KEIRA SPILLANE ET AL. *v.* NED LAMONT ET AL. (SC 20776)

Robinson, C. J., and D'Auria, Ecker, Alexander and Seeley, Js.

Syllabus

The defendants, state and municipal officials charged with oversight of public health and education, appealed from the trial court's denial of their motions to dismiss the plaintiff's action on sovereign immunity grounds. The plaintiffs sought injunctive relief and a judgment declaring that the public act (P.A. 21-6) that prospectively eliminated the religious exemption from the statutory (§ 10-204a) vaccination requirements for public and private school enrollment violated the plaintiffs' and their minor children's rights, under the federal and/or state constitution, to the free exercise of religion, equal protection and a free public education, as well as their rights under the statute (§ 52-571b) concerning religious freedom in Connecticut. The defendants claimed that the trial court had incorrectly concluded that the plaintiffs' constitutional challenges to P.A. 21-6 satisfied the substantial claim exception, and that their statutory free exercise of religion claim under § 52-571b satisfied the statutory waiver exception, to the doctrine of sovereign immunity. *Held*:

In ruling on a motion to dismiss based on a claim of sovereign immunity, the trial court must assess the legal sufficiency of a plaintiff's allegations to determine whether the plaintiff has asserted a substantial claim of a constitutional violation adequate to defeat the defense of sovereign immunity, but the court does not need to consider the merits of the constitutional claim in terms of its likelihood of success.

The plaintiffs' claims that P.A. 21-6 violates the free exercise of religion and equal protection provisions of the state and federal constitutions failed as a matter of law and, therefore, should have been dismissed on sovereign immunity grounds, as P.A. 21-6 is a neutral law of general applicability, and its repeal of the religious exemption was rationally related to the state's interest in protecting public health.

The plaintiffs' claim that P.A. 21-6 violates their right to a free public education under the state constitution (art. VIII, § 1) also failed as a matter of law and should have been dismissed on sovereign immunity grounds, as P.A. 21-6 was neither disciplinary nor infringed on the plaintiffs' right to access a substantially equal educational opportunity but, rather, merely imposed a reasonable vaccination requirement as a condition of enrolling in school, which reflected a rational exercise of legislative judgment that was reasonably related to the state's interest in preserving the health and safety of students.

The trial court correctly concluded that the plaintiffs' statutory free exercise of religion claim under § 52-571b satisfied the statutory waiver exception to sovereign immunity, as the scope of the waiver afforded by that statute extends to free exercise challenges to the enforcement of legislation.

Neither the principle that one legislature may not bind the legislative authority of its successors nor the rule that legislative enactments are presumed to repeal earlier, inconsistent ones to the extent that they are irreconcilably in conflict was violated by applying § 52-571b to P.A. 21-6, as P.A. 21-6 did not expressly or implicitly conflict with § 52-571b.

Argued October 26, 2023—officially released July 30, 2024*

Procedural History

Action seeking a judgment declaring that a statute concerning mandatory school vaccinations is unconstitutional, and for other relief, brought to the Superior Court in the judicial district of Stamford-Norwalk, where the action was withdrawn as against the defendant Whitby School; thereafter, the court, *Hon. Robert L. Genuario*, judge trial referee, denied the motions to dismiss filed by the named defendant et al., and the named defendant et al. appealed. *Reversed in part*; *further proceedings*.

Darren P. Cunningham, assistant attorney general, with whom were *Timothy J. Holzman*, assistant attorney general, and, on the brief, *William Tong*, attorney general, for the appellants (named defendant et al.).

Lindy R. Urso, for the appellees (plaintiffs).

Opinion

ALEXANDER, J. The sole issue in this appeal is whether the doctrine of sovereign immunity bars this declaratory judgment action challenging the legality of No. 21-6 of the 2021 Public Acts (P.A. 21-6). P.A. 21-6 prospectively eliminated the long-standing religious exemption from vaccination requirements as a condition of public and private school enrollment in General

* July 30, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Statutes § 10-204a while maintaining the existing medical exemption. The plaintiffs, Keira Spillane and Anna Kehle, are parents of minor children who challenge the elimination of the religious exemption from the school vaccination requirement. They commenced the present action against the defendants, state and municipal officials charged with oversight of public health and education,[1] seeking injunctive relief and a declaration that P.A. 21-6 violates the constitutional rights of the plaintiffs and their children to the free exercise of religion, equal protection of the laws, and a free public education; see U.S. Const., amends. I and XIV; Conn. Const., art. I, §§ 1, 3 and 20;[2] Conn. Const., art. 8, § 1; and violates their rights under General Statutes § 52-571b. The trial court denied the defendants' motions to dismiss the complaint on the ground that they were immune from suit, concluding that two recognized exceptions to the doctrine of sovereign immunity—a "substantial claim" of a constitutional violation and a statutory waiver—had been satisfied. The defendants appealed from that decision to the Appellate Court, and we transferred the appeal to this court. See General Statutes § 51-199 (c); Practice Book § 65-1. We affirm in part and reverse in part the judgment of the trial court.

The plaintiffs allege the following facts, which are assumed to be true for purposes of this appeal. Each plaintiff has a minor child who maintains a religious exemption as a result of the legacy provision in P.A.

[1] The defendants are Governor Ned Lamont; Charlene M. Russell-Tucker, the commissioner of education; Manisha Juthani, the commissioner of public health; the Greenwich Board of Education; and the Orange Board of Education. Whitby School was also named as a defendant, but the action was withdrawn as to it.

[2] The operative complaint mistakenly alleges a violation of equal protection under article first, § 10, of the Connecticut constitution. We presume, as do the defendants, that the plaintiffs intended to allege a violation under article first, §§ 1 and 20. See *Ramos* v. *Vernon*, 254 Conn. 799, 826, 761 A.2d 705 (2000).

21-6. See P.A. 21-6, § 1, codified at General Statutes (Supp. 2022) § 10-204a (b). Each plaintiff also has another minor child who was too young to have applied for the exemption before it was eliminated. The plaintiffs sincerely believe that mandatory inoculation violates their religious beliefs because, among other things, the vaccines are developed utilizing cell lines derived from aborted fetal tissue and the vaccines would "desecrate . . . their children's bodies by forever altering their innate immune systems."

A religious exemption from school vaccination requirements has existed since the enactment of § 10-204a in 1959. See Public Acts 1959, No. 588, §1. Connecticut schools have not had a substantial outbreak of any infectious disease for which a vaccine is mandated under § 10-204a for the past several decades.

At the time of the passage of P.A. 21-6, students enrolled in Connecticut public and private schools fell into one of the following four categories: fully compliant with the statutorily mandated vaccine schedule, not compliant with the vaccine schedule due to a medical exemption, not compliant with the vaccine schedule due to a religious exemption, and not compliant with the vaccine schedule, despite having neither a medical nor a religious exemption (secular noncompliance). Despite those who were noncompliant, Connecticut's statewide school vaccination rate was among the highest in the nation, well above the rate of 95 percent generally recommended by Centers for Disease Control and Prevention. Prior to the enactment of P.A. 21-6, the defendants had made little or no effort to increase statewide compliance rates or rates at those schools or districts that had vaccination rates substantially below statewide rates due to secular noncompliance. The defendants also failed to make any meaningful effort to employ means of increasing vaccination rates that

were less restrictive than the elimination of the religious exemption.

In light of these facts and the decision to maintain the medical exemption while eliminating the religious exemption, the plaintiffs contend that P.A. 21-6 is part of a systematic effort to violate their religious rights. They commenced the present action against the defendants, seeking to enjoin the enforcement of P.A. 21-6 and a declaration that the act violates their rights under § 52-571b, the state constitution, and the federal constitution.

The defendants filed motions to dismiss the complaint on the basis of sovereign immunity. In support of their motions, the defendants submitted immunization data collected by the state Department of Public Health that indicated, inter alia, that the percentage of vaccinated kindergarten students for the 2019–2020 school year had decreased since the 2012–2013 school year, that the percentage of kindergarten students with religious exemptions from the vaccination requirements had increased over that same period, and that the percentage of those students with medical exemptions from the vaccination requirements had remained fairly constant since the 2012–2013 school year.[3] They also submitted opening statements from the legislative debates on the bill ultimately adopted as P.A. 21-6 by the legislation's sponsors, which cited the trends reflected in this data.

The trial court denied the motions to dismiss, agreeing with the plaintiffs that their claims satisfied an

[3] The 2019–2020 school year data for kindergarten students indicated that 2.3 percent of those students had a religious exemption from vaccination requirements (compared to a 2.2 percent national average for nonmedical vaccination exemptions), which reflected a 0.2 percent decrease from the prior school year but an increase of 0.9 percent since 2012–2013, and 0.2 percent of those students had a medical exemption from vaccination requirements, as compared with 0.3 percent during previous years.

exception to sovereign immunity. The court determined that the plaintiffs' statutory free exercise claim (count one) was not barred because § 52-571b includes an express waiver of immunity. It rejected the defendants' arguments that the statutory waiver did not extend to challenges to legislation and that § 52-571b could not bar operation of the subsequently enacted P.A. 21-6. The court concluded that there was "no reason to presume that the legislature did not believe that its enactment [of P.A.] 21-6 was consistent with the strict scrutiny standard of § 52-571b (b) . . . [or] intended to deprive persons who previously would have the right to challenge the validity of such actions in a judicial proceeding of their right to do so pursuant [to §] 52-571b (c)."

The trial court further determined that the plaintiffs' constitutional claims (counts two through six) were not barred because the complaint sought only equitable relief and alleged "substantial" constitutional claims. It rejected the defendants' argument that, in order for constitutional claims to be sufficiently substantial to overcome sovereign immunity, the complaint must allege facts that demonstrate that the plaintiffs are sufficiently likely to prevail on their constitutional claims under governing precedent. The court deemed this merits-type inquiry inappropriate for resolving the jurisdictional question raised by the defendants' motions to dismiss. It instead focused on the constitutional *nature* of the alleged incursion on the plaintiffs' rights, as well as the factual allegations in support of the claims, and deemed those allegations sufficiently substantial to overcome the defendants' sovereign immunity defense.

The defendants appealed from the denial of their motions to dismiss.[4] Their appeal, broadly character-

[4] Although the denial of a motion to dismiss is ordinarily an unappealable interlocutory ruling, it is immediately appealable when the motion is based on sovereign immunity because "the order or action so concludes the rights of the parties that further proceedings cannot affect them." (Internal quota-

ized, asserts that the trial court's conclusions as to the exceptions to sovereign immunity were contrary to settled principles of law and rules governing the construction of such exceptions.

We begin by setting forth certain fundamental principles that are not in dispute. "A motion to dismiss . . . properly attacks the jurisdiction of the court, essentially asserting that the plaintiff cannot as a matter of law and fact state a cause of action that should be heard by the court. . . . A motion to dismiss tests, inter alia, whether, on the face of the record, the court is without jurisdiction. . . . [O]ur review of the trial court's ultimate legal conclusion and resulting [decision on] . . . the motion to dismiss will be de novo." (Internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, 293 Conn. 342, 346–47, 977 A.2d 636 (2009).

"When a trial court decides a jurisdictional question raised by a pretrial motion to dismiss on the basis of the complaint alone, it must consider the allegations of the complaint in their most favorable light. . . . In this regard, a court must take the facts to be those alleged in the complaint, including those facts necessarily implied from the allegations, construing them in a manner most favorable to the pleader." (Internal quotation marks omitted.) *Conboy* v. *State*, 292 Conn. 642, 651, 974 A.2d 669 (2009). "In contrast, if the complaint is supplemented by undisputed facts established by affidavits submitted in support of the motion to dismiss . . . other types of undisputed evidence . . . and/or public records of which judicial notice may be taken . . . the trial court, in determining the jurisdictional issue, may consider these supplementary undisputed facts and need not conclusively presume the validity

tion marks omitted.) *Caverly* v. *State*, 342 Conn. 226, 232 n.5, 269 A.3d 94 (2022).

of the allegations of the complaint. . . . Rather, those allegations are tempered by the light shed on them by the [supplementary undisputed facts]. . . . If affidavits and/or other evidence submitted in support of a defendant's motion to dismiss conclusively establish that jurisdiction is lacking, and the plaintiff fails to undermine this conclusion with counteraffidavits . . . or other evidence, the trial court may dismiss the action without further proceedings. . . . If, however, the defendant submits either no proof to rebut the plaintiff's jurisdictional allegations . . . or only evidence that fails to call those allegations into question . . . the plaintiff need not supply counteraffidavits or other evidence to support the complaint, but may rest on the jurisdictional allegations therein." (Emphasis omitted; internal quotation marks omitted.) *Cuozzo* v. *Orange*, 315 Conn. 606, 615–16, 109 A.3d 903 (2015).

"[T]he doctrine of sovereign immunity implicates subject matter jurisdiction and is therefore a basis for granting a motion to dismiss." (Internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 347. "The principle that the state cannot be sued without its consent . . . has deep roots in this state and our legal system in general, finding its origin in ancient common law." (Internal quotation marks omitted.) *DaimlerChrysler Corp.* v. *Law*, 284 Conn. 701, 711, 937 A.2d 675 (2007). The doctrine "rests on the principle and on the hazard that the subjection of the state and federal governments to private litigation might constitute a serious interference with the performance of their functions and with their control over their respective instrumentalities, funds and property." (Internal quotation marks omitted.) *Hicks* v. *State*, 297 Conn. 798, 807, 1 A.3d 39 (2010).

"[I]n its pristine form the doctrine of sovereign immunity would exempt the state from suit entirely . . . because the sovereign could not be sued in its own

courts and there can be no legal right as against the authority that makes the law on which the right depends. . . . This absolute bar of actions against the state [however] has been greatly modified both by statutes effectively consenting to suit in some instances as well as by judicial decisions in others. . . . For example, we have held that the doctrine . . . does not prevent a claimant from seeking declaratory or injunctive relief for allegations that a state official is acting either pursuant to an unconstitutional statute or in excess of his authority. . . . This is so because individuals have an important interest in being protected from improper governmental action and the state has no interest in allowing such activity to continue such that a court's action to curb that activity would interfere with the state's legitimate governmental functions." (Citations omitted; internal quotation marks omitted.) *Chief Information Officer* v. *Computers Plus Center, Inc.*, 310 Conn. 60, 80, 74 A.3d 1242 (2013); see id., 80–81 (explaining distinction drawn by this court between certain actions seeking equitable relief and those seeking damages); *Doe* v. *Heintz*, 204 Conn. 17, 31, 526 A.2d 1318 (1987) (acknowledging judicial decisions holding that bar to suit must be relaxed when state or its proxy engages in unconstitutional acts).

Our case law has identified three recognized exceptions to sovereign immunity: "(1) when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity . . . (2) when an action seeks declaratory or injunctive relief on the basis of a substantial claim that the state or one of its officers has violated the plaintiff's constitutional rights . . . and (3) when an action seeks declaratory or injunctive relief on the basis of a substantial allegation of wrongful conduct to promote an illegal purpose in excess of the officer's statutory authority." (Citations omitted; internal quotation marks omitted.) *Columbia*

Air Services, Inc. v. *Dept. of Transportation*, supra, 293 Conn. 349. The plaintiffs in the present case rely on the first and second of these exceptions.

I

We begin with the substantial claim exception, which determines whether the trial court has jurisdiction over the constitutional violations alleged in counts two through six of the complaint.[5] The defendants contend that the trial court incorrectly relied solely on the constitutional nature of the plaintiffs' claims and the supporting factual allegations to determine that these claims are "substantial." They assert that, in *Markley* v. *Dept. of Public Utility Control*, 301 Conn. 56, 23 A.3d 668 (2011), this court made clear that the trial court was required to consider the merits of those claims in determining whether the allegations and the undisputed evidence were sufficient to establish the violation of a constitutional right *as a matter of law*. According to the defendants, without a threshold judicial determination of legal sufficiency, state officials would lose the benefit of their immunity from suit and be exposed to burdensome discovery for alleged constitutional claims that have no reasonable possibility of succeeding. They further contend that, if the trial court had applied the correct standard in the present case, it would have been compelled to grant their motions to dismiss because the plaintiffs' constitutional claims are foreclosed as a matter of law and fact.

For the reasons set forth hereinafter, we agree with the defendants that, in ruling on a motion to dismiss based on a claim of sovereign immunity, our case law requires the trial court to assess the legal sufficiency of the allegations of a complaint to determine whether

[5] The complaint also contained a seventh count, which sought a preliminary injunction on the basis of the constitutional violations alleged in the other counts.

the plaintiff has asserted a substantial claim of a constitutional violation adequate to defeat the defense of sovereign immunity. Applying this standard to the plaintiffs' constitutional claims, we conclude that those claims are foreclosed as a matter of law and fact and, therefore, that they are barred by sovereign immunity.

A

In *Horton* v. *Meskill*, 172 Conn. 615, 376 A.2d 359 (1977), this court confirmed the three recognized exceptions to sovereign immunity and endorsed the "substantial claim" standard proposed by Professor J. Randolph Block to guide their application. Id., 624–25; see also J. Block, "Suits Against Government Officers and the Sovereign Immunity Doctrine," 59 Harv. L. Rev. 1060, 1081 (1946) ("[when] no substantial claim is made that the defendant officer is acting pursuant to an unconstitutional enactment or in excess of his statutory authority, the purpose of the sovereign immunity doctrine requires dismissal of the suit for want of jurisdiction"). Block had suggested that this standard would strike the proper balance between legitimate competing interests because, "[i]n those cases in which it is alleged that the defendant officer is proceeding under an unconstitutional statute or in excess of his statutory authority, the interest in the protection of the plaintiff's right to be free from the consequences of such action outweighs the interest served by the sovereign immunity doctrine. Moreover, the government cannot justifiably claim interference with its functions when the acts complained of are unconstitutional or unauthorized by statute. On the other hand, [when] no substantial claim is made that the defendant officer is acting pursuant to an unconstitutional enactment or in excess of his statutory authority, the purpose of the sovereign immunity doctrine requires dismissal of the suit for want of jurisdiction." (Internal quotation marks omitted.) *Horton* v. *Meskill*,

supra, 624, quoting J. Block, supra, 59 Harv. L. Rev. 1080–81.

We have stated that, "[f]or a claim made pursuant to the second exception, complaining of unconstitutional acts, we require that [t]he allegations of such a complaint and the factual underpinnings if placed in issue, must clearly demonstrate an incursion [on] constitutionally protected interests. . . . In the absence of a proper factual basis in the complaint to support the applicability of [any of the three] exceptions, the granting of a motion to dismiss on sovereign immunity grounds is proper." (Citations omitted; internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 350.

Prior to today, fourteen appellate cases have considered a motion to dismiss based on sovereign immunity in which the plaintiff claimed that the substantial claim exception had been met. In all of them, the court determined that the trial court should have granted the motion to dismiss because the complaint, as supplemented by the undisputed facts, demonstrated that the plaintiffs could not as a matter of law and fact state a cause of action. In each such case, the court reached its determination by assessing the facts alleged in the complaint (or established by uncontroverted evidence submitted in connection with the motion to dismiss) in light of case law establishing the elements required to prevail on the constitutional claim. See, e.g., *Markley* v. *Dept. of Public Utility Control*, supra, 301 Conn. 71–72 (allegations were insufficient to establish equal protection violation); *Gold* v. *Rowland*, 296 Conn. 186, 203–205, 994 A.2d 106 (2010) (allegations were insufficient to support claim of unconstitutional taking); *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 358–63 (allegations were insufficient to estab-

lish deprivation of procedural due process and equal protection of law).[6]

In *Markley*, this court appeared to equate a "substantial" constitutional claim with a claim supported by allegations that demonstrate a "sufficient likelihood of succeeding . . . ." *Markley* v. *Dept. of Public Utility Control*, supra, 301 Conn. 71–72; see id. ("we conclude that, to the extent that the plaintiff has preserved his equal protection challenges, he has failed to demonstrate a sufficient likelihood of succeeding on those claims to overcome the defendants' sovereign immunity"). Likelihood of success on the merits is a familiar element of proof when a plaintiff seeks a temporary injunction; see, e.g., *Griffin Hospital* v. *Commission on Hospitals & Health Care*, 196 Conn. 451, 457, 493

[6] See also *184 Windsor Avenue, LLC* v. *State*, 274 Conn. 302, 319–20, 875 A.2d 498 (2005) (allegations were insufficient to support finding that plaintiff had enforceable property interest); *Tamm* v. *Burns*, 222 Conn. 280, 288–89, 610 A.2d 590 (1992) (allegations were insufficient to support claim of unconstitutional taking by way of inverse condemnation); *Barde* v. *Board of Trustees*, 207 Conn. 59, 65–66, 539 A.2d 1000 (1988) (allegations were insufficient to establish equal protection claim); *Upson* v. *State*, 190 Conn. 622, 625–26, 461 A.2d 991 (1983) (allegations were insufficient to demonstrate unconstitutional taking when condemnation agreements appended to complaint reflected that plaintiff had agreed to value given as full compensation); *Horak* v. *State*, 171 Conn. 257, 261–62, 368 A.2d 155 (1976) (allegations were insufficient to establish unconstitutional taking); *Jan G.* v. *Semple*, 202 Conn. App. 202, 215, 223, 244 A.3d 644 (allegations were insufficient to demonstrate incursion on constitutionally protected interests), cert. denied, 336 Conn. 937, 249 A.3d 38, cert. denied, U.S. , 142 S. Ct. 205, 211 L. Ed. 2d 88 (2021); *Braham* v. *Newbould*, 160 Conn. App. 294, 305–306, 124 A.3d 977 (2015) (under established precedent, allegations were insufficient to support claim of violation of eighth amendment to United States constitution); *Traylor* v. *Gerratana*, 148 Conn. App. 605, 611–12, 88 A.3d 552 (conclusory allegations were insufficient to demonstrate violation of constitutional rights to equal access to court, separation of powers, equal protection, due process, and trial by jury), cert. denied, 312 Conn. 901, 91 A.3d 908, and cert. denied 312 Conn. 902, 112 A.3d 778, cert. denied, 574 U.S. 978, 135 S. Ct. 444, 190 L. Ed. 2d 336 (2014); *Page* v. *State Marshall Commission*, 108 Conn. App. 668, 676–79, 950 A.2d 529 (allegations were insufficient to demonstrate unconstitutional taking and violation of due process rights), cert. denied, 289 Conn. 921, 958 A.2d 152 (2008).

A.2d 229 (1985); but this court had never previously used this standard as a proxy for a substantial constitutional claim. The only authority cited in *Markley* in connection with this language was *Gold* v. *Rowland*, supra, 296 Conn. 200–201. *Markley* v. *Dept. of Public Utility Control*, supra, 71–72. However, *Gold*, which involved an unconstitutional taking claim, did not apply a sufficient likelihood of success standard in deciding the motion to dismiss but, rather, in accordance with prior precedent, stated that, "to survive the defense of sovereign immunity, [the complaint] must allege sufficient facts to support a finding of a taking of [property] in a constitutional sense . . . ." (Internal quotation marks omitted.) *Gold* v. *Rowland*, supra, 201. To the extent that *Markley* suggests that the court must also consider the merits of the constitutional claim in terms of its likelihood of success, we disavow any such implication.

Accordingly, in considering the defendants' motions to dismiss in the present case, we must determine only whether the allegations set forth in the complaint, as supplemented by the undisputed facts, demonstrate that the plaintiffs cannot as a matter of law and fact state a cause of action that may be heard by the court.

B

Whether the plaintiffs' complaint alleges constitutional claims sufficient to withstand the defendants' motions to dismiss depends on the legal requirements for each claim and the facts necessary to meet those requirements. The plaintiffs' complaint alleges violations of the right to the free exercise of religion and the right to equal protection of the law under both the state and the federal constitutions. The plaintiffs' appellate brief treats those parallel provisions of the Connecticut constitution as being governed by the same legal principles and standards as those governing their

federal constitutional claims. Their additional claim, pertaining to the right to a free public education, arises exclusively under the Connecticut constitution.

1

Free Exercise Claim

In support of their claim that the plaintiffs' free exercise claim is foreclosed as a matter of law, the defendants point to a recent federal decision that rejected a nearly identical constitutional challenge to P.A. 21-6. See *We the Patriots USA, Inc.* v. *Connecticut Office of Early Childhood Development*, 579 F. Supp. 3d 290, 302–306, 311–13 (D. Conn. 2022) (despite having previously accommodated religious objections to vaccination by providing mechanism for objectors to obtain exemptions, state may repeal religious exemptions without offending free exercise or equal protection clauses), vacated in part on other grounds, 76 F.4th 130 (2d Cir. 2023), cert. denied, U.S. , 144 S. Ct. 2682, L. Ed. 2d (2024). While the present appeal was pending, the United States Court of Appeals for the Second Circuit affirmed the District Court's resolution of the free exercise claim in *We the Patriots USA, Inc.*, citing, among other reasons, the "nearly unanimous consensus" of other courts rejecting claims of a constitutional defect in a state's school vaccination mandate on account of the absence or repeal of a religious exemption. *We the Patriots USA, Inc.* v. *Connecticut Office of Early Childhood Development*, supra, 76 F.4th 136. The United States Supreme Court subsequently denied the plaintiffs' petition for a writ of certiorari in that case. See *We the Patriots USA, Inc.* v. *Connecticut Office of Early Childhood Development*, supra, 144 S. Ct. 2682. We agree with the Second Circuit's analysis of the free exercise claim and adopt it as our own as it pertains to the plaintiffs' arguments in the present case.[7]

[7] This court gives decisions of the Second Circuit "particularly persuasive weight in the resolution of issues of federal law . . . ." (Internal quotation marks omitted.) *St. Juste* v. *Commissioner of Correction*, 328 Conn. 198,

In *Employment Division, Dept. of Human Resources* v. *Smith*, 494 U.S. 872, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990), the United States Supreme Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." (Internal quotation marks omitted.) Id., 879. Under *Smith*, "generally applicable, [religion neutral] laws that have the effect of burdening a particular religious practice need not be justified by a compelling governmental interest . . . ." Id., 886 n.3. "When a religiously neutral and generally applicable law incidentally burdens free exercise rights, [courts] will sustain the law against constitutional challenge if it is rationally related to a legitimate governmental interest." *Does 1-6* v. *Mills*, 16 F.4th 20, 29 (1st Cir. 2021), cert. denied sub nom. *Does 1-3* v. *Mills*, U.S. , 142 S. Ct. 1112, 212 L. Ed. 2d 9 (2022); see id., 29–30, 37 (upholding denial of preliminary injunction because petitioners were unlikely to succeed on merits of their claim that Maine's mandatory vaccination law for health-care workers, which did not offer a religious exemption, violated free exercise clause).

A law is not neutral if the government "proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton* v. *Philadelphia*, 593 U.S. 522, 533, 141 S. Ct. 1868, 210 L. Ed. 2d 137 (2021). This occurs when a law either "refers to a religious practice" or is facially neutral but "targets religious conduct for distinctive treatment . . . ."

210, 177 A.3d 1144 (2018); see also *Szewczyk* v. *Dept. of Social Services*, 275 Conn. 464, 475 n.11, 881 A.2d 259 (2005) ("[d]eparture from Second Circuit precedent on issues of federal law . . . should be constrained in order to prevent the plaintiff's decision to file an action in federal District Court rather than a state court located a few blocks away from having the bizarre consequence of being outcome determinative" (internal quotation marks omitted)).

Church of Lukumi Babalu Aye, Inc. v. *Hialeah*, 508 U.S. 520, 533, 534, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993). "To fail the neutrality prong, it is not enough for a law to simply *affect* religious practice; the law or the process of its enactment must demonstrate 'hostility' to religion. See, e.g., [*Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, 584 U.S. 617, 638, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018)]. The [United States] Supreme Court has stressed, however, that even 'subtle departures from neutrality' violate the [f]ree [e]xercise [c]lause, and thus 'upon even slight suspicion that proposals for state intervention stem from animosity to religion or distrust of its practices, all officials must pause to remember their own high duty to the [c]onstitution and to the rights it secures.' [Id., 638–39] . . . . To determine whether the government has acted neutrally, courts look to factors such as the background of the challenged decision, the sequence of events leading to its enactment, and the legislative or administrative history." (Emphasis in original.) *We the Patriots USA, Inc.* v. *Connecticut Office of Early Childhood Development*, supra, 76 F.4th 145.

