. Id., 581; see also id., 583. The court explained that, "when the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination." Id., 581.[30]

The California Court of Appeal reached a similar conclusion in *Doe* v. *Allee*, 30 Cal. App. 5th 1036, 242 Cal. Rptr. 3d 109 (2019). There, the court held that, "when a student accused of sexual misconduct faces severe disciplinary sanctions, and the credibility of witnesses

[30] The importance of cross-examination is also reflected in the preamble to the Title IX final rules. The United States Department of Education wrote that it "believes that in the context of sexual harassment allegations under Title IX, a rule of [nonreliance] on untested statements is more likely to lead to reliable outcomes than a rule of reliance on untested statements. If statements untested by cross-examination may still be considered and relied on, the benefits of cross-examination as a truth-seeking device will largely be lost in the Title IX grievance process." Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,347 (May 19, 2020).

At the time this opinion was written, the Department of Education had proposed amendments to Title IX regulations that would eliminate any cross-examination requirement at postsecondary institutions. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,390, 41,502–41,503 (proposed July 12, 2022). Regardless of how Title IX regulations may be amended, we conclude that, for absolute immunity to apply under Connecticut law, fundamental fairness requires meaningful cross-examination in proceedings like the one at issue.

(whether the accusing student, other witnesses, or both) is central to the adjudication of the allegation, fundamental fairness requires, at a minimum, that the university provide a mechanism by which the accused may cross-examine those witnesses, directly or indirectly . . . .'' Id., 1039.

Meaningful cross-examination allows for witness testimony to be challenged in real time, whether in person or through advanced video technology that allows for instant two-way communications and follow-up questions. It is equally important, in our view, that the accused *and the accuser* be provided a chance to cross-examine one another so as to allow the fact finder to assess the consistency of testimony and demeanor of both the parties when their testimony is called into question. See, e.g., id., 1065–66.

Our review of the UWC procedures provides us with no assurance that Khan had a meaningful opportunity to cross-examine or otherwise confront Doe in real time. We also have no record of the proceeding to demonstrate that the UWC varied from the procedures incorporated in the complaint in a manner that afforded Khan fundamental fairness. Although, under the UWC procedures, Khan and Doe were able to submit questions that they wanted the UWC hearing panel to ask, the panel had sole discretion to reject the questions or not to ask them. Thus, the UWC procedures hampered Khan's ability to ask legitimate questions or to sequence questions in a way he believed would test the veracity of Doe's testimony at the hearing. Accordingly, the procedures utilized by the UWC failed to provide Khan with an opportunity to challenge the statements Doe made to the investigator and to the UWC panel.

Allowing for confrontation of an accuser while still preventing abusive questioning is no doubt a difficult balance to strike, but fundamental fairness requires

some measure of meaningful cross-examination, and the present record compels us to conclude that the UWC procedures fall short. Therefore, Khan was denied a fundamental procedural protection essential to quasi-judicial proceedings because he was not given a meaningful opportunity to test the veracity or reliability of Doe's testimony in real time.

3

Third, unlike most of the proceedings that this court has recognized as quasi-judicial, the UWC proceeding did not provide the parties a reasonable opportunity to call witnesses. Although the UWC procedures allowed parties to request that the UWC hearing panel call witnesses to testify, the procedures provided no standards regarding whether the panel would in fact call or interview them, and there was no independent mechanism by which parties could call their own witnesses.[31]

At private universities, as in other settings, "basic principles of . . . fundamental fairness [are] adhered to [when] the students involved . . . [are allowed, among other things] to *call their own witnesses* . . . ." (Emphasis added; internal quotation marks omitted.) *Doe* v. *University of the Sciences*, 961 F.3d 203, 214 (3d Cir. 2020); see, e.g., id., 211, 215–16 (determining that student conduct procedures were not fair in breach of contract case). Supporting this basic tenet of procedural fairness, § 10a-55m (b), the Connecticut statutory provision that authorizes sexual assault disciplinary proceedings at institutions of higher education, requires that "[e]ach institution of higher education . . . adopt

[31] Specifically, the UWC procedures provide that, "[i]f a party believes the panel should interview witnesses, the party must submit to the [s]ecretary [of the UWC] the names of the witnesses and the subject of their testimony at least four days before the hearing. . . . At its sole discretion, the panel may request the testimony of additional witnesses." There is no indication in the record that the UWC panel called any witnesses other than Doe and Khan.

and disclose . . . (6) . . . a summary of such institution's student investigation and disciplinary procedures, including clear statements . . . (C) [that the student responding to reports of sexual assault] . . . (ii) *shall have the opportunity to present evidence and witnesses* on their behalf during any disciplinary proceeding . . . ." (Emphasis added.)

The fact that the UWC hearing panel could, "[a]t its sole discretion," reject any witnesses recommended by Khan deprived Khan of a fair opportunity to present a defense by calling or presenting witnesses, if he so chose,[32] to testify on his behalf. Under these circumstances, a person in Khan's position is left to rely on the grace of the panel to aid in his defense by presenting the in-person testimony of favorable witnesses. As a result, Yale's UWC policy does not comport with the protections typical of quasi-judicial proceedings.

4

Fourth, the UWC proceeding materially limited the assistance of counsel throughout the hearing. Under the UWC procedures, "[a] party may be accompanied by an adviser . . . [but] [t]he adviser may not submit documents, either directly or indirectly, on a party's behalf at any stage of the process, nor speak for the party during an interview with a [fact finder] or during a formal hearing." In practice, this meant that counsel could not present any argument, either orally or in writing, on Khan's behalf, raise objections, or be present during—let alone participate in—the questioning of witnesses. These restrictions effectively rendered counsel irrelevant, relegating Khan's attorney to the status of the proverbial potted plant.

[32] We note that the record, which lacks a transcript of the hearing, does not indicate whether Khan attempted, but was denied the opportunity, to call witnesses.

Our cases recognize that the assistance of counsel during a quasi-judicial proceeding is an important procedural safeguard to ensure the procedural and evidentiary fairness of a judicial proceeding. See part II B of this opinion. The active assistance of counsel is especially important in settings like the one at issue, when the accused or accuser may lack experience with self-advocacy or representing his or her interests in an adversarial process that involves significant consequences for the individual parties. Limitations on counsel's assistance during the proceeding will bear on whether the proceeding is quasi-judicial. In the present case, the UWC's procedures prohibited Khan's counsel from speaking on Khan's behalf, objecting to evidence, examining Khan's accusers, and submitting documents to the UWC panel. Although we do not agree with Khan's contention that these prohibitions predetermined the outcome of the hearing, we do agree that the restrictions placed on counsel's participation in the proceeding support the conclusion that the proceeding was not quasi-judicial.

5

Finally, the UWC proceeding limited a party's ability to seek review of the UWC panel's decision because it failed to establish an adequate record of the proceedings.[33] Although the UWC procedures require that the secretary of the UWC keep minutes from the meeting and a record of all the actions and reports filed, they explicitly provide that "[t]he minutes do not record statements, testimony, or questions." The UWC panel specifically denied Khan's request that it make a tran-

[33] If Khan wished to appeal the UWC hearing panel's or Yale College dean's decision, according to the UWC procedures, he could appeal to Yale's provost, but only on two grounds: (1) procedural error preventing a fair adjudication, or (2) new evidence not reasonably available at the time of the hearing. The provost may, in his or her discretion, return the matter to "the hearing panel for reconsideration."

script or other electronic recording of the hearing for the purpose of further review.

We have long recognized that the maintenance of a transcript or record is critical and a key feature of any quasi-judicial proceeding. For instance, in concluding that the proceeding in *Craig* was quasi-judicial, we relied on the fact that, "[d]uring the hearing, the hearing officer [took] notes on the testimony and evidence presented and, thereafter, transcribes his notes into typed form, which constitute[d] the record for the purposes of the hearing." *Craig* v. *Stafford Construction, Inc.*, supra, 271 Conn. 88. After the hearing, the record could be reviewed on appeal. See id. Similarly, in *Kelley*, the applicable state Board of Education regulation required that "[a] verbatim transcript of the hearing . . . be supplied to all members of the board, to the holder, to the requesting party, and to the secretary of the local board." (Internal quotation marks omitted.) *Kelley* v. *Bonney*, supra, 221 Conn. 570 n.14.

In the present case, Khan's ability to appeal was severely constrained by the absence of any transcript or recording of statements, testimony, or questions raised during the UWC hearing. That restriction was especially prejudicial in light of the fact that his counsel was not permitted to object when UWC panel members allegedly assumed facts not in evidence and otherwise violated core evidentiary principles.

C

On the basis of the foregoing, we conclude that the UWC proceeding lacked adequate procedural safeguards to ensure the reliability of the statements made in the proceeding and, therefore, did not qualify as quasi-judicial for purposes of absolute immunity. Our conclusion finds support in the decisions of other courts determining whether a university disciplinary proceeding had adequate procedural protections.

We find persuasive the decision of the United States District Court for the Eastern District of Virginia in *Doe* v. *Roe*, supra, 295 F. Supp. 3d 664. In that case, the District Court determined that disciplinary proceedings conducted at Marymount University were not quasi-judicial because they failed to afford the plaintiff basic due process protections. See id., 674. The District Court explained that, "[i]n determining whether a proceeding is quasi-judicial in nature, [courts] have stressed elements associated with notions of due process, including requirements for notice, a hearing, an unbiased adjudicator, and the ability to [marshal and present evidence and to call and cross-examine witnesses]." (Internal quotation marks omitted.) Id. The court ultimately held that, because the plaintiff "was not permitted to present exculpatory or documentary evidence, to call witnesses, or to confront and cross-examine his accuser, and significantly . . . was denied the opportunity to have an in-person hearing before [an] adjudicator . . . [there were no] guarantees of due process and fairness . . . ." (Citation omitted; footnote omitted.) Id., 674–75.

That court's reasoning is echoed in federal appellate decisions. For example, in *Overall* v. *University of Pennsylvania*, 412 F.3d 492 (3d Cir. 2005), the United States Court of Appeals for the Third Circuit declined to recognize a private grievance proceeding at a university as quasi-judicial in nature. See id., 498. Observing that quasi-judicial proceedings "involve basic procedural safeguards," the court relied on the fact that the private grievance proceeding at issue "did not require sworn testimony. The volunteer faculty members who presided over the hearing lacked the power to make any binding judgment or enforce any disciplinary measures . . . [a]nd of particular relevance to [the] case, no one kept a transcript of what was said during the hearing, so there is no record of exactly what [the defendant] said when he allegedly defamed [the plaintiff]." Id.

Likewise, in *Doe* v. *University of the Sciences*, supra, 961 F.3d 203, the Third Circuit determined that, at private universities, "basic principles of . . . fundamental fairness [are] adhered to [when] the students [involved] . . . [are] given notice of the charges and evidence against them, [are] allowed to be present and to participate in the hearing assisted by faculty, to call their own witnesses and to cross-examine the witnesses against them, and [are] fully apprised of the findings of the [h]earing [p]anel." (Internal quotation marks omitted.) Id., 214. The Third Circuit cautioned that fair process at a private university's sexual misconduct investigation would require, at a minimum, "the modest procedural protections of a live, meaningful, and adversarial hearing and the chance to test witnesses' credibility through some method of cross-examination." Id., 215.

Accordingly, because the UWC proceeding lacked the basic procedural safeguards that this court and other courts have deemed necessary to ensure the reliability of the information presented, we decline to recognize the UWC proceeding as quasi-judicial in nature for the purpose of affording Doe absolute immunity for her statements.[34]

IV

The Second Circuit next asks us, in light of our determination that the UWC proceeding was not quasi-judicial, whether Connecticut law would afford Doe qualified immunity or no immunity at all. *Khan* v. *Yale University*, supra, 27 F.4th 834.[35] We answer that public

[34] In light of this conclusion, it is unnecessary to address the other criteria discussed in *Priore* and in part II of this opinion.

[35] "[A]bsolute privileges are properly . . . classified as immunities . . . [because] they are based [on] the personal position or status of the actor. . . . [However], over a period of some centuries, these particular immunities always have been called privileges by the courts when they arise in connection with defamation . . . ." (Internal quotation marks omitted.) 2 F. Harper et al., Harper, James and Gray on Torts (3d Ed. 2006) § 5.21, pp. 209–10; see also, e.g., 3 Restatement (Second), Torts §§ 583 through 592A, pp. 240–57 (1977) (discussing absolute privileges). "Privileges of the second class . . .

policy supports a qualified privilege for participants in certain sexual misconduct proceedings. Nevertheless, because this matter is at the motion to dismiss stage and Khan has sufficiently alleged malice, we are unable to determine whether Doe is entitled to qualified immunity as a matter of law. At a later stage in the case, a court may reconsider the privilege as the factual record is developed.

Our standard of review is clear: "A defendant may shield himself from liability for defamation by asserting the defense that the communication is protected by a qualified privilege. . . . When considering whether a qualified privilege protects a defendant in a defamation case, the court must resolve two inquiries. . . . The first is whether the privilege applies, which is a question of law over which our review is plenary. . . . The second is whether the applicable privilege nevertheless has been defeated through its abuse, which is a question of fact." (Citations omitted.) *Gambardella* v. *Apple Health Care, Inc.*, 291 Conn. 620, 628, 969 A.2d 736 (2009).

A

We first consider whether a qualified privilege should apply to statements made by alleged victims in a sexual misconduct hearing at an institution of higher education.

