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CONNECTICUT REPORTS

Vol. 336

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

STATE OF CONNECTICUT *v.* DAVID G. LIEBENGUTH (SC 20145)

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

Syllabus

The defendant was convicted of breach of the peace in the second degree in connection with an incident in which he confronted and directed certain comments and racial slurs at M, an African-American parking enforcement officer, who, immediately beforehand, had placed a parking ticket on the defendant's vehicle for being parked in a metered space without payment. Upon returning to his vehicle and finding the parking ticket, the defendant confronted M. After M and the defendant exchanged words, the situation escalated, and the defendant told M that the parking authority with which he was employed was "fucking unbelievable" and that he issued the parking ticket because the defendant's car was "white." The defendant then told M that the actual reason he was given a parking ticket was because he was white. As the defendant started to walk away from M, the defendant stated, "remember Ferguson," which apparently was a reference to a then recent and highly publicized shooting of an African-American man by a white police officer in Ferguson, Missouri. Thereafter, both M and the defendant returned to and entered their vehicles, both of which had at least some of their windows down. M then thought he heard the defendant say the words "fucking niggers," which caused him to believe that the defendant's earlier comment about Ferguson was a threat meant to imply that what had happened in Ferguson was going to happen to him. As M was driving away, the defendant cut through the parking lot in his vehicle, approached M's vehicle, and then drove past M. As the defendant was driving past

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

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

M, he looked directly at M with an angry expression and repeated the slur "fucking niggers" louder than he had the first time he uttered it. On appeal to the Appellate Court from the judgment of conviction, the defendant claimed, inter alia, that the evidence was insufficient to sustain his breach of the peace conviction insofar as the racial taunts that he directed at M were protected by the first amendment to the United States constitution and, therefore, could not form the basis of such a conviction. The Appellate Court reversed the defendant's conviction, concluding, inter alia, that the defendant's utterances were unlikely to provoke an immediate, violent response by a reasonable person in M's shoes and, thus, were not prohibited fighting words under the first amendment. On the granting of certification, the state appealed to this court. *Held* that, contrary to the determination of the Appellate Court, the language the defendant used to demean, intimidate and anger M, when considered in the circumstances in which that language was used, constituted fighting words likely to provoke an immediate, violent response from a reasonable person in M's position, and, accordingly, the first amendment did not prohibit the state's use of the defendant's words to obtain his breach of the peace conviction: the defendant's use of the word "niggers," which is inextricably linked to racial prejudice and oppression, and which, when used by a white person as an assertion of the racial inferiority of an African-American person, is highly offensive and demeaning, his use of the profane adjective "fucking" to modify the word "niggers" to emphasize his anger, his continued escalation of the confrontation by approaching M while they were in their vehicles, looking at M with an angry expression as he drove by and repeating the words "fucking niggers," and his use of aggressive hand and bodily gestures and other profanities and racially charged innuendos earlier on in the confrontation all served to incite an immediate, violent response by a reasonable person in M's shoes; moreover, although M, like any parking enforcement officer, undoubtedly was aware that some members of the public might express frustration or anger upon receiving a ticket, and although M did not react violently despite the highly inflammatory and inciting nature of the defendant's words and conduct, this court disagreed that the average African-American parking official would have been prepared for and responded peaceably to the kind of racial slurs and threatening behavior with which M was confronted; furthermore, the fact that the defendant and M were in their vehicles when the defendant used the epithet "fucking niggers" was of no consequence, as the two men were in close proximity to and maintained eye contact with each other, so that each could see and hear each other clearly, and M was in a position to pursue the defendant or to retaliate immediately.

(*Two justices concurring separately in two opinions*)

Argued March 29, 2019—officially released August 27, 2020**

** August 27, 2020, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Amended information charging the defendant with breach of the peace in the second degree and tampering with a witness, brought to the Superior Court in the judicial district of Stamford-Norwalk, geographical area number twenty, and tried to the court, *Hernandez*, *J.*; verdict and judgment of guilty, from which the defendant appealed to the Appellate Court, *DiPentima*, *C. J.*, and *Sheldon* and *Devlin*, *Js.*, which reversed in part the trial court's judgment and remanded the case to that court with direction to render a judgment of acquittal on the charge of breach of the peace in the second degree, and the state, on the granting of certification, appealed to this court. *Reversed in part*; *judgment directed.*

Timothy F. Costello, assistant state's attorney, with whom, on the brief, were *Richard J. Colangelo*, *Jr.*, state's attorney, and *Nadia C. Prinz*, former deputy assistant state's attorney, for the appellant (state).