"A law is not generally applicable if it invite[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." (Internal quotation marks omitted.) *Fulton* v. *Philadelphia*, supra, 593 U.S. 533; see id., 534–35 (ordinance not generally applicable because exemptions from nondiscrimination provision made at " 'sole discretion' " of city official). A law is also not generally applicable if it "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." Id., 534. This principle, that a government may not be substantially underinclusive in pursuit of its legitimate interests, prohibits the state from "impos[ing] burdens only on conduct motivated by religious belief . . . ."

Church of Lukumi Babalu Aye, Inc. v. *Hialeah*, supra, 508 U.S. 543; see id. ("The ordinances . . . fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than [religious conduct] does. The underinclusion is substantial, not inconsequential. Despite the city's proffered interest in preventing cruelty to animals, the ordinances are drafted with care to forbid few killings but those occasioned by religious sacrifice.").

The United States Supreme Court, in applying these principles to state limitations on private religious gatherings during the COVID-19 pandemic, clarified the proper general applicability analysis. Relevant here, the court explained that government regulations "are not neutral and generally applicable, and therefore trigger strict scrutiny under the [f]ree [e]xercise [c]lause, whenever they treat *any* comparable secular activity more favorably than religious exercise." (Emphasis in original.) *Tandon* v. *Newsom*, 593 U.S. 61, 62, 141 S. Ct. 1294, 209 L. Ed. 2d 355 (2021). Further, "whether two activities are comparable for purposes of the [f]ree [e]xercise [c]lause must be judged against the asserted government interest that justifies the regulation at issue . . . [and] not the reasons why people gather." (Citation omitted.) Id.

We first consider whether P.A. 21-6 is neutral toward religion.[8] In undertaking the identical inquiry, the Second Circuit, in *We the Patriots USA, Inc.*, concluded that P.A. 21-6 satisfies *Smith*'s neutrality prong because (1) it is facially neutral, and (2) the legislative history surrounding it is devoid of evidence that the act was

[8] We take judicial notice of the legislative history surrounding P.A. 21-6. See, e.g., *State* v. *Santiago*, 318 Conn. 1, 126, 122 A.3d 1 (2015) ("legislative history . . . [is] properly subject to judicial notice"). We note further that the specific data on which we rely—and on which the Second Circuit in *We the Patriots USA, Inc.*, relied—are part of the record in this case in addition to being part of the legislative history.

motivated by "hostility to religious believers, even when read with an eye toward 'subtle departures from neutrality' or 'slight suspicion' of 'animosity to religion or distrust of its practices.' " *We the Patriots USA, Inc.* v. *Connecticut Office of Early Childhood Development*, supra, 76 F.4th 148, quoting *Masterpiece Cakeshop, Ltd.* v. *Colorado Civil Rights Commission*, supra, 584 U.S. 638–39. The court observed that, "[f]ar from expressing hostility, legislators accommodated religious objectors to an extent the legislators believed would not seriously undermine the [a]ct's goals." *We the Patriots USA, Inc.* v. *Connecticut Office of Early Childhood Development*, supra, 76 F.4th 148. They did this in a number of ways that included, but was not limited to, a legacy provision allowing students in kindergarten through twelfth grade to keep their religious exemptions, even if they moved to another school district. Id.

In reaching its determination, the Second Circuit rejected the plaintiffs' argument that "[P.A. 21-6] is not neutral under *Smith* [because] . . . repealing any existing religious exemption is hostile to religion per se." Id., 149. The plaintiffs in the present case make the same argument, asserting that "there is little doubt that P.A. 21-6 is not neutral on its face, as the entire purpose of the law was to eliminate the school vaccine religious exemption, which has existed for as long as the vaccine requirement itself."[9] (Emphasis omitted.) In rejecting

[9] The plaintiffs argue that dismissal of their constitutional claims is premature in the absence of discovery, which they argue "is needed to uncover the defendants' motives, animus, and [to] obtain evidence regarding the lack of neutrality." When asked during oral argument before this court what information could be obtained through discovery that is not already part of the record or legislative history, the plaintiffs' counsel responded that, to prevail, they needed additional data to demonstrate that eliminating the religious exemption was the most restrictive means for addressing the governmental concerns behind P.A. 21-6, not the least restrictive means. Contrary to those assertions, however, school data concerning vaccination compliance rates are part of the legislative history and were submitted in support of the defendants' motions to dismiss. More important, however, as counsel acknowledged at oral argument, this information is relevant only

this argument, the Second Circuit reasoned: "[The United States] Supreme Court has used a consistent cluster of terms to describe the kind of official attitude that violates the neutrality prong of *Smith*—'hostility,' 'animosity,' 'distrust,' 'a negative normative evaluation.' . . . These terms denote a subjective state of mind on a government actor's part, not the mere fact that government action has affected religious practice. . . . [T]he legislative record simply reveals no evidence of any such animus." (Citation omitted.) *We the Patriots USA, Inc.* v. *Connecticut Office of Early Childhood Development*, supra, 76 F.4th 149. The court noted that, to the extent that P.A. 21-6 mentions religion, it is only to provide legacy exemptions *benefiting* religious believers. Id.

The Second Circuit further reasoned: "[The United States] Supreme Court has long described religious exemptions as part of a mutually beneficial 'play in the joints' between the [e]stablishment [c]lause and [the] [f]ree [e]xercise [c]lause. [*Walz* v. *Tax Commission*], 397 U.S. 664, 669, 90 S. Ct. 1409, 25 L. Ed. 2d 697 (1970). As with many of the other exemptions that benefit individuals and communities of faith—not requiring religious organizations to pay income and property tax, for instance—the government may constitutionally elect to accommodate religious believers but is not constitutionally *required* to do so. See, e.g., *Carson* v. *Makin*, [596 U.S. 767, 785, 142 S. Ct. 1987], 213 L. Ed. 2d 286 (2022) (holding [that] [s]tates need not subsidize private education, including private religious schools, but must make any subsidies equally available to religious and nonreligious schools). [The plaintiffs'] argument, which would make every exemption permanent once granted, threatens to distort the relationship between the [c]lauses." (Emphasis in original). *We the Patriots USA*,

insofar as it may be proof that P.A. 21-6 is not narrowly tailored to the government's stated interest. Whether the law is narrowly tailored is relevant only if we conclude that P.A. 21-6 is subject to strict scrutiny under *Smith*.

Inc. v. *Connecticut Office of Early Childhood Development*, supra, 76 F.4th 150.

In coming to this conclusion, the Second Circuit relied on *Yellowbear* v. *Lampert*, 741 F.3d 48 (10th Cir. 2014), in which the United States Court of Appeals for the Tenth Circuit explained that "the granting of a religious accommodation to some in the past doesn't bind the government to provide that accommodation to all in the future, especially if experience teaches [that] the accommodation brings with it genuine safety problems that can't be addressed at a reasonable price." Id., 58. Following the Tenth Circuit's reasoning, the Second Circuit observed that "adopting [the] plaintiffs' rule would disincentivize [s]tates from accommodating religious practice in the first place. . . . Few reasonable legislators or other government actors would be willing to tie the hands of generations of their successors by enacting accommodations that could not be repealed or changed if they no longer served the public good." (Citation omitted.) *We the Patriots USA, Inc.* v. *Connecticut Office of Early Childhood Development*, supra, 76 F.4th 150. We agree with the Second Circuit's analysis of this issue and similarly conclude that P.A. 21-6 is neutral toward religious exercise.

Having determined that P.A. 21-6 satisfies *Smith*'s neutrality prong, we now consider whether the act is generally applicable. The Second Circuit, in deciding this question, concluded that P.A. 21-6 was generally applicable because it "does not provide 'a mechanism for individualized exemptions,' meaning that it does not give government officials discretion to decide whether a particular individual's reasons for requesting exemption are meritorious"; id.; and because it is not underinclusive, that is, it does not prohibit religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way. Id., 151. With respect to individualized exemptions, the court noted

that the medical exemptions provided under P.A. 21-6 are not discretionary but are "instead mandatory and framed in objective terms . . . ." Id., 150.

In reaching its determination, the Second Circuit rejected the plaintiffs' argument that P.A. 21-6's "requirement that specified documents supporting requests for medical exemptions be acknowledged by . . . state and local officials affords such officials the discretion to approve or deny exemptions on a case-by-case basis." Id., 151. The plaintiffs in the present case make a similar argument that the act provides a mechanism for individualized medical exemptions because the state "retains the sole discretion" to decide whether to accept a provider's statement that a vaccine is contraindicated. Although the plaintiffs analogize this case to *Fulton*, in which the "entirely discretionary exceptions in [that case] render[ed] the . . . [nondiscrimination] requirement not generally applicable"; *Fulton* v. *Philadelphia*, supra, 593 U.S. 536; nothing about the mandatory language in P.A. 21-6 provides any discretion in granting medical exemptions. Instead, P.A. 21-6 mandates that "[a]ny such child who . . . presents a certificate, in a form prescribed by the commissioner pursuant to section 7 of this act,[10] from a physician, physician assistant or

[10] Section 7 of P.A. 21-6 provides in relevant part: [T]he Commissioner of Public Health shall develop and make available . . . a certificate for use by a [medical provider] . . . stating that, in the opinion of such [provider] . . . a vaccination required by the general statutes is medically contraindicated for a person because of the physical condition of such person. The certificate shall include (1) definitions of the terms 'contraindication' and 'precaution,' (2) a list of contraindications and precautions recognized by the National Centers for Disease Control and Prevention for each of the statutorily required vaccinations, from which the [provider] . . . may select the relevant contraindication or precaution on behalf of such person, (3) a section in which the [provider] . . . may record a contraindication or precaution that is not recognized by the National Centers for Disease Control and Prevention, but in his or her discretion, results in the vaccination being medically contraindicated . . . (4) a section in which the [provider] . . . may include a written explanation for the exemption from any statutorily required vaccinations, (5) a section requiring the signature of the [provider] . . . (6) a requirement that the [provider] . . . attach such person's most

advanced practice registered nurse stating that in the opinion of such [medical provider] . . . such immunization is medically contraindicated because of the physical condition of such child . . . *shall be exempt* from the appropriate provisions of this section." (Emphasis added; footnote added.) P.A. 21-6, § 1, codified at General Statutes (Supp. 2022) § 10 (a) (a). As the Second Circuit explained: "[T]hese elements of the [a]ct's medical exemption regime do not allow the government to decide which reasons for not complying with the [vaccine] policy are worthy of solicitude." (Internal quotation marks omitted.) *We the Patriots USA, Inc.* v. *Connecticut Office of Early Childhood Development*, supra, 76 F.4th 151.

As for whether P.A. 21-6 is underinclusive, we conclude that it is not because it does not regulate religious conduct while failing to regulate secular conduct that is at least as harmful to the legitimate government interests purportedly justifying it. As the Second Circuit explained: "[W]hether two activities are comparable for purposes of the [f]ree [e]xercise [c]lause must be judged against the asserted government interest that justifies the regulation at issue," which, in the present case, is the state's interest in "[protecting] the health and safety of Connecticut students and the broader public . . . ." (Internal quotation marks omitted.) Id.

In determining that P.A. 21-6 was not underinclusive, the Second Circuit rejected the plaintiffs' argument that, "because unvaccinated children are [all] at heightened risk of developing and transmitting [vaccine preventable] illnesses, regardless of their reason for not being vaccinated, medical and religious exemptions are comparable, and, under [established precedent], the [s]tate may not prefer a medical reason over a religious one

current immunization record, and (7) a synopsis of the grounds for any order of quarantine or isolation . . . ."

when the medical reason undermines the government's asserted interests in a similar way." (Internal quotation marks omitted.) Id., 153. The plaintiffs in the present case make the same argument, that "P.A. 21-6 is not generally applicable . . . [because] it provides for medical exemptions while removing religious exemptions." We agree with the Second Circuit that the plaintiffs' argument "is based on a misunderstanding of the [s]tate's interest in mandating vaccination in schools . . . . Allowing students for whom vaccination is medically contraindicated to avoid vaccination while requiring students with religious objections to be vaccinated does, in both instances, advance the [s]tate's interest in promoting health and safety. To the contrary, exempting a student from the vaccination requirement because of a medical condition and exempting a student who declines to be vaccinated for religious reasons are not comparable in relation to the [s]tate's interest."[11] (Cita-

[11] The plaintiffs argue that the legislature's actual interest in passing P.A. 21-6—as opposed to its stated interest (protecting student and public health and safety), which the plaintiffs claim is intentionally cast in overly generalized terms to avoid the problem of underinclusion—is to increase vaccination rates in order to decrease the likelihood of a measles outbreak. They contend that "allowing any other category of student . . . to remain unvaccinated, such as students with grandfathered religious exemptions . . . preschool students with religious exemptions who were given a one-year grace period [to get vaccinated] . . . and students who are not in compliance with the vaccination requirements but do not have any exemption"; (citations omitted); renders the act underinclusive in light of what they contend is its actual purpose (decreasing the likelihood of a measles outbreak). We are not persuaded. Even if we were to accept the plaintiffs' narrow view of the legislature's interest in enacting P.A. 21-6; but see *We the Patriots USA, Inc.* v. *Connecticut Office of Early Childhood Development*, supra, 76 F.4th 151–53 (rejecting narrow view in light of legislative history); we disagree that the legacy provision or the existence of noncompliant students renders the act underinclusive. Far from penalizing religious conduct, the legacy provision *privileges* that conduct by allowing students in kindergarten and beyond who already have religious exemptions to keep them, and by providing preschool students with preexisting religious exemptions a one year grace period in which to get vaccinated.

The medical exemption also does not render P.A. 21-6 substantially underinclusive because medical and religious exemptions are not comparable for

tion omitted.) *We the Patriots USA, Inc.* v. *Connecticut Office of Early Childhood Development*, supra, 76 F.4th 153.

The Second Circuit continued: "[P.A. 21-6] promotes the health and safety of vaccinated students by decreasing, to the greatest extent medically possible, the number of unvaccinated students (and, thus, the risk of acquiring [vaccine preventable] diseases) in school . . . [while simultaneously] promot[ing] the health and safety of unvaccinated students. Not only does the absence of a religious exemption decrease the risk that unvaccinated students will acquire a [vaccine preventable] disease by lowering the number of unvaccinated peers they will encounter at school, but the medical exemption also allows the small proportion of students who cannot be vaccinated for medical reasons to avoid the harms that taking a particular vaccine would inflict

purposes of the free exercise analysis. See *Tandon* v. *Newsom*, supra, 593 U.S. 62 ("[c]omparability is concerned with the risks the various activities pose"). The data included in this record demonstrate that "more than ten times as many students had religious exemptions than medical exemptions." *We the Patriots USA, Inc.* v. *Connecticut Office of Early Childhood Development*, supra, 76 F.4th 155. Both the medical and religious exemptions, therefore, even when considered "against the [more narrowly cast] government interest," pose vastly different risks. *Tandon* v. *Newsom*, supra, 62; see also *We the Patriots USA, Inc.* v. *Hochul*, 17 F.4th 266, 287 (2d Cir. 2021) (concluding that it is appropriate to consider "aggregate data about transmission risks" in determining whether medical and religious exemptions from health care worker vaccine mandates were comparable), cert. denied sub nom. *Dr. A.* v. *Hochul*, U.S. , 142 S. Ct. 2569, 213 L. Ed. 2d 1126 (2022).

Finally, contrary to the plaintiffs' assertions, P.A. 21-6 does not treat noncompliant students more favorably than those who object to vaccines on religious grounds. Both groups are required to be vaccinated. The fact that there may be students who are noncompliant does not render P.A. 21-6 underinclusive. The plaintiffs' argument in this regard would merit consideration if we were to conclude that the act fails the two prongs under *Smith*. Only then would the state be required to prove that the act serves a compelling state interest and employs the least restrictive means available for doing so. See *Church of Lukumi Babalu Aye, Inc.* v. *Hialeah*, supra, 508 U.S. 546. Because we conclude that the act satisfies *Smith*'s two prongs, however, we need not address this argument.

on them. It is for these reasons that the acting commissioner [of public health] testified that '[h]igh vaccination rates protect not only vaccinated children, but also those who cannot be or have not been vaccinated.' . . . In contrast, exempting religious objectors from vaccination would only detract from the [s]tate's interest in promoting public health by increasing the risk of transmission of [vaccine preventable] diseases among vaccinated and unvaccinated students alike.

"This analysis is bolstered by the public health data and expert testimony the General Assembly considered before adopting the [a]ct, some of which are summarized in a document [the] plaintiffs appended to the complaint. . . . The material attached to the complaint is sparse, but, as we noted . . . we may take judicial notice of the facts and analysis in the legislative record, including the testimony of the acting commissioner [of public health] and comments from numerous medical authorities. These materials show there is no question that there is a difference in magnitude between the number of religious and medical exemptions that Connecticut families claimed prior to the [a]ct's adoption. In school years 2018–2019 and 2019–2020, more than ten times as many kindergartners claimed religious exemptions compared to medical exemptions. The legislative history, moreover, contains numerous indications that significant numbers of religiously exempt students attend the same schools. Against this backdrop, the [l]egislature reasonably judged that the risk of an outbreak of disease was acute, even if not necessarily imminent, and that continuing to permit religious exemptions, the [s]tate's only kind of nonmedical exemption, to multiply would increase that risk." (Citations omitted; emphasis omitted.) Id., 153–54.

Having concluded that P.A. 21-6 is a neutral law of general applicability, the only question that remains is whether it is rationally related to a legitimate govern-

mental interest. For any claim analyzed under rational basis review, the subject law will not be overturned "unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [government's] actions were irrational." *Vance* v. *Bradley*, 440 U.S. 93, 97, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979); see also *Heller v. Doe*, 509 U.S. 312, 321, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (under rational basis review, "[a] statute is presumed constitutional . . . and [t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis [that] might support it . . . whether or not the basis has a foundation in the record" (citations omitted; internal quotation marks omitted)). In *We the Patriots USA, Inc.*, the Second Circuit concluded that P.A. 21-6 passes rational basis review because the state's interest in protecting public health is indisputably a compelling governmental interest and because the "[a]ct's repeal of the religious exemption is rationally related to that interest because it seeks to maximize the number of students in Connecticut who are vaccinated against [vaccine preventable] diseases. . . . The [a]ct's legacy provision is [also] rationally related because it accommodates religious believers who are already in school without extending that accommodation to younger children. (Citations omitted.) *We the Patriots USA, Inc.* v. *Connecticut Office of Early Childhood Development*, supra, 76 F.4th 156. The plaintiffs in the present case do not contend otherwise.[12]

[12] The plaintiffs argue instead that, if P.A. 21-6 is a neutral and generally applicable law, strict scrutiny should still apply because their free exercise claim is "connected with the right of parents to direct the education of their children" recognized in *Wisconsin* v. *Yoder*, 406 U.S. 205, 92 S. Ct. 1526, 32 L. Ed. 2d 15 (1972), and *Pierce* v. *Society of Sisters*, 268 U.S. 510, 45 S. Ct. 571, 69 L. Ed. 1070 (1925), making it the sort of "hybrid rights" claim that the United States Supreme Court, in *Employment Division, Dept. of Human Resources* v. *Smith*, supra, 494 U.S. 872, stated in dictum could be subject to a higher level of scrutiny. The plaintiffs do not address in their appellate brief how P.A. 21-6 interferes with their rights as parents to direct the

Finally, we note that, in *Jacobson* v. *Massachusetts*, 197 U.S. 11, 25 S. Ct. 358, 49 L. Ed. 643 (1905), the United States Supreme Court rejected equal protection and due process challenges to a Massachusetts compulsory vaccination law. Id., 38–39. The court later observed that "*Jacobson* . . . settled that it is within the police power of a [s]tate to provide for compulsory vaccination." *Zucht* v. *King*, 260 U.S. 174, 176, 43 S. Ct. 24, 67 L. Ed. 194 (1922). Although *Jacobson* was decided before the free exercise clause was held to apply to the states; see *Cantwell* v. *Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 84 L. Ed. 1213 (1940); the United States Supreme Court has since stated, albeit in dictum, that

education of their children. We therefore decline to address this argument. See, e.g., *Burton* v. *Dept. of Environmental Protection*, 337 Conn. 781, 804–805, 256 A.3d 655 (2021) (courts do not reach inadequately briefed claims). We note, however, that the "hybrid rights" theory has never been applied by the United States Supreme Court and has been rejected outright by many of the federal courts of appeals, including the Second Circuit. See *Leebaert* v. *Harrington*, 332 F.3d 134, 144 (2d Cir. 2003) ("at least until the [United States] Supreme Court holds that legal standards under the [f]ree [e]xercise [c]lause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard' to evaluate hybrid claims" (internal quotation marks omitted)); see also *Fulton* v. *Philadelphia*, supra, 593 U.S. 599 (Alito, J., concurring in the judgment) ("It is hard to see the justification for this curious doctrine. The idea seems to be that if two independently insufficient constitutional claims join forces they may merge into a single valid hybrid claim, but surely the rule cannot be that asserting two invalid claims, no matter how weak, is always enough."); *Pleasant View Baptist Church* v. *Beshear*, 838 Fed. Appx. 936, 940 (6th Cir. 2020) (Donald, J., concurring) ("we have not only expressed skepticism regarding whether this passage from *Smith* formally created a '[hybrid rights]' doctrine, we have outright rejected it"); *Brown* v. *Pittsburgh*, 586 F.3d 263, 284 n.24 (3d Cir. 2009) ("Relying on dict[um] in *Smith*, some litigants pressing [f]ree [e]xercise claims have presented a 'hybrid rights' theory . . . . Like many of our sister courts of appeals, we have not endorsed this theory . . . ." (Citations omitted.)); *Henderson v. Kennedy*, 253 F.3d 12, 19 (D.C. Cir. 2001) (rejecting hybrid claim argument that "the combination of two untenable claims equals a tenable one"), cert. denied sub nom. *Henderson* v. *Mainella*, 535 U.S. 986, 122 S. Ct. 1537, 152 L. Ed. 2d 464 (2002); *Kissinger* v. *Board of Trustees of The Ohio State University of Veterinary Medicine*, 5 F.3d 177, 180 (6th Cir. 1993) (referring to hybrid rights theory as "completely illogical").

a parent "cannot claim freedom from compulsory vaccination for the child more than for himself on religious grounds. The right to practice religion freely does not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." (Footnote omitted.) *Prince* v. *Massachusetts*, 321 U.S. 158, 166–67, 64 S. Ct. 438, 88 L. Ed. 645 (1944). "That dictum is consonant with [the United States Supreme Court's] and [the Second Circuit's] precedents holding that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice." (Internal quotation marks omitted.) *Phillips* v. *New York*, 775 F.3d 538, 543 (2d. Cir.), cert. denied, 577 U.S. 822, 136 S. Ct. 104, 193 L. Ed. 2d 37 (2015); see id. (following reasoning of *Jacobson* and *Prince*, and concluding that "New York could constitutionally require that all children be vaccinated in order to attend public school" and that New York vaccination law "goes beyond what the [c]onstitution requires by allowing an exemption for parents with genuine and sincere religious beliefs").

In light of the foregoing, we conclude that the plaintiffs' free exercise challenge fails as a matter of law on this record, and, therefore, it is barred by sovereign immunity.

2

Equal Protection Claim

The defendants next claim that the trial court incorrectly denied their motions to dismiss the plaintiffs' claim that P.A. 21-6 violates their right to the equal protection of the law by treating students who are unvaccinated for religious reasons differently from students who are unvaccinated for medical reasons. The plaintiffs advance the same arguments in support of their equal protection claim as they did with respect to

their free exercise claim, albeit in considerably truncated form. These arguments survive rational basis review under the equal protection clause for the same reason they survive it under the free exercise clause. See, e.g., *Locke* v. *Davey*, 540 U.S. 712, 720 n.3, 124 S. Ct. 1307, 158 L. Ed. 2d 1 (2004) ("[The respondent] also argues that the [e]qual [p]rotection [c]lause protects against discrimination on the basis of religion. Because we hold . . . that the program is not a violation of the [f]ree [e]xercise [c]lause, however, we apply [rational basis] scrutiny to his equal protection claims. *Johnson* v. *Robison*, [415 U.S. 361, 375 n.14, 94 S. Ct. 1160, 39 L. Ed. 2d 389] (1974); see also *McDaniel* v. *Paty*, [435 U.S. 618, 98 S. Ct. 1322, 55 L. Ed. 2d 593 (1978)] (reviewing religious discrimination claim under the [f]ree [e]xercise [c]lause)"). Accordingly, the plaintiffs' equal protection claim is also barred by sovereign immunity.

3

Right to Education Claim

Finally, the defendants argue that the trial court incorrectly denied their motions to dismiss the plaintiffs' claim that P.A. 21-6 violates their right to a free public school education under article eighth, § 1, of the state constitution. The defendants assert that the plaintiffs' claim is foreclosed as a matter of law by this court's precedent interpreting the right guaranteed by article eighth, § 1, and recognizing school vaccination requirements to be a proper exercise of the state's police power. The plaintiffs' counter that P.A. 21-6 violates their right to education because it forces them to make a difficult choice between the free exercise of their sincerely held religious beliefs and their fundamental right to education. We agree with the defendants that the plaintiffs' claim is foreclosed as a matter of law.

Article eighth, § 1, of the Connecticut constitution provides: "There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation." This language "imposes an affirmative constitutional obligation on the legislature to provide a substantially equal educational opportunity for all public schoolchildren"; *Sheff* v. *O'Neill*, 238 Conn. 1, 23, 678 A.2d 1267 (1996); that is "suitable to give them the opportunity to be responsible citizens able to participate fully in democratic institutions, such as jury service and voting." *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, 295 Conn. 240, 314, 990 A.2d 206 (2010); see id., 315–17 (establishing qualitative standards for constitutionally adequate education under article eighth, § 1, with "recognition of the political branches' constitutional responsibilities, and indeed, greater expertise, with respect to the implementation of specific educational policies pursuant to the education clause").

In *Horton* v. *Meskill*, supra, 172 Conn. 615, this court held, in the context of statewide disparities in the financing of public school education, that "elementary and secondary education is a fundamental right, [and] that pupils in the public schools are entitled to the equal enjoyment of that right . . . ." Id., 648–49. Although we stated in *Horton* that the constitutional right to education is "so basic and fundamental that any infringement of that right must be strictly scrutinized"; id., 646; we subsequently rejected the conclusion that "strict scrutiny must be the test for any and all governmental regulations affecting public school education." *Campbell* v. *Board of Education*, 193 Conn. 93, 105, 475 A.2d 289 (1984). Indeed, we have held repeatedly that decisions relating to educational policy and its implementation are "quintessentially legislative in nature" and are not to be second-guessed by the courts. *Connecticut*

Coalition for Justice in Education Funding, Inc. v. *Rell*, 327 Conn. 650, 658, 176 A.3d 28 (2018); see also *Bissell* v. *Davison*, 65 Conn. 183, 190–92, 32 A. 348 (1894) (upholding vaccine mandate under state and federal constitutions and observing that "the question [of] what terms, conditions, and restrictions will best [serve] the end sought in the establishment and maintenance of public schools . . . is a question solely for the legislature and not for the courts").

We conclude that P.A. 21-6 does not impinge on the plaintiffs' state constitutional right to education. In *Campbell* v. *Board of Education*, supra, 193 Conn. 93, we held that an educational policy "[that] is neither disciplinary . . . nor an infringement of equal educational opportunity, does not jeopardize *any* fundamental rights under our state constitution." (Citations omitted; emphasis added.) Id., 104. P.A. 21-6 is neither disciplinary nor infringes the plaintiffs' right to access a substantially equal educational opportunity, which is the substance of the right secured under article eighth, § 1. Rather, P.A. 21-6 merely imposes a reasonable vaccine requirement as a condition of enrolling in public school. In *Bissell* v. *Davison*, supra, 65 Conn. 183, we upheld a similar vaccine requirement against claims that it violated the equal protection and due process clauses of the state and federal constitutions. Id., 192. The plaintiff in *Bissell* argued that "the statute conferring the power to require vaccination[s] as a condition of admittance to, or attendance at, the public schools, violate[d] [his constitutional rights because it] allow[ed] . . . the privileges of the common schools to those who believe in vaccination, [while denying] it to those who do not . . . ." Id., 190.