Unlike absolute immunity, which provides a blanket protection for a speaker's false statements, a qualified privilege protects only those allegedly defamatory statements that are not made maliciously. See *Gallo* v. *Barile*, supra, 284 Conn. 463 n.6. A qualified privilege is appro-

are commonly called conditional or qualified privileges. . . . They are more properly to be classified as privileges, [as] they arise out of the particular occasion [on] which the defamation is published." 2 F. Harper et al., supra, § 5.21, p. 210; see also 8 S. Speiser et al., The American Law of Torts (1991) § 29:87, p. 596 ("this 'privilege' is more properly termed an 'immunity' ").

priate when it "is based [on] a public policy that recognizes that it is desirable that true information be given whenever it is reasonably necessary for the protection of the actor's own interests, the interests of a third person or certain interests of the public . . . ." (Internal quotation marks omitted.) Id., 468 n.12; see 3 Restatement (Second), Torts §§ 594 through 598, pp. 263–81 (1977). In other words, a qualified privilege is appropriate when the legitimate public or private interest underlying the publication of statements outweighs the important reputational interests of the individual. See 50 Am. Jur. 2d 624, Libel and Slander § 259 (2017); see also *Rioux* v. *Barry*, 283 Conn. 338, 346, 927 A.2d 304 (2007) ("whether and what form of immunity applies in any given case is a matter of policy that requires a balancing of interests"). Importantly, a qualified privilege for communications made to advance certain public interests or to protect individuals is applicable only when the communications are made to those who may be expected to take official action of some kind for the protection of those interests or individuals. See, e.g., *Gallo* v. *Barile*, supra, 468–69 n.12, citing W. Keeton et al., supra, § 115, p. 830; *Government Micro Resources, Inc.* v. *Jackson*, 271 Va. 29, 43, 624 S.E.2d 63 (2006) ("qualified privilege protects a communication from allegations of defamation if made in good faith, to and by persons who have corresponding duties or interests in the subject of the communication"); see also, e.g., 3 Restatement (Second), supra, § 598, p. 281.

For example, in *Gallo* v. *Barile*, supra, 284 Conn. 459, this court engaged in a balancing test to determine whether an absolute or a qualified privilege is appropriate for statements made to the police in connection with a criminal investigation. See id., 468–72. This court concluded that those statements were subject to a qualified privilege, explaining that "a qualified privilege is sufficiently protective of [those] wishing to report

events concerning [a] crime . . . [because] [t]here is no benefit to society or the administration of justice in protecting those who make intentionally false and malicious defamatory statements to the police. The countervailing harm caused by the malicious destruction of another's reputation by false accusation can have irreparable consequences. . . . [T]he law should provide a [judicial] remedy in [such] situations . . . ." (Internal quotation marks omitted.) Id., 471–72; see also *Petyan* v. *Ellis*, supra, 200 Conn. 252 (recognizing qualified immunity for complaining witness who initiates prosecution).

Although the question of whether a qualified privilege should be afforded to statements made at sexual misconduct hearings at institutions of higher education is one of first impression for this court, we find instructive the decision of the United States District Court for the District of Maryland in *Doe* v. *Salisbury Univ*ersity, 123 F. Supp. 3d 748 (D. Md. 2015). In that case, the District Court recognized that defamatory statements made regarding an alleged sexual assault on a college campus would enjoy a conditional, or qualified, privilege under Maryland law. See id., 758–59. The court reasoned that Maryland courts recognize a conditional privilege for statements "made in furtherance of [the victims'] legitimate interest in personal safety and the safety of those closest to [them]." Id., 758; see also id., 759. Without such privilege, "[v]ictims would have to weigh, on the one hand, the value of reaching out for help in the aftermath of a traumatic sexual assault, and on the other hand the risk that they could be subject to civil liability for defamation if the occurrence of sexual assault is contested by the alleged perpetrator." Id., 759.

Similarly, in *Doe* v. *Roe*, supra, 295 F. Supp. 3d 664, the District Court for the Eastern District of Virginia concluded that, when allegations of sexual assault are made during a university Title IX investigation, "quali-

fied immunity, not absolute immunity, is the appropriate privilege to apply . . . .'' Id., 676. The court reached that conclusion after determining that the proceeding lacked basic due process protections to afford proceeding participants absolute immunity. See id., 674–75; see also part III C of this opinion.

Just as our case law provides a qualified privilege to individuals reporting crimes to the police, the public policy of this state supports providing a qualified privilege for statements made by individuals alleging sexual assault to proper authorities at institutions of higher education. See General Statutes § 10a-55m. As the amici explain, sexual assault remains a serious and vastly underreported crime. The hesitation of victims to report such crimes is, in no small part, due to a fear of retaliation.[36] The hesitation to report sexual misconduct may be especially pronounced on college campuses, and fears and concerns surrounding such reports would undoubtedly be compounded if victims had to worry that any report they made could also be the subject of a defamation suit. See, e.g., *Sagaille* v. *Carrega*, 194 App. Div. 3d 92, 94, 143 N.Y.S.3d 36 (''defamation suits . . . constitute [one] form of retaliation against those with the courage to speak out''), appeal denied, 37 N.Y.3d 909, 174 N.E.3d 710, 152 N.Y.S.3d 685 (2021).

Our legislature has responded aggressively to address these concerns. As we discussed, § 10a-55m requires institutions of higher education to establish disciplinary committees and related reporting systems for crimes

[36] See, e.g., Conn. Joint Standing Committee Hearings, Higher Education and Employment Advancement, Pt. 3, 2012 Sess., p. 862, testimony of Women's Center of Greater Danbury (identifying fear of reprisal as dominant reason for victims not to report sexual assault); see also, e.g., Bureau of Justice Statistics, Office of Justice Programs, United States Department of Justice, Female Victims of Sexual Violence, 1994–2010 (Rev. May 31, 2016) p. 7, available at https://www.bjs.gov/content/pub/pdf/fvsv9410.pdf (last visited June 21, 2023).

of sexual violence. See part III A and footnote 26 of this opinion. In 2012, the Connecticut legislature expanded on the federal Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act)[37] by enacting No. 12-78 of the 2012 Public Acts (P.A. 12-78), titled "An Act Concerning Sexual Violence on College Campuses."[38] Public Act 12-78, § 1, requires higher education institutions to run prevention and awareness programs for all students that provide information concerning the reporting of incidences of sexual assault and violence. In addition, P.A. 12-78, § 1, as codified, requires institutions to establish a campus resource team dedicated to providing support and a victim centered response to reported sexual assault victims and to provide free counseling and advocacy services. See General Statutes (Rev. to 2013) § 10a-55m (b) (2) (now § 10a-55m (b) (3)).

In 2014, our legislature passed a law to provide additional services for those victimized by sexual violence on college campuses. Public Acts 2014, No. 14-11, § 2 (P.A. 14-11). Specifically, P.A. 14-11, § 2, as codified, permits anonymous reporting to authorities at institutions of higher education.[39] General Statutes (Rev. to 2015)

[37] The Clery Act, which is codified at 20 U.S.C. § 1092 (f), was enacted in 1990, after the 1986 rape and murder of Jeanne Clery, a nineteen year old college student. T. Franklin, Note, "*Brown* v. *Delta Tau Delta*: In a Claim of Premises Liability, How Far Should the Law Court Go To Assign a Duty of Care," 68 Me. L. Rev. 363, 369 (2016). The Clery Act requires colleges and universities that participate in federal financial aid programs (known as Title IX schools) to disclose information about crimes occurring on their campuses, as well as to have specific campus safety and security related policies and procedures in place. See id.

[38] Representative Roberta B. Willis, the bill's sponsor, stated that the act "asks our schools, both private and public, to play an active role in preventing [sexual] assaults . . . . [P]reventing sexual assault on college campuses takes a [community-wide] commitment to changing the culture and conditions that allow violence to occur." 55 H.R. Proc., Pt. 13, 2012 Sess., p. 4297.

[39] Anonymous reporting may trigger further investigations and, if a subsequent hearing ensues, require that the victim's identity be disclosed. See General Statutes § 10a-55m (d).

§ 10a-55m (d). Public Act 14-11, § 2, as codified, also mandates that institutions of higher education disclose their disciplinary and reporting procedures to the joint standing committee of the General Assembly having cognizance of matters relating to higher education. See General Statutes (Rev. to 2015) § 10a-55m (f).

The legislature took further action in 2016, enacting No. 16-106 of the 2016 Public Acts, which required all campus hearings regarding claims of sexual misconduct to apply an affirmative consent[40] standard. See Public Acts 2016, No. 16-106, § 1. Each of these measures reflects a strong public commitment to protecting alleged victims of sexual assault on college and university campuses, encouraging them to report claims of sexual violence, and allowing them to obtain justice with dignity and privacy.

Thus, given the legitimate public interests that our legislature has articulated, we conclude that a qualified privilege is appropriate to afford alleged victims of sexual assault who report their abuse to proper authorities at institutions of higher education. "On the one hand, the privilege encourages victims of sexual assault to speak candidly with university officials and to report abuse by immunizing their good-faith reports. . . . At the same time, the qualified nature of the privilege provides plaintiffs with an opportunity to overcome the privilege in those rare instances [in which] a report is made, not in good faith, but rather with malice." *Doe* v. *Roe*, supra, 295 F. Supp. 3d 677.

B

Because a qualified privilege is available to Doe, the question becomes whether the privilege has been

[40] The law defines "affirmative consent" as "an active, clear and voluntary agreement by a person to engage in sexual activity with another person . . . ." General Statutes § 10a-55m (a) (1). Connecticut does not require a covered institution to adopt this statutory definition verbatim, as long as it uses a definition with a substantially similar meaning. General Statutes § 10a-55m (h).

defeated. See *Bleich* v. *Ortiz*, 196 Conn. 498, 504, 493 A.2d 236 (1985) ("[e]ven [if the court determines that] a legitimate interest is at stake, a claim of conditional [or qualified] privilege is defeated if the defendant acts with malice in making the defamatory communication at issue").[41]

At the motion to dismiss stage, the court must accept the factual allegations in the complaint as true and must draw inferences in the plaintiff's favor. See Fed. R. Civ. P. 12 (b) (6). Consequently, if the plaintiff sufficiently alleges with particular facts that the defendant acted with malice when making the statement(s) at issue, at the motion to dismiss stage, the court must take those allegations as true, and, therefore, the privilege will be defeated at this stage of the proceedings.[42] See *Doe* v. *College of Wooster*, Docket No. 5:16-cv-979, 2018 WL 838630, *9 (N.D. Ohio February 13, 2018) (denying motion to dismiss sexual assault defamation claim based on qualified privilege because pleadings demonstrated actual malice sufficient to defeat qualified privilege); *Jackson* v. *Liberty University*, Docket No. 6:17-CV-00041, 2017 WL 3326972, *14 (W.D. Va. August 3, 2017) (at motion to dismiss stage, "there [were] suffi-

[41] "[T]he malice required to overcome a qualified privilege in defamation cases is malice in fact or actual malice." *Hopkins* v. *O'Connor*, supra, 282 Conn. 845. "Actual malice requires that the statement, when made, be made with actual knowledge that it was false or with reckless disregard of whether it was false. . . . A negligent misstatement of fact will not suffice; the evidence must demonstrate a purposeful avoidance of the truth. . . . Malice in fact is sufficiently shown by proof that the [statement was] made with improper and unjustifiable motives." (Citation omitted; internal quotation marks omitted.) Id., 846–47; see also *Bleich* v. *Ortiz*, supra, 196 Conn. 504 ("[f]or purposes of our law of defamation, malice is not restricted to hatred, spite or ill will against a plaintiff, but includes any improper or unjustifiable motive").

[42] We note that "[c]onclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to [defeat] a motion to dismiss." (Internal quotation marks omitted.) *Kirch* v. *Liberty Media Corp.*, 449 F.3d 388, 398 (2d Cir. 2006).

cient, [nonconclusory] facts showing the malice required to overcome the qualified privilege [because the plaintiff pleaded facts indicating that sexual assault accusations were unjustifiably motivated]"); *Routh* v. *University of Rochester*, 981 F. Supp. 2d 184, 213 (W.D.N.Y. 2013) ("consideration of facts outside of the complaint [is] inappropriate . . . on a motion to dismiss" (internal quotation marks omitted)), appeal withdrawn, United States Court of Appeals, Docket No. 13-4623 (2d Cir. January 9, 2014).

In this case, Khan alleged in his complaint that Doe made false accusations for the sake of trying to expel Khan as part of a larger political movement and personal vendetta. Khan asserts that Doe made romantic advances toward him. He further alleges that, at first, she told a campus health care worker that she had engaged in consensual unprotected sex. Khan contends that Doe reported rape to her friends and, ultimately, to the Title IX coordinator only because she was ashamed of her sexual advances and encouraged by the larger political movement waged against Khan. Specifically, Khan cites in his complaint how, despite a jury's dismissing Doe's allegation and finding Khan not guilty of criminal sexual assault charges, more than 77,000 people signed a petition protesting Khan's readmission to Yale. On the basis of these assertions, which must be accepted as true for the purpose of reviewing Doe's motion to dismiss, a reasonable inference could be drawn that Doe knowingly fabricated claims of sexual assault.

Therefore, we conclude that, although a qualified privilege against claims of defamation is available to participants in sexual misconduct proceedings at institutions of higher education, Khan has alleged sufficient facts in his complaint to defeat Doe's qualified privilege at the motion to dismiss stage. A more complete factual record, however, may warrant revisiting Doe's qualified privilege at the summary judgment stage or when sub-

mitting the matter to a jury. See *Doe* v. *Roe*, supra, 295 F. Supp. 3d 677–78 (concluding that defendant was not entitled to qualified immunity at motion to dismiss stage but not foreclosing that qualified immunity may be established as matter of law during later stage of proceedings).