John R. Williams, for the appellee (defendant).

Opinion

PALMER, J. Under General Statutes § 53a-181 (a) (5), a person is guilty of breach of the peace in the second degree when, with the intent to cause inconvenience, annoyance or alarm, he uses abusive language in a public place.[1] That broad statutory proscription, however, is limited by the free speech provisions of the first amendment to the United States constitution,[2] which prohibit

[1] General Statutes § 53a-181 (a) provides in relevant part: "A person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person . . . (5) in a public place, uses abusive or obscene language or makes an obscene gesture . . . ."

[2] The first amendment to the United States constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech . . . ."

The first amendment prohibition against laws abridging the freedom of speech is made applicable to the states through the due process clause of the fourteenth amendment to the United States constitution. E.g., *44 Liquormart, Inc.* v. *Rhode Island*, 517 U.S. 484, 489 n.1, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996)

the government from "restrict[ing] expression because of its message, its ideas, its subject matter, or its content"; (internal quotation marks omitted) *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002); thereby protecting speech "without regard . . . to the truth, popularity, or social utility of the ideas and beliefs [that] are offered." *National Assn. for the Advancement of Colored People* v. *Button*, 371 U.S. 415, 445, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963). These safeguards, however, although expansive, are not absolute, and the United States Supreme Court has long recognized a few discrete categories of speech that may be prosecuted and punished, including so-called "fighting words"—"those personally abusive epithets [that], when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen* v. *California*, 403 U.S. 15, 20, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971). In this certified appeal, we must determine whether certain vulgar and racially charged remarks of the defendant, David G. Liebenguth, which included multiple utterances of the words "fucking niggers" directed at an African American parking enforcement official during a hostile confrontation with that official following the defendant's receipt of a parking ticket, were "fighting words" subject to criminal sanctions. As a result of his conduct, the defendant was arrested and charged with breach of the peace in the second degree in violation of § 53a-181 (a) (5) and, following a trial to the court, was found guilty.[3] On appeal to the Appellate Court,

[3] The trial court also found the defendant guilty of tampering with a witness in violation of General Statutes § 53a-151. See footnote 4 of this opinion. On the charge of breach of the peace in the second degree, the court sentenced the defendant to a term of imprisonment of six months, execution suspended, followed by two years of probation with several conditions, plus a $1000 fine; on the charge of tampering with a witness, the court sentenced the defendant to a consecutive term of imprisonment of four years, execution suspended, followed by four years of probation with the same conditions and a $3000 fine. The defendant's conviction of tampering with a witness, which thereafter was upheld by the Appellate Court; see

the defendant claimed, inter alia, that the evidence was insufficient to support the trial court's finding of guilty because the words he uttered to the parking official constituted protected speech that could not, consistent with the first amendment, provide the basis of a criminal conviction. See *State* v. *Liebenguth*, 181 Conn. App. 37, 47, 186 A.3d 39 (2018). Although acknowledging that the defendant's language was "extremely vulgar and offensive" and "meant to personally demean" the official; id., 53; the Appellate Court, with one judge dissenting, agreed with the defendant that his speech was constitutionally protected and that, consequently, his conviction, because it was predicated on that speech, could not stand. See id., 54; see also id., 58 (*Devlin*, *J.*, concurring in part and dissenting in part). We granted the state's petition for certification to appeal, limited to the question of whether the Appellate Court correctly concluded that the defendant's conviction must be reversed because the first amendment barred his prosecution for the verbal statements at issue. See *State* v. *Liebenguth*, 330 Conn. 901, 189 A.3d 1231 (2018). We now conclude that the defendant's remarks were unprotected fighting words and, therefore, that his conviction does not run afoul of the first amendment. Accordingly, we reverse the judgment of the Appellate Court in part and remand the case to that court with direction to affirm the trial court's judgment with respect to his conviction of breach of the peace in the second degree.