Although the right to education was not yet enshrined in our state constitution when *Bissell* was decided, we recognized therein that the duty to provide a free public school education had been "assumed by the [s]tate; not

only because the education of [children] is a matter of great public utility, but also and chiefly because it is one of great public necessity for the protection and welfare of the [s]tate itself. In the performance of this duty, the [s]tate maintains and supports, at great expense, and with an ever watchful solicitude, public schools throughout its territory, and secures to its [children] the privilege of attendance therein. . . . This privilege is granted, and is to be enjoyed [on] such terms and under such reasonable conditions and restrictions as the [lawmaking] power, within constitutional limits, may see fit to impose; and, within those limits, the question [of] what terms, conditions, and restrictions will best [serve] the end sought in the establishment and maintenance of public schools . . . is a question solely for the legislature and not for the courts. The statute in question authorizes the [school] committee to impose [a] vaccination [requirement] as one of those conditions. It does not authorize or compel compulsory vaccination; it simply requires vaccination[s] as one of the conditions of . . . attending the public school. Its object is to promote the usefulness and efficiency of the schools by caring for the health of the scholars. . . . The statute is essentially a police regulation . . . .'' Id., 191.

''In the case at bar the [vaccination requirement] is made to operate impartially [on] all children alike; it affects all in the same way; and reasonable provision is made for providing free vaccination[s] [when] necessary. It is a reasonable exercise of the power to require vaccination[s] . . . . [W]e think that in a case like [this] . . . touching the terms and conditions of attendance at the public schools, the question of the reasonableness . . . of such a requirement, is one exclusively for the legislature.

''The question before us is not whether the legislature ought to have passed such a law; it is simply whether it had the power to pass it.

"In no proper sense can this statute be said to contravene the provisions of . . . our [s]tate [c]onstitution, as claimed by the plaintiff. It may operate to exclude his son from school, but if so, it will be because of his failure to comply with what the legislature regards, wisely or unwisely, as a reasonable requirement enacted in good faith to promote the public welfare.

"Nor in any proper sense can the statute be said to deprive the plaintiff of any right without due process of law, or to deny to him the equal protection of the law." Id., 192.

Although our state constitution now imposes an affirmative obligation on the state to provide adequate educational opportunities to its school-age children, we remain of the view that school vaccine requirements are a rational exercise of legislative judgment reasonably related to the state's interest in caring for the health and safety of its students, and that, "within the limits of rationality, the legislature's efforts to tackle the problems [of education] should be entitled to respect." (Internal quotation marks omitted.) *Connecticut Coalition for Justice in Education Funding, Inc.* v. *Rell*, supra, 327 Conn. 667–68.

We find no merit in the plaintiffs' argument that P.A. 21-6 presents them with a "Hobson's choice" between the free exercise of their religious beliefs and their fundamental right to education. Although some who are opposed to vaccination on religious grounds may opt not to take advantage of the educational opportunities provided to them under article eighth, § 1, of the state constitution, this does not mean that P.A. 21-6 deprives them of those opportunities. See *We the Patriots USA, Inc.* v. *Hochul*, 17 F.4th 266, 293–94 (2d Cir. 2021) ("[a]lthough individuals who object to receiving the vaccines on religious grounds have a hard choice to make, they do have a choice"), cert. denied sub nom.

Dr. A. v. *Hochul*, U.S. , 142 S. Ct. 2569, 213 L. Ed. 2d 1126 (2022). Accordingly, and for the other reasons previously set forth in this opinion, we conclude that the plaintiffs' challenge to P.A. 21-6 under article eighth, § 1, fails as a matter of law, and, therefore, it is barred by sovereign immunity.

II

We next turn to the question of whether the plaintiffs' free exercise of religion claim under § 52-571b satisfies the first exception to sovereign immunity: "when the legislature, either expressly or by force of a necessary implication, statutorily waives the state's sovereign immunity . . . ." (Citations omitted; internal quotation marks omitted.) *Columbia Air Services, Inc.* v. *Dept. of Transportation*, supra, 293 Conn. 349.

The defendants raise two challenges to the trial court's determination that this exception was satisfied. First, they contend that the text of § 52-571b does not encompass legislation and, therefore, could not waive immunity for the plaintiffs' challenge to P.A. 21-6. Second, they argue that it would violate settled legal principles to apply § 52-571b to the subsequently enacted P.A. 21-6. Specifically, the defendants contend that this application would violate the constitutionally based principle that one legislature cannot control the powers of a succeeding legislature, as well as the precept that subsequent legislation will be presumed to repeal earlier legislation to the extent that both conflict. We disagree.

Our analysis begins with the statutory text. Section 52-571b provides in relevant part: "(a) The state or any political subdivision of the state shall not burden a person's exercise of religion under section 3 of article first of the Constitution of the state even if the burden results from a rule of general applicability, except as provided in subsection (b) of this section.

"(b) The state or any political subdivision of the state may burden a person's exercise of religion only if it demonstrates that application of the burden to the person (1) is in furtherance of a compelling governmental interest, and (2) is the least restrictive means of furthering that compelling governmental interest.

"(c) A person whose exercise of religion has been burdened in violation of the provisions of this section may assert that violation as a claim or defense in a judicial proceeding and obtain appropriate relief against the state or any political subdivision of the state.

* * *

"(f) For the purposes of this section, 'state or any political subdivision of the state' includes any agency, board, commission, department, officer or employee of the state or any political subdivision of the state . . . ."

We note that the two components of the state's burden under subsection (b) of the statute—compelling governmental interest and least restrictive means—constitute a codification of the constitutional standard for strict scrutiny. See, e.g., *Kennedy* v. *Bremerton School District*, 597 U.S. 507, 525, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (2022).

A

The defendants' textual argument implicitly concedes what is plainly apparent from the text of § 52-571b, that subsection (c) provides a waiver of sovereign immunity when, as in the present case, a plaintiff claims a violation of the right to the free exercise of religion under the state constitution and seeks equitable relief. Cf. *Davila* v. *Gladden*, 777 F.3d 1198, 1208-1209 (11th Cir.) (citing uncontroversial proposition that similar language in federal Religious Freedom Restoration Act of 1993, 42 U.S.C. § 2000bb et seq., waived sovereign immunity for claims seeking injunctive relief), cert.

denied, 577 U.S. 820, 136 S. Ct. 78, 193 L. Ed. 2d 32 (2015). The defendants' position is that this waiver does not extend to challenges to legislation because (1) strict statutory construction applies, and (2) the text of § 52-571b does not plainly encompass legislation.[13] We are not persuaded.

The issue of whether the legislature has waived the state's sovereign immunity under the statute is a matter of statutory interpretation. See, e.g., *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, 293 Conn. 382, 386, 978 A.2d 49 (2009). This inquiry implicates certain general rules of construction, as well as specific rules applicable to the particular inquiry. One such specific rule is that "statutes in derogation of sovereign immunity should be strictly construed. . . . [When] there is any doubt about their meaning or intent they are given the effect [that] makes the least rather than the most change in sovereign immunity." (Internal quotation marks omitted.) *Feliciano* v. *State*, 336 Conn. 669, 675, 249 A.3d 340 (2020). This rule, under which our inquiry begins and ends with the statute's text, applies when the question is *whether* a statute provides a waiver of immunity, either expressly or by necessary

[13] The defendants contend that "[t]he *plain text* of § 52-571b makes clear that the statute does *not* apply to legislation." (Emphasis added.) We note that the attorney general responded to a legislative request for a formal legal opinion regarding "the constitutionality of eliminating the religious exemption for required immunizations" for school enrollment. (Internal quotation marks omitted.) Opinions, Conn. Atty. Gen. No. 2019-01 (May 6, 2019) p. 1. Although the request was phrased specifically in terms of constitutional impediments, the attorney general's opinion also treated § 52-571b as controlling and expressed confidence that such legislative action would meet the statute's compelling interest standard. See id., p. 4–5. The opinion was issued in response to an earlier legislative effort to repeal the religious exemption; see House Bill No. 5044, 2020 Sess.; but was specifically referenced in Senate and House floor debates in 2021. See 64 S. Proc., Pt. 1, 2021 Sess., pp. 786, 794, remarks of Senators Kevin C. Kelly and Martin Looney; 64 H.R. Proc., Pt. 2, 2021 Sess., pp. 1065–66, 1453, remarks of Representative Jonathan Steinberg.

implication. See *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, supra, 389–91 and n.6. When, however, the question is the *scope* of a waiver of immunity, our inquiry is not similarly constrained. See id., 391 n.6. In such cases, we are guided by General Statutes § 1-2z, which permits review of extratextual sources to resolve textual ambiguities. See id.; see also *State* v. *Lombardo Bros. Mason Contractors, Inc.*, 307 Conn. 412, 453, 54 A.3d 1005 (2012) (legislative history).

The issue in the present case involves the scope of the waiver provided in § 52-571b. Starting with the text, we find nothing in the language of § 52-571b that expressly excludes a challenge to legislation; nor do we find unambiguous evidence of exclusion by implication. The textual evidence implies no apparent exceptions, but, instead, defines the waiver to include the conduct of "*any* agency, board, commission, department, officer or employee of the state or any political subdivision of the state . . . ." (Emphasis added.) General Statutes § 52-571b (f). These are the very governmental actors most typically charged with the enforcement of legislation and manifestly include the defendants in the present case.[14] Legislation reasonably may be characterized as setting forth "rule[s] of general applicability . . . ." General Statutes § 52-571b (a). To the extent that the defendants argue that a statute is different from a rule, the case cited in the defendants' brief as support for this proposition acknowledged that the term "rule" "could . . . encompass a statute" but concluded that it would not when read in conjunction with other language referring to administrative acts. *Wadler* v. *Bio-Rad Laboratories, Inc.*, 916 F.3d 1176, 1186 (9th Cir.

[14] Even if the defendants are correct that the officials named by the plaintiffs as defendants are not the ones who would enforce the vaccine mandate, an issue that was not resolved by the trial court, that pleading error would not be relevant to the question before us, namely, whether § 52-571b waives sovereign immunity for free exercise challenges to legislation.

2019). Nonetheless, although the broad language of § 52-571b seems to suggest that it naturally would extend to legislation, we cannot say that it does so unambiguously given the legislature's use of the term "rule."

We therefore consider extratextual sources. As this court previously has explained after examining the statute's legislative history, "§ 52-571b was enacted in response to the United States Supreme Court's decision in *Employment Division, Dept. of Human Resources* v. *Smith*, supra, 494 U.S. 885, in which the court held that a generally applicable prohibition against socially harmful conduct does not violate the free exercise clause, regardless of whether the law burdens religious exercise. . . . [T]he purpose of § 52-571b was to restore the balancing standard, articulated by the United States Supreme Court in *Sherbert* v. *Verner*, [374 U.S. 398, 403, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963)], under which a law that burdens religious exercise must be justified by a compelling governmental interest." (Citations omitted.) *Cambodian Buddhist Society of Connecticut, Inc.* v. *Planning & Zoning Commission*, 285 Conn. 381, 423–24, 941 A.2d 868 (2008). *Smith* and *Sherbert*, notably, both involved constitutional challenges to statutes. See id., 402–404 (discussing facts in both cases). Proponents of the bill ultimately enacted as § 52-571b made clear that the intention was to provide a judicial remedy for *any* free exercise claim that could have been made prior to *Smith*. See, e.g., 36 S. Proc., Pt. 8, 1993 Sess., p. 2785, remarks of Senator George C. Jepson ("to be absolutely clear . . . this bill does not expand, contract or alter the ability of a claimant to obtain relief in a manner consistent with the [United States] Supreme Court's free exercise . . . jurisprudence under the compelling interest test prior to . . . *Smith*"). This extratextual evidence confirms what the text of the statute suggests—the legislature intended

for the waiver of immunity in § 52-571b to extend to free exercise challenges to the enforcement of legislation.

B

We next consider the defendants' arguments as to why, regardless of the legislature's clear intent to waive sovereign immunity in § 52-571b, certain doctrines bar application of the statute to P.A. 21-6. The defendants point to two doctrinal rules with constitutional underpinnings. The first rule is the "centuries-old concept that one legislature may not bind the legislative authority of its successors." *United States* v. *Winstar Corp.*, 518 U.S. 839, 872, 116 S. Ct. 2432, 135 L. Ed. 2d 964 (1996); accord *Patterson* v. *Dempsey*, 152 Conn. 431, 439, 207 A.2d 739 (1965). The second rule is that legislative enactments are presumed to repeal earlier inconsistent ones, to the extent that they are irreconcilably in conflict. See, e.g., *Tomlinson* v. *Tomlinson*, 305 Conn. 539, 553, 46 A.3d 112 (2012); *Dugas* v. *Lumbermens Mutual Casualty Co.*, 217 Conn. 631, 641, 587 A.2d 415 (1991). The defendants claim that these principles would be violated by applying § 52-571b to P.A. 21-6 because § 52-571b prescribes a higher standard for the state to meet (compelling interest) to pass judicial scrutiny than the standard that applies to a free exercise constitutional challenge under *Smith*. They argue that, if the validity of P.A. 21-6 is determined by the earlier enacted § 52-571b, P.A. 21-6 could be struck down by a court, even if the legislation was constitutional under *Smith*, which, in turn, would violate these doctrinal rules. We disagree that either of the rules cited by the defendants are violated by the application of § 52-571b to P.A. 21-6.

The text of § 52-571b does not purport to limit the authority of subsequent legislatures to repeal the statute or to modify its terms. Cf. *Patterson* v. *Dempsey*, supra, 152 Conn. 438–39 (statute prohibiting future legislatures from including general legislation in appropriations bills

violated rule that "[o]ne legislature cannot control the exercise of the powers of a succeeding legislature" (internal quotation marks omitted)). The legislative history in fact reflects that this issue was considered. The sponsor of the legislation acknowledged that the statutory standard could be changed by a subsequent legislature to a rational basis test, as long as that lower standard of scrutiny did not conflict with the constitutional standard.[15] See 36 H.R. Proc., Pt. 14, 1993 Sess., pp. 4940-41, remarks of Representative Richard D. Tulisano.

The question thus becomes whether § 10-204 (a), as amended by P.A. 21-6, expressly or by necessary, or fair, implication conflicts with § 52-571b. See *Lockhart* v. *United States*, 546 U.S. 142, 148, 126 S. Ct. 699, 163 L. Ed. 2d 557 (2005) (Scalia, J., concurring) (citing cases using "necessary implication" or "fair implication" (emphasis omitted; internal quotation marks omitted)). This answer is dictated by application of settled principles of statutory construction. One such principle is that there is a "powerful presumption against implied repeals." *Lockhart* v. *United States*, supra, 149 (Scalia,

[15] The following exchange occurred during legislative debate:

"[Representative Dale W. Radcliffe]: In introducing the bill Representative Tulisano referred to the [s]tate [c]onstitution, the [s]tate constitutional provisions. This is a statute. We're in effect adopting [the] compelling interest test as a statutory standard. . . . [G]iven the decision in *Smith* and the fact that no similar case has been decided under the [s]tate [c]onstitution, if this [l]egislature or a subsequent [l]egislature does desire, might we establish a rational basis test to replace this compelling interest test in [the] statute? . . .

"[Representative Richard D. Tulisano]: . . . I believe we could. However . . . the [s]tate Supreme Court may very well say, could very well say, that despite what we did, that it is the compelling state interest test under [the Connecticut constitution] because our [c]onstitution in some people's [belief] . . . has greater protections than that given under the federal, and so [the court] could very well interpret our [c]onstitution to have always had that despite what we say, and we cannot minimize what has already been granted by the people of the [s]tate of Connecticut." 36 H.R. Proc., Pt. 14, 1993 Sess., pp. 4940–41.

J., concurring). This presumption can be overcome only if the "two statutes are in irreconcilable conflict, or [when] the [later enacted provision] covers the whole subject of the earlier one and is clearly intended as a substitute." (Internal quotation marks omitted.) *Branch* v. *Smith*, 538 U.S. 254, 273, 123 S. Ct. 1429, 155 L. Ed. 2d 407 (2003) (opinion announcing judgment); accord *Lockhart* v. *United States*, supra, 149 (Scalia, J., concurring).

P.A. 21-6 does not expressly conflict with § 52-571b. Section 10-204a, as amended by P.A. 21-6, dictates only that certain immunizations are a condition of school enrollment and enumerates limited exemptions from those requirements. P.A. 21-6 does not expressly address the availability of judicial review or the standard that would guide such review. It also does not exempt its provisions from the scope of § 52-571b. Nor is there text in P.A. 21-6 that necessarily, or fairly, implies that the act provides immunity from suit or requires courts to apply a lower level of scrutiny than that required should § 52-571b apply. As the defendants argue, it is possible that P.A. 21-6 would be subject to and satisfy the lower level of scrutiny set forth in *Smith*—hence, meeting the federal constitutional standard—and, yet, fail to satisfy the strict scrutiny standard required under § 52-571b. We are not persuaded, however, that this possibility gives rise to an irreconcilable conflict between the statutes.

Although the law permits us to presume that the legislature was aware of the compelling interest standard in § 52-571b when it enacted P.A. 21-6, in the present case, there is evidence indicating awareness of that standard. Attorney General William Tong provided a formal opinion to the Majority Leader of the House of Representatives regarding the constitutionality of eliminating the religious exemption from the vaccine mandate. See Opinions, Conn. Atty. Gen. No. 2019-01

(May 6, 2019). Tong not only expressed confidence that there was no constitutional concern; id., pp. 1, 7; he also explained that § 52-571b applied, and he expressed similar confidence that the statute presented no necessary conflict with such a repeal. See id., p. 5. During debate in the Senate on the bill enacted as P.A. 21-6, the bill's sponsor similarly asserted that the bill was "in accordance with settled law," specifically quoting the critical language in § 52-571b and citing Attorney General Tong's opinion.[16] See 64 S. Proc., Pt. 1, 2021 Sess., p. 794, remarks of Senator Martin Looney. No one suggested that the bill should be amended to expressly exclude it from operation of the statute, e.g., by adding "notwithstanding § 52-571b."

Accordingly, nothing in the legislative history indicates that the legislature considered P.A. 21-6 to be inconsistent with the requirements of § 52-571b. To the contrary, there is considerable evidence that the legislature considered § 52-571b to be applicable to P.A. 21-

[16] Senator Martin Looney asserted that mandatory vaccination requirements comported with the federal constitution and then stated: "And what we are doing here is in accordance, both with our best traditions of protecting public health and safety, and also in accordance with settled law. [Section] 52-571b provides that in the state of Connecticut, any state or any political subdivision cannot burden the free exercise of religion under article [first], [§] 3 of the [s]tate [c]onstitution, even if that burden results from a rule of general applicability *except* [*when*] *the burden is in furtherance of a compelling state interest. And it is the least restrictive means of furthering that compelling state interest.*

"*And that is what we are asserting here.* There is a compelling state interest here that demands regulation that we would be irresponsible not to undertake. Attorney General Tong's opinion was mentioned earlier, he just two years ago . . . asserted that repealing or suspending the religious exemption does not create any necessary conflict with [§ 52-571b] in the first instance and says that combatting the spread of dangerous infectious diseases, particularly among children who congregate in schools where the danger of the spread of such diseases is particularly high ground. That it is the state's paramount duty to seek to ensure [the] public safety has repeatedly been found to constitute a compelling state interest . . . ." 64 S. Proc., Pt. 1, 2021 Sess., p. 794.

6. We therefore conclude that the text, the legislative history, and the circumstances surrounding the enactment of P.A. 21-6 demonstrate that application of § 52-571b to the act does not violate either doctrinal rule relied on by the defendants.

The judgment is reversed in part and the case is remanded with direction to dismiss counts two through six of the complaint and for further proceedings consistent with this opinion; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

PHYLLIS AIREY ET AL. *v.* GISELLE FELICIANO ET AL.
(SC 20991)

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

Syllabus

The intervening defendants, a slate of candidates seeking to appear on the ballot for the March 5, 2024 primary election for the Democratic Town Committee for the seventh district of the city of Hartford, appealed from the judgment of the trial court in favor of the plaintiffs, members of a competing slate of candidates, on the plaintiffs' complaint and in part for the intervening defendants on their counterclaim. The intervening defendants claimed that the trial court improperly invalidated a petition sheet that they had used to qualify for the primary on the ground that it bore the signature of N, whose son had signed N's signature on the sheet under a purported power of attorney. They also claimed that, if the trial court was required to reject the petition sheet bearing N's purported signature, it was also required to reject five petition sheets submitted by the plaintiffs because those sheets did not include a written tally of the number of verified signatures, as required by statute (§ 9-410 (c)). *Held*:

The trial court properly rejected N's purported signature because, regardless of whether § 9-410 (a) permits an agent to sign a primary petition, there was no evidence in the record that N's son was acting pursuant to a valid power of attorney under the Connecticut Uniform Power of Attorney Act (§ 1-350 et seq.) or that the specific authority to sign political petitions on N's behalf fell within the scope of the purported power of attorney.

The trial court correctly determined that the entire petition sheet bearing N's purported signature must be rejected, as the applicable statute (§ 9-412) was clear that the entire page on which the purported signature appeared must be rejected for procedural violations of § 9-410, including the submission of an illegal signature accompanied by a false attestation, and those statutes contain no implied exception for violations that result from a misunderstanding of the law rather than fraudulent intent.

The trial court incorrectly determined that the five petition sheets submitted on behalf of the plaintiffs without the signature count required by § 9-410 (c) substantially complied with that statute, and the court should have invalidated those petition sheets.

Argued March 19—officially released August 1, 2024*

Procedural History

Action for a judgment declaring that certain signatures on a petition sheet circulated by a slate of candidates seeking to appear on the ballot for a certain primary election for the Democratic Town Committee for the seventh district for the city of Hartford were invalid and that the slate was not qualified for nomination due to a failure to file the necessary number of signatures, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Noble*, *J.*, granted the motion filed by Kenneth P. Green et al. to intervene as defendants; thereafter, the intervening defendant Kenneth P. Green et al. filed a counterclaim; subsequently, the case was tried to the court, *Noble*, *J.*; judgment for the plaintiffs on their complaint and in part for the intervening defendants on their counterclaim, and an order directing the named defendant et al. to remove the names of the intervening defendants from the ballot, from which the intervening defendants appealed. *Reversed in part*; *further proceedings.*

Alexander T. Taubes, for the appellants (intervening defendants).

John B. Kennelly, for the appellees (plaintiffs).

* August 1, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Opinion

McDONALD, J. This case highlights how important it is that individuals seeking elected office familiarize themselves with and adhere to the laws that our legislature has enacted to secure the integrity of the electoral process. The appeal arises from efforts by two competing slates of candidates to collect enough petition signatures to qualify to appear on the ballot for the March 5, 2024 primary election for the Democratic Town Committee for the seventh district of the city of Hartford. The named defendant, Giselle Feliciano, the Democratic registrar of voters for the city of Hartford, and the defendant city clerk, Noel McGregor, initially certified that both slates had obtained more than the 375 valid petition signatures necessary to qualify for the primary. The slate that includes the named plaintiff, Phyllis Airey (Airey slate, or Airey),[1] then initiated the present action, alleging that the slate that includes defendant Kenneth P. Green (Green slate, or Green)[2] should be disqualified because one of the petition sheets used to qualify the Green slate revealed statutory irregularities. Specifically, Airey alleged that one signature on the sheet, that of Clement Nurse, had not in fact been provided by Nurse but, rather, by his son, Andrew Nurse (Andrew), under a purported power of attorney. The individual members of the Green slate then successfully moved to intervene and filed a counterclaim, alleging that (1) one sheet of the Airey petition should be rejected because it contained the forged signature of

[1] The other plaintiff members of the Airey slate are Ayesha Clarke, Amir Rasheed Johnson, Dyshawn Thames, Ewan Shariff, Michelle Whatley, Donna Thompson-Daniel, Andrew Rodney, Yvette Mosely, Raymond Dolphin, Cambar Edwards, Francisca Nugent, Charmaine Anderson, and John Davis.

[2] The other intervening defendant members of the Green slate are Benita Toussaint, Helen Boutte, Elaine Hatcher, Cynthia Jennings, Kreeshawn Rismay, Katibu Hatcher, Keith Bolling, Jr., Elisha Barrows, Camille Thomas, Ashley Thomas, and Sherma Rismay.

Lawrence Williams, and (2) five other sheets of the Airey petition should be disqualified because they failed to include a written tally of the number of verified signatures, as required by General Statutes § 9-410 (c).

The trial court agreed that the sheets containing the Nurse and Williams signatures must be rejected but determined that the other five challenged Airey sheets substantially complied with § 9-410 (c). This decision left only the Airey slate with the necessary 375 valid signatures. On appeal, Green contends that the sheet purporting to contain Nurse's signature should not have been rejected and, in the alternative, that all of the challenged Airey sheets must be rejected as well. Affirming in part and reversing in part the judgment of the trial court, we conclude that all of the challenged sheets must be rejected, resulting in the disqualification of both slates.

The following facts, as found by the trial court or otherwise undisputed, are relevant to our disposition. Both slates submitted their petition sheets to Feliciano on January 31, 2024, the statutory deadline. Feliciano, in turn, submitted the sheets to McGregor, who certified that each slate had collected and submitted more than the minimally required 375 petition signatures, which qualified them to appear on the primary ballot. See General Statutes §§ 9-405 and 9-406. Feliciano ultimately certified that the Green slate had submitted 382 qualifying signatures of registered Democratic voters residing in the seventh district, and that the Airey slate had submitted 429 qualifying signatures.

Airey commenced the present action pursuant to General Statutes § 9-329a, and the Green slate members subsequently intervened as defendants and filed a counterclaim. Each party claimed entitlement to a judgment declaring that the opposing slate of potential candidates was ineligible for consideration in the primary due to

defects in their respective petitions, and each sought a corresponding order of mandamus. The case was tried to the court.

With respect to Airey's claim, Ashley Thomas, who was responsible for the petition sheet purporting to contain Nurse's signature, testified that she had only recently become engaged in town politics when she agreed to circulate petitions for the Green slate. On her first day seeking signatures, Thomas observed a male leaving Nurse's apartment. The male initially identified himself as Nurse but later volunteered that he was actually Nurse's son, Andrew. Andrew indicated that he possessed a power of attorney and had the authority to sign documents on Nurse's behalf, including the petition. Thomas believed that Andrew, having the legal authority to sign Nurse's name, could sign the petition on Nurse's behalf. Andrew proceeded to sign Nurse's name, without providing any indication on the petition that the signature was not actually Nurse's. On the back of the sheet, Thomas signed a "statement of authenticity of signatures," as required by § 9-410 (c), attesting that "each person whose name appears on [the] sheet signed the same in person in [her] presence . . . ."

At trial, Nurse provided contradictory testimony and acknowledged feeling confused and having a poor memory. He testified that he signed the petition and that the signature on the petition was his, but he also admitted that he had signed two affidavits averring that the signature was not his and that he had not had any contact with the circulator. Nurse confirmed that Andrew has a power of attorney permitting him to sign documents on his behalf and that Andrew does, in fact, sign documents on his behalf. Andrew did not testify at trial, and there was no testimony as to what powers were afforded to him under the purported power of attorney, and there was no written power of attorney proffered.

The trial court issued a memorandum of decision on March 1, 2024, four days before the primary was to be held. The court found that Nurse did not sign the petition sheet bearing his purported signature but that he had granted Andrew a power of attorney of undetermined scope. The court concluded that the signature was submitted in violation of § 9-410 (a) and (b), which make it illegal to sign a name other than the signee's own to a primary election petition without the legal authority to do so. The court further concluded that Thomas had knowingly and falsely attested that she had verified the signature as Nurse's and, therefore, that the entire sheet of twenty names must be rejected. Because the loss of twenty signatures reduced Green's total to 362 signees, less than the statutory minimum, the trial court directed Feliciano and McGregor to remove the Green slate from the primary ballot.

With respect to Green's counterclaim, the trial court found that the signature purporting to be that of Lawrence Williams was not, in fact, his and determined that the entire sheet of twenty signatures on which his name appeared must be rejected, reducing Airey's total from 429 to 409 valid signatures. Airey does not challenge those findings and determinations, and they are not before us on appeal.