SUMMARY

The answer to the first certified question as modified is: A quasi-judicial proceeding is an adjudicative one, in which the proceeding is specifically authorized by law, the entity conducting the proceeding applies the law to the facts within a framework that contains procedural safeguards, and there is a sound public policy justification for affording proceeding participants absolute immunity.

The answer to the second certified question as modified is: No, the UWC proceeding was not quasi-judicial because it lacked important procedural safeguards. Accordingly, we need not answer the third certified question.

The answer to the fourth certified question as modified is: Yes, a qualified privilege is available to alleged victims of sexual assault who report their abuse to proper authorities at institutions of higher education, but, at this stage of the proceedings, the allegations of malice in Khan's complaint are sufficient to defeat Doe's entitlement to qualified immunity as a matter of law.

No costs shall be taxed in this court to any party.

In this opinion the other justices concurred.

COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES *v.* RICHARD CANTILLON ET AL.
(SC 20655)

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

Syllabus

The complainant, H, filed a complaint with the plaintiff, the Commission on Human Rights and Opportunities, alleging housing discrimination on the basis of race against the defendant C, her neighbor in a condominium complex, who tormented H by repeatedly making obscene gestures, directing vile, racial epithets toward her, and threatening her. C was defaulted in the underlying administrative proceeding, and, following a hearing in damages, the human rights referee found that H had suffered emotional distress and awarded her $15,000 in damages. The commission, viewing the award as insufficient, appealed to the Superior Court, claiming that, under *Patino* v. *Birken Mfg. Co.* (304 Conn. 679), an award for garden-variety emotional distress damages presumptively must be at least $30,000, and that the referee made various errors of law in assessing the heinousness of C's conduct pursuant to the test that the commission adopted in its prior decision in *Commission on Human Rights & Opportunities ex rel. Harrison* v. *Greco* (*Harrison*). The trial court, recognizing that it was bound by the highly deferential standard of review that governs administrative decisions, concluded that there was no legal basis for it to second-guess the award, and it rendered judgment dismissing the appeal. The Appellate Court affirmed the trial court's judgment, concluding that *Patino* did not adopt any presumptive floor for emotional distress damages and that the referee's heavily fact-specific assessment of H's emotional distress damages was not an abuse of discretion. On the granting of certification, the commission appealed to this court. *Held*:

1. There was no merit to the commission's claim that the referee's award of $15,000 in damages violated *Patino*, an employment discrimination case in which this court upheld a jury award of more than $90,000 in noneconomic damages for garden-variety emotional distress:

   In *Patino*, the court cited to a series of cases in which awards of $100,000 or more had been made in civil rights cases and quoted a federal district court case in support of the proposition that garden-variety emotional distress claims "generally merit $30,000 to $125,000 awards," and the commission claimed, for purposes of the present case, that *Patino* therefore established that range for garden-variety emotional distress claims.

This court clarified that its intent in *Patino* was to note that an award of damages that was squarely within the range of those awards that often are made in nearby jurisdictions will not shock the judicial conscience, and the court in *Patino* did not intend to use the range of damages referenced therein to establish the inverse rule, namely, that an award lower than the generally prevailing range of damages in federal jury trials is presumptively an abuse of discretion in Connecticut.

This court further clarified that the quote from the federal district court case on which *Patino* relied was misleading insofar as that federal case and its progeny acknowledged that the range of awards in the Second Circuit is much wider than $30,000 to $125,000, in both directions.

Moreover, confining emotional distress damages to some permissible range would run afoul of decades of Connecticut jurisprudence, insofar as this court has rejected the idea that any specific yardstick can be applied to cabin the discretion of the trier of fact when calculating a fair and appropriate award of noneconomic damages.

Furthermore, the commission did not identify any other area of the law in which Connecticut courts have taken the extraordinary step of establishing any limit on the amount of damages that presumptively can be awarded by a Connecticut jury, court, or administrative agency, and it would be inappropriate for courts to do so insofar as the determination of whether to establish some minimum or maximum permissible award for any particular cause of action, in light of evolving public sentiments and the conflicting societal interests involved, is a quintessentially legislative, rather than judicial, function, especially when that determination involves an administrative agency.

Notwithstanding the commission's claim to the contrary, the lack of a floor on emotional distress damages awards that is consistent with the lower end of the prevailing range of awards in the Second Circuit would not create a forum shopping issue, as there was no evidence that complainants have been engaging in such forum shopping, and, even if federal jury awards were in the range that *Patino* quoted, there are many other differences between pursuing an administrative complaint before the commission and litigating a civil action in federal court that might make one venue or the other more advantageous for a particular complainant.

2. The commission could not prevail on its claim that the referee incorrectly applied and expanded the three factor test that the commission adopted in *Harrison* for calculating emotional distress damages, and the Appellate Court correctly determined that the referee invoked the applicable legal standard, that her application of that standard did not represent an abuse of discretion, and that her factual findings were not clearly erroneous:

Harrison recognized that the first and most important factor in calculating emotional distress damages is the subjective internal emotional reaction of the complainant to the discriminatory experience that he or she had undergone, and whether the reaction was intense, prolonged, and understandable, the second factor is whether the discrimination occurred in public, and the third factor is the degree of the offensiveness of the discrimination and the impact on the complainant.

The referee in the present case found that the first factor warranted some award of emotional distress damages, but she also found the existence of mitigating factors, such as the fact that H relied on her own testimony to support her emotional distress claim, which was largely but not completely uncorroborated, and such as the facts that H did not seek medical or psychological help, miss work, move from the condominium, or suffer an inability to eat or sleep.

The commission did not contest any of the referee's factual findings with respect to the first *Harrison* factor, which were entitled to substantial deference, but, instead, claimed that the referee did not adequately or appropriately weigh various objective factors, the commission could not prevail on that claim because the referee correctly recognized that the subjective factors were paramount and properly considered determinants that were directly relevant to assessing subjective emotional distress, and, on the basis of those considerations and the referee's own observations, the referee found that H's subjective emotional distress, although serious, was not so severe or disabling as to warrant an award in the range sought by the commission.

Moreover, to the extent that the commission's arguments constituted a critique of the *Harrison* three factor test, this court declined to reexamine it in light of the unique procedural posture of the case, in which opposing viewpoints had not been represented, and insofar as the parties did not ask this court to reject the *Harrison* test.

(*One justice dissenting*)

Argued December 21, 2022—officially released June 27, 2023

Procedural History

Appeal from the decision of a human rights referee for the defendant Commission on Human Rights and Opportunities, inter alia, declining to increase the amount of damages awarded to the defendant Kelly Howard in an action alleging housing discrimination against the named defendant, brought to the Superior Court in the judicial district of New Britain, where the court, *Cordani, J.*, rendered judgment dismissing the appeal, from

which the plaintiff appealed to the Appellate Court, *Alvord*, *Alexander* and *Vertefeuille*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

Michael E. Roberts, human rights attorney, for the appellant (plaintiff).

Anna-Marie Puryear, human rights attorney, for the appellee (defendant Commission on Human Rights and Opportunities).

William Tong, attorney general, *Michael Skold*, deputy solicitor general, and *Colleen B. Valentine* and *Matthew F. Larock*, assistant attorneys general, filed a brief for the state of Connecticut as amicus curiae.

Opinion

MULLINS, J. The facts of this case are deeply disturbing. For years, the named defendant, Richard Cantillon, tormented his neighbor, the complainant, Kelly Howard, repeatedly making obscene gestures and calling her the most vile racial epithets, including use of the N-word, when she attempted to access public areas of the condominium complex where they both resided.[1] Cantillon also physically menaced the complainant. He threatened to shoot her and punch her in the face, and he brandished a snow shovel on one occasion. These various incidents resulted in as many as thirty calls to the police. In response to this treatment, the complainant filed a neighbor versus neighbor claim with the Commission on Human Rights and Opportunities, alleg-

[1] By way of example, Cantillon called the complainant a "nigger" as many as five times per week, he told her that "[n]iggers don't belong here," and he warned her, "I'm . . . going to get you nigger." He also called her former boyfriend a "nigger," and he went so far as to call her daughter a "fat, Black nigger."

ing housing discrimination, in that Cantillon had violated her civil rights on the basis of her race.[2]

Cantillon failed to appear for the administrative hearing on the complainant's claims. Consequently, he was defaulted. Then, after a hearing in damages, the presiding human rights referee found that the complainant had suffered emotional distress and awarded her $15,000 in damages, in addition to costs and postjudgment interest.

The commission itself, viewing the award as too low in light of the pervasive scope and nature of Cantillon's discriminatory conduct, appealed to the Superior Court, challenging the amount of the award. Specifically, the commission argued that (1) under *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 708, 41 A.3d 1013 (2012), an award for garden-variety emotional distress damages[3] presumptively must be at least $30,000, and (2) the referee made various errors of law in assessing the heinousness of Cantillon's conduct pursuant to the test espoused in *Commission on Human Rights & Oppor-*

[2] Specifically, the complainant alleged that Cantillon had engaged in discriminatory housing practices in violation of General Statutes § 46a-64c and the federal Fair Housing Act, 42 U.S.C. 3601 et seq., as applied via General Statutes § 46a-58 (a). In its amicus brief in opposition to certain arguments of the commission, the state raises the question of whether a housing discrimination claim is cognizable against a neighbor under either the federal or the state fair housing law. Because Cantillon is not present to argue that a claim may not be brought against a neighbor, in accordance with state and federal fair housing law, we assume, without deciding, that such a claim will lie under at least some circumstances.

[3] The term "garden-variety" is a bit of a misnomer, in that it seems to disparage these types of claims, when, in reality, it merely refers to mental suffering that is established primarily through the testimony of a plaintiff or a complainant and not through expert medical or psychological evidence. See, e.g., *Patino* v. *Birken Mfg. Co.*, supra, 304 Conn. 707; see also, e.g., *Connecticut Judicial Branch* v. *Gilbert*, 343 Conn. 90, 127–28 n.25, 272 A.3d 603 (2022) (discussing definition of garden-variety emotional distress). That said, a claim of mental suffering that is supported only by the testimony of that individual may be more difficult for the trier of fact to assess than one that is corroborated by expert testimony.

tunities ex rel. Harrison v. *Greco*, Docket No. 7930433 (C.H.R.O. June 3, 1985) (*Harrison*). Neither the complainant nor Cantillon participated in the appeal, however, and, for arcane reasons that are set forth in the decision of the Appellate Court; see *Commission on Human Rights & Opportunities* v. *Cantillon*, 207 Conn. App. 668, 670 n.1, 263 A.3d 887 (2021); the commission operated as both the appellant and the appellee in its appeal before the Superior Court. In doing so, the commission, as plaintiff, and the commission, as defendant, both challenged the referee's award as insufficient.[4]

Even though no party to the appeal defended the decision of the referee or argued in support of Cantillon's likely position that the award was not impermissibly low, the trial court, recognizing that it was bound by the highly deferential standard of review that governs administrative decisions; see General Statutes § 4-183 (j); concluded that there was no legal basis for it to second-guess the award and rendered judgment dismissing the appeal. For similar reasons, and with the parties similarly situated, the Appellate Court affirmed the judgment of the Superior Court. See *Commission on Human Rights & Opportunities* v. *Cantillon*, supra, 207 Conn. App. 670–71, 686. This certified appeal followed.[5]

[4] General Statutes § 46a-94a (a) authorizes the commission (as plaintiff) to appeal to the Superior Court an adverse decision of a presiding officer, but the commission (as defendant) understands itself to be prevented from defending the decision of the officer because it owes a continuing obligation to the complainant. As a result, the defendant commission filed its brief arguing essentially the same position as the plaintiff commission. The complainant is also a defendant, although she has not participated in the appeal.

In the interest of simplicity, we refer to the plaintiff commission and the defendant commission collectively as the commission, except when it is necessary to identify one of those parties individually.

[5] We granted the plaintiff commission's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the trial court had properly determined that the . . . referee adjudicating the underlying housing discrimination claim applied the proper legal principles in awarding the claimant 'garden-variety' damages for emotional distress in the amount of $15,000 against [Cantillon], a neighbor who repeat-

Like the courts below, we are compelled to affirm. If some minimum award for garden-variety emotional distress damages is to be established for such heinous conduct, then that minimum amount must be established by the legislature, either independently, via legislation, or in conjunction with the commission, through the Uniform Administrative Procedure Act's rule-making process; see General Statutes § 4-168 et seq.; and not on an ad hoc basis by this court.

We presume the reader's familiarity with the well reasoned opinion of the Appellate Court. That court did an admirable job of setting forth the relevant facts and procedural history, describing the controlling standard of review, summarizing the commission's arguments as to the alleged flaws in the decision of the referee, and explaining why those arguments ultimately were not persuasive. Specifically, the Appellate Court did not read *Patino* to adopt any presumptive floor for emotional distress damages; see *Commission on Human Rights & Opportunities* v. *Cantillon*, supra, 207 Conn. App. 673–79; and it concluded that the referee's heavily fact specific assessment of the complainant's emotional distress damages was not an abuse of discretion. See id., 679–86. We agree with that court's resolution of the commission's claims, and no useful purpose would be served by retracing those steps here. We take this opportunity, however, to clarify and elaborate on a few points raised by the commission.