The opinion of the Appellate Court sets forth the following relevant facts and procedural history. "Michael McCargo, a parking enforcement officer for the town of New Canaan, testified that he was patrolling the [Morse] Court parking lot on the morning of August 28, 2014, when he noticed that the defendant's vehicle

State v. *Liebenguth*, 181 Conn. App. 37, 58, 186 A.3d 39 (2018); is not the subject of this appeal. Unless otherwise noted, all references hereinafter to the defendant's conviction are to his conviction of breach of the peace in the second degree.

was parked in a metered space for which no payment had been made. He first issued a [fifteen dollar parking] ticket for the defendant's vehicle, then walked to another vehicle to issue a ticket, while his vehicle remained idling behind the defendant's vehicle. As McCargo was returning to his vehicle, he was approached by the defendant, whom he had never before seen or interacted with. The defendant said to McCargo, 'not only did you give me a ticket, but you blocked me in.' Initially believing that the defendant was calm, McCargo jokingly responded that he didn't want the defendant getting away. When the defendant then attempted to explain why he had parked in the lot, McCargo responded that his vehicle was in a metered space for which payment was required, not in one of the lot's free parking spaces. McCargo testified that the defendant's demeanor then 'escalated,' with the defendant [having said] that the parking authority was '[fucking] [un]believable' and [having told] McCargo that he had given him a parking ticket 'because my car is white. . . . [N]o, [you gave] me a ticket because I'm white.' As the defendant, who is white, spoke with McCargo, who is African-American, he 'flared' his hands and added special emphasis to the profanity he uttered. Even so, according to McCargo, the defendant always remained a 'respectable' distance from him. Finally, as the defendant was walking away from McCargo toward his own vehicle, he spoke the words, 'remember Ferguson.' " *State* v. *Liebenguth*, supra, 181 Conn. App. 39–40.

McCargo also testified that, "[a]fter both men had returned to and reentered their vehicles, McCargo, whose window was rolled down . . . thought he heard the defendant say the words, 'fucking niggers.' This caused him to believe that the defendant's prior comment about Ferguson had been made in reference to the then recent [and highly publicized] shooting of an African-American man by a white police officer in Ferguson, Missouri [on August 9, 2014, approximately three

weeks earlier]. [McCargo] thus believed that the [defendant's reference to Ferguson was a 'threat'] meant to imply that what had happened in Ferguson 'was going to happen' to him. McCargo also believed that, by uttering the racial slur and making reference to Ferguson, the defendant was trying to rile him up and [to] escalate the situation [by 'taking it to a whole other level']. That, however, did not happen, for, although McCargo found the remark offensive, and he had never before been the target of such language while performing his duties, he remained calm at all times and simply drove away to resume his patrol." Id., 40. McCargo further testified, however, that, "[s]hortly thereafter . . . as [McCargo] was driving away, the defendant [cut through the parking lot in his vehicle, approached McCargo, and then] drove past him." Id., 40–41. As the defendant was driving past McCargo, "the defendant turned toward him, looked directly at him with an angry expression on his face, and repeated the slur, 'fucking niggers.' McCargo [also] noted in his testimony that the defendant said the slur louder the second time than he had the first time.

"After the defendant drove out of the parking lot, McCargo [who was shocked and personally offended by the encounter] called his supervisor, who instructed him to report the incident to the New Canaan police. In his report, McCargo noted that there might have been a witness to the interaction, whom he described as a young, white female. The defendant later was arrested in connection with the incident on the charge of breach of the peace in the second degree." Id., 41.