Green also challenged three sheets of Airey's petition circulated and submitted by Thomas Clarke and two sheets circulated and submitted by Andrew Rodney. The trial court found that those circulators had not included on each sheet the required tally of the total number of authenticated signatures, as required by § 9-410 (c). Nevertheless, the court concluded that the sheets were completed in substantial compliance with § 9-410 (c) because "the number of signatures is readily determined by a quick review of the numbered signature pages." The trial court thus denied Green's request that these five sheets be rejected, which left Airey with 409

valid signatures and allowed the Airey slate to remain on the primary ballot.

The trial court rendered judgment accordingly,[3] and this direct appeal followed.[4] Additional facts will be set forth as necessary.

I

We begin with Green's claim that the trial court should not have disqualified Nurse's purported signature. Green further contends that, even if that one signature was properly disqualified, the trial court should not have invalidated the entire petition page on which that signature appeared. We are not persuaded.

A

Green's argument that it was permissible for Andrew to sign Nurse's name in his stead relies on § 9-410 (a).[5] That statute provides in relevant part: "The petition form for candidacies for nomination to municipal office or for election as members of town committees shall be prescribed by the Secretary of the State and provided by the registrar of the municipality in which the candidacy is to be filed . . . and signatures shall be obtained

[3] With only one authorized slate remaining, Feliciano and McGregor canceled the March 5 primary.

[4] After this appeal was filed, this court determined that it would treat the appeal as if it had been filed in the Appellate Court and transferred the appeal to itself. See, e.g., *Caruso* v. *Bridgeport*, 285 Conn. 618, 622 n.3, 941 A.2d 266 (2008) (relying on *Bortner* v. *Woodbridge*, 250 Conn. 241, 245 n.4, 736 A.2d 104 (1999)). But see *In re Election of the United States Representative for the Second Congressional District*, 231 Conn. 602, 608 n.5, 653 A.2d 79 (1994) (suggesting in dictum that, in addition to certified questions, General Statutes § 9-325 authorizes direct appeals to this court in primary election disputes decided under § 9-329a); *Penn* v. *Irizarry*, 220 Conn. 682, 600 A.2d 1024 (1991) (entertaining direct appeal without comment). We invite the legislature to clarify whether the 1978 amendments to § 9-325; Public Acts 1978, No. 78-125, § 10; authorize direct appeals to this court outside of the certified question process.

[5] For a more extensive discussion of the governing legal framework, the reader is directed to this court's decision in *Arciniega* v. *Feliciano*, 329 Conn. 293, 296–300, 184 A.3d 1202 (2018).

only on such forms or such duplicate petition pages. Such form shall include, at the top of the form and in bold print, the following:

WARNING

IT IS A CRIME TO SIGN THIS PETITION

IN THE NAME OF ANOTHER PERSON

WITHOUT LEGAL AUTHORITY TO DO SO

AND YOU MAY NOT SIGN THIS PETITION

IF YOU ARE NOT AN ELECTOR."

General Statutes § 9-410 (a).[6]

Green contends that this language, "without legal authority to do so," implies that there are situations in which one individual has the legal authority to sign a primary petition for another voter. Green further contends that the Connecticut Uniform Power of Attorney Act (act), General Statutes § 1-350 et seq., provides such legal authority. Green points specifically to General Statutes § 1-351b (7), which provides in relevant part that, by default, a general power of attorney authorizes the agent to "[p]repare, execute and file a record, report or other document to safeguard or promote the principal's interest under a federal or state statute or regulation . . . ." Green argues that this encompasses the signing of electoral petitions.

The trial court rejected this argument on the theory that there is one, and only one, statute that expressly allows an authorized agent to sign a political petition for another person: General Statutes § 9-6b permits an authorized agent to sign a petition on behalf of a blind person. The court construed § 9-6b to mean that, when

[6] General Statutes § 9-410 (b) makes it a crime to sign another person's name to a primary petition, without any indication that there is an exception for those who have legal authority to so sign.

the legislature wants to authorize proxy signatures for purposes of § 9-410 (a), it does so expressly, as it did in § 9-6b; we should not read other statutes, such as the power of attorney laws, which provide for more general forms of agency, to create, by implication, additional exceptions to the requirements of § 9-410 (a).

We recognize that two important distinctions between § 9-6b and § 1-351b (7), aside from the fact that only the former applies to electoral petitions by its express terms, appear to support the trial court's reasoning. One of those distinctions is that § 9-6b sets forth specific procedures that must be followed before an authorized agent can legally sign a petition on behalf of a blind elector.[7] Those procedures are calculated to ensure not only that the blind person understands the nature of the petition that he or she is supporting but also that it is clear, both to the circulator and to those reviewing the petition, that the signature is that of an authorized agent for a blind person. See General Statutes § 9-6b (b).

The statutory provisions governing powers of attorney in general contain no such protections. In the present case, for example, Thomas testified that she encountered Andrew in the hallway as he was leaving Nurse's apartment, and it was there that he signed the petition. There is no indication that Nurse was even aware of the interaction, let alone that he understood and approved of the petition that Andrew was signing on his behalf. Further, Andrew signed Nurse's name without memorializing that he was doing so as an authorized agent.[8]

[7] General Statutes § 9-6b (b) provides in relevant part: "Any person who is blind . . . may cause his name to be affixed to a petition . . . provided an authorized agent reads aloud the full text of the petition in the presence of the circulator, and the blind person consents to having his name appear thereon. In the event a blind person is unable to write, his authorized agent may write the name of such blind person followed by the word 'by' and his own signature. . . . No circulator shall act as an authorized agent."

[8] As the trial court noted, in other contexts in which electors may receive assistance or proxy signatures from authorized agents, the legislature also

A second distinction is that § 9-6b respects the autonomy of blind persons, while also safeguarding the fundamental democratic principle of one person, one vote. Allowing petitions to be signed by a power of attorney, by contrast, runs the risk of devolving into improper proxy voting. The agent may believe that he is entitled to exercise discretion to sign a petition on the basis of his own opinion, when the principal would choose otherwise. And an agent who held a power of attorney for both of his parents could, in effect, cast three votes.

This is presumably one reason why a Connecticut power of attorney confers neither the authority to exercise by proxy voting rights with respect to an entity; General Statutes § 1-350b (3); nor "[any] power created on a form prescribed by a government or governmental subdivision, agency or instrumentality for a governmental purpose." General Statutes § 1-350b (4). That is not to say that the legislature could not constitutionally authorize such voting—a question on which we express no opinion—only that we would expect that, if it wanted to do so, it would do so expressly, as it did in § 9-6b.

Nevertheless, we need not decide whether the trial court correctly construed the act. Regardless of whether the legislature intended to permit (or preclude) an agent to sign a petition pursuant to the act, there is no evidence that Andrew was acting under § 1-351b pursuant to a valid power of attorney. Indeed, there are at least three key gaps in the record.

First, it is not clear that whatever power of attorney Nurse granted to Andrew was executed pursuant to the act. The act took effect relatively recently, on October

has required that the agent sign and indicate that he or she is submitting a signature on the principal's behalf. See, e.g., General Statutes § 9-23g (b) (authorized agent may sign application for admission as elector on behalf of applicant who is unable to write); General Statutes § 9-140a (absentee ballot applicant who is unable to write may cause name to be signed on ballot form by authorized agent).

1, 2016. See Public Acts 2016, No. 16-40; Public Acts 2015, No. 15-240. Powers of attorney executed in Connecticut pursuant to a previous law, or those executed in another jurisdiction pursuant to the law of that jurisdiction, must comply with the law under which they were executed. See General Statutes §§ 1-350e and 1-350f. There is no indication as to whether the purported power of attorney was executed in Connecticut after October 1, 2016.

Second, even if we assume, for the sake of argument, that Nurse's power of attorney was executed pursuant to the act, to be valid it must be in the form of a writing or other record "inscribed on [another] tangible medium . . . that is . . . retrievable in perceivable form"; General Statutes § 1-350a (7) and (11); and it must be dated and signed in the presence of two witnesses. General Statutes § 1-350d. No such signed and witnessed writing or other tangible record was proffered to verify that Nurse's purported power of attorney was valid and enforceable. Although the trial court credited the testimony that Nurse granted Andrew some form of a power of attorney, there was no evidence by which to determine whether that power of attorney complied with the statutory requirements.

Third, there was no testimony or other evidence as to the scope of the alleged power of attorney. Even if Green were correct that the act *permits* an individual such as Nurse to grant a power of attorney to sign political petitions on his behalf, there is no way to know whether Nurse did, in fact, grant that specific authority to Andrew. For these reasons, we reject Green's claim that the trial court incorrectly concluded that Nurse's purported signature must be rejected pursuant to § 9-410.

B

We also are not persuaded by Green's alternative claim that, even if Nurse's purported signature was

properly rejected, the trial court should have ordered that only one signature be rejected, and not the other nineteen signatures on that page. The precise nature of Green's argument is not entirely clear. The trial court held that the entire signature page must be rejected pursuant to General Statutes § 9-412, but Green has not addressed or attempted to construe that provision.

Section 9-412 sets forth one scenario under which the registrar of voters is required to reject only an individual signature on a petition, namely, if the name does not appear on the current enrollment list. The statute also specifies that an individual name should not be rejected if the street address on the petition differs from that on the enrollment list, so long as the signee is eligible to vote for the candidate and the stated date of birth matches that on the person's registration record. General Statutes § 9-412. The statute further provides in relevant part: "The registrar shall reject any page of a petition which does not contain the certifications provided in section 9-410, or which the registrar determines to have been circulated in violation of any other provision of section 9-410. . . ." General Statutes § 9-412. Section 9-410 (c) independently requires that the registrar reject "[a]ny sheet of a petition . . . upon which the statement of the circulator is incomplete in any respect . . . ."

On its face, the statutory language plainly supports the trial court's determination that the entire sheet containing Nurse's name must be rejected. The statutory scheme distinguishes between violations that call for the rejection only of an individual name and those that call for an entire sheet to be rejected. The disqualification of Nurse's purported signature arose from a violation of § 9-410, namely, that Thomas knowingly and falsely attested that each person whose name appeared on the sheet had signed in her presence. Section 9-412

dictates that the offending page *shall* be rejected for the violation of *any* provision of § 9-410. Thomas' attestation also was incomplete, insofar as she failed to indicate the circumstances surrounding Nurse's purported signature, and § 9-410 (c) dictates that any such sheet "*shall* be rejected . . . ." (Emphasis added.)

Although the word "shall" is not always used in its mandatory sense; see, e.g., *Wilton Campus 1691, LLC* v. *Wilton*, 339 Conn. 157, 168, 260 A.3d 464 (2021); we previously have construed § 9-412 to require the disqualification of any petition page found to be in violation of § 9-410. See, e.g., *Arciniega* v. *Feliciano*, 329 Conn. 293, 297, 184 A.3d 1202 (2018) ("[t]he registrar *must reject* any petition page that fails to contain the requisite certifications by the circulator or that was circulated in violation of the specified procedures" (emphasis added)); see also *Keeley* v. *Ayala*, 328 Conn. 393, 410, 179 A.3d 1249 (2018) (concluding that General Statutes § 9-140b, governing return of absentee ballots, is mandatory). Green neither invites us to revisit *Arciniega* nor offers a competing interpretation of the statute.

Rather, Green argues that (1) the violation of § 9-410, if there was one, was de minimis, because Thomas acted in good faith, with no intent to commit fraud, and, therefore, Green substantially complied with the statutory requirements, and (2) to reject all twenty signatures, and thereby disqualify Green, would disenfranchise voters, contrary to the purpose of the statutory scheme. Both arguments miss the mark.

With respect to the first argument, we determined previously in this opinion that Green did not substantially comply with § 9-410, as Thomas knowingly allowed Andrew to sign for Nurse, without legal authorization and without providing any indication that the signature

was not that of the named voter.[9] The question, then, is whether §§ 9-410 and 9-412 contain an implied exception for "honest mistakes," that is, for violations that result from a misunderstanding of the law and not from any fraudulent intent. There is no indication that they do. Section 9-412 itself is framed broadly, requiring the rejection of a petition page circulated in violation of *any* provision of § 9-410. Section 9-410 itself requires the registrar to reject a full petition page for a number of additional violations, including the certification by the registrars of two or more municipalities; General Statutes § 9-410 (b); the failure to include a statement that the circulator is an enrolled party member in the municipality; General Statutes § 9-410 (c); and the circulation of a petition by one candidate for another candidate for the same position. General Statutes § 9-410 (c). Section 9-410 (c) then concludes with a catchall provision that requires the rejection of a petition sheet for a range of other violations: "Any sheet of a petition filed with the registrar which does not contain . . . a statement by the circulator as to the authenticity of the signatures thereon, or upon which the statement of the circulator is incomplete *in any respect*, or which does not contain the certification hereinbefore required by the registrar of the town in which the circulator is an enrolled party member, shall be rejected by the registrar." (Emphasis added.) The fact that § 9-410 requires the rejection of a petition sheet for such a wide array of violations, none of which by its terms must be predicated on fraudulent intent or bad faith on the part of the signee, the circulator, or the registrar, counsels strongly

[9] To the extent that Green argues that an individual such as Thomas may clearly violate and yet substantially comply with a statutory requirement—whether because she acted in good faith or because she complied with all other statutory requirements, or because compliance with the requirement is alleged to be less important than fostering full participation in the democratic process—that argument fails for the reasons discussed in part II of this opinion.

against reading a good faith exception into either statute. See, e.g., *Keeley* v. *Ayala*, supra, 328 Conn. 411 (concluding that failure to substantially comply with § 9-140b results in invalidation, regardless of lack of evidence of fraudulent intent, because, " '[h]ad the legislature chosen to do so, it could have enacted a remedial scheme under which ballots would . . . be invalidated [only] upon a showing of fraud or other related irregularity' "); *Wrinn* v. *Dunleavy*, 186 Conn. 125, 149, 440 A.2d 261 (1982) ("[w]hether fraud has been committed . . . is irrelevant to the question of whether there has been substantial compliance"). Put differently, the fact that the legislature may have enacted a statute with one purpose being to prevent or deter electoral fraud does not mean that evidence of fraudulent intent is necessary to establish a violation of the statute.

With respect to Green's second argument, we recognize that the statutory scheme has, from the outset, reflected a balancing of competing interests. The legislature has encouraged and attempted to facilitate full participation in the democratic process, while at the same time minimizing the possibility of fraud, which tends to erode public faith in our elections. See *State ex rel. Bell* v. *Weed*, 60 Conn. 18, 22, 22 A. 443 (1891). If Green believes that the balance has tipped too far toward one side or the other, that concern is better directed to the elected branches of government than to this court. See, e.g., *Arciniega* v. *Feliciano*, supra, 329 Conn. 310 ("recourse lies with other branches of the government"). As §§ 9-410 and 9-412 are currently drafted, however, it is clear that the legislature intended that entire petition pages would be rejected for a range of procedural violations, including the submission of an illegal signature accompanied by a false attestation. For these reasons, we conclude that the trial court correctly determined that not only Nurse's purported

signature but the full petition page containing that signature must be rejected.

II

We next consider Green's claim that, if the statutory scheme requires the rejection of the page containing Nurse's name, then it also requires the rejection of those pages of the Airey petition that were submitted in violation of § 9-410 (c). We agree.

As we discussed, § 9-410 (c) mandates that "[e]ach separate sheet of [a] petition shall contain a statement as to the authenticity of the signatures thereon *and the number of such signatures* . . . . Any sheet of a petition filed with the registrar which does not contain such a statement . . . shall be rejected by the registrar." (Emphasis added.) There is no dispute that five pages of the Airey petition did not contain the required signature count, in violation of the statute, and that the requirement is mandatory. The only question is whether the trial court correctly determined that the rejection of those pages was not required because Airey had, nevertheless, substantially complied with the statutory requirements. We address that question de novo. See, e.g., *Keeley* v. *Ayala*, supra, 328 Conn. 404.

The principle that a court should not lightly vacate the results of a democratically conducted election when there has been substantial compliance with the relevant statutes and other legal requirements has been established in Connecticut for well over one century. See *State ex rel. Bell* v. *Weed*, supra, 60 Conn. 24. From the start, however, this court also recognized both that "guard[ing] the ballot box against illegal votes and corrupt practices . . . is a duty of the highest importance," to be balanced against "the right of the qualified voter to have his vote counted"; id., 22; and that the substantial compliance doctrine cannot be extended so

far as to contravene a clear statutory requirement. See id., 22–24.

More recently, this court has given what at times may appear to be conflicting guidance as to the scope of the substantial compliance doctrine, especially with respect to statutes that impose mandatory duties. In *Butts* v. *Bysiewicz*, 298 Conn. 665, 5 A.3d 932 (2010), for example, we defined the scope of the doctrine quite narrowly, stating: "There are only two election cases in which this court has stated that a mandatory requirement of an election law could be satisfied by substantial compliance. In *Dombkowski* v. *Messier*, 164 Conn. 204, 206–208, 319 A.2d 373 (1972), the court deemed such a result would be proper when, unlike the present case, there was no adverse consequence specifically prescribed for noncompliance with the requirement at issue. In *Wrinn* v. *Dunleavy*, [supra, 186 Conn. 147–50], the court acknowledged the substantial compliance standard, but in effect applied strict compliance by concluding that, because the absentee ballot had not been mailed by any of the enumerated persons authorized by statute to do so, the ballots could not be counted." *Butts* v. *Bysiewicz*, supra, 689 n.23. In other cases, however, we have indicated that, even with respect to mandatory statutory requirements governing the electoral process, only substantial compliance is necessary. See, e.g., *Cohen* v. *Rossi*, 346 Conn. 642, 661, 295 A.3d 75 (2023); *In re Election of the United States Representative for the Second Congressional District*, 231 Conn. 602, 651, 653 A.2d 79 (1994).

Some—although perhaps not all—of the confusion engendered by these apparently conflicting statements may be dispelled by emphasizing a distinction implicit in our electoral jurisprudence.[10] On the one hand, there

[10] We note as well that we generally have articulated the substantial compliance doctrine in contexts in which requiring strict compliance would result in voiding the results of an election, an outcome that courts have hesitated to sanction. For purposes of this appeal, we assume without deciding that

are the quintessential substantial compliance cases in which, although there may not have been full, technical compliance with a specific statutory mandate, that particular requirement had, in essence, been satisfied. In those instances, substantial compliance is enough. This would be a different case, for example, if Clarke had written "15+5," when he should have recorded "20" verified signatures on his full sheets, or if Rodney, instead of recording the total on each page, as required by statute, had attached one master sheet listing the verified totals for each of his pages. We do not foreclose the possibility that an election official or a trial court reasonably might determine that such conduct, although technically in violation, substantially complied with the statutory requirements.

But this case falls into a second category. There is no plausible claim here that Clarke or Rodney complied with the law by some means distinct from, but comparable to, that set forth in the statute. They simply failed to comply. The substantial compliance claim here, rather, is that what is admittedly a clear violation of the statute should not be met with that statute's consequences, because it would be unfair, or because other statutory requirements have been satisfied, or because a full, robust democratic process is alleged to be more important than compliance with relatively picayune mandates. We have continued to reject such claims since we first set forth the substantial compliance doctrine in *State ex rel. Bell* v. *Weed*, supra, 60 Conn. 24. See, e.g., *Cohen* v. *Rossi*, supra, 346 Conn. 680 ("[i]f there is to be [disen]franchisement, it should be because the legislature has seen fit to require it in the interest of an honest suffrage, and has expressed that requirement in unmistakable language" (internal quotation

the parties are correct that we should have some—if not the same—hesitancy to overturn the expressed preferences of the voters in the petition gathering context.

marks omitted)); *Butts* v. *Bysiewicz*, supra, 298 Conn. 689 ("the court cannot invoke its equitable authority to compel the defendant to act in direct contravention [of a] clear legislative mandate"); *Dombkowski* v. *Messier*, supra, 164 Conn. 207 ("[When] the legislature in express terms says that a ballot shall be void for some cause, the courts must undoubtedly hold it to be void; but no voter is to be [disen]franchised on a doubtful construction, and statutes tending to limit the exercise of the ballot should be liberally construed in his favor. Unless a ballot comes clearly within the prohibition of some statute it should be counted . . . ." (Internal quotation marks omitted.)).

To summarize, when a statute sets forth a mandatory requirement in plain and unambiguous terms, and dictates that petitions submitted in violation of that requirement be rejected, we are not free to ignore patent violations of that requirement under the banner of substantial compliance. To do so would be to substitute our judgment for that of the legislature and to determine that certain statutes are not important enough to demand compliance. That we will not do. See, e.g., *Butts* v. *Bysiewicz*, supra, 298 Conn. 675.

We also disagree with the trial court's determination that Airey did substantially comply with the statutory requirements because "the number of signatures is readily determined by a quick review of the numbered signature pages." At oral argument before this court, Airey's counsel acknowledged that the tallying of verified signatures by each circulator is not a mere technical requirement; rather, it plays an important role in limiting the opportunity for fraud. If, hypothetically, the registrar of voters receives a full page containing twenty signatures but the total number is not certified as required by statute, there is no way to know whether the circulator personally authenticated all twenty signatures or whether, say, fifteen signatures were authenti-

cated and then five additional, unauthenticated signatures were added to the sheet after it was signed by the circulator but before it was filed.

To the extent that it is relevant, the legislative history supports the conclusion that the requirement that the circulator attest to the total number of verified signatures was adopted to prevent fraud of this sort. When the relevant language was added to § 9-410 (c) in 1978; see Public Acts 1978, No. 78-125, § 3; Claire Jacobs, vice chairman of the State Elections Commission, which was one of the entities that had requested that the legislature enact the amendments, explained the rationale as follows: "There are . . . sheets to which names have been added after the circulator has signed and submitted those sheets to a third person for delivery to the registrar. Such fraudulent abuses of the petition process would be severely curtailed . . . ." Conn. Joint Standing Committee Hearings, Elections, 1978 Sess., p. 11.

We thus agree with Green that Feliciano and McGregor were required to reject the five Airey sheets that were submitted without proper tallies. According to Green's counterclaim, the disqualification of those five sheets will result in the removal of approximately sixty additional signatures, bringing Airey below the minimum 375 needed to appear on the primary ballot. The parties have not briefed the question of how the primary election, which was unilaterally cancelled by Feliciano and McGregor, is to be conducted with both slates disqualified from appearing on the primary ballot. We leave that question to the trial court to resolve on remand.

The judgment is reversed with respect to the five contested sheets of the Airey petition and the case is remanded with direction to order Feliciano and McGregor to reject all signatures on those sheets and, if that results in a total of fewer than 375 verified signatures, to dis-

qualify the Airey slate from the primary ballot for the Democratic Town Committee for the seventh district of the city of Hartford, and for other proceedings according to law; the judgment is affirmed in all other respects.

In this opinion the other justices concurred.

TENISHA O'REGGIO *v.* COMMISSION ON HUMAN RIGHTS AND OPPORTUNITIES ET AL.
(SC 20847)

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

Syllabus

The plaintiff employee appealed from the judgment of the Appellate Court, which affirmed the trial court's judgment. The trial court had upheld the decision of the named defendant, the Commission on Human Rights and Opportunities, which determined that the defendant employer was not vicariously liable for the creation of a hostile work environment by another employee, K, in violation of the Connecticut Fair Employment Practices Act (§ 46a-51 et seq.). The plaintiff claimed that the Appellate Court incorrectly had applied the definition of the term "supervisor," adopted by the United States Supreme Court in *Vance* v. *Ball State University* (570 U.S. 421), in concluding that the employer could not be held vicariously liable because K, the individual to whom the plaintiff reported and who allegedly made racially discriminatory comments to the plaintiff and in her presence, was not a supervisor under the definition of that term adopted in *Vance*. *Held*:

The Appellate Court correctly applied to the plaintiff's hostile work environment claim the definition of the term "supervisor" adopted in *Vance*, which is limited to employees who are empowered by the employer to take tangible employment actions against the victim of the alleged discrimination.

Because there was no evidence in the record that K had the authority to take tangible employment actions against the plaintiff, the employer could not be held vicariously liable for K's creation of a hostile work environment.

(*Three justices dissenting in one opinion*)

Argued March 20—officially released August 1, 2024*

* August 1, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Appeal from the decision of the human rights referee for the named defendant that the defendant Department of Labor was not liable to the plaintiff for her claim of a hostile work environment, brought to the Superior Court in the judicial district of New Britain and tried to the court, *Klau*, *J.*; judgment affirming the decision, from which the plaintiff appealed to the Appellate Court, *Prescott*, *Seeley* and *Eveleigh*, *Js.*, which affirmed the trial court's judgment, and the plaintiff, on the granting of certification, appealed to this court. *Affirmed.*

James V. Sabatini, for the appellant (plaintiff).

Michael E. Roberts, human rights attorney, for the appellee (named defendant).

Colleen B. Valentine, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, *Joshua Perry*, solicitor general, and *Michael K. Skold*, deputy solicitor general, for the appellee (defendant Department of Labor).

Opinion

ALEXANDER, J. This certified appeal raises the question of who qualifies as a "supervisor" and renders an employer vicariously liable for the creation of a hostile work environment in violation of the Connecticut Fair Employment Practices Act (state act), General Statutes § 46a-51 et seq. The named defendant, the Commission on Human Rights and Opportunities (commission), concluded in an administrative decision that the defendant employer, the Department of Labor (department), was not vicariously liable for the creation of a hostile work environment in the office where it employed the plaintiff, Tenisha O'Reggio. The decision was upheld by the trial court, and the Appellate Court affirmed that judgment. See *O'Reggio* v. *Commission on Human Rights & Opportunities*, 219 Conn. App. 1, 4–5, 20, 293 A.3d 955

(2023). We granted the plaintiff's petition for certification to appeal, limited to the following issue: "Did the Appellate Court correctly conclude that the legal standard adopted by the United States Supreme Court in *Vance* v. *Ball State University*, 570 U.S. 421, 133 S. Ct. 2434, 186 L. Ed. 2d 565 (2013), applied to the plaintiff's claim under the [state act] . . . that the [department] was vicariously liable for the hostile work environment allegedly created by one of the [department's] employees?" *O'Reggio* v. *Commission on Human Rights & Opportunities*, 346 Conn. 1029, 295 A.3d 944 (2023). Following our well established use of federal case law applying Title VII of the Civil Rights Act of 1964, as amended by Title VII of the Civil Rights Act of 1991, 42 U.S.C. § 2000e et seq. (Title VII), to guide our interpretation and application of the state act, we conclude that the Appellate Court's comprehensive and well reasoned opinion correctly adopted the *Vance* definition of the term "supervisor." Accordingly, we affirm the judgment of the Appellate Court.

The record reveals the following relevant facts and procedural history. The plaintiff began working for the department in 2009 and was promoted in 2012 to the position of adjudicator in the unemployment unit of its Bridgeport office, where she reported to the unit's program services coordinator, Diane Krevolin. Krevolin had the authority to assign work, to approve requests for leave, to set employee schedules, to provide training, and to conduct performance reviews. She did not have the authority to hire, fire, or otherwise discipline any employee. In 2016, the plaintiff, who is Black, filed an internal complaint with the department's office of human resources (HR), claiming that Krevolin, who is white, had made several racially discriminatory statements to her and in her presence.[1] The plaintiff met with

[1] The Appellate Court summarized Krevolin's discriminatory statements as follows: "[A]t a one-on-one meeting with Krevolin six months after the plaintiff began her adjudicator position, Krevolin asked the plaintiff what

HR personnel, and, the following day, the department placed Krevolin on paid administrative leave. HR personnel and the department's equal employment opportunity manager each conducted separate internal investigations into the plaintiff's claim. Both investigations concluded that Krevolin had made discriminatory statements. After considering the results of the investigations and Krevolin's lengthy record of service with the department, which lacked any previous disciplinary actions, the commissioner of labor issued Krevolin a one day suspension without pay and required her to attend diversity training.