I

The commission's primary argument is that the award violated the law of Connecticut, as purportedly set forth in *Patino* v. *Birken Mfg. Co.*, supra, 304 Conn. 679. Specifically, the commission claims that our decision in

edly subjected the claimant to racially motivated verbal and physical harassment?" *Commission on Human Rights & Opportunities* v. *Cantillon*, 340 Conn. 909, 909–10, 264 A.3d 94 (2021).

Patino set a range for garden-variety emotional distress claims of between $30,000 and $125,000. See id., 708. We disagree.

Patino involved an employment discrimination action in which the jury awarded the plaintiff $94,500 in noneconomic damages for garden-variety emotional distress. See id., 682, 686. The defendant employer appealed from the trial court's denial of its posttrial motion for remittitur, contending that the $94,500 damages award was tantamount to punitive damages, as it was so excessive as to shock the conscience. Id., 705. In rejecting that claim, we emphasized that, "[b]ecause an award of damages is a matter peculiarly within the province of the trier of facts," a reviewing court should exercise its authority to order remittitur only when "the size of the verdict so shocks the sense of justice as to compel the conclusion that the [trier was] influenced by partiality, prejudice, mistake or corruption." (Internal quotation marks omitted.) Id., 705–706. That exacting standard was not satisfied in *Patino*, we concluded, because there was evidence that the plaintiff had suffered severe, prolonged discrimination and that the defendant had continually failed to remedy the situation. Id., 707–708. In response to the defendant's argument that a trial judge in a similar case had ordered a remittitur; see id., 708 n.26; we cited to a series of cases in which verdicts of $100,000 or more had been awarded in civil rights cases. Id., 708. Following that string citation, we wrote: "see also *Olsen* v. *Nassau*, [615 F. Supp. 2d 35, 46 (E.D.N.Y. 2009)] ('[garden-variety] emotional distress claims generally merit $30,000 to $125,000 awards' . . .)." *Patino* v. *Birken Mfg. Co.*, supra, 304 Conn. 708.

The commission finds much meaning in this brief parenthetical. Specifically, the commission reads our citation to *Olsen* to mean that (1) when awarding damages, a referee must benchmark a case not only to other

decisions of the commission, or even to jury verdicts in Connecticut state courts, but also to jury verdicts awarded in the federal courts of neighboring states, (2) a failure to do so would create inequities and inconsistencies and encourage forum shopping, and (3) our referencing of the $30,000 to $125,000 range was meant not just to be descriptive of typical jury verdicts but to establish a soft floor, that is, a norm or rule as to the minimum award that will be deemed presumptively valid.

After a thorough review of our decision in *Patino*, the Appellate Court concluded that "the holding pertaining to the damage[s] award was limited and based on the particular factual circumstances of that case"; *Commission on Human Rights & Opportunities* v. *Cantillon*, supra, 207 Conn. App. 676; and that, "[a]lthough perhaps instructive, these cursory references to a range of damages in other cases do not . . . [stand] for any binding principle pertaining to damage[s] awards in emotional distress actions." (Emphasis omitted.) Id., 677. We agree.

Our point in *Patino* was simply that an award of damages that was squarely within the range of those that often are awarded in this part of the country will not shock the judicial conscience. We were not called on, nor did we intend, to use a range of damages referenced in a string citation parenthetical to establish the inverse rule, namely, that an award *lower* than the generally prevailing range of damages awarded in federal jury trials is presumptively an abuse of discretion in Connecticut. And surely we did not intend to constrain an executive agency that was created and directed by the legislature to provide a prompt remedy.

Beyond the analysis offered by the Appellate Court, we would emphasize four additional points so as to resolve any confusion that *Patino* may have engendered. First, the quote from *Olsen*, that "[garden-vari-

ety] emotional distress claims generally merit $30,000 to $125,000 awards," is misleading if not understood in context. (Internal quotation marks omitted.) *Olsen* v. *Nassau*, supra, 615 F. Supp. 2d 46. Although the "$30,000 to $125,000" quote has received much attention, both *Olsen* and its progeny acknowledged that the range of awards in the Second Circuit is actually much wider. In fact, in *Olsen* itself, the court acknowledged that, in *Quinby* v. *WestLB AG*, Docket No. 04 Civ. 7406 (WHP), 2008 WL 3826695 (S.D.N.Y. August 15, 2008), the case from which *Olsen* borrowed the "$30,000 to $125,000" language; id., *3; the court authorized a $300,000 award for garden-variety emotional distress damages that, it concluded, was "at or above the upper range of reasonableness . . . ." (Citations omitted; internal quotation marks omitted.) *Olsen* v. *Nassau*, supra, 46, quoting *Quinby* v. *WestLB AG*, supra, *4.

Other cases decided in the Second Circuit over the past decade or so have remitted such damages to, or approved awards of, well below $30,000.[6] Indeed, just

[6] See, e.g., *Lore* v. *Syracuse*, 670 F.3d 127, 177 ("New York cases vary widely in the amount of damages awarded for mental anguish. Many do reduce awards to $30,000 or below." (Internal quotation marks omitted.)), modified, 460 Fed. Appx. 73 (2d Cir. 2012); *MacMillan* v. *Millennium Broadway Hotel*, 873 F. Supp. 2d 546, 550–51, 561, 563 (S.D.N.Y. 2012) (holding, in employment discrimination case, that motion for new trial concerning compensatory damages would be granted unless plaintiff agreed to remittitur reducing amount of compensatory damages, observing that, "[when] a plaintiff offers only sparse evidence of emotional distress . . . courts have reduced such awards to as little as $10,000," and concluding that "an award of $30,000 constitutes the maximum that [can] be upheld . . . as not excessive" (internal quotation marks omitted)); *Charvenko* v. *Barbera*, Docket No. 09-CV-6383T, 2011 WL 1672471, *6–8 (W.D.N.Y. March 30, 2011) (awarding $1000 in emotional distress damages in connection with default judgment in housing discrimination claim, and reviewing case law supporting comparably low awards when testimony of distress is largely conclusory or limited to describing feelings of humiliation) (report and recommendation adopted, Docket No. 09-CV-6383T, 2011 WL 1659882 (W.D.N.Y. May 3, 2011)); see also, e.g., *Borja-Fierro* v. *Girozentrale Vienna Bank*, Docket No. 91 Civ. 8743 (CMM), 1994 WL 240360, *4 (S.D.N.Y. May 27, 1994) ("in the vast majority of cases [involving similarly vague and conclusory testimony regarding mental anguish], courts found awards of $5,000 to $10,000 to be appro-

last year, in *Fontana* v. *Bowls & Salads Mexican Grill, Inc.*, Docket No. 19-CV-01587 (JMA) (ARL), 2022 WL 2389298 (E.D.N.Y. July 1, 2022), the court approved an award of $15,000 in damages for garden-variety emotional distress in an employment discrimination case. Id., *1–2.

More recent assessments, therefore, have placed a much lower floor on the prevailing range of awards than did *Olsen*. See, e.g., *Fontana* v. *Bowls & Salads Mexican Grill, Inc.*, Docket No. 19-CV-01587 (JMA) (ARL), 2022 WL 3362181, *6 (E.D.N.Y. February 3, 2022) ("[f]or garden-variety emotional distress claims, courts in the Second Circuit have awarded damages ranging from $5,000 to $125,000") (report and recommendation adopted, Docket No. 19-CV-01587 (JMA) (ARL), 2022 WL 2389298 (E.D.N.Y. July 1, 2022)); *Manson* v. *Friedberg*, Docket No. 08 Civ. 3890 (RO), 2013 WL 2896971, *7 (S.D.N.Y. June 13, 2013) ("[f]or typical or [garden-variety] emotional distress claims, district courts have awarded damages ranging from $5,000 to $35,000" (internal quotation marks omitted)). *Olsen*'s range, then, is hardly a rule.[7]

Second, for this court to confine emotional distress damages to some permissible range by judicial fiat would run afoul of decades of Connecticut jurisprudence. Noneconomic damages, such as emotional distress, pain and suffering, are, "at best, rather indefinite and speculative in nature." *McKirdy* v. *Cascio*, 142 Conn. 80, 84, 111 A.2d 555 (1955). For more than fifty years, this court has rejected the idea that any specific

priate").

[7] It bears emphasizing that all of these federal cases were decided in the context of motions for remittitur, rather than for additur. "[T]he Supreme Court of the United States has declared, as a matter of federal law, that any additur violates the right to a jury trial that is guaranteed by the seventh amendment to the United States constitution." (Emphasis omitted.) *Turner* v. *Pascarelli*, 88 Conn. App. 720, 723, 871 A.2d 1044 (2005).

yardstick can be applied to cabin the discretion of the trier of fact when calculating a fair and appropriate award of noneconomic damages.

As we explained in *Margolin* v. *Kleban & Samor, P.C.*, 275 Conn. 765, 882 A.2d 653 (2005), in the closely related context of a motion for remittitur, "[t]he law . . . is well settled. The amount of a damage[s] award is a matter peculiarly within the province of the trier of fact . . . . The size of the verdict alone does not determine whether it is excessive. *The only practical test* to apply to [a] verdict is whether the award falls somewhere within the necessarily uncertain limits of just damages or whether the size of the verdict so shocks the sense of justice as to compel the conclusion that the [trier of fact] was influenced by partiality, prejudice, mistake or corruption." (Emphasis added; internal quotation marks omitted.) Id., 783; see also, e.g., *Munn* v. *Hotchkiss School*, 326 Conn. 540, 577, 165 A.3d 1167 (2017) ("[Emotional distress damages and related] damages lie in an extremely uncertain area . . . in which it is quite impossible to assign values with any precision . . . . [N]o formulaic process of review applies . . . ." (Citation omitted; internal quotation marks omitted.)); *Wichers* v. *Hatch*, 252 Conn. 174, 181, 745 A.2d 789 (2000) (attempt by this court "to establish an arbitrary demarcation" for calculating noneconomic damages award would be "both unnecessary and unwise"); *Birgel* v. *Heintz*, 163 Conn. 23, 34, 301 A.2d 249 (1972) ("[p]roper compensation for personal injuries cannot be computed by mathematical formula, and the law furnishes no precise rule for [such an] assessment" (internal quotation marks omitted)).

Consistent with our repeated rejection of any "practical test" or "mathematical formula" for both additur and remittitur, this court long has been of the view that benchmarking a challenged award against awards in other cases is not required or even, necessarily, appro-

priate, holding that "comparisons with amounts in other verdicts serve little purpose." *Gorham* v. *Farmington Motor Inn, Inc.*, 159 Conn. 576, 585, 271 A.2d 94 (1970), citing *Fairbanks* v. *State*, 143 Conn. 653, 661, 124 A.2d 893 (1956).

Most recently, in *Munn* v. *Hotchkiss School*, supra, 326 Conn. 540, in the context of a motion to remit a substantial award of more than $30 million in noneconomic damages; see id., 543, 569; we declined the defendant's invitation "to examine the verdicts returned by other juries in other cases and to engage in an exercise of comparing which plaintiff's injuries are worse." Id., 578. We reiterated that "[n]o one life is like any other, and the damages for the destruction of one furnish no fixed standard for others. . . . Consequently, [*i*]*t serves no useful purpose to compare a verdict in one personal injury case with the verdicts in other personal injury cases*." (Citations omitted; emphasis added; internal quotation marks omitted.) Id.; see also, e.g., *Welsh* v. *Martinez*, 157 Conn. App. 223, 242, 114 A.3d 1231 ("[a]s our Supreme Court has explained, [c]omparison of verdicts is of little value" (internal quotation marks omitted)), cert. denied, 317 Conn. 922, 118 A.3d 63 (2015).[8]

The rationales that underlie these rules counsel perhaps most strongly against establishing a legal floor for garden-variety emotional distress damages. It is well established that everyday hurt feelings and affronts can, as a matter of fact or law, be insufficient as to be legally actionable; see, e.g., *Appleton* v. *Board of Education*, 254 Conn. 205, 211, 757 A.2d 1059 (2000); and that, even

[8] Although this has remained the prevailing view, as exemplified by our recent decision in *Munn* v. *Hotchkiss School*, supra, 326 Conn. 540, in a few older cases, this court suggested that cases from other jurisdictions, although not determinative, may offer some guidance in determining a fair and reasonable range of damages. See, e.g., *Wochek* v. *Foley*, 193 Conn. 582, 587, 477 A.2d 1015 (1984); *Gorczyca* v. *New York, New Haven & Hartford Railroad Co.*, 141 Conn. 701, 705, 109 A.2d 589 (1954).

when a compensable injury has been proven, an award of no more than nominal emotional distress damages is permissible. See, e.g., *Richey* v. *Main Street Stafford, LLC*, 110 Conn. App. 209, 224–25, 954 A.2d 889 (2008). It would be an odd rule indeed if we were to hold, on the one hand, that it is permissible to award only a few dollars in the many cases in which the plaintiff's distress falls somewhere within the ordinary range of emotional harms endured in the course of any human life but then to hold, on the other hand, that, when more than nominal damages *are* awarded, the award must be $30,000 or more. Surely, across the broad spectrum of purely emotional human anguish, one can imagine an injury warranting a $15,000 award. Whether *this* was *that* injury, under the circumstances of this case, was a question for the referee. Notwithstanding our own view that this case certainly may have merited a more substantial award, pursuant to our standard of review, namely, to decide only whether, in light of the evidence, the referee has acted unreasonably, arbitrarily, illegally, or in abuse of her discretion; see, e.g., *Meriden* v. *Freedom of Information Commission*, 338 Conn. 310, 318, 258 A.3d 1 (2021); we cannot conclude that the referee committed reversible error.