"Next to testify was Mallory Frangione, the young, white female witness to the incident whom McCargo had mentioned in his report. She testified that she parked in the [Morse] Court parking lot around 9:45 a.m. on . . . August 28, 2014, and, as soon as she opened her car door, she heard yelling. She then saw two men, McCargo and the defendant, who were standing outside

of their vehicles about seventy feet away from her. She observed that the defendant was moving his hands all around, that his body movements were aggressive and irate, and that his voice was loud. She heard him say something about Ferguson, then say that something was '[fucking] unbelievable.' [Frangione] further testified that she saw the defendant take steps toward McCargo while acting in an aggressive manner. She described McCargo, by contrast, as calm, noting that he never raised his voice, moved his arms or gesticulated in any way. McCargo ultimately backed away from the defendant and got into his vehicle. The defendant, [Frangione] recalled, drove in two circles around the parking lot before leaving. Frangione testified that witnessing the interaction made her feel nervous and upset."[4] Id.

"After the state rested [its case], the defendant moved for a judgment of acquittal . . . which the court denied. The defendant elected not to testify. The court, ruling from the bench, found the defendant guilty . . . . It reasoned as follows: 'In finding that the defendant's language and behavior [are] not protected speech, the court considers the words themselves, in other words,

[4] The evidence adduced at trial also established that, on March 6, 2015, while his criminal case was pending, the defendant sent an e-mail to McCargo's supervisor at the New Canaan Parking Department indicating that he would press felony charges against McCargo and cause McCargo to lose his job if he appeared in court at the defendant's criminal trial and testified against him. See *State* v. *Liebenguth*, supra, 181 Conn. App. 42. The e-mail further stated that the defendant would not take such action against McCargo if he did not appear in court to testify against the defendant. Id. As the Appellate Court explained, "[t]he language of the defendant's e-mail clearly indicates that the defendant intended to induce McCargo not to appear in court, insofar as it stated: 'It goes without mention that if your meter maid [McCargo] does not show up in court this case will be over and everyone can go peacefully on their own way, no harm, no foul, no fallout' and '[p]erhaps the judge will remand him to custody right then and there from his witness chair? Obviously, not if he is not there.' " Id., 57–58. This evidence provided the basis for the trial court's guilty finding with respect to the charge of tampering with a witness in violation of General Statutes § 53a-151. See footnote 3 of this opinion.

the content of the speech, the context in which [they were] uttered, and all of the circumstances surrounding the defendant's speech and behavior.

" 'The court finds that the defendant's language, fucking niggers directed at . . . McCargo twice . . . is not protected speech. . . . [I]n the American lexicon, there is no other racial epithet more loaded with racial animus, no other epithet more degrading, demeaning or dehumanizing. It is a word [that] is probably the most [vile] racial epithet a non-African-American can direct [toward] an African-American. [The defendant] is white. . . . McCargo is African-American.

" 'In light of this country's long and shameful history of state sanctioned slavery, Jim Crow segregation, state sanctioned racial terrorism, financial and housing discrimination, the word simply has . . . no understanding under these circumstances other than as a word directed to incite violence. The word itself is a word likely to provoke a violent response.

" 'The defendant is not however being prosecuted solely for use of this word. All language must be considered in light of its context.

" 'The court finds that considering . . . the content of the defendant's speech taken in context and in light of his belligerent tone, his aggressive stance, the fact that he was walking [toward] . . . McCargo and moving his hands in an aggressive manner, there's no other interpretation other than these are fighting words.[5]

[5] We note that the Appellate Court read this statement by the trial court as reflecting a finding that the defendant took an aggressive stance, was walking toward McCargo, and moving his hands in an aggressive manner at the very same time he uttered the words "fucking niggers." (Internal quotation marks omitted.) *State* v. *Liebenguth*, supra, 181 Conn. App. 49. As the Appellate Court also observed; see id.; such a finding would be inconsistent with the trial testimony, which clearly established that the defendant was seated in his vehicle both times he directed that epithet at McCargo. In contrast to the Appellate Court, however, we do not understand the trial court to have found that the conduct referred to occurred simultane-

And he uttered the phrase not once but twice. It was directed—the court finds that it was directed directly at . . . McCargo. There were no other African-Americans present . . . in the parking lot when it happened, and indeed . . . McCargo's unease and apprehension at hearing those words [were] corroborated by . . . Frangione who . . . said that she felt disconcerted by the defendant's tone of voice and his aggressive stance and actions.' " (Footnote added.) Id., 43–44.