After the internal investigations were completed, the plaintiff requested that she be allowed to report to someone other than Krevolin or to sit in an area away from Krevolin, but each of those requests were denied. The department determined that the plaintiff could not report directly to the person above Krevolin in the organizational structure, and Krevolin's union contract did not allow her to be involuntarily transferred for disciplinary purposes.[2] Because the plaintiff felt that she could not continue to report to Krevolin, she took a position in another division of the department. The new

she would do if someone called her a racial epithet; on a later date, Krevolin made a comment suggesting that the man with whom she was talking to must have been lying about looking for work because he was Black; at a meeting, Krevolin stated to the plaintiff and other adjudicators, '[y]ou know Hispanics don't have bank accounts'; Krevolin made a comment that the plaintiff believed was implying that the plaintiff had no reason to be in Sweden on vacation because she is Black; Krevolin said to the plaintiff's coworker, who had dreadlocks but then changed her hairstyle, 'I'm glad you . . . took that mess out of your head, you looked like Whoopi Goldberg'; and Krevolin complimented the plaintiff's hairstyle and stated that she did not like the plaintiff's old hairstyle because it reminded her of 'Aunt Jemima.' " *O'Reggio* v. *Commission on Human Rights & Opportunities*, supra, 219 Conn. App. 5–6 n.4.

[2] Within the organizational structure of the department, Krevolin reported to the director of adjudications and unemployment insurance field services, who, in turn, reported to the director of labor operations. The director of labor operations reported to both the commissioner and the deputy commissioner of labor.

position was for a durational basis from December, 2016, to December, 2017, after which time the plaintiff could request to return to her former position in the unemployment unit. Although Krevolin retired in October, 2017, the plaintiff did not seek to return to her former position when eligible in December, 2017. In March, 2019, the plaintiff asked to return to her former position, and the department granted that request.

While the department's internal investigations were ongoing, the plaintiff filed a complaint with the commission alleging that the department had subjected her to a hostile work environment based on her race and color in violation of General Statutes (Rev. to 2015) § 46a-60 (a) (1)[3] and General Statutes §§ 46a-58 (a)[4] and 46a-70.[5] Following a hearing, the presiding human rights referee

[3] General Statutes (Rev. to 2015) § 46a-60 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section: (1) For an employer, by the employer or the employer's agent . . . to refuse to hire or employ or to bar or to discharge from employment any individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment because of the individuals' race [or] color . . . ."

[4] General Statutes § 46a-58 (a) provides in relevant part: "It shall be a discriminatory practice in violation of this section for any person to subject, or cause to be subjected, any other person to the deprivation of any rights, privileges or immunities, secured or protected by the Constitution or laws of this state or of the United States, on account of . . . color [or] race . . . ."

We note that § 46a-58 has been the subject of several amendments since the filing of the plaintiff's complaint. See Public Acts 2022, No. 22-82, § 11; Public Acts 2017, No. 17-127, § 2; Public Acts 2017, No. 17-111, § 1; Public Acts, Spec. Sess., June, 2015, No. 15-5, § 73. Because those amendments have no bearing on the merits of this appeal, and in the interest of simplicity, we refer to the current revision of the statute.

[5] General Statutes § 46a-70 (a) provides in relevant part: "State officials and supervisory personnel shall recruit, appoint, assign, train, evaluate and promote state personnel on the basis of merit and qualifications, without regard for race [or] color . . . ."

We note that § 46a-70 has been the subject of several amendments since the filing of the plaintiff's complaint. See Public Acts 2022, No. 22-82, § 16; Public Acts 2018, No. 18-72, § 44; Public Acts 2017, No. 17-127, § 8. Because those amendments have no bearing on the merits of this appeal, and in the interest of simplicity, we refer to the current revision of the statute.

(referee) issued a final decision, concluding that, although Krevolin had created a hostile work environment, the department acted promptly and reasonably under the circumstances to remedy the situation and, therefore, was not vicariously liable for Krevolin's actions.

The plaintiff thereafter filed an administrative appeal from the commission's decision to the trial court pursuant to General Statutes § 4-183. The trial court upheld the commission's decision, concluding that the plaintiff's vicarious liability claim under the state act against the department failed because Krevolin was not a "supervisor" as defined by the United States Supreme Court in *Vance*, namely, an employee empowered by the employer "to take tangible employment actions against the victim . . . ." *Vance* v. *Ball State University*, supra, 570 U.S. 424. The trial court further concluded that, despite some ambiguity in the commission's decision as to whether the referee had found Krevolin to be the plaintiff's supervisor under *Vance*, a remand to the commission was unnecessary because the plaintiff's counsel had expressly conceded during oral argument before the trial court that Krevolin's supervisory responsibilities, which did not include hiring, firing, or disciplining employees, did not satisfy the *Vance* standard.

The plaintiff appealed from the trial court's judgment to the Appellate Court. The sole issue in the appeal was whether the trial court had incorrectly applied the *Vance* definition of "supervisor" to the plaintiff's hostile work environment claim. See *O'Reggio* v. *Commission on Human Rights & Opportunities*, supra, 219 Conn. App. 10. The Appellate Court concluded that the *Vance* definition of "supervisor" furnishes "the appropriate definition for distinguishing between the coworker and supervisor theories of liability for hostile work environment claims brought under [the state act]." Id., 19. Accordingly, the Appellate Court affirmed the trial court's judgment. Id., 20. This certified appeal followed.

On appeal, the plaintiff, joined in part by the commission,[6] claims that the Appellate Court incorrectly applied the *Vance* definition of "supervisor" to her claim seeking to hold the department vicariously liable under the state act for the creation of a hostile work environment by Krevolin. The plaintiff contends that the *Vance* definition undermines the remedial nature of the state act because it is unduly narrow and that we should instead adopt a definition of "supervisor" that includes employees who have the authority to control the conditions under which subordinate employees do their daily work.

In response, the department argues that the Appellate Court correctly applied the *Vance* definition of "supervisor" because this court has "long followed federal Title VII precedent in determining an employer's liability when an employee is subject to a hostile work environment." See, e.g., *Brittell* v. *Dept. of Correction*, 247 Conn. 148, 166–67, 717 A.2d 1254 (1998) (applying definition of "hostile work environment" from federal case

[6] The commission contends that it is not necessary for this court to reach the certified issue of whether to adopt the *Vance* definition and, instead, asks us to affirm the trial court's judgment on the alternative grounds that (1) the plaintiff abandoned her claim before the trial court because of inadequate briefing, and (2) the department waived the *Ellerth/Faragher* defense that underlies the *Vance* issue. See, e.g., *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 765, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998) ("An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." (Citation omitted.)); see also *Faragher* v. *Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998) (same). Given our conclusion that the *Vance* definition is applicable to claims filed under the state act, we need not reach the alternative grounds advanced by the commission.

law in case brought under state act). The department further argues that "powerful policy interests" support adopting the *Vance* definition of "supervisor." The department also argues that the definition urged by the plaintiff "requires murky factual determinations and risks inconsistent results." We agree with the department that, for the purposes of vicarious liability, a supervisor is an employee "empowered by the employer to take tangible employment actions against the victim"; *Vance* v. *Ball State University*, supra, 570 U.S. 424; including those individuals authorized to take such action subject to approval by higher management. See id., 437 n.8.

We begin with the principles that govern our standard of review in an appeal from the decision of an administrative agency. Under the Uniform Administrative Procedure Act, General Statutes § 4-166 et seq., "it is [not] the function . . . of this court to retry the case or to substitute its judgment for that of the administrative agency. . . . Even for conclusions of law, [t]he court's ultimate duty is only to decide whether, in light of the evidence, the [agency] has acted unreasonably, arbitrarily, illegally, or in abuse of its discretion. . . . [Thus] [c]onclusions 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." (Internal quotation marks omitted.) *Drumm* v. *Freedom of Information Commission*, 348 Conn. 565, 579–80, 308 A.3d 993 (2024). "Cases that present pure questions of law, however, invoke a broader standard of review . . . . [T]he traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] a governmental agency's time-tested interpretation . . . ." (Internal quotation marks omitted.)

Id., 580. Because this case presents a question of law that has not been previously considered, our review is plenary. See, e.g., *Longley* v. *State Employees Retirement Commission*, 284 Conn. 149, 166, 931 A.2d 890 (2007).

We turn next to the legal principles governing our construction and application of the state act. "This court previously has determined that Connecticut antidiscrimination statutes should be interpreted in accordance with federal antidiscrimination laws." (Internal quotation marks omitted.) *Patino* v. *Birken Mfg. Co.*, 304 Conn. 679, 689, 41 A.3d 1013 (2012). "We look to federal law for guidance on interpreting state employment discrimination law, and the analysis is the same under both." (Internal quotation marks omitted.) *Feliciano* v. *Autozone, Inc.*, 316 Conn. 65, 73, 111 A.3d 453 (2015). Thus, guided by the long line of cases following *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986), in which the United States Supreme Court first recognized that the creation of a hostile or abusive work environment was a violation of Title VII; id., 66; this court has determined that, to establish a claim of hostile work environment under the state act, "the workplace [must be] permeated with discriminatory intimidation, ridicule, and insult that [are] sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive [work] environment . . . ."[7] (Emphasis omitted; inter-

[7] Guided by federal case law, this court has further determined that, in order to be actionable, a hostile work "environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so. . . . Whether an environment is objectively hostile is determined by looking at the record as a whole and at all the circumstances, including the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. . . . [T]here must be more than a few isolated incidents of racial enmity . . . meaning that [i]nstead of sporadic racial slurs, there must be a steady barrage of opprobrious racial comments . . . . Thus, whether racial slurs constitute a hostile

nal quotation marks omitted.) *Patino* v. *Birken Mfg. Co.*, supra, 691.

"We also have recognized that our legislature's intent, in general, was to make [the state act] complement the provisions of Title VII." *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, 322 Conn. 154, 160, 140 A.3d 190 (2016). Accordingly, we previously have considered Title VII jurisprudence in interpreting the meaning of both "employer"; see, e.g., *Perodeau* v. *Hartford*, 259 Conn. 729, 738–39, 792 A.2d 752 (2002); and "employee" under the state act. See, e.g., *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, supra, 160–61. Because the term "supervisor" is not defined in the state act, and our appellate courts have not adopted a definition, we look to federal case law interpreting Title VII for guidance. See, e.g., *Haskenhoff* v. *Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 571 n.2 (Iowa 2017).

In *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998), and *Faragher* v. *Boca Raton*, 524 U.S. 775, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998), the United States Supreme Court adopted a framework setting forth the circumstances under which an employer may be held vicariously liable under Title VII for an employee's creation of a hostile work environment.[8] In establishing that

work environment typically depends [on] the quantity, frequency, and severity of those slurs . . . considered cumulatively in order to obtain a realistic view of the work environment . . . ." (Citations omitted; internal quotation marks omitted.) *Patino* v. *Birken Mfg. Co.*, supra, 304 Conn. 699–700.

[8] As the Appellate Court aptly recognized, neither this court nor the Appellate Court previously has had the opportunity to consider whether the *Ellerth/Faragher* framework applies to cases brought under the state act. See *O'Reggio* v. *Commission on Human Rights & Opportunities*, supra, 219 Conn. App. 12–13; see also *Brittell* v. *Dept. of Correction*, supra, 247 Conn. 166 n.30 (recognizing then recent decisions in *Ellerth* and *Faragher* but deeming them inapplicable in case involving coworker sexual harassment). Nevertheless, no party in the present case argues that that framework should not apply. Therefore, like the Appellate Court, we assume, without deciding, that the *Ellerth/Faragher* framework applies to hostile work environment

framework, the court was guided by § 219 (2) (d) of the Restatement (Second) of Agency, recognizing an exception to the general rule that employers are not liable for those tortious acts that are committed outside the scope of employment; that exception allows for vicarious liability when the employee was "aided in accomplishing the tort by the existence of the agency relation." (Internal quotation marks omitted.) *Vance* v. *Ball State University*, supra, 570 U.S. 428, quoting 1 Restatement (Second), Agency § 219 (2) (d), p. 481 (1958); see *Faragher* v. *Boca Raton*, supra, 803 ("[w]hen a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw [on] his superior position over the people who report to him . . . whereas an employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a [coworker]"); *Burlington Industries, Inc.* v. *Ellerth*, supra, 761–62 ("When a supervisor makes a tangible employment decision, there is assurance the injury could not have been inflicted [in the absence of] the agency relation. A tangible employment action in most cases inflicts direct economic harm. As a general proposition, only a supervisor, or other person acting with the authority of the company, can cause this sort of injury.").

Guided by this "aided-in-the-accomplishment theory of vicarious liability"; *Vance* v. *Ball State University*, supra, 570 U.S. 432; the United States Supreme Court concluded that "[a]n employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Burlington Industries, Inc.* v. *Ellerth*, supra, 524 U.S. 765. If a supervisor's harassment culminates in a tangi-

claims brought under the state act. See *O'Reggio* v. *Commission on Human Rights & Opportunities*, supra, 13.

ble employment action, such as termination, demotion, or an undesirable reassignment, liability for the supervisor's action is automatically imputed to the employer. Id., 762–63. "In that instance, it would be implausible to interpret agency principles to allow an employer to escape liability . . . ." Id., 763. "When no tangible employment action is taken, [however], a defending employer may raise an affirmative defense to liability . . . . The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any . . . harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." (Citation omitted.) *Faragher* v. *Boca Raton*, supra, 524 U.S. 807.

Conversely, if the harassing employee is a coworker and not a supervisor of the victim, the burden imposed by the affirmative defense does not apply, and the employer is liable only if the victim can show the employer was negligent in failing to prevent harassment from taking place. See *Vance* v. *Ball State University*, supra, 570 U.S. 448–49. "[Although] the reasonableness of an employer's response to . . . harassment is at issue under both standards, the plaintiff must clear a higher hurdle under the negligence standard [applicable to harassment by coworkers], where she bears the burden of establishing her employer's negligence, than under the vicarious liability standard [applicable to harassment by supervisors], where the burden shifts to the employer to prove its own reasonableness and the plaintiff's negligence." *Curry* v. *District of Columbia*, 195 F.3d 654, 660 (D.C. Cir. 1999), cert. denied, 530 U.S. 1215, 120 S. Ct. 2219, 147 L. Ed. 2d 251 (2000); see also *Swinton* v. *Potomac Corp.*, 270 F.3d 794, 804 (9th Cir. 2001) (Discussing burden shifting scheme and stating that "[i]t might reasonably be argued . . . that employ-

ers are 'better off' in the negligence context, [in which] the plaintiff is required to prove both the employer's knowledge of the harassment (or that it should have known) and that it failed to take reasonable corrective action. In the strict liability context, the plaintiff is required to prove significantly less in the prima facie case: merely that the harasser was his supervisor."), cert. denied, 535 U.S. 1018, 122 S. Ct. 1609, 152 L. Ed. 2d 623 (2002).

Under the *Ellerth/Faragher* framework, it is, therefore, analytically important to determine whether an alleged harasser is a supervisor or a coworker. Because a split developed among the federal courts of appeals with respect to the meaning of the term "supervisor," the United States Supreme Court adopted a definition of that term in *Vance*. The court concluded in *Vance* that a supervisor is an employee empowered by the employer "to take tangible employment actions against the victim, i.e., to effect a significant change in employment status such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." (Internal quotation marks omitted.) *Vance* v. *Ball State University*, supra, 570 U.S. 431. Additionally, if the coworker is empowered to take a tangible employment action subject to approval by higher management, that coworker might also qualify as a supervisor. Id., 437 n.8.

Adopting the *Vance* definition is consistent with our well established body of case law holding that "our legislature's intent, in general, was to make [the state act] complement the provisions of Title VII." *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, supra, 322 Conn. 160. Although this court has occasionally interpreted the state act differently from Title VII, "it has done so only in circumstances in which there is clear evidence of a contrary legislative intent." Id., 162; see, e.g., *McWeeny* v. *Hartford*, 287

Conn. 56, 69, 946 A.2d 862 (2008) (concluding that guidance from case law interpreting Title VII was unnecessary because relevant language of state act was "susceptible of only one reasonable interpretation"); see also *Vollemans* v. *Wallingford*, 103 Conn. App. 188, 217, 928 A.2d 586 (2007) (concluding that following guidance from federal case law would contradict intent of state legislature), aff'd, 289 Conn. 57, 956 A.2d 579 (2008). Neither the parties' briefs nor our independent research has found anything in the text or legislative history of the state act indicating that the legislature desired to depart from federal law with respect to the proof and defense of hostile work environment claims. See *Patino* v. *Birken Mfg. Co.*, supra, 304 Conn. 695–97. We note that the dissent's rejection of the *Vance* definition is inconsistent with this court's approach in interpreting the state act "in accordance with federal antidiscrimination laws." (Internal quotation marks omitted.) Id., 689; see, e.g., *Feliciano* v. *Autozone, Inc.*, supra, 316 Conn. 73 ("[w]e look to federal law for guidance on interpreting state employment discrimination law, and the analysis is the same under both" (internal quotation marks omitted)).

In arguing for a broader approach, the dissent rejects the oft cited proposition that "our legislature's intent, in general, was to make [the state act] complement the provisions of Title VII." *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, supra, 322 Conn. 160. Specifically, the dissent argues that this proposition is the result of a misreading of *Pik-Kwik Stores, Inc.* v. *Commission on Human Rights & Opportunities*, 170 Conn. 327, 331, 365 A.2d 1210 (1976), by this court in *Wroblewski* v. *Lexington Gardens, Inc.*, 188 Conn. 44, 53, 448 A.2d 801 (1982). Although we recognize the dissent's criticisms of the analysis in *Wroblewski*, this proposition has been advanced in countless employment discrimination decisions and has put

the legislature on notice of our consistent interpretation of the state act. Given the interest in stability in the context of statutory interpretation, and the legislature's primary role in formulating the public policy of our state; see, e.g., *Graham* v. *Commissioner of Transportation*, 330 Conn. 400, 417–18, 195 A.3d 664 (2018) (discussing principles of legislative acquiescence and stare decisis); we decline to depart from guiding principles of federal law in the absence of an indication of legislative intent to the contrary. We acknowledge that there are good and persuasive arguments that support the dissent's adoption of a broader definition of who qualifies as a supervisor. The legislature, however, has not expressly set forth its intent for us to adopt such a definition. To the extent that the legislature wishes to define the term "supervisor" more broadly, it is of course free to adopt legislation directing that approach or, in the alternative, clarifying the persuasive value of federal case law as it has in other contexts.[9]

Given the lack of any response to *Vance* from our legislature, which is certainly aware of the hostile work environment theory of liability; see General Statutes § 46a-60 (b) (8) (harassment on "basis of sex or gender identity or expression," including via conduct creating "intimidating, hostile or offensive [work] environment," is prohibited discriminatory practice under state act); we continue to view consistency with federal case law as "especially important in employment law. Employers must comply with both state and federal law. Human resources personnel and supervisors must apply myriad rules and regulations in complex situations. . . . Uncertainty invites more litigation and increasing costs

[9] Compare Iowa Code Ann. § 216.18 (1) (West 2017) (directing that Iowa Civil Rights Act, Iowa Code Ann. § 216 et seq., which includes employment discrimination protections, "shall be construed broadly to effectuate its purposes"), with General Statutes § 35-44b (in interpreting state antitrust statutes, "the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes").

for all parties. An uncertain or costly litigation environment inhibits job creation." *Haskenhoff* v. *Homeland Energy Solutions, LLC*, supra, 897 N.W.2d 585.

The United States Supreme Court in *Vance* reasoned that the *Vance* definition of "supervisor" is "easily workable" and "can be applied without undue difficulty at both the summary judgment stage and at trial." *Vance* v. *Ball State University*, supra, 570 U.S. 432. Indeed, whether an employee is a supervisor or simply a coworker can usually be "readily determined" by written documentation in official company records as opposed to "a highly case-specific evaluation of numerous factors." Id.

The dissent, the plaintiff, and the commission nonetheless encourage us to reject the *Vance* definition, relying heavily on the argument advanced by Justice Ruth Bader Ginsburg in her dissenting opinion in *Vance*. Justice Ginsburg concluded that a definition that does not include employees who have the authority to direct daily work activities "hinder[s] efforts to stamp out discrimination in the workplace" by "reliev[ing] scores of employers of responsibility for the behavior" of their employees. *Vance* v. *Ball State University*, supra, 570 U.S. 463, 468 (Ginsburg, J., dissenting); see also *Aguas* v. *State*, 220 N.J. 494, 528, 107 A.3d 1250 (2015) (rejecting *Vance* definition and concluding that more expansive definition of "supervisor" "prompts employers to focus attention not only on an elite group of [decision makers] at the pinnacle of the organization, but on all employees granted the authority to direct the day-to-day responsibilities of subordinates, and to ensure that those employees are carefully selected and thoroughly trained"). We disagree for two reasons. First, when a harasser is not a supervisor under *Vance*, an employer may nevertheless be held liable upon proof that it was negligent in failing to prevent that harassment. See *Vance* v. *Ball State University*, supra, 446. A plaintiff could therefore still prevail by showing, for example, that "an employer

did not monitor the workplace, failed to respond to complaints, failed to provide a system for registering complaints, or effectively discouraged complaints . . . ." Id., 449. Thus, an employer is not relieved of responsibility for the behavior of its employees when its own negligence has led to the creation or continuation of a hostile work environment. See id., 446. This is particularly so when an employee has put the employer on notice of the hostile work environment created by a coworker, rendering the employer's complaint process—and the employee's participation in that process—of paramount importance in any assessment of the employer's negligence.

Second, by encompassing within the definition of "supervisor" those employees empowered by the employer to take tangible employment actions subject to approval by higher management, the *Vance* definition shifts the burden of proof to the employer under the *Ellerth/Faragher* framework whenever the harasser is aided by the agency relationship with the employer. Even if an employer confines ultimate decision-making power to a small number of individuals in an attempt to escape vicarious liability, those individuals will likely need to rely on—and perhaps delegate authority to—other individuals who actually interact with the subordinate employees. If a delegation of the authority to take tangible employment actions occurs, an employer could still be subject to vicariously liability. See id., 437 and n.8.

We acknowledge that coworkers are, unfortunately, more than capable of creating hostile work environments. We conclude nonetheless that " 'something more' is required in order to warrant vicarious liability," and that something more requires the harasser to have the power to take tangible employment actions. Id., 439. In the absence of a contrary expression of intent by the legislature with respect to the state act, the *Vance* definition strikes a reasonable balance between

accomplishing the antidiscrimination purpose of the state act and protecting the legitimate interests of employers. See id., 431–32. It would upset settled expectations with respect to our jurisprudence interpreting the state act for us to depart from the *Vance* definition of "supervisor."

In the present case, the commission made no factual findings as to whether Krevolin was a supervisor under the *Vance* definition. A remand to the commission, however, is unnecessary because the plaintiff's counsel expressly conceded that Krevolin's responsibilities did not satisfy the *Vance* definition of "supervisor,"[10] meaning that "the evidence supports only one conclusion as a matter of law . . . ." (Internal quotation marks omitted.) *O'Reggio* v. *Commission on Human Rights & Opportunities*, supra, 219 Conn. App. 19; see *Salmon* v. *Dept. of Public Health & Addiction Services*, 259 Conn. 288, 304–305, 788 A.2d 1199 (2002). Although Krevolin had the authority to assign work, to approve requests for leave, to set employee schedules, to provide training, and to conduct performance reviews, there is no evidence in the record that she had the authority to take tangible employment actions against the plaintiff. Accordingly, we conclude that the department is not vicariously liable for Krevolin's creation of a hostile work environment.

The judgment of the Appellate Court is affirmed.

In this opinion McDONALD, D'AURIA and DANNEHY, Js., concurred.

ROBINSON, C. J., with whom MULLINS and ECKER, Js., join, dissenting. I respectfully disagree with the

[10] At oral argument before this court, the plaintiff's counsel specifically stated: "Krevolin did not have the authority by her employer to terminate, promote, demote, transfer, or discipline, so she lacked the power to inflict direct economic harm on [the plaintiff]. Thus, per . . . the definition in *Vance*, [Krevolin] is not a supervisor."

majority's conclusion that the definition of the term "supervisor" adopted by the United States Supreme Court in *Vance* v. *Ball State University*, 570 U.S. 421, 424, 450, 133 S. Ct. 2434, 186 L. Ed. 2d 565 (2013), for purposes of establishing vicarious liability under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e et seq. (2018), is the correct standard to apply to hostile work environment claims brought under the Connecticut Fair Employment Practices Act (state act), General Statutes § 46a-51 et seq. Consistent with Connecticut's robust antidiscrimination scheme, I would adopt a broader definition of the term "supervisor" that motivates employers to foster work environments that are free from discrimination. Specifically, I would include within the definition of supervisor not only individuals vested with the authority to make or recommend tangible employment decisions, but also those authorized to direct the daily work activities of subordinate employees. Because I conclude that the *Vance* definition of supervisor is too narrow to apply to hostile work environment claims brought under the state act, like those of the plaintiff, Tenisha O'Reggio, I would reverse the judgment of the Appellate Court. See *O'Reggio* v. *Commission on Human Rights & Opportunities*, 219 Conn. App. 1, 19–20, 293 A.3d 955 (2023). Accordingly, I respectfully dissent.

At the outset, I agree with the majority's recitation of the statement of the facts, procedural history, and standard of review applicable to this certified appeal. I also agree with the majority's description of the *Ellerth*/*Faragher* body of federal case law, setting forth the burden of proof in hostile work environment cases, under which a harasser's supervisor status is significant in determining whether an employer bears the burden of proof in the form of an affirmative defense. See *Burlington Industries, Inc.* v. *Ellerth*, 524 U.S. 742, 762–65, 118 S. Ct. 2257, 141 L. Ed. 2d 633 (1998); *Fara-*

gher v. *Boca Raton*, 524 U.S. 775, 807, 118 S. Ct. 2275, 141 L. Ed. 2d 662 (1998). Where I part company with the majority is its adoption of the *Vance* definition of the term "supervisor" for claims brought under the state act.

Although the majority agrees with the United States Supreme Court's description of the *Vance* definition as " 'easily workable' " and " 'appli[cable] without undue difficulty at both the summary judgment stage and at trial,' " Justice Ruth Bader Ginsburg's dissent in *Vance* astutely points out that the definition overlooks the fact that "[s]upervisors, like the workplaces they manage, come in all shapes and sizes." *Vance* v. *Ball State University*, supra, 570 U.S. 465 (Ginsburg, J., dissenting). "One cannot know whether an employer has vested supervisory authority in an employee, and whether harassment is aided by that authority, without looking to the particular working relationship between the harasser and the victim." Id. As one scholarly commentator has aptly observed, "[w]orkplaces . . . are becoming more fluid, with responsibilities shifting from one project to another. In these fluid environments, [i]t is not reasonable to expect that supervisor status can be accurately discerned solely from job descriptions or express grants of power from upper management."[1]

[1] "This is especially true in industries with [low wage] workers. An informal survey by the National Women's Law Center found that in ten [low income] industries, [lower level] supervisors without the authority to take tangible employment actions [nevertheless] had the authority to train new employees, assign tasks, give permission for breaks, set schedules, make teams, coach employees, and evaluate performance." J. Sheldon-Sherman, "The Effect of *Vance v. Ball State* in Title VII Litigation," 2021 U. Ill. L. Rev. 983, 1032. After the United States Supreme Court decided *Vance*, Congress attempted to restore through legislation the broader definition of supervisor embraced by the Equal Employment Opportunity Commission. See id., 1040–41 and n.359. Congress' proposed act recognized the reality for low wage workers: "Workers in industries including retail, restaurant, health care, housekeeping, and personal care, which may pay low wages and employ a large number of female workers, are particularly vulnerable to harassment by individuals who have the power to direct day-to-day work activities but lack the power to take tangible employment actions." (Internal quotation marks omitted.)

(Footnote omitted; internal quotation marks omitted.) J. Sheldon-Sherman, "The Effect of *Vance v. Ball State* in Title VII Litigation," 2021 U. Ill. L. Rev. 983, 1032; see also E. Lee, Note, "Simplicity v. Reality in the Workplace: Balancing the Aims of *Vance v. Ball State University* and the Fair Employment Protection Act," 67 Hastings L.J. 1769, 1787 (2016) ("[e]mployees across industries, especially [low wage] workers, find themselves 'between a rock and a hard place' when they experience harassment in the workplace—choosing between the risk of losing their job after reporting the harassment, and the risk of unsuccessfully litigating their claims under the narrow *Vance* standard"); Note, "Title VII—Employer Liability for Supervisor Harassment—*Vance v. Ball State University*," 127 Harv. L. Rev. 398, 405–407 (2013) (criticizing majority opinion in *Vance* for not considering superior-servant principle from agency law, which provides that, when "an employer's vicarious liability depends on the tortfeasor's 'superior' status, as defined in relation to the injured employee, that status does not depend on the tortfeasor's having the authority to hire or discharge the injured employee" (emphasis omitted; footnote omitted)).