That brings us to the third point. The commission has not identified any other area of the law in which the courts of this state have taken the extraordinary step of establishing a limit—upward or downward—on the amount of damages that presumptively can be awarded by a Connecticut jury, court, or administrative agency. And for good reason. Public sentiments regarding the range of damages that is fair and fitting in different types of legal actions can vary widely and evolve rapidly. See, e.g., *Wochek* v. *Foley*, 193 Conn. 582, 586, 477 A.2d 1015 (1984) ("[t]he question of damages in personal injury cases, especially in these times of changing values, is always a difficult one" (internal quotation

marks omitted)). For that reason, determining whether to establish some minimum or maximum permissible award for any particular cause of action, in light of evolving public sentiments and the conflicting societal interests involved, is a quintessentially legislative, rather than judicial, function, especially when that determination involves an executive agency. See, e.g., *Jarmie* v. *Troncale*, 306 Conn. 578, 624–25, 50 A.3d 802 (2012) (tort reform is proper domain of legislature); *Jones* v. *Karraker*, 98 Ill. 2d 487, 492, 457 N.E.2d 23 (1983) ("In our opinion placing a limit on the maximum or minimum amount of an award . . . is a legislative prerogative. We decline to do so."). In Connecticut, our legislature has exercised that prerogative on multiple occasions, establishing minimum[9] and maximum[10] damages of various sorts across a range of actions. It has not done so here.

Fourth, we are not persuaded by the commission's argument that, if we decline to set a floor for emotional distress damages awards consistent with the lower end of the prevailing range of awards in the Second Circuit, then there will be a forum shopping problem. The concern, it seems, is that complainants may choose to file an action in a federal district court, where they can be assured of a recovery of at least $30,000, rather than to file a claim with the commission.

Although forum shopping can be a problem in certain contexts; see, e.g., *Adams* v. *Aircraft Spruce & Spe-*

[9] See, e.g., General Statutes § 42-251 (b) (establishing minimum damages award of $250 for violation of rent-to-own agreement laws); General Statutes § 54-41r (establishing minimum compensatory damages award of $1000 for tampering with contents of private communications and for illegal wiretapping and electronic surveillance).

[10] See, e.g., General Statutes § 35-53 (b) (capping punitive damages in wilful and malicious misappropriation actions); General Statutes § 46a-89 (b) (2) (C) (same, discriminatory housing and public accommodations practices actions); General Statutes § 46a-98 (c) and (d) (same, discriminatory credit practice actions); General Statutes § 52-240b (same, product liability actions); and General Statutes § 52-564a (c) (capping civil damages that may be awarded to property owner in shoplifting action).

cialty Co., 345 Conn. 312, 348, 284 A.3d 600 (2022) (discussing concerns regarding forum shopping by nonresident plaintiffs); one must be careful not to overstate the concern. See, e.g., *New London County Mutual Ins. Co.* v. *Nantes*, 303 Conn. 737, 750–51, 36 A.3d 224 (2012). In the present case, the commission has presented no evidence that complainants have in fact been engaging in forum shopping of this sort, and there are many reasons why we believe that the concerns expressed by the commission are overstated. As we discussed, *Olsen* appears to have overstated the floor for garden-variety emotional distress damages in the Second Circuit. One need not look far to find recent federal cases in Connecticut in which emotional distress damages of less than $30,000 were awarded.[11]

We note that, even if federal jury awards were in the range that *Olsen* indicated, there are many differences between pursuing an administrative complaint before the commission and litigating a civil action in federal court—everything from different statutes of limitations and institutional support for injured parties to alacrity and mandatory mediation—that might make one venue or the other more advantageous for a particular complainant. Accordingly, we do not see a serious forum shopping problem here.

II

The second principal argument raised by the commission is that the referee, in fashioning the damages award, incorrectly applied and expanded the so-called "*Harrison* factors." In *Harrison*, the commission adopted a three factor test to be applied when calculating

[11] See, e.g., *Champagne* v. *Columbia Dental, P.C.*, Docket No. 3:18-cv-01390 (VLB), 2022 WL 951687, *1 (D. Conn. March 30, 2022) ($10,000 for sexual harassment and discrimination); *Brown* v. *B&D Land Clearing & Logging, LLC*, Docket No. 3:17-CV-01413 (KAD), 2020 WL 13248680, *4 (D. Conn. March 3, 2020) ($10,000 for wrongful termination).

emotional distress damages. See *Commission on human Rights & Opportunities ex rel. Harrison* v. *Greco*, supra, Docket No. 7930433, pp. 7–8. "Under the *Harrison* analysis, the [first and] most important factor [in calculating emotional distress] damages is the subjective internal emotional reaction of the complainants to the discriminatory experience [that] they have undergone and whether the reaction was intense, prolonged and understandable. . . . [The second factor] . . . is whether the discrimination occurred in front of other people. . . . For this, the [referee] must consider [whether] the discriminatory act was [performed] in public and in view or earshot of other persons which would cause a more intense feeling of humiliation and embarrassment. . . . The third and final factor is the degree of the offensiveness of the discrimination and the impact on the complainant. . . . In other words, was the act egregious and was it done with the intention and effect of producing the maximum pain, embarrassment and humiliation." (Internal quotation marks omitted.) *Commission on Human Rights & Opportunities ex rel. Cortes* v. *Valentin*, 213 Conn. App. 635, 653, 278 A.3d 607, cert. denied, 345 Conn. 962, 285 A.3d 389 (2022); see also *Commission on Human Rights & Opportunities ex rel. Harrison* v. *Greco*, supra, pp. 7–8. In the present case, the commission contends that the referee erred by, among other things, considering factors other than those highlighted in the test, such as the fact that Cantillon did not hold a position of power over the complainant, and misconstruing the second factor, namely, public humiliation.

We agree with the Appellate Court that the referee invoked the applicable legal standard, that her application of that standard did not represent an abuse of discretion, and that her factual findings were not clearly erroneous. See *Commission on Human Rights &*

Opportunities v. *Cantillon*, supra, 207 Conn. App. 681–86.

Harrison recognizes that the subjective factors—the emotional and psychological impacts of the discriminatory conduct on the complainant—will always be the most important because what we ultimately are assessing is the degree of actual emotional distress suffered. The parties do not contend otherwise. The referee recognized this principle, observing, at the outset, that the complainant's "internal subjective emotional reaction to [Cantillon's] racially motivated harassment is the key element and the most important consideration."

Although the referee found that this element was satisfied, so as to warrant some award of emotional distress damages, she also repeatedly emphasized what she found to be various limiting or mitigating factors. First, the complainant relied on her own testimony to support her emotional distress claim, which was largely, though not completely, uncorroborated by relatives, friends, or associates. Second, the emotional distress was not enough to cause the complainant to seek medical or psychological help; nor did it cause her to miss any work or compel her to move from her condominium. Third, the distress did not rise to a level at which it interfered with her ability to sleep or eat. Indeed, there was no evidence of any recognized symptoms of severe emotional distress, such as "depression, mental anxiety, panic attacks, isolation, sleeplessness, weight loss, or increased [alcohol consumption] . . . ." From those facts, the referee determined that "there is no indication from the evidence presented that any emotional damage[s] suffered by the complainant [were] severe or had long-term implications or ramifications."

The commission does not contest any of those factual findings. Rather, the commission's primary challenge is that the referee did not adequately or appropriately

weigh various objective factors. Specifically, the commission contends that the referee afforded insufficient weight to the unique heinousness of the N-word, the fact that Cantillon's abuse of the complainant did not occur entirely out of the public view,[12] and the secretive nature of Cantillon's conduct, but that the referee gave too much weight to the fact that Cantillon was merely a neighbor. But, as we stated, although these objective considerations are relevant to a referee's assessment of emotional damages, they are secondary to the subjective factors. The referee correctly recognized that the subjective factors are paramount, she considered determinants that are directly relevant to assessing subjective emotional distress, and, on the basis of those considerations and her own observations, she found, as a factual matter, that the complainant's subjective emotional distress, although serious, was not so severe or disabling as to warrant an award in the range sought by the commission.[13] Her factual findings in that regard are entitled to substantial deference. Although we might have assessed the complainant's condition differently, and although we certainly have some questions regarding the weight that the referee afforded to some of the secondary, objective factors, her conclusions were not arbitrary, illegal, or an abuse of discretion, which would be required to overturn them.[14]

[12] Consistent with the testimony, the referee found that, although Cantillon had directed racially disparaging slurs and obscene gestures at the complainant primarily when the two were alone and there were no witnesses to observe the harassment, witnesses did observe two such incidents, as well as Cantillon's threat, at a public meeting, to punch the complainant in the face. The commission argues that, rather than emphasizing the largely private nature of the harassment, the referee should have simply deemed the second *Harrison* factor satisfied on the basis of the handful of public incidents.

[13] The defendant commission concedes that "this is not a case [in which the complainant] felt embarrassed or humiliated . . . ."

[14] We have considered the plaintiff commission's other arguments, and, to the extent that the Appellate Court did not directly dispose of them, we conclude that they are without merit.

We have one final observation. We understand that some of the commission's arguments could be construed as a critique of the *Harrison* test itself. The commission, for example, appears to take issue with the fact that the second *Harrison* factor assumes that public discrimination, which may be particularly embarrassing or humiliating, is necessarily more egregious than private, physically threatening discrimination, which may be more terrifying.

We are sympathetic to the commission's argument that, although the subjective factors will always be the most important, a host of more objective factors also may assist a referee in the difficult task of assessing another individual's internal psychological state, based on our shared understanding of what sorts of experiences tend to be the most traumatic and distressing. Those objective factors may include those emphasized by the commission—the heinous nature of the language involved, the insidious, secretive character of the discrimination, and the fact that the verbal abuse was paired with physical threats—as well as many other factors. For these and other reasons, we are not entirely convinced that the *Harrison* test represents a reasonable framework for assessing emotional distress damages.

The parties have not asked us to reject the *Harrison* three factor test, however. Given the unique procedural posture of this case, in which opposing viewpoints have not been represented, this is not the case in which to do so. Therefore, we save for another day the question of whether we should reexamine the *Harrison* framework.

We cannot overstate the vileness of Cantillon's language and his ongoing campaign to terrorize the complainant and, at times, her daughter and her former boyfriend, on the basis of their race. He should not be rewarded for the complainant's admirable resilience in

the face of malice. We have little doubt that Cantillon's heinous conduct reasonably could have resulted in a damages award many times higher. But the referee, as the finder of fact, was in the best position to assess the necessarily uncertain nature and degree of the complainant's internal distress, and it would not be proper for us to substitute our own judgment for those factual determinations. See, e.g., *Meriden* v. *Freedom of Information Commission*, supra, 338 Conn. 318.

The judgment of the Appellate Court is affirmed.

In this opinion ROBINSON, C. J., and McDONALD and D'AURIA, Js., concurred.

ECKER, J., dissenting. I agree with the majority that our decision in *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 708, 41 A.3d 1013 (2012), did not establish a presumptive benchmark range for damages awards in emotional distress cases before the Commission on Human Rights and Opportunities (CHRO). "For more than fifty years," the majority explains, "this court has rejected the idea that any specific yardstick can be applied to cabin the discretion of the trier of fact when calculating a fair and appropriate award of noneconomic damages." Part I of the majority opinion. My problem with the majority's holding is that, in the very next breath, it approves and endorses the use by the CHRO's human rights referee (referee) of a valuation method that employs just such a yardstick to constrain the award of noneconomic damages in the present case. Specifically, the referee used a handful of old CHRO awards to arrive at a definitive range of emotional distress damages with a "high water mark" of $50,000, and a low end of $6000. In arriving at this range, the referee refused to consider in her comparative valuation a vast reservoir of awards made by courts, juries, and other administrative agen-

cies charged with the responsibility of valuing the emotional distress suffered by complainants, like the complainant in this case, Kelly Howard, who have endured illegal racial discrimination. The referee's chosen valuation methodology adopts a self-imposed, artificial, and arbitrary measure of damages for which I can find no judicial, legislative, or regulatory authority. Reversal is required so that a damages award can be calculated using a proper valuation methodology.

The referee's use of an unjustifiably restrictive valuation methodology is no accident. My research reveals that some or all of the current CHRO referees evidently have reached an informal consensus, with no official guidance, authorization, or approval, that the emotional distress damages awarded by courts, juries, and other administrative agencies in comparable cases are too high. Their chosen valuation methodology reflects an unofficial but deliberate policy choice to keep CHRO awards low. In implementing this policy, the referees have created a self-contained and self-replicating universe of comparative values that categorically excludes consideration of any awards other than those produced in-house at the CHRO. This practice should end, and this court should end it, because the referees have no authority to adopt a presumptive valuation range that, whether by design or in effect, produces emotional distress damages awards far lower than permitted by law.

I likewise find unjustifiable the referee's failure to account for inflation when relying on past CHRO awards, some decades old, to determine the value of the complainant's emotional distress. The referee awarded $15,000 to the complainant in the present case based on the referee's conclusion that the closest comparable awards were a CHRO award of $20,000 in 2000, an award of $25,000 in 2006, and—curiously—an award of no damages in 2008 resulting from a finding that there was no violation of Connecticut's discriminatory housing

practice statute, General Statutes § 46a-64c.[1] See footnote 11 of this opinion. The referee also took into consideration awards to a husband and wife of $12,000 and $10,000 in 2008, and an award of $6000 in 2000. See id. The referee did not adjust any of these comparative values for inflation, despite the obvious and inarguable fact that the value of a dollar in 2000, 2006, and 2008 was significantly less than the value of a dollar in 2017, which is when the damages originally were awarded to the complainant in this case. For example, an award of $20,000 in 2000, adjusted for inflation, was worth approximately $29,000 in 2017.[2] The failure to account for inflation caused the referee to substantially undervalue the damages award in this case.

I

It is important to properly frame the precise nature of the errors committed by the referee in order to ascertain the correct standard of appellate review. To be clear, I do not quarrel with the referee's factual findings. Although I probably would have arrived at materially different findings than the referee did regarding the character and degree of the emotional distress suffered by the complainant, it is not the function of this court "to retry the case or to substitute its judgment for that of the administrative agency." (Internal quotation marks omitted.) *Connecticut Judicial Branch* v. *Gilbert*, 343 Conn. 90, 135, 272 A.3d 603 (2022). Although the majority and I seem to agree that the size of the damages

[1] It was manifestly erroneous for the referee to value the complainant's emotional distress using a comparator case in which no liability for unlawful discrimination was found, and thus no compensable damages were awarded as a matter of law. See *Commission on Human Rights & Opportunities ex rel. McIntosh-Waller* v. *Vahistrom*, Docket No. 0750080, 2008 WL 2683291, *8–9 (C.H.R.O. June 6, 2008).

[2] Likewise, an award of $6000 in 2000 is the equivalent of approximately $8600 in 2017 dollars. See Bureau of Labor Statistics, United States Department of Labor, CPI Inflation Calculator, available at https://www.bls.gov/data/inflation_calculator.htm (last visited June 23, 2023).

award reflects a distinctly parsimonious sensibility, we are required to defer to the referee's wide discretion in that regard. See, e.g., *Stratford Police Dept.* v. *Board of Firearms Permit Examiners*, 343 Conn. 62, 81, 272 A.3d 639 (2022) ("[a]n agency's factual and discretionary determinations are to be accorded considerable weight by the courts" (internal quotation marks omitted)); cf. *Margolin* v. *Kleban & Samor, P.C.*, 275 Conn. 765, 783, 882 A.2d 653 (2005) ("[t]he amount of a damage[s] award is a matter peculiarly within the province of the trier of fact" (internal quotation marks omitted)).

The errors at issue, however, are not factual. Nor do they involve the nature or extent of the emotional distress suffered by the complainant as a result of the discriminatory conduct of the named defendant, Richard Cantillon. The errors are *methodological*. After the referee assessed the severity of the complainant's emotional distress using the framework set forth in *Commission on Human Rights & Opportunities ex rel. Harrison* v. *Greco*, Docket No. 7930433 (C.H.R.O. June 3, 1985) (*Harrison*),[3] the referee then applied a particular methodology to value that emotional distress, i.e., to convert the harm into dollars. I will review that valuation methodology in more detail in parts II and III of this opinion, but the critical point for present purposes is that the referee arrived at a valuation on the basis of a range of awards for emotional distress damages

[3] *Harrison* instructs CHRO referees to consider the following factors when awarding emotional distress damages caused by discrimination: (1) the subjective internal emotional reaction of the complainant; (2) whether the discrimination occurred in front of other people; and (3) the degree of offensiveness of the discrimination and its impact on the complainant. See *Commission on Human Rights & Opportunities ex rel. Harrison* v. *Greco*, supra, Docket No. 7930433. Like the majority, I am not entirely convinced that the *Harrison* factors represent a proper framework for assessing emotional distress damages, especially in cases like the one before us. See part II of the majority opinion. The parties, however, have not challenged the legal validity of the *Harrison* factors, and, therefore, I do not address the issue.

established by prior CHRO awards, to the exclusion of other relevant comparative data, and without taking into account the rate of inflation.[4]

The referee's selection of a valuation methodology presents a *legal* question on appeal because it raises the issue of whether a proper measure of damages has been employed to calculate the complainant's damages.[5] It is well established that, "[a]lthough the amount of recoverable damages is a question of fact, the measure of damages [on] which the factual computation is based is a question of law." (Internal quotation marks omitted.) *Oscar Gruss & Son, Inc.* v. *Hollander*, 337 F.3d 186, 196 (2d Cir. 2003); see *Vermont Microsystems, Inc.*, v. *Autodesk, Inc.*, 138 F.3d 449, 452 (2d Cir. 1998) ("[a]lthough [the] calculation of the amount of damages is a factual determination, the formula used in making that calculation is a question of law"); *Carrillo* v. *Goldberg*, 141 Conn. App. 299, 307, 61 A.3d 1164 (2013) ("[w]e accord plenary

[4] On remand, the referee also applied *Patino* as a comparator, but only because she was ordered to do so by the trial court.

[5] This presents an issue of law because the valuation methodology itself was formulated on the basis of generally applicable principles regarding the range of damages recoverable for emotional distress caused by racial discrimination, without regard to the underlying facts of this particular case. See *Lysenko* v. *Sawaya*, 7 P.3d 783, 787 (Utah 2000) ("Questions of fact are generally regarded as entailing the empirical, such as things, events, actions, or conditions happening, existing, or taking place, as well as the subjective, such as state of mind. . . . Legal questions, in contrast, are defined as those [that] are not of fact but are essentially of rules or principles uniformly applied to persons of similar qualities and status in similar circumstances. . . . Thus, to determine whether the measure of damages . . . presented the trial court with a legal question . . . [the court] must determine whether there is a [rule] or [principle] governing the measure of damages that can be uniformly applied to persons of similar qualities and status in similar circumstances." (Citations omitted; internal quotation marks omitted.)). The *application* of that damages model to the particular facts of the case—e.g., whether the complainant's emotional distress fits within the selected range of damages—is a mixed question of law and fact that is entitled to deference. See General Statutes § 4-183 (j). This latter issue is not contested in the present case.

review to the [trial] court's legal basis for its damages award" (internal quotation marks omitted)).[6]

The standard of review applied to legal determinations made by an administrative agency depends on a number of factors. "Conclusions of law reached by the administrative agency must stand if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a state agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010).

The appropriate valuation methodology for emotional distress damages in discrimination cases has not previously been subjected to judicial scrutiny, and, therefore, I consider that narrow issue to present a pure question of law subject to plenary review.[7] See, e.g.,

[6] Damages assessed after the entry of default are no different. After default is entered, establishing the appropriate amount of damages involves two steps: (1) "determining the proper rule for calculating damages on . . . a claim," and (2) "assessing [the] plaintiff's evidence supporting [the] damages to be determined under this rule." (Internal quotation marks omitted.) *Pelgrift* v. *335 W. 41st Tavern, Inc.*, Docket No. 14-CV-8934 (AJN), 2018 WL 4735705, *3 (S.D.N.Y. September 30, 2018), appeal dismissed, United States Court of Appeals, Docket No. 18-3283 (2d Cir. February 12, 2019); see *Steiger* v. *J. S. Builders, Inc.*, 39 Conn. App. 32, 33, 35, 663 A.2d 432 (1995) ("the trial court applied the wrong standard in calculating the award of attorney's fees" after default judgment was entered against defendants).

[7] Even if the referee's valuation methodology were entitled to deference, I would conclude, for the reasons explained in parts II and III of this opinion, that the referee's exclusion of emotional distress damages awarded by courts, juries, and other administrative agencies to ascertain the value of the complainant's harm, as well as her failure to account for the passage

Commissioner of Public Safety v. *Freedom of Information Commission*, 312 Conn. 513, 526, 93 A.3d 1142 (2014) (for pure questions of law, plenary review is applicable unless agency's interpretation has been subjected to judicial scrutiny or is time-tested and reasonable); *Okeke* v. *Commissioner of Public Health*, 304 Conn. 317, 324, 39 A.3d 1095 (2012) (Under the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq., "[a] reviewing court . . . is not required to defer to an improper application of the law. . . . It is the function of the courts to expound and apply governing principles of law." (Internal quotation marks omitted.)). Accordingly, we must resolve the legal question of whether the referee adopted the proper valuation methodology by limiting herself to a range of comparative cases that included only prior CHRO awards (and one jury award on remand) and excluded all other damages awarded for emotional distress caused by racial discrimination by courts, juries, and other administrative agencies, as well as the rate of inflation.

II

CHRO referees evidently have been employing a valuation methodology for discrimination claims that arrives at a dollar value for emotional distress solely on the basis of a relatively small number of prior CHRO cases in which such damages were awarded. Little to no consideration is given to the robust comparative data available from numerous other sources of valuation in the juridical realm that assigns dollar amounts to this specific form of harm, namely, damages awards made by courts, juries, and other administrative agencies. In my view, the referee erred by adopting a methodology that disregards all valuation data except awards made by the CHRO itself.

of time and rate of inflation, was arbitrary, capricious, and an abuse of discretion.

It is well established that a referee charged with remedying a person's deprivation of civil rights protected by state and federal fair housing laws may award damages for emotional distress under General Statutes § 46a-86. See, e.g., *Commission on Human Rights & Opportunities* v. *Board of Education*, 270 Conn. 665, 705, 855 A.2d 212 (2004) (emotional distress damages can be awarded under § 46a-86 (c)); *Commission on Human Rights & Opportunities ex rel. Cortes* v. *Valentin*, 213 Conn. App. 635, 651–52, 278 A.3d 607 (upholding emotional distress damages award under § 46a-64c), cert. denied, 345 Conn. 962, 285 A.3d 389 (2022). It is equally well established that the purpose of remedial awards under our antidiscrimination statutes is to make victims of discrimination "whole" and to deter "like discrimination in the future . . . ." (Internal quotation marks omitted.) *Connecticut Judicial Branch* v. *Gilbert*, supra, 343 Conn. 141; accord *Commission on Human Rights & Opportunities* v. *Board of Education*, supra, 694; see General Statutes § 46a-86 (c) ("upon a finding of a discriminatory practice prohibited by [among other provisions, General Statutes §§ 46a-58 and 46a-64c], the presiding officer *shall* determine the damage suffered by the complainant . . . as a result of such discriminatory practice" (emphasis added)); *State* v. *Commission on Human Rights & Opportunities*, 211 Conn. 464, 478, 559 A.2d 1120 (1989) ("hearing officer[s] [have] not merely the power but the *duty* to render a decree which will, so far as possible, eliminate the discriminatory effects of the past as well as bar like discrimination in the future" (emphasis added; internal quotation marks omitted)).

In recent years, it appears that CHRO referees have been relying almost exclusively on awards from their own agency when awarding damages for emotional distress, disregarding decisions that assess such damages from courts, juries, and other administrative agencies,

such as the United States Department of Housing and Urban Development (HUD). See, e.g., *Commission on Human Rights & Opportunities ex rel. Lauray* v. *City Hall Café*, Docket No. 1530333, 2016 WL 1719121, *8 (C.H.R.O. March 31, 2016) (awarding $8000 for racial discrimination in violation of Connecticut Fair Employment Practices Act after reviewing only prior CHRO cases); *Commission on Human Rights & Opportunities ex rel. Jackson* v. *Pixbey*, Docket Nos. 0950094 and 0950095, 2010 WL 5517184, *7 (C.H.R.O. May 25, 2010) (awarding $40,000 in neighbor-on-neighbor, hostile housing environment case after reviewing only two CHRO cases); *Commission on Human Rights & Opportunities ex rel. Brown* v. *Jackson*, Docket Nos. 0750001 and 075002, 2008 WL 5122193, *24 (C.H.R.O. November 17, 2008) ("in recognition of the various awards order[ed] by [the CHRO]," awarding $12,000 to husband and $10,000 to wife as damages for hostile housing environment); *Commission on Human Rights & Opportunities ex rel. Scott* v. *Jemison*, Docket No. 9950020, 2000 WL 35575662, *1, *6, *9 (C.H.R.O. March 20, 2000) (awarding $6000 for emotional distress caused by housing discrimination after reviewing range of awards articulated in two prior CHRO decisions); *Commission on Human Rights & Opportunities ex rel. Little* v. *Clark*, Docket No. 9810387, 2000 WL 35575648, *13, *16 (C.H.R.O. August 2, 2000) (awarding $20,000 for emotional distress and noting that "[the requested] award of $75,000 [was] far out of line with the majority of awards ordered by [the CHRO]").

The referee in the present case followed this model. As the referee made clear in her memorandum of decision, she employed a valuation methodology limited solely to other CHRO comparators (and, on remand, one jury case), and deliberately excluded federal awards of damages for emotional distress. This unauthorized, arbitrary, and self-imposed limitation is not founded on

law, logic, or principle, but on an unofficial, subjective assessment that the federal awards were too high. Indeed, to ensure that the valuation remained entirely uninfluenced by non-CHRO comparators, the referee declined to consider a few early CHRO cases that valued emotional harm on the basis of federal decisions, explaining that these awards were unreliable outliers because "[f]ederal awards for emotional distress in cases of housing discrimination have consistently been much higher than awards from [the CHRO]." (Internal quotation marks omitted.), quoting *Commission on Human Rights & Opportunities ex rel. Hartling* v. *Carfi*, Docket No. 0550116, 2006 WL 4753467, *8 n.6 (C.H.R.O. October 26, 2006) (critiquing *Commission on Human Rights & Opportunities ex rel. Planas* v. *Bierko*, Docket No. 9420599 (C.H.R.O. February 8, 1995), and its reliance on federal decisions, including awards from courts, juries, and other administrative agencies, such as HUD, in calculating award of $75,000). The referee, quoting *Commission on Human Rights & Opportunities ex rel. Lawton* v. *Jansen*, Docket No. 0550135, 2007 WL 4623071, *8 n.10 (C.H.R.O. October 18, 2007), noted that *Planas* is " 'at the far end of the extreme of awards' " due, in part, to its reliance on federal cases. The referee therefore took the $75,000 award in *Planas* out of the list of comparator cases and established, as a "high water mark," an award of $50,000 on the basis of *Commission on Human Rights & Opportunities ex rel. Maybin* v. *Berthiaume*, Docket No. 9950026 (C.H.R.O. March 29, 1999) (*Maybin*).[8]

[8] Although the referee set the top of the range for emotional distress damages at $50,000 on the basis of the CHRO's prior damages award in *Maybin*, she also treated *Maybin* as an outlier, in part because "[t]he basis for the $50,000 emotional distress award rest[ed] primarily on the aggressive monetary award in *Planas*, on a trend in certain appellate decisions [that] have encouraged hearing officers to be aggressive in the award of [compensatory] damages . . . and on awards in other jurisdictions." (Citation omitted; internal quotation marks omitted.)