Nonetheless, the majority adopts a narrow definition that allows employers to escape liability, even if the harasser had the authority to, for example, assign work, approve requests for leave, create the work schedule, provide training, and conduct performance reviews. Indeed, pursuant to the majority opinion, harassers with such control over their victims' working lives somehow are not aided in accomplishing the harassment by that very control. See *Faragher* v. *Boca Raton*, supra, 524

Id., 1032. "And it is precisely in these contexts—[in which] employees have limited options and harassers control significant daily work activities that affect economic and emotional well-being—that protection against workplace harassment should be paramount." Id., 1033.

U.S. 803 ("[w]hen a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw [on] his superior position over the people who report to him"). Because, in my view, the authority over a subordinate employee's day-to-day working conditions, and not solely the authority to take or recommend tangible employment actions, aids a harasser in the workplace, I agree with Justice Ginsburg's adoption of the more expansive definition of the term "supervisor" that had been promulgated by the United States Equal Employment Opportunities Commission (EEOC) prior to *Vance*. See U.S. Equal Employment Opportunity Commission, Enforcement Guidance: Vicarious Liability for Unlawful Harassment by Supervisors (last modified March 29, 2010) p. 4, available at http://www.eeoc.gov/policy/docs/harassment.pdf (last visited July 30, 2024).

Guided by the realities of the twenty-first century workplace, I conclude that the definition of "supervisor" for purposes of an employer's vicarious liability for hostile work environment claims under the state act should include an individual who directs an employee's day-to-day working conditions, in addition to one who is authorized to take tangible employment actions. The prospect of filing a hostile work environment complaint against an individual with the authority to affect an employee's day-to-day life at work by, for example, changing schedules, rejecting time off requests, assigning extra work, or giving a poor performance review is likely just as intimidating to an employee as filing a complaint against an individual who can take a tangible employment action. Indeed, in many cases, employees have regular interaction only with a superior who can direct their daily work activities, and not with a superior who can fire them. By removing these individuals from the definition of "supervisor," employers throughout the state "will have a diminished incentive" to train the

individuals who "actually interact" with the employees. (Internal quotation marks omitted.) *Vance* v. *Ball State University*, supra, 570 U.S. 468 (Ginsburg, J., dissenting); see M. Chamallas, "Two Very Different Stories: Vicarious Liability Under Tort and Title VII Law," 75 Ohio St. L.J. 1315, 1329 (2014) (negligence standard "is largely oblivious to systemic problems," whereas "strict liability provides greater incentives for employers to think [system wide] and to address the culture of the organization").

I agree with the plaintiff's argument that the remedial purpose of the state act weighs against adopting *Vance*'s unrealistically narrow definition of the term "supervisor." Although both the state act and its legislative history are silent on the definition of "supervisor," which is itself a term that is a product of the case law interpreting Title VII, a broader definition of "supervisor" that includes individuals who have the authority to direct daily work activities better effectuates "the noble purpose" of the state act, namely, "to create an effective machinery in this state for the elimination of discrimination in employment." 8 H.R. Proc., Pt. 7, 1959 Sess., p. 2584, remarks of Representative Robert Satter. In restricting the definition of the term "supervisor," the United States Supreme Court "[shut] from sight the robust protection against workplace discrimination Congress intended Title VII to secure." (Internal quotation marks omitted.) *Vance* v. *Ball State University*, supra, 570 U.S. 463 (Ginsburg, J., dissenting). Adopting the limited *Vance* definition for purposes of the state act frustrates the intent of the legislature by limiting the robust protections against workplace discrimination that the legislature envisioned in enacting the state act.

My most significant disagreement with the majority comes from its apparent determination that, without clear legislative history indicating otherwise, Connecticut antidiscrimination statutes should *always* be inter-

preted in accordance with federal antidiscrimination laws.[2] Instead, I am persuaded that "federal law defines

[2] The majority relies on *Commission on Human Rights & Opportunities* v. *Echo Hose Ambulance*, 322 Conn. 154, 160, 140 A.3d 190 (2016), in which this court observed that it previously had "recognized that our legislature's intent, in general, was to make [the state act] complement the provisions of Title VII." This oft recited proposition, however, is based on a long line of cases that misinterprets the legislature's intent and compounds the error through sheer repetition. I note that the legislature first enacted the state act in 1947, seventeen years before Congress passed Title VII in 1964. See General Statutes (Supp. 1947) §§ 1360i through 1366i. Thus, there can be no legislative history from that time discussing an intention to make the state act complement a nonexistent federal law. The idea that the legislature's intent was to make the state act complement Title VII comes from an amendment to the state act in 1967. At that time, Title VII prohibited discrimination in employment based on sex, but the state act did not. Thus, the legislature passed a bill that purported to "[bring] the [state] act in line with Title [VII] . . . ." 12 S. Proc., Pt. 3, 1967 Sess., p. 1091, remarks of Senator Frederick Pope, Jr. Thereafter, this court, in *Pik-Kwik Stores*, *Inc.* v. *Commission on Human Rights & Opportunities*, 170 Conn. 327, 365 A.2d 1210 (1976) (*Pik-Kwik*), concluded that, "[a]lthough the language of the federal statute and that of the [state act] differ slightly, it is clear that the intent of the legislature in adopting 1967 Public Acts, No. 426 (which extended the provisions of the [state act] . . . to prohibit discrimination on the basis of sex) was to make the [state act] coextensive with the federal [statute] . . . ." (Citation omitted.) Id., 331. In 1982, however, that quote from *Pik-Kwik* was truncated in *Wroblewski* v. *Lexington Gardens*, *Inc.*, 188 Conn. 44, 53, 448 A.2d 801 (1982), in which this court observed that it had "previously confirmed our legislature's intention 'to make the [state act] coextensive with the federal [statute].' " In my view, by truncating the quote from *Pik-Kwik*, this court's decision in *Wroblewski*, and the very lengthy line of cases that follows, misinterprets *Pik-Kwik* and the legislature's intention with respect to the state act. The legislature's desire to add sex as a protected class to bring the state act in line with Title VII is emphatically not the same as the legislature's declaration of its intention that the state act always complement Title VII. Indeed, had the legislature desired this court to follow federal case law in interpreting the state act, it could have clearly expressed that intention, as it has done in other areas, such as in the Connecticut Antitrust Act, General Statutes § 35-24 et seq., which expressly provides that "[i]t is the intent of the General Assembly that in construing sections 35-24 to 35-46, inclusive, the courts of this state shall be guided by interpretations given by the federal courts to federal antitrust statutes." General Statutes § 35-44b; see, e.g., *Tremont Public Advisors*, *LLC* v. *Connecticut Resources Recovery Authority*, 333 Conn. 672, 693, 217 A.3d 953 (2019) ("this court follow[s] federal precedent when [it] interpret[s] the [Connecticut Antitrust] [A]ct *unless the text of our antitrust statutes*, *or other pertinent state law*, *requires us to interpret it differently*" (emphasis in original; internal quotation marks omitted)). Thus, federal law

the beginning and not the end of our approach to the subject." (Internal quotation marks omitted.) *State* v. *Commission on Human Rights & Opportunities*, 211 Conn. 464, 470, 559 A.2d 1120 (1989); see, e.g., *Vollemans* v. *Wallingford*, 103 Conn. App. 188, 199, 928 A.2d 586 (2007) ("while often a source of great assistance and persuasive force . . . it is axiomatic that decisions of the United States Supreme Court are not binding on Connecticut courts tasked with interpreting [the] General Statutes" (citation omitted; internal quotation marks omitted)), aff'd, 289 Conn. 57, 956 A.2d 579 (2008). This court should, of course, rely on persuasive federal precedent, particularly when the federal interpretation supports an expansive reading of the state act. When the federal interpretation is narrow or restrictive, however, this court must remember that "we 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.) *Commission on Human Rights & Opportunities* v. *Savin Rock Condominium Assn., Inc.*, 273 Conn. 373, 386 n.11, 870 A.2d 457 (2005).

Like many standards in employment law developed by the United States Supreme Court, the definition of the term "supervisor" is not found in the statutory text of Title VII and was judicially articulated based on public policy considerations. See, e.g., *Faragher* v. *Boca Raton*, supra, 524 U.S. 804–805, 807–808 (*Ellerth/Faragher* affirmative defense was created by United States Supreme Court as result of policy considerations and has no express textual support in Title VII); *Meritor Savings Bank, FSB* v. *Vinson*, 477 U.S. 57, 67, 106 S. Ct. 2399, 91 L. Ed. 2d 49 (1986) (requirement that harass-

can be a guide but should not be a command, as we must remember that "Connecticut is the final arbiter of its own laws." *Johnson* v. *Manson*, 196 Conn. 309, 319, 493 A.2d 846 (1985), cert. denied, 474 U.S. 1063, 106 S. Ct. 813, 88 L. Ed. 2d 787 (1986).

ment "be sufficiently severe or pervasive" as to amount to actionable discrimination is standard created by United States Supreme Court); see also *Haskenhoff* v. *Homeland Energy Solutions, LLC*, 897 N.W.2d 553, 611–12 (Iowa 2017) (Appel, J., concurring in part and dissenting in part) (citing cases). In these cases, and in *Vance*, "the federal courts have imposed an analytical structure [on] statutes that is not directly drawn from the federal statutes." S. Sperino, "Revitalizing State Employment Discrimination Law," 20 Geo. Mason L. Rev. 545, 574 (2013). Therefore, as one scholar rightly noted, "there is greater reason to be skeptical about importing these concepts into state law." Id., 573. I am indeed skeptical about importing the narrow *Vance* definition into our state law because "it fails to effectuate both the legislative policy underlying the [state act] and the remedial nature thereof . . . ." *Vollemans* v. *Wallingford*, supra, 103 Conn. App. 200 n.10. Instead, *Vance* "forces the realities of the workplace into an [ill fitted] set of descriptions, definitions, and standards"; L. Davenport, Comment, "*Vance v. Ball State University* and the Ill-Fitted Supervisor/Co-Worker Dichotomy of Employer Liability," 52 Hous. L. Rev. 1431, 1433 (2015); see id., 1461; and "will [therefore] hinder efforts to stamp out discrimination in the workplace." *Vance* v. *Ball State University*, supra, 570 U.S. 468 (Ginsburg, J., dissenting).

My conclusion that the definition of supervisor should include both an individual authorized to undertake or recommend tangible employment decisions and one with authority to direct the employee's daily work activities also finds support in a decision from New Jersey, *Aguas* v. *State*, 220 N.J. 494, 528, 107 A.3d 1250 (2015), in which the New Jersey Supreme Court rejected the narrow *Vance* definition of supervisor in favor of the more expansive definition adopted by the EEOC. In *Aguas*, the plaintiff correction officer claimed that

two of her supervisors subjected her to sexual harassment in the workplace and sought to impute liability to their employer. See id., 499, 505–506. Because the term supervisor was not defined by New Jersey's antidiscrimination law or in its case law, the court considered both the EEOC and *Vance* definitions of the term. See id., 526–28. In declining "to adopt the restrictive definition of 'supervisor' prescribed by the [United States] Supreme Court majority in *Vance*," the New Jersey court concluded, among other things, that "[t]he EEOC definition takes into account the broad range of employer structures and factual settings in which . . . harassment occurs." Id., 528. Additionally, the court determined that "the more expansive definition of 'supervisor' furthers the paramount goal of the [New Jersey antidiscrimination law]: the eradication of sexual harassment in the workplace. It prompts employers to focus attention not only on an elite group of [decision makers] at the pinnacle of the organization, but on all employees granted the authority to direct the day-to-day responsibilities of subordinates, and to ensure that those employees are carefully selected and thoroughly trained." Id. In my view, a more expansive definition of "supervisor" would have the same salutary effects for employers and employees in Connecticut.

In sum, I conclude that the Appellate Court incorrectly applied the *Vance* definition of the term "supervisor" in determining whether the department employer, the state Department of Labor, was vicariously liable under the *Ellerth/Faragher* framework. Instead, for purposes of the state act, I would define a supervisor as an employee empowered by the employer (1) to undertake or recommend tangible employment decisions affecting the employee, or (2) to direct the employee's daily work activities. I therefore respectfully disagree with the majority's failure to consider that "[a] supervisor with authority to control subordinates' daily work

is no less aided in his harassment than is a supervisor with authority to fire, demote, or transfer." *Vance* v. *Ball State University*, supra, 570 U.S. 457–58 (Ginsburg, J., dissenting).

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

ROBERT ESPOSITO *v.* CITY OF STAMFORD ET AL. (SC 20928)

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

Syllabus

The plaintiff, the decedent's surviving spouse, appealed from the decision of the Compensation Review Board. The board had upheld the administrative law judge's denial of an award of statutory (§ 31-308 (b)) permanent partial disability benefits in connection with injuries that the decedent had sustained while working for the Stamford Police Department. The plaintiff claimed, inter alia, that the board had incorrectly concluded that the decedent's entitlement to permanent partial disability benefits did not vest before his death because, prior to his death, the decedent had reached maximum medical improvement as a matter of law, insofar as the decedent previously had been found to have a permanent incapacity qualifying him for statutory (§ 31-307 (c)) total incapacity benefits. *Held*:

A finding of a permanent injury under § 31-307 (c) does not entitle a workers' compensation claimant to permanency benefits under § 31-308 (b) as a matter of law, in the absence of a permanent partial disability rating or an agreement sufficient for a binding meeting of the minds that would furnish a basis for the requisite finding of maximum medical improvement.

The decedent's entitlement to permanency benefits under § 31-308 (b) did not vest before his death because the record did not establish that he had reached maximum medical improvement during his lifetime, even though he had been found to have a permanent injury under § 31-307 (c).

(*Three justices dissenting in one opinion*)

Argued April 22—officially released August 2, 2024*

* August 2, 2024, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Appeal from the decision of the administrative law judge for the Seventh District of the Workers' Compensation Commission, where Roseann Esposito was added as a plaintiff, denying the claim for permanent partial disability benefits, brought to the Compensation Review Board, which affirmed the decision of the administrative law judge, and the plaintiff Roseann Esposito appealed. *Affirmed.*

Steven G. Howe, for the appellant (plaintiff Roseann Esposito).

Scott W. Williams, for the appellees (defendants).

Opinion

ROBINSON, C. J. In this appeal, we consider whether a finding of a "permanent" injury entitling a workers' compensation claimant to total incapacity benefits under General Statutes § 31-307 (c) means that the claimant has reached maximum medical improvement as a matter of law, thus also entitling the claimant to permanent partial disability benefits (permanency benefits) under General Statutes § 31-308 (b). The plaintiff Roseann Esposito, who is the surviving spouse of the decedent and original plaintiff, Robert Esposito,[1] appeals[2] from the decision of the Compensation Review Board (board) affirming the decision of the administrative law judge for the Seventh District of the Workers'

[1] The decedent was the original plaintiff in this matter before the Workers' Compensation Commission. After his death, Roseann Esposito, his surviving spouse, was added as a plaintiff. For the sake of simplicity, we refer to Roseann Esposito as the plaintiff and Robert Esposito as the decedent.

[2] The plaintiff appealed from the decision of the Compensation Review Board to the Appellate Court; see General Statutes § 31-301b; and we transferred the appeal to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

Compensation Commission (commission),[3] who denied an award of permanency benefits. The board based its affirmance on its determination that the decedent had not reached maximum medical improvement during his lifetime. On appeal, the plaintiff claims, among other things, that the decedent, who had been employed as a police officer for the named defendant, the city of Stamford (city),[4] had reached maximum medical improvement prior to his death as a matter of law, insofar as he had been found to have a permanent incapacity qualifying him for benefits under § 31-307 (c). Guided by this court's recent decision in *Brennan* v. *Waterbury*, 331 Conn. 672, 697, 207 A.3d 1 (2019), we disagree with the plaintiff and, accordingly, affirm the decision of the board.

The record reveals the following relevant facts and procedural history. The decedent began working for the city's police department in 1976, at which time his physical examination indicated that his vision was 20/20 in both eyes. In 1982, in the course of his employment, the decedent fell and struck the back of his head on a concrete floor, losing consciousness. When he awoke, he experienced blurred vision in both eyes. James E. Pulkin, an ophthalmologist at Yale University, treated the decedent immediately for "a profound visual loss in both eyes," finding that "the best level of corrected

[3] As a result of General Statutes § 31-275d (a) (1), the administrative adjudicators for the commission became known as "administrative law judges," rather than their former title of "workers' compensation commissioners." Because this appeal includes decisions rendered both before and after October 1, 2021, which was the effective date of § 31-275d (a) (1), consistent with recent workers' compensation appeals, we refer to the commission's administrative adjudicators by their title at the time of the applicable decision. See, e.g., *Ajdini* v. *Frank Lill & Son, Inc.*, 349 Conn. 1, 3 n.1, 4–5, 312 A.3d 579 (2024); *Clark* v. *Waterford, Cohanzie Fire Dept.*, 346 Conn. 711, 716 n.4, 295 A.3d 889 (2023).

[4] PMA Management Corporation of New England, the third-party administrator for the city, also is a defendant.

vision in the right eye was 20/400 and finger counting at four inches in the left eye." (Internal quotation marks omitted.)

The decedent filed a claim for benefits with the commission. In 1984, at an informal hearing before the commission, the defendants agreed to provide total incapacity benefits to the decedent pursuant to General Statutes (Rev. to 1983) § 31-307 and, thereafter, began paying benefits of $531.03 per week. Subsequently, in 1985, the commissioner awarded the decedent total incapacity benefits pursuant to General Statutes (Rev. to 1985) § 31-307 "due to total and permanent loss of sight in both eyes." (Internal quotation marks omitted.) The decedent moved to Ohio in 1985 and began treatment with Bruce R. Jacobson, an ophthalmologist. Jacobson diagnosed the decedent with "a macular hole (cystic lesion) of the left eye with a visual acuity of 20/200 (uncorrected) and a visual acuity of the right eye of 20/200 (uncorrected)." One decade later, in 1995, Roland D. Carlson, an ophthalmologist, examined the decedent and reviewed medical reports provided by Jacobson, Abbas Sadeghian, a clinical psychologist, and Cyril Waynik, a psychiatrist. Carlson found that the decedent had "a macular hole in his left eye and vision of 20/200," which is equivalent to "one tenth or less of normal uncorrected vision." The decedent was then given a "bioptic telescope," which corrected his vision in his right eye to an acuity level of 20/40. Carlson, however, additionally found that the decedent suffered from a "hysterical component" that contributed to his inability to see, which is a condition known as "psychogenic blindness." Jacobson "agree[d] that [the decedent's] vision may [have been] complicated by the contribution of this psychogenic overlay" but opined that his ultimate "visual disability [was] equal to [one] having a purely organic cause."

The defendants filed a form 36[5] in April, 1998, contesting the decedent's continued entitlement to total incapacity benefits pursuant to § 31-307 (c). In June, 1998, the commissioner denied the defendants' form 36 and ordered the defendants to continue to pay benefits pursuant to § 31-307 (c) (1998 finding). In the 1998 finding, the commissioner found that the decedent had been receiving total incapacity benefits since 1984 due to his "total and permanent loss of sight or the reduction to one tenth or less of normal vision in both eyes," satisfying the § 31-307 (c) standard. The defendants did not challenge the 1998 finding or that order. The defendants continued to make total incapacity benefit payments pursuant to § 31-307 (c), with the applicable cost of living adjustments pursuant to General Statutes § 31-307a, from April, 1982, until the decedent's death in November, 2020.

In July, 2021, the plaintiff was added as a party at formal proceedings before the commission; she claimed that she was the decedent's surviving spouse and sole presumptive dependent, and sought permanency benefits pursuant to § 31-308 (b). The plaintiff argued that, as the surviving spouse, she was entitled to permanency benefits pursuant to § 31-308 (b) following the decedent's death, even though those benefits had never been paid to the decedent and he had never requested them during his lifetime. The plaintiff argued that she was a presumptive dependent, as defined by General Statutes § 31-275 (19), and that the decedent's bilateral eye condition had become permanent no later than the date of

[5] "A [f]orm 36 is a [statutorily required] notice to the [workers'] compensation commissioner and the [claimant] of the intention of the employer and its insurer to discontinue [or reduce] compensation payments. The filing of this notice and its approval by the commissioner are required by statute in order properly to discontinue [or reduce] payments." (Internal quotation marks omitted.) *Gardner* v. *Dept. of Mental Health & Addiction Services*, 223 Conn. App. 221, 223 n.2, 308 A.3d 550, cert. granted, 348 Conn. 954, 309 A.3d 304 (2024).

the 1998 finding, and as early as 1984. Additionally, the plaintiff claimed that the decedent's right to permanency benefits pursuant to § 31-308 (b) vested once his condition became permanent, thus entitling the plaintiff, as his surviving spouse, to those vested permanency benefits.

Considering these claims, the administrative law judge concluded that the decedent's entitlement to permanency benefits under § 31-308 (b) had vested no later than the date of the 1998 finding and that the decedent had reached maximum medical improvement by June, 1998, entitling him to a permanency award of 235 weeks of benefits for each eye. However, the administrative law judge also concluded that the defendants were entitled to a credit against any permanency award "for all indemnity benefits paid after the date of maximum medical improvement" because the amount of total incapacity benefits paid by the defendants was greater than the amount of permanency benefits owed to the decedent. Therefore, the administrative law judge denied and dismissed the plaintiff's claim for permanency benefits.[6]

The plaintiff appealed from the decision of the administrative law judge to the board. On appeal, the plaintiff claimed that the administrative law judge "erroneously applied the law" in concluding that the defendants were entitled to a credit against the unpaid permanency benefits. The board did not decide this claim, instead affirming

[6] In objecting to the plaintiff's claim for permanency benefits, the defendants also contended that the date of injury rule governed the plaintiff's dependency rights and that the plaintiff's and decedent's divorce in 1992 broke the legal chain of marriage, thus terminating any right the plaintiff might have had, even though they had remarried each other in 2010 and remained married until the decedent's death in 2020. The administrative law judge did not decide the issue of whether the divorce affected the plaintiff's status as the presumptive dependent of the decedent because it was "not material to the outcome of this case, as there [were] no permanency benefits still owing."

the administrative law judge's decision on alternative grounds. Specifically, quoting from this court's decision in *Brennan* v. *Waterbury*, supra, 331 Conn. 697, the board concluded that, despite the decedent's "inchoate entitlement to 235 weeks of permanency benefits for each eye," the decedent nevertheless was not entitled to permanency benefits because the record lacked proof of a "concomitant assignment or award of a permanent partial disability rating, or 'an agreement between the parties sufficient to establish a binding meeting of the minds.' " Observing that the 1998 finding lacked any reference to a written or oral agreement for the payment of permanency benefits, the board concluded that the finding of statutory total incapacity did not create "an automatic entitlement to [permanency benefits] by operation of law." The board further concluded that, even if the 1998 finding were construed as a finding of maximum medical improvement, the commencement date of the credit could not be the date that the finding was issued in June, 1998, because that calculation would depend on "the specific circumstances of the claim along with consideration of the prohibition against double recovery." Accordingly, the board affirmed the administrative law judge's decision dismissing and denying the plaintiff's claim for permanency benefits. This appeal followed.

On appeal, the plaintiff claims that the board incorrectly concluded that the decedent's entitlement to permanency benefits did not vest before his death because he had reached maximum medical improvement as of the date of the 1998 finding, entitling him to permanency benefits as a matter of law.[7] The plaintiff contends that

[7] Addressing the other matters raised before the board and the administrative law judge, the plaintiff also claims that (1) the defendants are not entitled to a credit against the permanency benefits for the total incapacity benefits they paid because §§ 31-307 (c) and 31-308 (b) each compensate the claimant for distinct losses, meaning that the payment of both types of benefits was not an impermissible double recovery, and (2) she is a presumptive dependent entitled to the vested permanency benefits because, despite

the board incorrectly relied on the decedent's failure to request a permanency award during his lifetime and on the absence of an order for the payment of permanency benefits. Additionally, the plaintiff argues that a decedent need only have a permanent incapacity under § 31-307 (c) to satisfy § 31-308 (b), and that the fact that the decedent's disability spanned many years was enough to render his condition permanent. The defendants contend in response that the decedent's entitlement to permanency benefits did not vest before his death because the record lacks evidence of the decedent's maximum medical improvement. The defendants argue that the 1998 finding did not satisfy the § 31-308 (b) standard because there was no medical report addressing maximum medical improvement and because the parties had never discussed a permanent partial disability rating during the decedent's lifetime. We agree with the defendants and conclude that the decedent's entitlement to permanency benefits under § 31-308 (b) did not vest before his death because the record does not establish that he had reached maximum medical improvement, even though he had been found to have a permanent injury under § 31-307 (c).

"The principles that govern our standard of review in workers' compensation appeals are well established. The conclusions drawn by [the commissioner] from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them. . . . [Moreover, it] is well established that [a]lthough not dispositive, we accord great weight to the construction given to the workers' compensation

their earlier divorce, she was married to the decedent at the time of his injury and had remarried him prior to his death. See footnote 6 of this opinion. Given our conclusion that the decedent was not entitled to permanency benefits under § 31-308 (b), we need not address these additional claims.

statutes by the commissioner and [the] board. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is ordinarily involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . We have determined, therefore, that the traditional deference accorded to an agency's interpretation of a statutory term is unwarranted when the construction of a statute . . . has not previously been subjected to judicial scrutiny [or to] . . . a governmental agency's time-tested interpretation . . . ." (Internal quotation marks omitted.) *Coughlin* v. *Stamford Fire Dept.*, 334 Conn. 857, 862–63, 224 A.3d 1161 (2020).

"In addition, we are mindful of the proposition that all workers' compensation legislation, because of its remedial nature, should be broadly construed in favor of disabled employees." (Internal quotation marks omitted.) Id., 863. "It is axiomatic that we follow the plain meaning rule set forth in General Statutes § 1-2z in construing statutes . . . ." *Clark* v. *Waterford*, *Cohanzie Fire Dept.*, 346 Conn. 711, 725, 295 A.3d 889 (2023). Because the present case does not present a time-tested agency interpretation, and because no appellate court has considered whether a finding of a permanent injury under § 31-307 (c) entitles a claimant to § 31-308 (b) permanency benefits as a matter of law, our review is plenary.

By way of background, workers' compensation claimants may receive either "special" or "specific" benefits, depending on the extent and nature of their injuries. Special benefits, such as temporary, total incapacity benefits, "continue only as long as there is an impairment of wage earning power . . . ." *Brennan* v. *Waterbury*, supra, 331 Conn. 685. In contrast, specific benefits, like permanency benefits, are awarded "for a fixed period in relation to the degree of impairment of a body part." Id.

Section 31-307 provides for temporary, total incapacity benefits, which are considered special benefits. Id. Section 31-307 (a) provides in relevant part: "If any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury . . . ." Section 31-307 (c) enumerates a list of injuries that are considered to cause total incapacity, including "[t]otal and permanent loss of sight of both eyes, or the reduction to one-tenth or less of normal vision . . . ." General Statutes § 31-307 (c) (1). The statute is designed to compensate claimants for the loss of earning capacity, with compensation amounts dependent on the capacity to work. See *Gardner* v. *Dept. of Mental Health & Addiction Services*, 223 Conn. App. 221, 232, 308 A.3d 550, cert. granted, 348 Conn. 954, 309 A.3d 304 (2024).

In contrast, § 31-308 authorizes the payment of permanent partial disability benefits, or permanency benefits. Injured employees who qualify for permanency benefits receive "a weekly compensation equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by the injured employee before his injury . . . ." General Statutes § 31-308 (a). Subsection (b) of § 31-308 lists injuries that qualify under the statute for permanency benefits and includes, for one eye, "[c]omplete and permanent loss of sight in, or reduction of sight to one-tenth or less of normal vision . . . ." The statute is intended to compensate injured employees "for the loss, or loss of use, of a body part." *Marandino* v. *Prometheus Pharmacy*, 294 Conn. 564, 577, 986 A.2d 1023 (2010); see *Gardner* v. *Dept. of Mental Health & Addiction Services*, supra, 223 Conn. App. 236–37. Pursuant to § 31-308 (d), in the event of a claim-

ant's death, such benefits may be paid to his surviving spouse or his presumptive dependent, as defined by § 31-275 (19). See *Churchville* v. *Bruce R. Daly Mechanical Contractor*, 299 Conn. 185, 191–92, 8 A.3d 507 (2010).