Federal awards for emotional distress caused by housing discrimination were not the only comparators excluded from the referee's valuation methodology. The referee also categorically disregarded jury awards for emotional distress caused by racial discrimination. It was not until the trial court ordered the referee on remand to consider *Patino* v. *Birken Mfg. Co.*, supra, 304 Conn. 679, that the referee reluctantly included *Patino* (and only *Patino*) in her valuation as the single non-CHRO damages award comparator.

The referee gave no legitimate reason to explain why she did not consider jury verdicts as part of her valuation of emotional distress damages. The referee stated that a comparison of values using jury verdicts is not possible because jury verdicts are unaccompanied by any explanation from the jury as to why it arrived at the amount of the award.[9] This assertion misses the point. The jury awards warranting consideration as comparators are those awards—and there are many of them—that are subject to judicial review, typically either for inadequacy or excessiveness. As in *Patino*, that review process results in a published judicial decision containing sufficient factual and contextual information to allow a judge—and a CHRO referee—to assess the evidence bearing on the jury's valuation and to use the data as a point of comparison, precisely as the referee in this case used the CHRO's own awards (and the *Patino* case) as comparators.[10] The referee's legal con-

[9] The referee also explained that "Connecticut courts have yet to issue an award of compensatory damages in a case involving a housing discrimination claim based on hostile environment harassment . . . ." (Footnote omitted.) This does not, however, explain the referee's failure to consider state jury awards for emotional distress in other contexts, such as employment discrimination.

[10] Indeed, when the trial court remanded the present case to the referee with instruction to reconsider the award of emotional distress damages in light of *Patino*, the referee had no difficulty comparing the underlying facts with those presented in *Patino* and concluding, as was her prerogative, that the harm was worse in *Patino* than it was in this case.

clusion—that jury awards cannot be used as comparators because the jury does not explain its verdict—is erroneous.

The refusal to consider emotional distress damages awarded by courts, juries, and other administrative agencies as comparators led the referee in the present case to award the complainant $15,000, an award the referee fashioned on the basis of a data set consisting of nothing more than a few relatively dated CHRO decisions[11] establishing a presumptive range with a low end of $6000 and a high end of $50,000. The referee concluded that $15,000 was an appropriate award because it fell "well within the realm of compensatory awards

[11] The referee relied on the following comparators, from high to low, in creating this presumptive range: (1) *Commission on Human Rights & Opportunities ex rel. Maybin* v. *Berthiaume*, supra, Docket No. 9950026 ($50,000 emotional distress damages award in hostile housing environment case), (2) *Commission on Human Rights & Opportunities ex rel. Jackson* v. *Pixbey*, supra, 2010 WL 5517184, *8–9 ($40,000 emotional distress damages award in hostile housing environment case), (3) *Commission on Human Rights & Opportunities ex rel. Jackson* v. *Lutkowski*, Docket Nos. 0950094 and 0950095 (C.H.R.O. May 25, 2010) ($40,000 emotional distress damages award in hostile housing environment case), (4) *Commission on Human Rights & Opportunities ex rel. Lawton* v. *Jansen*, supra, 2007 WL 4623071, *1, *9 ($40,000 emotional distress damages award in hostile housing environment case), (5) *Commission on Human Rights & Opportunities ex rel. Hartling* v. *Carfi*, supra, 2006 WL 4753467, *10 ($25,000 emotional distress damages award in hostile housing environment case), (6) *Commission on Human Rights & Opportunities ex rel. Thomas* v. *Mills*, Docket No. 9510408 (C.H.R.O. August 5, 1998) ($25,000 emotional distress damages award in public accommodations case), (7) *Commission on Human Rights & Opportunities ex rel. Brown* v. *Jackson*, supra, 2008 WL 5122193, *24 ($22,000 emotional distress damages award in hostile housing environment case), (8) *Commission on Human Rights & Opportunities ex rel. Little* v. *Clark*, supra, 2000 WL 35575648, *1, *16 ($20,000 emotional distress damages award in hostile environment discrimination case), (9) *Commission on Human Rights & Opportunities ex rel. Scott* v. *Jemison*, supra, 2000 WL 35575662, *1 ($6000 emotional distress damages award in hostile housing environment case); (10) *Commission on Human Rights & Opportunities ex rel. McIntosh-Waller* v. *Vahistrom*, Docket No. 0750080, 2008 WL 2683291, *8–9 (C.H.R.O. June 6, 2008) (no damages were awarded because no liability was found in hostile housing environment case).

ordered in similar cases decided by [the CHRO]." By plotting the complainant's emotional harm within a range of values established by a handful of prior CHRO awards, the referee operated within an artificially and arbitrarily limited framework that required her award to fall within a presumptive range far narrower than that permitted by law. This constraint on the amount of damages awarded to the complainant is an error of law that necessitates reversal.

A number of inexplicable incongruities arise as a result of this court's decision today. First, the majority endorses the referee's use of an unauthorized, self-imposed constraint on the award of emotional distress damages by employing a presumptive range of damages with a low end of $6000 and a high end of $50,000, while rejecting the higher presumptive range taken from *Patino* because it constrains the referee's discretion.[12] Of even more concern, the range of damages used in the present case is derived solely from prior CHRO awards, whereas the range of damages described in *Patino* is based on federal jury verdicts. See *Patino* v. *Birken Mfg. Co.*, supra, 304 Conn. 708. Jury verdicts are a more reliable indicator of the value to ascribe to emotional distress damages because each verdict is arrived at independently and, thus, provides a separate and distinct data point for comparison. By contrast, the range of awards for comparative purposes under the referee's methodology is strictly limited to a small number of awards previously made by the CHRO, and no one else. Moreover, a range established by prior CHRO decisions exists as a closed system—there is no fresh data to update or modify the referee's pool of compara-

[12] In my view, neither the jury awards nor the CHRO awards should create a presumptive range; the referee should consider as comparators administrative and judicial awards (including jury awards) for emotional distress caused by similar acts of illegal racial discrimination, and either accept or reject the comparison based on the similarity or dissimilarity or the underlying facts, not the identity of the decision maker.

tive data because any "new" agency awards are themselves derived from prior valuations, and the system is therefore self-replicating. The valuation range derived from jury awards, by contrast, is subject to constant revision as the data set of comparators expands because these awards are made without consideration of other jury awards.[13]

Second, this is not a context in which the administrative agency can claim that deference is due because the agency possesses particular, technical expertise in the subject matter; there is no reason to think that CHRO referees are any better than juries or federal agencies at valuing emotional distress caused by racial discrimination. Given the inherent difficulty of assessing emotional distress damages, it seems obvious to me that the more valuation data utilized, the more accurate, just, and fair the assessment of damages will be. As the majority acknowledges, damages for intangible harms,

[13] The majority relies on our case law regarding additur and remittitur to conclude that "benchmarking a challenged award against awards in other cases is not required or even, necessarily, appropriate" because "comparisons with amounts in other verdicts serve little purpose." (Internal quotation marks omitted.) Part I of the majority opinion. I agree with the majority that a comparison to other jury awards normally is unhelpful to determine whether a jury award in any particular case is inadequate or excessive, because "[j]uries may differ widely in the conclusions [that] they reach in what may be apparently similar cases, and, in fact, in any given case one jury may arrive at a result substantially different from that of another jury." (Internal quotation marks omitted.) *Munn* v. *Hotchkiss School*, 326 Conn. 540, 579, 165 A.3d 1167 (2017). As we previously have observed, "[t]his flexibility, though it may lead to uncertainty, is a necessary concomitant of the jury system as it operates in cases of this nature." *Birgel* v. *Heintz*, 163 Conn. 23, 34, 301 A.2d 249 (1972). Indeed, jurors are not allowed to learn about awards in other cases. But CHRO referees are not jurors; they are administrative decision makers who arrive at a fair and just valuation of emotional distress damages by reference to damages awards for emotional distress in other cases involving comparable facts. For comparative purposes, it is irrelevant whether the other awards are made by courts, juries, or other administrative agency adjudicators, so long as they represent a fair and fitting valuation of emotional distress damages under factually comparable circumstances.

such as pain, suffering, and emotional distress, "lie in an extremely uncertain area . . . in which it is quite impossible to assign values with any precision . . . . [N]o formulaic process of review [for excessiveness or inadequacy] applies . . . ." (Internal quotation marks omitted.) Part I of the majority opinion; see *Commission on Human Rights & Opportunities ex rel. Arnold* v. *Forvil*, 302 Conn. 263, 287, 25 A.3d 632 (2011) (recognizing that "[the] limits of fair and reasonable compensation in [a] particular case" are "necessarily uncertain" (internal quotation marks omitted)); see also *Stampf* v. *Long Island Railroad Co.*, 761 F.3d 192, 205 (2d Cir. 2014) ("Awards for mental and emotional distress are inherently speculative. There is no objective way to assign any particular dollar value to distress."). The availability of data about what other decision makers have done under comparable circumstances provides a very useful reference point for those charged with the responsibility of navigating this uncertain landscape. One would think that CHRO referees assigned with the responsibility of awarding money damages for emotional distress would see a great benefit in consulting all relevant data—including damages awarded by courts, juries, and other administrative agencies in comparable cases—before undertaking the humbling task of telling the victim of discrimination the value of his or her suffering in the eyes of the law.

Such guidance is particularly important when a decision maker is trying to fix a monetary value to the unique kind of emotional harm caused by racial discrimination. Many other forms of emotional distress are assessed on a strictly individual basis because the effects tend to be idiosyncratic to the individual victim. Group based racial discrimination is different. The wrongful act of discrimination itself, as well as the harm caused to the victim, inherently contains a shared, collective dimension, as one would expect of illegal conduct that achieves

its goal through the weaponization of the deeply embedded history of racism in our country. The harm that each individual suffers will be different, of course, and must be assessed on an individual basis, but we cannot ignore the reality that racial discrimination has very powerful social and cultural dimensions that necessarily impact the nature and extent of the resulting psychic harm. There is substantial evidence, for example, that racial discrimination in America has such a deep, pervasive, and persistent place in our history that the harm it causes is especially profound.[14]

Given the unique nature of the harm caused by racial discrimination, and in light of the fact that the valuation of emotional distress is not a matter of science, there is particular benefit in consulting jury awards for comparative purposes. The jury system has its flaws, but there are certain contexts in which jurors have an especially important role in our system of justice as repre-

[14] The United States Supreme Court, lower federal courts, this court, and legal scholars all have remarked on the severe, pervasive, and often irreversible harm caused by racial discrimination. See, e.g., *Brown* v. *Board of Education*, 347 U.S. 483, 494, 74 S. Ct. 686, 98 L. Ed. 873 (1954) ("[t]o separate [children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone"); *Mardell* v. *Harleysville Life Ins. Co.*, 65 F.3d 1072, 1074 (3d Cir. 1995) ("[a] victim of discrimination suffers a dehumanizing injury as real as, and often of far more severe and lasting harm than, a blow to the jaw" (internal quotation marks omitted)); *State* v. *Liebenguth*, 336 Conn. 685, 703–704, 250 A.3d 1 (2020) ("[I]t is beyond question that the use of the [N] word . . . is highly offensive and demeaning, evoking a history of racial violence, brutality, and subordination. . . . [I]t is probably the single most offensive word in the English language." (Citations omitted; internal quotation marks omitted.)); see also V. Goode & C. Johnson, "Emotional Harm in Housing Discrimination Cases: A New Look at a Lingering Problem," 30 Fordham Urban L.J. 1143, 1148 (2003) ("Emotional harm claims in housing discrimination cases tend to subtly reflect the shadow of racism in this country. It is the persistence of segregated housing patterns that contributes to a lack of understanding of the impact of racism and a diminished sense of empathy that is so essential in compensating the full nature of the dignitary harm that flows from housing discrimination." (Footnote omitted.)).

sentatives of the conscience of the community. See *Carter* v. *Jury Commission of Greene County*, 396 U.S. 320, 330, 90 S. Ct. 518, 24 L. Ed. 2d 549 (1970) ("the very idea of a jury . . . [is of] a body truly representative of the community" (internal quotation marks omitted)); *United States* v. *Gilliam*, 994 F.2d 97, 101 (2d Cir.) (jurors are "representatives of the people"), cert. denied, 510 U.S. 927, 114 S. Ct. 335, 126 L. Ed. 2d 280 (1993); *United States ex rel. McCann* v. *Adams*, 126 F.2d 774, 776 (2d Cir. 1942) (jury "introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions"), rev'd on other grounds, 317 U.S. 269, 63 S. Ct. 236, 87 L. Ed. 268 (1942); *McKirdy* v. *Cascio*, 142 Conn. 80, 84, 111 A.2d 555 (1955) (amount of award in wrongful death actions was within province of jury given inherently speculative nature of harm). Our juries' assessment of the harm caused by racial discrimination strikes me as one such situation, and such awards should not be excluded from a CHRO referee's valuation unless the law requires otherwise.