It is well settled that, pursuant to General Statutes § 31-295 (c), a claimant's entitlement to permanency benefits under § 31-308 (b) vests once the claimant has reached maximum medical improvement. See, e.g., *Brennan* v. *Waterbury*, supra, 331 Conn. 696; *Gardner* v. *Dept. of Mental Health & Addiction Services*, supra, 223 Conn. App. 237–38; see also *McCurdy* v. *State*, 227 Conn. 261, 268, 630 A.2d 64 (1993); *Osterlund* v. *State*, 129 Conn. 591, 598, 30 A.2d 393 (1943). The right to permanency benefits automatically vests once maximum medical improvement is reached, even if the claimant has not affirmatively requested those benefits. *Churchville* v. *Bruce R. Daly Mechanical Contractor*, supra, 299 Conn. 191. A finding of maximum medical improvement requires a determination of the specific date that a claimant has reached maximum medical improvement; that date is significant for two reasons. First, the date of maximum medical improvement is when "the *right* to permanent disability benefits . . . is established . . . ." (Emphasis in original.) *Brennan* v. *Waterbury*, supra, 695. Second, that date establishes the point at which "the *degree* of permanent impairment (loss of, or loss of use of a body part) can be assessed, which will determine the employer's payment obligations . . . ." (Emphasis in original.) Id., 696.

Although permanency benefits may be awarded posthumously, such an award requires the existence of a supporting record containing a finding of maximum medical improvement by permanent partial disability ratings or separate reports or medical evaluations expressly stating that the claimant has reached maximum medical improvement. See *Churchville* v. *Bruce R.*

Daly Mechanical Contractor, supra, 299 Conn. 188–90 (record established that claimant underwent multiple medical evaluations to determine extent of his disability, and multiple physicians found that he had reached some percentage of maximum medical improvement); *McCurdy* v. *State*, supra, 227 Conn. 263–64 (claimant was assigned permanent partial disability rating of 70 percent, and separate report stated that he had reached maximum medical improvement prior to his death).

The "rule against double compensation prohibits [the] concurrent payment" of total incapacity benefits under § 31-307 (c) and permanency benefits under § 31-308 (b) for "the same incident." *Paternostro* v. *Edward Coon Co.*, 217 Conn. 42, 49, 583 A.2d 1293 (1991). Rather, § 31-308 permanency benefits are paid consecutively to § 31-307 total incapacity benefits because both statutes compensate an employee for a different type of loss. See *Olmstead* v. *Lamphier*, 93 Conn. 20, 22–23, 104 A. 488 (1918); see also *Paternostro* v. *Edward Coon Co.*, supra, 47–48 (discussing how new language added to predecessor statute of § 31-308 (b) did not overrule this court's previous holding that total incapacity benefits and permanency benefits can be paid consecutively). Therefore, an award of § 31-307 total incapacity benefits does not discharge the employer's obligation to pay § 31-308 permanency benefits sometime in the future. *Cappellino* v. *Cheshire*, 226 Conn. 569, 578, 628 A.2d 595 (1993).

In determining whether a claimant has established maximum medical improvement for purposes of permanency benefits under § 31-308, we find instructive our recent decision in *Brennan* v. *Waterbury*, supra, 331 Conn. 672. In *Brennan*, the commissioner had agreed with the claim that the decedent, Thomas Brennan, had clearly reached maximum medical improvement during his lifetime and ordered the defendant city to pay the executor of Brennan's estate benefits for 80 percent

permanent partial disability of Brennan's heart pursuant to the heart and hypertension statute, General Statutes § 7-433c, and § 31-308. See id., 679–80, 693–94. We concluded that permanent disability benefits can mature "only after the degree of permanency has been fixed by way of an award or an agreement between the parties sufficient to establish a binding meeting of the minds" and, accordingly, remanded the case to the commissioner for this finding. Id., 697; see id., 700. Remand to the commissioner for additional findings was required because we could not "state with certainty that the unpaid portion of the 80 percent [permanency] benefits necessarily matured before [Brennan's] death," insofar as there was a lack of necessary findings on critical issues. Id., 694. First, the commissioner's award of benefits simply stated that Brennan had established a compensable condition under § 7-433c but did not state that maximum medical improvement had been reached or that there was a permanent partial disability rating; three medical experts gave assessments of Brennan's disability varying from 50 to 80 percent. See id., 676–77, 698. Second, there was no voluntary agreement that had been submitted to the commissioner for approval during the decedent's lifetime, and a draft agreement that had been presented was not signed by the defendant city. See id., 698. Third, there was no evidence of a meeting of the minds on the degree of permanency to be assigned. See id., 699. Therefore, we remanded the case to the commissioner to determine the amount of benefits due. Id., 700.

Guided by *Brennan*, we now consider whether the record in the present case establishes that the decedent achieved maximum medical improvement during his lifetime, thus entitling him to permanency benefits under § 31-308.[8] We conclude that the decedent did

[8] The dissent asserts that we misread *Brennan* because the "central issue in the present case involves when benefits under § 31-308 (b) *vest*, not when they *mature*," insofar as "benefits vest when the claimant's injury becomes

not reach maximum medical improvement during his lifetime because the record lacks the requisite finding to that effect, as contemplated by *Brennan*. See id., 697.

First, the record lacks a clear permanent partial disability rating, or an agreement to that effect between the decedent and the defendants that would furnish a basis for the requisite finding of maximum medical improvement. See id., 698–99. Although the decedent's physicians characterized his condition as "one tenth or less of normal uncorrected vision" when he was originally examined and treated between 1982 and 1995, there is no other indication that the physicians determined that that particular degree of vision loss constituted any percentage of maximum medical improvement. Nor was there an agreement between the parties establishing whether the decedent had reached any percentage of maximum medical improvement. The absence of either of these items from the record is particularly

permanent; they mature when they become payable. The issue of maturation does not relate to *when* the benefits become an entitlement, but *who has the right to receive the benefits* to which the claimant is entitled after death—the estate, or the dependents." (Emphasis in original.) Part II B of the dissenting opinion. We disagree with the dissent's reading of *Brennan* on this point. In *Brennan*, we observed that "this court occasionally has stated that the benefits did not 'accrue' because there had been no determination whether, or the date [on] which, the claimant reached maximum medical improvement," and stated: "We do not read these references to accrual to mean that [Brennan's] benefits would have matured if that date had been established irrespective of whether the degree of permanent disability had been established. Rather, *we construe such references as equivalent to vesting, in that the right to such benefits would be established when the date is fixed*. An unfortunate feature of our workers' compensation jurisprudence is a lack of consistency in terminology." (Emphasis added.) *Brennan* v. *Waterbury*, supra, 331 Conn. 695 n.17. Regardless of the terminology in the workers' compensation lexicon, *Brennan* indicates that the key finding for establishing entitlement to § 31-308 (b) permanency benefits—which is lacking in this case—is the degree of permanency via establishing maximum medical improvement. See id., 695–96. Who is entitled to receive those benefits after the death of the original claimant, and at which point, is an issue that we simply do not reach given the lack of that threshold finding. See footnotes 6 and 7 of this opinion.

significant in light of the decedent's psychogenic blindness diagnosis, which suggests that there could well have been room for the improvement of his condition.

Relying on this court's decisions in *McCurdy* v. *State*, supra, 227 Conn. 261, and *Churchville* v. *Bruce R. Daly Mechanical Contractor*, supra, 299 Conn. 185, the plaintiff argues that the board improperly focused on the decedent's failure to seek permanency benefits during his lifetime and the lack of any predeath order or award of benefits. She contends that, under *McCurdy* and *Churchville*, the decedent had reached maximum medical improvement and became entitled to permanency benefits during his lifetime as a matter of law, thus rendering unnecessary an order for the payment of permanency benefits. Although we agree with the plaintiff that this court's decisions in *McCurdy* and *Churchville* do not require a decedent to have affirmatively requested permanency benefits during his or her lifetime in order for the decedent's surviving spouse to receive the benefits posthumously, those cases are distinguishable from the present case. In the present case, the board's decision reflected that permanency, including the degree of disability, had not been established given the lack of a finding of maximum medical improvement or an agreement between the parties. In contrast, in both *McCurdy* and *Churchville*, there was no dispute as to whether the decedent had reached maximum medical improvement. See *Churchville* v. *Bruce R. Daly Mechanical Contractor*, supra, 189–90 (board had upheld commissioner's finding that decedent "suffered a 10 percent permanent partial disability to his right shoulder and a 32 percent permanent partial disability to his lumbar spine"); *McCurdy* v. *State*, supra, 266–67 (there was no dispute as to degree of disability and realization of maximum medical improvement when decedent was rated by phy-

sician as having 70 percent permanent partial disability). Thus, the factual records in both *McCurdy* and *Churchville* bore some consensus of a permanency rating or a finding by the commissioner that signified a meeting of the minds, consistent with the standard later articulated in *Brennan* v. *Waterbury*, supra, 331 Conn. 697.

The plaintiff, joined by the dissent, also contends that the 1998 finding, which was echoed by the administrative law judge in the decision at issue in this appeal, established that the decedent had reached maximum medical improvement, despite the lack of express language to that effect in the finding. See part II A and footnote 9 of the dissenting opinion. We disagree. In the 1998 finding, the commissioner identified the issue to be "[t]he approval or denial of a form 36 filed and received on April 1, 1998, and alleging that [the decedent's] permanent total disability status is other than it was in 1984." The commissioner ultimately concluded that the decedent's condition continued to meet the § 31-307 (c) standard and ordered the defendants to continue making payments pursuant to that statute. In making the 1998 finding, the commissioner applied only the § 31-307 (c) standard and did not consider maximum medical improvement for purposes of § 31-308 (b), despite characterizing the decedent's condition as the "total and permanent loss of sight or the reduction to one tenth or less of normal vision in both eyes." Accordingly, the commissioner denied the defendants' form 36, which challenged the decedent's entitlement to total incapacity benefits under § 31-307 (c). The record lacked then, as it lacks now, any medical confirmation of a permanency rating, any consideration of how the hysterical component affected or would have affected that rating, or any form of agreement between the parties regarding the extent of the disability. Accordingly, that the record established an entitlement to § 31-307

(c) benefits does not mean that it established the maximum medical improvement required for the award of benefits pursuant to § 31-308 (b).[9] See *Cappellino* v. *Cheshire*, supra, 226 Conn. 578 (observing that "[the] two types of benefits [under §§ 31-307 and 31-308] compensate an employee for different types of loss" in concluding that "the payment of temporary total [incapacity] benefits [does not] automatically [discharge the employer's] obligation under [a] voluntary agreement to pay [permanency] benefits").

The plaintiff argues, and the dissent also asserts, that, because both §§ 31-307 (c) and 31-308 (b) use identical language regarding an eye disability, qualifying for one

[9] The dissent characterizes our conclusion as the product of failing to give appropriate appellate deference, as the factual findings of an administrative adjudicator, to the administrative law judge's conclusion that the decedent had reached maximum medical improvement and that his right to permanency benefits vested by June 9, 1998—the date of the 1998 finding about the permanency of the decedent's vision loss. See part II A of the dissenting opinion; see, e.g., *Coughlin* v. *Stamford Fire Dept.*, supra, 334 Conn. 862–63; *Birnie* v. *Electric Boat Corp.*, 288 Conn. 392, 404, 953 A.2d 28 (2008). We respectfully disagree with the dissent's characterization of our analysis as failing to afford proper appellate deference to the administrative law judge's 2022 decision. Unlike the dissent, we do not read the administrative law judge's 2022 decision as finding new facts but, instead, as giving legal effect to the 1998 finding concerning the plaintiff's claim for permanency benefits under § 31-308 (b). Put differently, rather than considering the simpler appellate question of whether the 1998 finding is grounded in the factual record—a proposition with which we have no quarrel with the dissent—the actual question in this appeal is about the effect of the 1998 finding concerning the § 31-308 (b) claim. It distills to a question of preclusion, given the difference in the applicable legal standards. See *Birnie* v. *Electric Boat Corp.*, supra, 413. Because the commissioner was not asked to, and did not, consider what has become the critical question of maximum medical improvement in making the 1998 finding, our decision not to give it preclusive effect on that issue simply does not amount to failing to give the administrative law judge's 2022 decision the appropriate level of appellate deference. To the extent that this issue may distill to a simple question of appellate deference to the fact finder—as the dissent sees it—we observe that the lack of clarity in the plaintiff's briefing on this point, compounded by the lack of a reply brief, contributes to our understanding of the issue as a question of law.

benefit entitles a claimant to qualify for the other as a matter of law. See part II A of the dissenting opinion. The plaintiff also contends that the lack of "maximum medical improvement" language in § 31-308 (b) means that having a permanent incapacity under § 31-307 (c) is sufficient to comply with § 31-308 (b). However, both propositions are inconsistent with our long established case law. First, there is no case law suggesting that qualification for benefits under § 31-307 (c) similarly qualifies a claimant for permanency benefits under § 31-308 (b). Instead, *Brennan* states that permanency benefits mature under § 31-308 only *after* the degree of permanency is fixed by either an award or an agreement between the parties, which is a standard that does not apply to § 31-307 benefits. See *Brennan* v. *Waterbury*, supra, 331 Conn. 697. Therefore, there is no qualification as a matter of law, despite some general similarity between the two statutes and particularly the injuries that they cover. See *Vitti* v. *Milford*, 336 Conn. 654, 666, 249 A.3d 726 (2020) ("a holding that § 31-308 (b) is triggered automatically upon the removal of a native organ, without regard to the ameliorative effects of a transplant, would be inconsistent with nearly one century of case law governing the concept of maximum medical improvement"). Second, *Brennan* did not concern a § 31-307 claim and, instead, considered the proof necessary to establish maximum medical improvement for § 31-308 purposes, even though the statute itself does not expressly require proof of maximum medical improvement to establish an entitlement to benefits. See *Brennan* v. *Waterbury*, supra, 679, 696–97. *Brennan*'s requirement of a meeting of the minds as to a clear permanency rating via an award or an agreement between the parties ensures that (1) the claimant is receiving the full and correct amount of benefits that he or she is entitled to, and (2) the employer is put on notice of any potential change in benefits. See id., 697.

Finally, the plaintiff argues that, because the decedent suffered from a compensable injury that did not change in degree for sixteen years, his injury necessarily constitutes a complete and permanent disability for purposes of § 31-308. We disagree. That there was no further updating of the decedent's medical record with respect to his eye injuries between 1995 and his death in 2020 does not mean as a matter of law that his condition remained unchanged since 1984. This is particularly important given the 1986 diagnosis of psychogenic blindness, which could well have affected a permanency rating. Although there is evidence in the record that might well ultimately support a finding of maximum medical improvement, we do not agree with the plaintiff and the dissent that the 1998 finding, as viewed by the administrative law judge, conclusively established the maximum medical improvement required for an award of permanency benefits under § 31-308 (b). See part II A of the dissenting opinion.

Accordingly, we conclude that a finding of total incapacity pursuant to § 31-307 (c) does not create an entitlement to permanency benefits under § 31-308 (b) as a matter of law, in the absence of a permanency finding or an agreement sufficient for a binding meeting of the minds within the meaning of *Brennan* v. *Waterbury*, supra, 331 Conn. 697. Because the record does not establish that the decedent had reached maximum medical improvement, thus entitling him to permanency benefits pursuant to § 31-308, we need not reach the plaintiff's remaining claims, or the alternative grounds on which the board relied in affirming the decision of the administrative law judge. See footnotes 6 and 7 of this opinion.

The decision of the Compensation Review Board is affirmed.

In this opinion D'AURIA, MULLINS and DANNEHY, Js., concurred.

ECKER, J., with whom McDONALD and ALEXANDER, Js., join, dissenting. Properly construing and applying Connecticut workers' compensation law can be a challenge due to the labyrinthine statutes and intricate case law that has attached to the statutory framework over the years. The present case, however, can be resolved by straightforward application of the relevant statutes and the basic principles underlying them. In my view, the majority's analysis departs from the applicable statutory directives, overlooking the operative principles established by those statutes, and misinterpreting the pertinent case law, especially our recent decision in *Brennan* v. *Waterbury*, 331 Conn. 672, 207 A.3d 1 (2019). I respectfully dissent.

I

The primary issue raised in this appeal is whether the decedent, Robert Esposito,[1] was entitled to permanent disability benefits under General Statutes § 31-308 (b) at the time of his death in 2020.[2] On March 22, 2022, following a formal hearing, the administrative law judge for the Seventh District of the Workers' Compensation

[1] As the majority notes, "[t]he decedent was the original plaintiff in this matter before the Workers' Compensation Commission. After his death, Roseann Esposito, his surviving spouse, was added as a plaintiff." Footnote 1 of the majority opinion. Like the majority, I refer to Roseann Esposito as the plaintiff and Robert Esposito as the decedent for the sake of simplicity.

[2] Two additional issues arise if the decedent was entitled to permanent disability benefits under § 31-308 (b): (1) whether the plaintiff, Roseann Esposito, was entitled to receive those benefits as the decedent's surviving spouse at the time of his death, and (2) whether the defendants—the city of Stamford and its third-party administrator for workers' compensation benefits, PMA Management Corporation of New England—were entitled to a credit against any such permanent disability award for incapacity payments made to the decedent pursuant to General Statutes § 31-307 (c) from the date that his injuries became permanent in 1998 until the date of his death in 2020. See footnote 17 of this opinion.

Commission found that the decedent's loss of vision in both eyes had become a permanent condition and, therefore, that his entitlement to permanent disability benefits pursuant to § 31-308 (b) had vested no later than June 9, 1998.[3] The administrative law judge also concluded, however, that the defendants—the city of Stamford (city) and its third-party administrator for workers' compensation benefits, PMA Management Corporation of New England—were entitled to an offsetting credit for total incapacity benefits paid to the decedent during his lifetime under General Statutes § 31-307 (c), with the net result that no actual benefits were payable because the amount of the credit exceeded the amount of any benefits due. The Compensation Review Board (board) upheld the award but did so on the alternative ground that the decedent's "inchoate entitlement to 235 weeks of permanency benefits for each eye" never vested because the record contained no proof of an "assignment or award of a permanent partial disability rating or an agreement between the parties" establishing such a rating. (Internal quotation marks omitted.)

Four foundational points require reversal of the board's decision.

First, it is axiomatic that the two categories of workers' compensation benefits under consideration serve entirely different purposes, and, as such, both types of

[3] I emphasize at the outset that the award under review in this case is *not* the award of permanent incapacity benefits made by Workers' Compensation Commissioner Leonard S. Paoletta on June 9, 1998. Rather, the award at issue is the award of permanent disability benefits made by Administrative Law Judge Randy L. Cohen on March 22, 2022.

Like the majority, I refer to Commissioner Paoletta as the commissioner and to Administrative Law Judge Cohen as the administrative law judge, in accordance with the titles given to administrative adjudicators at the time Commissioner Paoletta and Administrative Law Judge Cohen rendered their respective findings and awards. See footnote 3 of the majority opinion; see also General Statutes § 31-275d.

benefits are payable for the same injury to the same worker under our workers' compensation laws.[4] Section 31-307 benefits, properly known as total incapacity benefits, provide compensation for wages lost when an employee is incapacitated by a work related injury to a degree that the employee is completely unable to work as a result. See General Statutes § 31-307 (a) ("[i]f any injury for which compensation is provided under the provisions of this chapter results in total incapacity to work, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the injured employee's average weekly earnings as of the date of the injury");[5] see also *Churchville* v. *Bruce R. Daly Mechanical Contractor*, 299 Conn. 185, 193, 8 A.3d 507 (2010) (noting that "[i]ncapacity, as that term is used under the Workers' Compensation Act, means incapacity to work, as distinguished from the loss or loss of use of a member of the body," and that "[e]ntitlement to incapacity benefits depends on the employee's capacity to work"). In this case, the decedent, during his lifetime, was paid total incapacity benefits under subsection (c) of § 31-307, which deems six particular injuries—including the injury sustained by the decedent in this case, namely, the "[t]otal and permanent loss of

[4] As we have pointed out previously, our past cases sometimes have used imprecise language, which has generated confusion. See *Brennan* v. *Waterbury*, supra, 331 Conn. 695 n.17 ("[a]n unfortunate feature of our workers' compensation jurisprudence is a lack of consistency in terminology"). When we use terms like "disability," "incapacity," "vested," "matured," "owed," or "due" imprecisely in these cases, we invite confusion. Courts, including this one, must take special care to adhere to uniform terminology if we hope to achieve and maintain doctrinal clarity.

[5] The Workers' Compensation Act also provides benefits for partial incapacity caused by a work related injury. See General Statutes § 31-308 (a) ("[i]f any injury for which compensation is provided under the provisions of this chapter results in partial incapacity, the injured employee shall be paid a weekly compensation equal to seventy-five per cent of the difference between the wages currently earned by an employee in a position comparable to the position held by the injured employee before his injury"). Section 31-308 (a) benefits were not sought or awarded in this case.

sight of both eyes, or the reduction to one-tenth or less of normal vision"—to be injuries that "shall be considered as causing total incapacity" and which mandates that "compensation shall be paid accordingly . . . ." General Statutes § 31-307 (c) (1).

Section 31-308 (b) benefits, unlike total incapacity benefits, do not compensate the claimant for loss of earnings. Instead, § 31-308 (b) benefits, properly known as disability benefits, compensate an injured employee for the loss (or loss of use) of a body part or organ,[6] and are paid in recognition of the fact that a loss of

[6] Section 31-308 (b) provides benefits for the total or partial disability of a lengthy list of particular body parts and bodily functions (which the statute refers to as "the member or organ"). Total disability benefits are awarded for the loss of (or "the complete and permanent loss of use of") the injured member or organ and are calculated based on the number of weeks assigned by the statute to that particular member or organ. General Statutes § 31-308 (b). To use as an example the injury sustained by the decedent in the present case, the version of § 31-308 (b) in effect at the time of the injury to the decedent in 1982 provided that the "complete and permanent loss of the sight of one eye, or the reduction in one eye to one-tenth or less of normal vision" entitled the claimant to 235 weeks of compensation. General Statutes (Rev. to 1981) § 31-308 (b) (7). A claimant with a permanent total disability under this criterion is eligible to receive total disability payments equal to 235 multiplied by the claimant's weekly rate of compensation, which the statute provides is "sixty-six and two-thirds per cent of the average weekly earnings of the injured employee," with specified adjustments. General Statutes (Rev. to 1981) § 31-308 (b). This explains why the administrative law judge in the present case concluded that, "pursuant to § 31-308 (b) and the permanency schedule that was in effect on the date of [the decedent's] injury," the decedent "was entitled to an award of 235 weeks for each eye."

In addition to creating an entitlement to mandatory benefits for permanent total disability, § 31-308 (b) also gives the administrative law judge the discretion to award compensation to an injured employee who suffers only "a permanent partial loss of the use of a member," or whose "injury results in a permanent partial loss of function . . . ." The amount of permanent partial disability benefits is calculated by multiplying the award for total disability by the percentage of disability assigned or awarded. For example, if the claimant has lost the use of 50 percent of one eye, the administrative law judge would have been authorized to award the claimant 117.5 weeks of partial disability benefits (50 percent of 235 weeks). The injury in the present case involves a total disability; partial disability benefits were not sought or awarded in this case.

earnings is not the only harm sustained by a worker whose injury is permanent. "Compensation for the disability takes the form of payment of medical expenses . . . [as well as] specific indemnity awards, which compensate the injured employee for the lifetime handicap that results from the permanent loss of, or loss of use of, a scheduled body part." (Citation omitted.) *Churchville* v. *Bruce R. Daly Mechanical Contractor*, supra, 299 Conn. 192; see id. (citing § 31-308 (b) as example of specific indemnity award that compensates employee for "[the] loss of or [the] loss of use of [a] member [of the body]"); see also *Brennan* v. *Waterbury*, supra, 331 Conn. 693 n.16 (quoting *Churchville* for proposition that " 'it is clear that these two types of benefits [namely, incapacity and disability benefits] compensate an employee for different types of loss' "); R. Carter et al., 19 Connecticut Practice Series: Workers' Compensation Law (2008) § 8:77, p. 352 ("Unlike total [incapacity] benefits payable under . . . § 31-307, temporary partial disability benefits payable under . . . § 31-308 (a), or wage loss benefits payable under [General Statutes] § 31-308a, permanent partial disability benefits [under § 31-308 (b)] are not a substitute for lost earning capacity. Early in the history of the [Workers' Compensation] Act, [this] [c]ourt emphasized that permanent partial disability payments [under § 31-308 (b)] are not wage replacement benefits, but are designed to compensate an injured employee for the handicap resulting from a workplace injury.").

The second foundational point, which logically follows from the first, is that these two types of benefits are not mutually exclusive. Indeed, § 31-308 expressly provides that permanent disability benefits provided thereunder shall be "*in addition to the usual compensation for total incapacity* but in lieu of all other payments for compensation . . . ." (Emphasis added.) General Statutes § 31-308 (b); see *Churchville* v. *Bruce*

R. Daly Mechanical Contractor, supra, 299 Conn. 192 ("[b]enefits available under the [Workers' Compensation Act] serve the dual function of compensating for the disability arising from the injury and for the loss of earning power resulting from that injury" (internal quotation marks omitted)); *Churchville* v. *Bruce R. Daly Mechanical Contractor*, supra, 193 ("We have noted that § 31-308 specifically provides that compensation for permanent partial disability shall be in addition to the usual compensation for total incapacity [under § 31-307]. . . . [I]t is clear that these two types of benefits compensate an employee for different types of loss . . . and that the payment of . . . § 31-307 temporary total [incapacity] benefits does not discharge the obligation to pay § 31-308 permanent partial disability benefits at some point in the future." (Citations omitted; internal quotation marks omitted.)).

The limitation on these dual statutory entitlements is that total incapacity payments and permanent disability benefits cannot be received concurrently; only successive payments are permissible. See *Paternostro* v. *Edward Coon Co.*, 217 Conn. 42, 49, 583 A.2d 1293 (1991) (concluding "that the rule against double compensation prohibits [the] concurrent payment of specific indemnity benefits for permanent partial impairment under § 31-308 (b) and benefits for total incapacity under § 31-307 as a result of the same incident"); see also *McCurdy* v. *State*, 227 Conn. 261, 267 n.8, 630 A.2d 64 (1993) (using imprecise terminology but noting that "[an employee] can at once be *temporarily* totally disabled and *permanently* partially disabled . . . although he cannot collect for both at the same time" (citation omitted; emphasis in original)); *Cappellino* v. *Cheshire*, 226 Conn. 569, 577–78, 628 A.2d 595 (1993) ("we have held that the [Workers' Compensation Act] prohibits [the] *concurrent* payment of benefits for permanent partial disability and temporary total [incapacity]" (emphasis

in original)); cf. *Churchville* v. *Bruce R. Daly Mechanical Contractor*, supra, 299 Conn. 193 ("it is clear that . . . the payment of . . . § 31-307 temporary total [incapacity] benefits does not discharge the obligation to pay § 31-308 permanent partial disability benefits at some point in the future" (citation omitted; internal quotation marks omitted)).

The third point is that, although permanent disability payments under § 31-308 (b) are not *payable* until a claim is made for those benefits (by the claimant or the claimant's dependents or heirs, as the case may be), it is well settled that a claimant has a vested entitlement to those benefits when the claimant's injury becomes permanent. See *Churchville* v. *Bruce R. Daly Mechanical Contractor*, supra, 299 Conn. 195 (observing that "[an] employee [who] has reached maximum medical improvement" has "[a vested] right to a disability benefit award"); *McCurdy* v. *State*, supra, 227 Conn. 268 ("[w]e have long held that an injured worker *has a right* to a permanent partial disability award once he or she reaches maximum medical improvement" (emphasis added)). These cases are rooted in the recognition that benefits under § 31-308 (b) compensate the injured employee for "the complete and permanent loss of use of the member or organ referred to . . . ." General Statutes § 31-308 (b). It is clear under Connecticut law that a claimant's right to permanent disability benefits vests under the statute when the disability becomes permanent.