Jury awards are not the only relevant data that was categorically excluded from consideration by the CHRO referee. Other administrative agencies, such as HUD, are also charged with the responsibility of awarding damages for emotional distress caused by unlawful racial discrimination. See, e.g., 42 U.S.C. § 3612 (g) (3) (2018) ("[i]f the administrative law judge finds that a respondent has engaged or is about to engage in a discriminatory housing practice, such administrative law judge shall promptly issue an order for such relief as may be appropriate, which may include actual damages suffered by the aggrieved person and injunctive or other equitable relief"); 24 C.F.R. § 180.670 (b) (3) (i) (2022) ("If the [administrative law judge] finds that a respondent has engaged, or is about to engage, in a discriminatory housing practice, the [administrative law judge]

shall issue an initial decision against the respondent and order such relief as may be appropriate. Relief may include, but is not limited to . . . [o]rdering the respondent to pay damages to the aggrieved person (*including damages caused by humiliation and embarrassment*)." (Emphasis added.)). These awards likewise provide valuable data points for CHRO referees to consider. Looking at this data would be especially useful in cases like the present one, in which a victim of discrimination has alleged harm under the federal Fair Housing Act (FHA), 42 U.S.C. § 3601 et seq., and our state equivalent, § 46a-64c. In fact, we consistently have recognized that the § 46a-64c is intended to be applied in a manner consistent with its federal equivalent, with any deviation typically providing only greater protections to citizens of this state than under the federal counterpart. See, e.g., *Commission on Human Rights & Opportunities* v. *Savin Rock Condominium Assn., Inc.*, 273 Conn. 373, 385, 870 A.2d 457 (2005) (§ 46a-64c was adopted with "the intent of creating a state antidiscrimination housing statute [that is] consistent with its federal counterpart"); id., 386 n.11 ("[our courts] have interpreted our statutes even more broadly than their federal counterparts, to provide *greater* protections to our citizens, especially in the area of civil rights" (emphasis in original)); see also *Commission on Human Rights & Opportunities* v. *Housing Authority*, 117 Conn. App. 30, 46, 978 A.2d 136 (2009) ("[o]ne of the purposes of [Connecticut's fair housing] scheme is to render it substantially equivalent to the federal scheme, in terms of protecting the policy against housing discrimination and the rights of persons subject to such discrimination"), appeal dismissed, 302 Conn. 158, 24 A.3d 596 (2011). Given the intent and purpose animating § 46a-64c, I see no reason for the CHRO to ignore these federal administrative agency awards.

Lest I be misunderstood, I do not intend to suggest that the ultimate focus of the valuation analysis should

shift away from the particular facts of each individual case. CHRO referees "must rely primarily on [case specific] facts relating to the severity of the discriminatory behavior and [the] duration of the resulting emotional damage." *Broome* v. *Biondi*, 17 F. Supp. 2d 211, 225 (S.D.N.Y. 1997). A victim's individual experience is paramount, and awards made in other cases are merely instructive, not dispositive or presumptive. But CHRO referees who utilize a comparative valuation methodology are not properly discharging their statutory responsibilities by adopting a comparative methodology that, by design, excludes a large universe of damages awarded by courts, juries, and other administrative agencies in racial discrimination cases.[15] Expanding the universe of comparators that referees utilize can help to ensure that the damages award in each individual case is fair. The more data, the better. See *Zakre* v. *Norddeutsche Landesbank Girozentrale*, 541 F. Supp. 2d 555, 568 (S.D.N.Y. 2008) ("[r]eference to other awards in similar cases is appropriate . . . but courts must take care not to limit their review too narrowly" (citation omitted; internal quotation marks omitted)), aff'd, 344 Fed. Appx. 628 (2d Cir. 2009); cf. *Broome* v. *Biondi*, supra, 225 (comparing emotional distress damages between employment and housing discrimination claims is not improper). Of course, if a referee finds that a case is a bad data point because of factual differences, the referee has the discretion to reject the purported comparator.

A more robust comparative award approach than the one employed by the referee in this case reveals that there is a general trend within the United States Court

[15] For purposes of this appeal, I need not venture an opinion on the particular number of cases, or the ratio of CHRO cases to non-CHRO cases, that should be considered by the referee to provide a sufficiently representative pool of data. I would be loathe to encourage judicial micromanagement at that level of detail. It is enough in the present case to say that the categorical exclusion of all comparators except CHRO awards (and one jury award on remand) was improper.

of Appeals for the Second Circuit to award damages greater than the "high water mark" of $50,000, with awards often sitting closer to or well into the six figures for "garden variety"[16] emotional distress in civil rights cases. See, e.g., *Lewis* v. *American Sugar Refining, Inc.*, 325 F. Supp. 3d 321, 364 (S.D.N.Y. 2018) ("[a]wards [for] garden-variety emotional distress or mental anguish in the Second Circuit range from $30,000 to $125,000"); *Olsen* v. *Nassau*, 615 F. Supp. 2d 35, 46 (E.D.N.Y. 2009) (same); *Watson* v. *E.S. Sutton, Inc.*, Docket No. 02 Civ. 2739 (KMW), 2005 WL 2170659, *16 (S.D.N.Y. September 6, 2005) (same), aff'd, 225 Fed. Appx. 3 (2006); see also *Lore* v. *Syracuse*, 670 F.3d 127, 176–80 (2d Cir. 2012) ($150,000 award for emotional distress); *Parris* v. *Pappas*, 844 F. Supp. 2d 271, 277–79 (D. Conn. 2012) ($100,000 award in compensatory damages for FHA violation).[17]

The majority cites to *Manson* v. *Friedberg*, Docket No. 08 Civ. 3890 (RO), 2013 WL 2896971, *7 (S.D.N.Y. June 13, 2013), which posits that there is a much lower range of damages, between $5000 and $35,000, for garden-variety emotional distress damages. See part I of the majority opinion. The majority cites *Manson* for the proposition that the higher range in *Olsen* "is hardly

[16] As the majority recognizes, the "term 'garden-variety' " refers to emotional distress that is established primarily through a plaintiff's own testimony, rather than through medical or psychological evidence. Footnote 3 of the majority opinion. I agree with the majority that the term "is a bit of a misnomer" in that it appears to trivialize an individual's experience with emotional distress. Id.; see A. Merjian, "Nothing 'Garden Variety' About It: Manifest Error and Gross Devaluation in the Assessment of Emotional Distress Damages," 70 Syracuse L. Rev. 689, 693 (2020) ("There is nothing '[garden-variety]' about the experience of discrimination. Discrimination is never 'commonplace' or 'forgettable,' common synonyms for this phrase.").

[17] The $30,000 to $125,000 range derives primarily from cases decided in the mid-2000s. This range would be much higher today after adjusting to account for inflation. As I explain in part III of this opinion, when conducting a comparative methodological approach to assess emotional distress damages, it is vital to account for the passage of time.

a rule." Id. I agree that none of these ranges should serve as a rule, but it is important to note that the range cited in *Manson* is generally viewed as outdated and that cases that award damages within that lower range are typically seen as outliers. See, e.g., *Equal Employment Opportunity Commission* v. *United Health Programs of America, Inc.*, Docket No. 14-CV-3673 (KAM) (JO), 2020 WL 1083771, *13 (E.D.N.Y. March 6, 2020) ("[t]he court will not cap [garden-variety] emotional distress damages at $35,000 on the basis of *Moore* [v. *Houlihan's Restaurant, Inc.*, Docket No. 07-CV-3129 (ENV) (RER), 2011 WL 2470023, *6 (E.D.N.Y. May 10, 2011)], an outlier among recent cases in this circuit, and which cites to *Rainone* [v. *Potter*, 388 F. Supp. 2d 120, 122 (E.D.N.Y. 2005)] for its damages range [of $5000 to $35,000], a case that courts have acknowledged is quite outdated and is now considered a [lower than normal] damages range"); *Olsen* v. *Nassau*, supra, 615 F. Supp. 2d 46 n.4 (rejecting defendants' reliance on *Rainone* for damages range of $5000 to $35,000 and noting that "[m]ore recent cases find this range to be significantly higher"); see also, e.g., *Watson* v. *E.S. Sutton, Inc.*, supra, 2005 WL 2170659, *15 (range of $5000 to $30,000 was "at the low end of the range of damages generally awarded under New York law"); A. Merjian, "Nothing 'Garden Variety' About It: Manifest Error and Gross Devaluation in the Assessment of Emotional Distress Damages," 70 Syracuse L. Rev. 689, 699 (2020) ($5000 to $35,000 range was derived from outdated 1999 law review article, which omitted many Second Circuit cases in which awards were well above $35,000).

I am very concerned not only that the referee in the present case applied a presumptive range for awarding emotional distress damages in CHRO proceedings, but deliberately selected a range drawn exclusively from a small group of prior CHRO awards for the purpose of keeping CHRO awards low. This unofficial and unautho-

rized methodology now serves as a self-replicating and self-contained precedential source for future administrative adjudications in Connecticut. Its purpose and effect are to constrain the referees to award damages lower than those authorized by law. Under current law, if CHRO referees apply a comparative value methodology, they must look beyond the narrow confines of prior CHRO awards to consider comparable awards made in like cases by other decision makers, including courts, juries, and other relevant administrative agencies. A larger and more representative pool of comparators will ensure that awards for emotional distress are fair, just, and reasonable.

III

The referee's valuation methodology also was flawed because she failed to account for inflation when she used prior awards to arrive at a damages award in the present case. As I discussed previously, the referee established a range of $6000 to $50,000 for emotional distress damages on the basis of CHRO awards made between 1998 and 2010. Of those awards, the referee found three decisions particularly instructive in valuing the complainant's harm: *Commission on Human Rights & Opportunities ex rel. Hartling* v. *Carfi*, supra, 2006 WL 4753467, *10 (awarding $25,000 for emotional distress), *Commission on Human Rights & Opportunities ex rel. Little* v. *Clark*, supra, 2000 WL 35575648, *16 (awarding $20,000 for emotional distress), and *Commission on Human Rights & Opportunities ex rel. McIntosh-Waller* v. *Vahistrom*, Docket No. 0750080, 2008 WL 2683291, *8–9 (C.H.R.O. June 6, 2008) (no damages were awarded because no liability was found).[18] The referee's valuation methodology was erroneous as a matter of law because she used these historical awards without adjusting for inflation.

[18] See footnote 1 of this opinion.

It is crystal clear that an adjustment for inflation is necessary under these circumstances.[19] The Second Circuit has emphasized the importance of considering the passage of time and inflation when utilizing a comparative award approach to review jury damages awards for excessiveness. See, e.g., *Meacham* v. *Knolls Atomic Power Laboratory*, 381 F.3d 56, 78 (2d Cir. 2004) ("the passage of time since [those] cases were decided could reasonably support higher verdicts"), vacated on other grounds sub nom. *KAPL, Inc.* v. *Meacham*, 544 U.S. 957, 125 S. Ct. 1731, 161 L. Ed. 2d 596 (2005); *DiSorbo* v. *Hoy*, 343 F.3d 172, 185 (2d Cir. 2003) ("when considering the sizes of the awards in earlier cases, we must take into account inflation, as the reasonable range for [the plaintiff's] injuries today is higher than what it would have been ten years ago"); *Luciano* v. *Olsten Corp.*, 912 F. Supp. 663, 673 (E.D.N.Y. 1996) ("an amount that may have been excessive five to ten years ago . . . may be reasonable today simply by virtue of inflation"), aff'd, 110 F.3d 210 (1997). A dollar in 1998 was worth considerably less than a dollar in 2017. To achieve equivalency, the referee in 2017 would need to award approximately $1.50 for every dollar awarded nineteen years earlier. See Bureau of Labor Statistics, United States Department of Labor, CPI Inflation Calculator, available at https://www.bls.gov/data/inflation_calculator.htm (last visited June 23, 2023). The referee failed to account for inflation when she relied on past awards to calculate the amount of the complainant's emotional distress damages,

[19] In *Moore* v. *Moore*, 173 Conn. 120, 376 A.2d 1085 (1977), this court held that our courts may take judicial notice of the "fact of inflation . . . without affording [the parties] an opportunity to be heard . . . ." Id., 123. To the extent that the rate of inflation may be subject to reasonable factual dispute; see id.; the parties are free to proffer evidence regarding the rate of inflation. In the absence of evidence, the rate of inflation, as reflected by governmental statistics, such as those provided by the United States Department of Labor, should be presumed. See Bureau of Labor Statistics, United States Department of Labor, CPI Inflation Calculator, available at https://www.bls.gov/data/inflation_calculator.htm (last visited June 23, 2023).

and, therefore, her valuation methodology was fundamentally flawed.

IV

Our legislature has placed the responsibility of compensating victims of racial discrimination on the CHRO. The CHRO has a duty to ensure that victims of racial discrimination are properly compensated in accordance with the law. See, e.g., *State* v. *Commission on Human Rights & Opportunities*, supra, 211 Conn. 478. In order to fulfill this duty using a comparative valuation methodology, CHRO referees may not limit their analysis of comparative data to prior CHRO cases only. Nor may they fail to adjust past awards to account for the rate of inflation. Because the referee in the present case used a flawed valuation methodology to calculate the complainant's award of damages, the Appellate Court's judgment must be reversed. Accordingly, I respectfully dissent.