When an injury becomes permanent is determined by reference to equally well settled principles. Permanency exists at "that time when there is no reasonable prognosis for complete or partial cure and no improvement in the physical condition or appearance of the injured body member can be reasonably made." *Cappellino* v. *Cheshire*, 27 Conn. App. 699, 703 n.2, 608 A.2d 1185 (1992) (citing *Wrenn* v. *Connecticut Brass Co.*, 96 Conn.

35, 38, 112 A. 638 (1921)), aff'd, 226 Conn. 569, 628 A.2d 595 (1993). This event is also referred to as the time when the claimant reaches maximum medical improvement. See *Cappellino* v. *Cheshire*, supra, 27 Conn. App. 703 n.2. In other words, a complete and permanent loss of use of the member or organ exists when the condition is probably not going to improve. At that time, the injury is permanent, i.e., has reached maximum medical improvement, and the claimant has a vested right to disability benefits under § 31-308 (b). See id.; see also *Churchville* v. *Bruce R. Daly Mechanical Contractor*, supra, 299 Conn. 195.

Fourth, when a claimant dies with vested disability benefits remaining unpaid, the right to payment of those vested benefits does not terminate. See *Churchville* v. *Bruce R. Daly Mechanical Contractor*, supra, 299 Conn. 191 ("[w]e have long recognized that the beneficiaries of the Workers' Compensation Act . . . include both the injured employee and his or her dependents" (citation omitted)). The issue is not whether the vested but unpaid benefits are payable, but *to whom* they are payable. That question is resolved by determining whether the unpaid benefits are matured or unmatured, because that determination establishes whether the vested entitlement passes to (1) the claimant's estate, or (2) the claimant's dependents. See *Brennan* v. *Waterbury*, supra, 331 Conn. 684–85. As we explained in *Brennan*, "[s]ince the earliest days of our workers' compensation law, compensation owed to a claimant but not paid before his death was distributed according to whether the benefit 'accrued' or 'matured' during the claimant's lifetime." (Footnote omitted.) Id., 684. Matured benefits, those which "accrue[d] in [the claimant's] lifetime [but which remain] unpaid," become "an asset of the [claimant's] estate" and are distributed accordingly.[7] (Internal

[7] See 7 L. Larson & T. Robinson, Larson's Workers' Compensation Law (2024) § 89.02 ("[a]ccrued but unpaid installments are, of course, an asset of the estate, like any other debt").

quotation marks omitted.) Id., 684. By contrast, "the [claimant's] dependents alone have the right to the *unmatured* part of the award of compensation . . . ." (Emphasis in original; internal quotation marks omitted.) Id., 685, quoting *Bassett* v. *Stratford Lumber Co.*, 105 Conn. 297, 303–304, 135 A. 574 (1926). The concept of maturation is thus relevant to determining the proper recipient of vested benefits upon a claimant's death.[8]

These four basic points, properly applied, resolve this case. Because total incapacity benefits and permanent disability benefits serve different purposes and compensate different losses, the fact that the decedent received § 31-307 benefits in no way precludes the right of his heirs or dependents to receive § 31-308 (b) benefits after the § 31-307 benefits cease. The decedent's right to § 31-308 (b) benefits vested when he became eligible to receive those benefits, which was on June 9, 1998, the date the administrative law judge, in her findings and award issued on March 22, 2022, expressly found that the injuries to his eyes were total and permanent. This finding controls the outcome of this case.

II

The majority opinion contains three intertwined errors. The first is the lack of deference the majority gives to the administrative law judge's express factual finding, contained in her findings and award dated March 22, 2022, that the decedent's loss of vision became permanent no later than June 9, 1998, thereby vesting his right to permanent disability benefits under § 31-308 (b) as of that date. The other two errors involve the majority's interpretation of our recent decision in *Brennan* and its application to this case.

[8] To illustrate, take the hypothetical example of a claimant who is entitled to permanent disability benefits for a period of 235 weeks and dies after 35 weeks. Any benefits that have not been yet paid for those 35 weeks have matured (and are payable to the claimant's estate), whereas the 200 weeks of unmatured benefits are owed to the claimant's dependents.

A

The principal flaw in the majority opinion is its failure to defer to the findings and award issued by the administrative law judge, who concluded that the decedent's loss of vision became permanent no later than June 9, 1998, thereby vesting his right to permanent disability benefits under § 31-308 (b) as of that date.[9] The administrative law judge's finding that the decedent "suffered from a reduction to one tenth or less of normal vision in both of his eyes" satisfies § 31-308 (b) to the letter.[10] There is strong factual support in the record supporting the administrative law judge's conclusion. It should not be subjected to second-guessing by either the board or this court.

The majority characterizes the plaintiff's argument as claiming an entitlement to disability benefits under § 31-308 (b) "as a matter of law" because the decedent was previously awarded total incapacity benefits under § 31-307 (c). That is not the plaintiff's claim. What the plaintiff argues is that, in 1998, the commissioner made the factual finding that the decedent's loss of vision was permanent, and that the administrative law judge's factual findings in 2022 reached the same conclusion

[9] The majority misreads this dissent in claiming that this court should afford the commissioner's 1998 finding and award "appropriate appellate deference, as the factual findings of an administrative adjudicator . . . ." Footnote 9 of the majority opinion. That is not my argument. The factual findings at issue in this appeal are those made by the administrative law judge in 2022, not those made by the commissioner in 1998. The administrative law judge did not consider herself bound by the commissioner's findings; nor did she give them preclusive effect. Instead, she credited those findings, together with other record evidence, in arriving at her own determination that "the [decedent had] reached maximum medical improvement by June 9, 1998 . . . ." The fact that the administrative law judge's finding was consistent with the conclusions reached by the commissioner does not mean that the finding was not made by the administrative law judge.

[10] Section 31-308 (b) requires the "[c]omplete and permanent loss of sight in, or reduction of sight to one-tenth or less of normal vision," to establish a right to permanent disability benefits.

based on her own review of the evidence. "There can be no dispute," the plaintiff argues, "that [the commissioner's] June 9, 1998 finding and award adjudicated and definitively determined that the [decedent's] vision loss was permanent and remained permanent." The argument continues in the same vein: "The fact that [the commissioner] did not specifically incorporate the phrase 'maximum medical improvement' in his decision does not undo his conclusion that the [decedent's] vision loss remained permanent." The plaintiff then points out, in very clear terms, that "the administrative law judge [who rendered the § 31-308 (b) award in 2022] . . . *agreed. She concluded that the* [*decedent*] *reached maximum medical improvement by June 9, 1998, and that the* [*decedent's*] *entitlement to permanency benefits vested no later than that date.*" (Emphasis added.)

The plaintiff also contends that, wholly apart from the commissioner's findings in 1998, the undisputed "chronicity" of the impairment itself provided sufficient evidence of its permanency to support the administrative law judge's conclusion, in 2022, that the loss of vision was both total and permanent: "Even if [this court] were to completely disregard [the commissioner's] finding and award, the adjudicated fact that the [decedent] suffered from a compensable injury that caused statutorily defined total incapacity, per § 31-307, over approximately thirty-eight . . . years—from the injury [in 1982] until the [decedent's] death [in 2020]—would still support the reasonable inference that [his] vision loss was permanent. The impairment persisted over a period of almost four . . . decades. The [decedent] died with the condition unchanged from its onset. The chronicity of the condition, alone, provides sufficient evidentiary support to infer that it was permanent during his lifetime. If the [decedent's] vision loss was not permanent, it begs the question as to what else is needed to establish permanency." In other words, the

fact that total incapacity benefits were paid to the decedent from the date of injury until his death is evidence supporting the reasonable conclusion that his medical condition was *in fact* permanent.

The issue, then, is not whether the plaintiff is entitled to § 31-308 (b) benefits as a matter of law. The issue is whether the record contains any support for the administrative law judge's factual finding that the decedent's loss of vision was permanent no later than June 9, 1998. We cannot reject this finding because we would have concluded otherwise. "[T]he power and duty of determining the facts rests [with] the commissioner, the trier of facts. . . . The conclusions drawn by him from the facts found must stand unless they result from an incorrect application of the law to the subordinate facts or from an inference illegally or unreasonably drawn from them." (Citation omitted; internal quotation marks omitted.) *Fair* v. *People's Savings Bank*, 207 Conn. 535, 539, 542 A.2d 1118 (1988); see *Coughlin* v. *Stamford Fire Dept.*, 334 Conn. 857, 862–63, 224 A.3d 1161 (2020). "Neither the . . . board nor this court has the power to retry facts." (Internal quotation marks omitted.) *Birnie* v. *Electric Boat Corp.*, 288 Conn. 392, 404, 953 A.2d 28 (2008). Instead, "[o]n appeal, the board must determine whether there is any evidence in the record to support the commissioner's findings and award. . . . Our scope of review of [the] actions of the [board] is [similarly] . . . limited. . . . [However] [t]he decision of the [board] must be correct in law, and it must not include facts found without evidence or fail to include material facts [that] are admitted or undisputed." (Internal quotation marks omitted.) *Pantanella* v. *Enfield Ford, Inc.*, 65 Conn. App. 46, 52–53, 782 A.2d 141, cert. denied, 258 Conn. 930, 783 A.2d 1029 (2001). "To the extent that the commissioner's finding discloses facts, his finding cannot be changed *unless the record discloses that the finding includes facts found*

without evidence or fails to include material facts [*that*] *are admitted or undisputed.*" (Emphasis in original; internal quotation marks omitted.) *McCurdy* v. *State*, supra, 227 Conn. 267.

With respect to factual findings of permanency in particular, the commissioner "can under certain conditions find the injured worker is or is not at maximum medical improvement and *that decision is a factual decision* [*that*] *rests solely with the* [*commissioner*] *as the arbitrator of fact.*" (Emphasis added.) 3 A. Sevarino, Connecticut Workers' Compensation After Reforms (7th Ed. 2017) § 6.02.6, p. 913; see, e.g., *Ayna* v. *Graebel/CT Movers, Inc.*, 133 Conn. App. 65, 70–71, 33 A.3d 832 (reviewing "the commissioner's decision that the plaintiff . . . had reached maximum medical improvement" as factual finding), cert. denied, 304 Conn. 905, 38 A.3d 1201 (2012); *Ferrara* v. *Hospital of St. Raphael*, 54 Conn. App. 345, 354–55, 735 A.2d 357 (considering "the . . . claim that the commissioner improperly found that [the plaintiff] had reached maximum medical improvement" and concluding that surgeon's "testimony provide[d] reasonable support for the commissioner's determination" and that "the board properly upheld the factual determinations of the commissioner"), cert. denied, 251 Conn. 916, 740 A.2d 864 (1999).

The conclusion reached by the administrative law judge in the present case—that disability benefits under § 31-308 (b) vested no later than June 9, 1998—was a factual determination based on her own review of the evidentiary record, which led her to make an express finding that the decedent's eye injuries had become permanent, i.e., had reached maximum medical improvement, during the decedent's lifetime. The administrative law judge observed that the decedent had been "diagnosed . . . with a '*profound visual loss in both eyes*' " and "had been receiving 'total [incapacity] benefits pur-

suant to § 31-307 . . . since 1984 . . . [for] *total and permanent loss of sight or the reduction to one tenth or less of normal vision in both eyes*.' " (Emphasis added.) The administrative law judge also noted in her findings that "Commissioner Gerald Kolinsky issued a letter dated June 3, 1985, stating that the [decedent] was 'entitled to permanent total [incapacity] benefits, pursuant to [§] 31-307 . . . due to *total and permanent loss of sight in both eyes*."[11] (Emphasis added.)

The administrative law judge further noted that a formal hearing had been held before the commissioner in 1998, in response to the city's filing of a form 36 "contesting the [decedent's] continued entitlement to permanent and total disability benefits pursuant to . . . § 31-307 (c)" based on the city's allegation that " 'the [decedent's] permanent total disability status is other than it was in 1984.' " After that hearing, the commissioner "concluded that the [decedent had, indeed, still] satisfied the standard set forth in . . . § 31-307 (c): *total incapacity caused by the reduction to one tenth or less of normal vision in both eyes*, which condition had existed since the original injury of April 24, 1982." (Emphasis added.) Because the commissioner denied the form 36, the administrative law judge found that, as of 1998, "there had been no change in the [decedent's] total disability status subsequent to the original injury in 1982."

The administrative law judge reviewed not only the commissioner's conclusion, but also the evidence supporting that conclusion as presented at the formal hearing in 1998. This evidence consisted of the opinions of various medical experts, including the decedent's treating ophthalmologist, Bruce R. Jacobson. Jacobson

[11] Commissioners Paoletta and Kolinsky both mistakenly used the word "disability" rather than "incapacity." The usage is so common that it is probably unfair to call it a mistake. Nonetheless, the terminology is imprecise and can lead to confusion. See footnote 4 of this opinion. No confusion exists here because of the references to § 31-307.

issued reports regarding the decedent's condition no fewer than six times over a period of twelve years, from 1986 to 1998, and repeatedly stated that the decedent had at best "a visual acuity of 20/200" in both eyes, which is one tenth or less of normal, uncorrected vision. The record also contained the deposition and reports of another ophthalmologist, Roland D. Carlson, who examined the decedent at the city's request in 1985 and 1987. Carlson found that the decedent's "uncorrected vision [in] the right [eye] was 20/200" and that the vision in his "left eye [was] 20/200," as well. Carlson reported that the decedent had "just light perception" of the left eye.[12] Carlson also indicated that the decedent's visual loss could be psychogenic. A psychiatrist, Cyril Waynik, stated that the decedent's "blindness" was "psychogenic," but Waynik also concluded that the "catastrophic injury [that the decedent suffered] had a profoundly incapacitating effect, which because of its long duration and chronicity bode[d] poorly prognostically." Jacobson, the treating ophthalmologist, opined that, regardless of the psychiatric complications, the decedent's visual disability was equal to a visual disability having a "purely organic" cause.[13]

[12] Carlson explained that light perception means that "the patient can tell whether you have a flashlight turned on or off."

[13] The case presented a classic battle of the experts. Jacobson and Carlson disagreed on important points. For example, with respect to the "psychogenic overlay" that impacted Carlson's opinion, Jacobson opined that the decedent's "visual disability [was] equal to a visual disability having a purely organic cause." Waynik, the psychiatrist, agreed with Jacobson in this regard. The commissioner and the administrative law judge evidently credited Jacobson's opinions over Carlson's, as they were entitled to do. See, e.g., *Barlow* v. *Commissioner of Correction*, 343 Conn. 347, 368, 273 A.3d 680 (2022) ("It is the [fact finder's] exclusive province to weigh the conflicting evidence and to determine the credibility of witnesses. . . . The [fact finder] can . . . decide what—all, none or some—of a witness' testimony to accept or reject." (Internal quotation marks omitted.)); *Dooley* v. *Leo*, 184 Conn. 583, 586, 440 A.2d 236 (1981) (when "there is strongly conflicting testimony from the expert witnesses, the trier of fact must determine the credibility of that testimony and may believe all, some, or none of the testimony of a particular witness").

The evidentiary record reviewed by the administrative law judge also contained testimony from the decedent and the plaintiff, his widow, regarding the permanent nature of his vision loss. There was a transcript of the decedent's testimony at the 1998 hearing, at which he was asked whether his "ability to see ha[d] . . . changed" since the incident in 1982. He replied, "[n]ot at all." This evidence, if credited by the administrative law judge, showed that the decedent's condition had not improved at all over sixteen years. The city never subsequently contested the permanent nature of the decedent's vision loss, and no contrary findings were made or orders issued. The record also contained a transcript of the deposition testimony the plaintiff gave in 2021. When asked whether, "after [the] incident took place [in 1982]," she had "observe[d] [the decedent] having problems with his vision," she replied, "[y]es." When asked whether those problems "ever [went] away," she replied, "[n]o." When asked whether the decedent had ever stated "that he thought his vision was improving at any point," she replied, "[n]ever, no."

In light of the foregoing evidence, the administrative law judge concluded in her findings and award, "[c]onsistent with the findings by [the commissioner], [that] the [decedent had] suffered from a reduction to one tenth or less of normal vision in both of his eyes from the original injury [on] April 24, 1982." The administrative law judge further concluded that the decedent had "reached maximum medical improvement by [the date the commissioner's finding and award issued on] June 9, 1998," and that his "entitlement to permanency benefits [pursuant to § 31-308 (b) had] vested no later than . . . June 9, 1998." This is clearly a factual finding.

Applying the proper standard of review, I perceive no basis for this court to conclude that the administrative law judge did not make a factual determination that the decedent had reached maximum medical

improvement as of June 9, 1998. Far from being unreasonable, the determination finds substantial support in the record. Indeed, the majority concedes as much. The majority states: "[*a*]*lthough there is evidence in the record that might well ultimately support a finding of maximum medical improvement*, we do not agree . . . that the 1998 finding, as viewed by the administrative law judge, conclusively established the maximum medical improvement required for an award of permanency benefits under § 31-308 (b)." (Emphasis added.) The issue on appeal, once again, is not whether the 1998 finding conclusively established maximum medical improvement; it is whether the administrative law judge in 2022 made that finding, which she plainly did, in clear and unambiguous terms. As I previously explained, that finding was based on *all* of the evidence in the record, not merely the commissioner's 1998 finding. The majority acknowledges that there is evidence in the record "that might well" support such a finding. Under these circumstances, there is nothing left to decide regarding the decedent's entitlement to disability benefits under § 31-308 (b).

The majority suggests that the factual findings of the administrative law judge who awarded benefits under § 31-308 (b) in 2022 are not entitled to deference because the administrative law judge made no "new" factual findings but, instead, merely gave "legal effect to the 1998 finding concerning the plaintiff's claim for permanency benefits under § 31-308 (b)." Footnote 9 of the majority opinion. Two points warrant emphasis in response to this suggestion. Perhaps most important, the administrative law judge did, in fact, make her own findings in 2022 after holding a formal hearing at which evidence was taken. I have reviewed that evidence and those findings in detail and will not repeat them here. As I noted previously in this opinion, the administrative law judge plainly did not consider herself bound by

the commissioner's earlier findings, gave those earlier findings no preclusive effect, and proceeded to reach her own factual conclusions. See footnote 9 of this opinion. The fact that the administrative law judge's finding of permanency was based in part on evidence in the 1998 record, and is consistent with the commissioner's previous findings, does not mean that her factual findings are any less her own or entitled to any less appellate deference.

Second, it is clear that there is no legal prohibition that barred the administrative law judge from awarding benefits under § 31-308 (b) on the basis (in part) of evidence initially submitted in connection with the 1998 hearing regarding § 31-307 (c) benefits. A review of our case law demonstrates that the contrary is true. By using the record and findings supporting the 1998 award of total incapacity benefits under § 31-307 (c) as documentary evidence, among other evidence, showing that the decedent's condition had become permanent at that time for purposes of awarding § 31-308 (b) benefits, the administrative law judge followed the same procedure we adhered to in *McCurdy* v. *State*, supra, 227 Conn. 261. In *McCurdy*, we looked at competing medical reports in the record and independently concluded that maximum medical improvement had been reached, such that the right to permanency benefits had vested in the decedent's lifetime. See id., 263–64, 268–69; see also *Adzima* v. *UAC/Norden Division*, 177 Conn. 107, 116–19, 411 A.2d 924 (1979) (finding that deceased claimant had not reached maximum medical improvement after weighing conflicting medical opinions in record). The administrative law judge in the present case did not err at any juncture as she followed this procedure.

It is, of course, true that the administrative law judge reviewed evidence that had in large part, although not entirely, been submitted in support of a claim for total

incapacity benefits under § 31-307 (c) rather than permanent disability benefits under § 31-308 (b). But that fact matters only if the particular evidence establishing the decedent's entitlement to benefits under the former statute cannot also be used to establish his entitlement to benefits under the latter statute. Such is not the case here. To the contrary—and specifically with respect to benefits for the loss of vision—the relevant criteria are the same under these two statutory provisions, and the same evidence that establishes an entitlement to total incapacity benefits, if credited by the fact finder in a proceeding for disability benefits under § 31-308 (b), can establish an entitlement to permanent disability benefits. Section 31-307 (c) provides in relevant part that "[t]he following injuries of any person shall be considered as causing total incapacity and compensation shall be paid accordingly: (1) Total and *permanent loss of sight of both eyes, or the reduction to one-tenth or less of normal vision* . . . ." (Emphasis added.) Section 31-308 (b) identifies injuries that "shall" entitle the claimant to disability benefits, "in addition to the usual compensation for total incapacity," and specifies that "[a]ll of the following injuries include the loss of the member or organ and the complete and *permanent loss of use* of the member or organ referred to . . . ." (Emphasis added.) The scheduled injuries include the "[c]omplete and *permanent loss of sight in, or reduction of sight to one-tenth or less of normal vision* . . . ." (Emphasis added.) General Statutes § 31-308 (b).

The relevant statutory language requiring a finding of permanency is virtually identical in the two statutes, which normally means that the legislature intended the words to have the same meaning. See, e.g., *State* v. *Sabato*, 321 Conn. 729, 747, 138 A.3d 895 (2016) ("[i]n light of the close relationship between [General Statutes] §§ 53a-151 (a) and 53a-151a (a), it is appropriate

to give the same phrase in each statute the same meaning"); *State* v. *Grant*, 294 Conn. 151, 160, 982 A.2d 169 (2009) ("ordinarily, the same or similar language in the same statutory scheme will be given the same meaning").

Again, there is no need to decide whether a claimant who is entitled to total incapacity benefits for loss of vision is entitled to permanent disability benefits for loss of vision "as a matter of law" because that is neither what the administrative law judge concluded in this case nor what the plaintiff argues before this court. The critical point is simply that the evidence and findings in connection with the award of total incapacity benefits for loss of vision in the present case, and presumably in most cases, will be highly relevant to any subsequent claim seeking permanent disability benefits under § 31-308 (b), particularly in the absence of any evidence that, notwithstanding the finding of a "total and permanent" loss of function when incapacity benefits were awarded, the claimant's condition improved thereafter. General Statutes § 31-307 (c) (1).

Neither the majority nor the defendants point to any factual finding that negates the conclusion reached by the administrative law judge; the majority even concedes that the factual findings "might well" *support* the conclusion reached by the administrative law judge. The majority observes only that the fact "[t]hat there was no further updating of the decedent's medical record with respect to his eye injuries between 1995 and his death in 2020 does not mean *as a matter of law* that his condition remained unchanged since 1984." (Emphasis added.) Again, no one is contending that permanency has been established as a matter of law. The claim is a factual one, and, as I have indicated, there is abundant evidence—and, as the majority acknowledges, there is at the very least some evidence, which is all that is needed—to support the administrative law judge's conclusion that the decedent's loss of

vision was more likely than not a permanent condition as of June 9, 1998.

B

I also disagree with the majority's application of our recent decision in *Brennan* in two respects. First, the majority interprets *Brennan* to require a permanent partial disability *rating* to establish that an injury is permanent. It observes that "the record lacks a clear permanent partial disability rating, or an agreement to that effect between the decedent and the defendants that would furnish a basis for the requisite finding of maximum medical improvement." The majority asserts that, "[a]lthough the decedent's physicians characterized his condition as 'one tenth or less of normal uncorrected vision' when he was originally examined and treated between 1982 and 1995, there is no other indication that the physicians determined that that particular degree of vision loss constituted any percentage of maximum medical improvement."

The requirement of a permanent partial disability rating, although of importance in *Brennan*,[14] has no relevance in the present case because the injury in this case involved a *total* (100 percent) disability. On April

[14] Brennan explains that a permanent partial disability rating was necessary in that case because the rating establishes "the point at which the *degree* of permanent impairment (loss of, or loss of use of a body part) can be assessed, which will determine the employer's payment obligations (i.e., number of weeks of compensation owed). An employer's payment obligations, then, are not fixed until the establishment of entitlement to permanent disability benefits. . . . This court has recognized that the condition precedent, entitlement to this benefit, 'depends on both the establishment of a permanent disability and the extent of that disability . . . .' " (Emphasis in original.) *Brennan* v. *Waterbury*, supra, 331 Conn. 696, quoting *Churchville* v. *Bruce R. Daly Mechanical Contractor*, supra, 299 Conn. 193. This reasoning has no application when, as here, the claim is for total or complete impairment as defined by statute, i.e., the "[c]omplete and permanent loss of sight in, or reduction of sight to one-tenth or less of normal vision . . . ." General Statutes § 31-308 (b).

24, 1982, when the decedent sustained the injury at issue, the version of § 31-308 (b) in effect provided that a claimant suffering from "the complete and permanent loss of the sight of one eye, or the reduction in one eye to one-tenth or less of normal vision," was entitled to 235 weeks of benefits for that injury. General Statutes (Rev. to 1981) § 31-308 (b) (7). As I discussed previously, precisely that degree of permanency was an explicit component of the findings made by administrative law judge on the basis of the medical records and related testimony at the two formal hearings held in connection with this matter. No percentage rating was needed beyond the finding that the decedent suffered a reduction to one tenth or less of normal vision in both of his eyes; that finding established a 100 percent disability under the express terms of the statute.[15]

Second, the majority opinion misapprehends the doctrinal distinction between the *vesting* and the *maturation* of benefits under § 31-308 (b). Based on its reading of *Brennan*, the majority characterizes the issue at hand as whether the decedent's right to benefits under § 31-308 (b) had matured: "*Brennan* states that permanency benefits *mature* under § 31-308 only after the degree of permanency is fixed by either an award or an agreement between the parties . . . ." (Emphasis altered.) In another instance, the majority states: "We concluded [in *Brennan*] that permanent disability benefits can mature 'only after the degree of permanency has been fixed by way of an award or an agreement between the parties sufficient to establish a binding meeting of the minds'

[15] The majority also suggests that other cases in addition to *Brennan* establish the need for a permanent partial disability rating as a prerequisite to any permanent partial disability award. It cites *Churchville* and *McCurdy* in support. Both cases are distinguishable for the same reason as *Brennan*, namely, because neither involved a permanent injury that entitled the claimant to a fixed number of weeks of benefits.

and, accordingly, remanded the case to the commissioner for this finding."[16]

The central issue in the present case involves when benefits under § 31-308 (b) *vest*, not when they *mature*. As I discussed in part I of this opinion, benefits vest when the claimant's injury becomes permanent; they mature when they become payable. The issue of maturation does not relate to *when* the benefits become an entitlement, but *who has the right to receive the benefits* to which the claimant is entitled after death—the estate, or the dependents. *Brennan* did not change our legal standard regarding vesting in any respect. Indeed, we indicated that the benefits at issue in *Brennan* had vested when maximum medical improvement was reached on October 13, 1993. *Brennan* v. *Waterbury*, supra, 331 Conn. 699. Our inquiry was focused on determining whether the claimant's "disability benefits [under General Statutes § 7-433c] . . . *matured* before his death," and, accordingly, we "remanded for further proceedings to decide the *proper beneficiary* of any benefits due." (Emphasis added.) Id., 700. Our conclusion in *Brennan* affected solely our standard regarding maturation, not vesting.

To summarize, I would conclude that the board erred in rejecting the administrative law judge's factual conclusion that the decedent's entitlement to disability benefits under § 31-308 (b) vested no later than June 9, 1998. Our review of an administrative law judge's factual findings in this context is deferential, and there is

[16] Although the majority indicates that it disagrees with my reading of *Brennan* in this respect, the language it quotes from *Brennan* actually supports my point. *Brennan* explains that the benefits do not vest (or accrue, a term "equivalent to vesting") until the date when the claimant reaches maximum medical improvement. *Brennan* v. *Waterbury*, supra, 331 Conn. 695 n.17.

abundant evidence in the record to support the 2022 findings and award.

For the foregoing reasons, I respectfully dissent.[17]

[17] The two remaining issues are (1) whether the plaintiff, as the decedent's widow, is the decedent's presumptive dependent and therefore entitled to the vested permanent disability benefits, and (2) whether the defendants were entitled to a credit against the vested permanent disability benefits for the total incapacity benefits that were paid after the June 9, 1998 award. Because the majority concludes that the decedent, at the time of his death, had no vested entitlement to permanent disability benefits under § 31-308 (b), it does not reach these issues. Although I am of the opinion that the right to permanent disability benefits had vested, I also choose to leave these subsidiary issues unaddressed because the case should be remanded to the board to analyze those issues in the first instance with the benefit of the legal principles set forth in this opinion.