The defendant thereafter appealed to the Appellate Court, claiming, inter alia, that the evidence was insufficient to support his conviction of breach of the peace in the second degree. Id., 39. Specifically, he maintained that the racial taunts he directed at McCargo were protected by the first amendment and, therefore, could not form the basis of a conviction under § 53a-181 (a) (5). Id., 47. Relying in large measure on this court's decision in *State* v. *Baccala*, 326 Conn. 232, 163 A.3d 1, cert. denied, U.S. , 138 S. Ct. 510, 199 L. Ed. 2d 408 (2017),[6] the Appellate Court, in a two-to-one decision, agreed with the defendant that the evidence was insufficient to support his conviction because his utterances were unlikely to provoke an immediate, violent

ously with the offensive utterances. Rather, we read the decision's reference to that conduct as consistent with the record; see, e.g., *Lauer* v. *Zoning Commission*, 220 Conn. 455, 470, 600 A.2d 310 (1991) (reviewing court reads arguably ambiguous trial court record to support, rather than to undermine, its judgment); that is, as reflecting a finding by the trial court only that the conduct was relevant to the broader context in which the defendant's epithets were uttered, which it certainly was. In any event, we, like the Appellate Court, resolve the issue on appeal predicated on the testimony adduced at trial, which is not disputed for purposes of this appeal.

[6] As we discuss more fully hereinafter, in *Baccala*, we concluded that the conviction of the defendant in that case—also for breach of the peace in the second degree in violation of § 53a-181 (a) (5)—had to be reversed, despite the vile and personally demeaning nature of the gender based epithets on which that conviction was predicated, in light of our determination that the defendant's speech was entitled to first amendment protection because it was not likely to evoke a violent response from a reasonable person under the circumstances presented. See *State* v. *Baccala*, supra, 326 Conn. 251–56.

response by a reasonable person in McCargo's shoes—that is, his utterances were not prohibited fighting words, and, therefore, the defendant's conviction could not pass muster under the first amendment. See *State* v. *Liebenguth*, supra, 181 Conn. App. 53–54.

In support of its conclusion, the Appellate Court reasoned: "[T]he defendant used extremely vulgar and offensive language, meant to personally demean McCargo. Under the circumstances in which he uttered this language, however, it was not likely to tend to provoke a reasonable person in McCargo's position immediately to retaliate with violence. Although the evidence unequivocally supports a finding that the defendant at one point walked toward McCargo while yelling and moving his hands . . . [t]he evidence [also] unequivocally shows . . . that the defendant was in his car both times that he directed the racial slurs toward McCargo. McCargo did testify that the defendant's use of the slurs shocked and appalled him, and that he found the remarks offensive. He also testified, however, that he remained calm throughout the encounter and felt no need to raise his voice to the defendant. A reasonable person acting in the capacity of a parking official would be aware that some level of frustration might be expressed by some members of the public who are unhappy with receiving tickets and would therefore not be likely to retaliate with immediate violence during such an interaction. In reviewing the entire context of the interaction, we therefore find that, because McCargo was unlikely to retaliate with immediate violence to the conduct for which the defendant was charged, the defendant's words were not 'fighting words,' [on] which he might appropriately be convicted of breach of the peace. The defendant's conviction of breach of the peace in the second degree must therefore be reversed." (Footnotes omitted.) Id.

Judge Devlin dissented with respect to this holding because, in his view, the defendant's remarks, when con-

sidered in the context in which they were uttered, constituted fighting words that were likely to provoke a reasonable person in McCargo's position to retaliate with violence. See id., 66 (*Devlin*, *J.*, concurring in part and dissenting in part). Judge Devlin concluded that the majority did not adequately account for the truly heinous and inflammatory nature of the word "nigger," in particular, when, as in the present case, that "viciously hostile epithet," which has deep roots in this nation's long and deplorable history of racial bigotry and discrimination, is used by a white person with the intent of demeaning and humiliating an African-American person. (Internal quotation marks omitted.) Id., 64–65 (*Devlin*, *J.*, concurring in part and dissenting in part). In rejecting the defendant's assertion that his speech was shielded from prosecution by the first amendment, Judge Devlin explained that the defendant's words "were scathing insults that in many situations would provoke a reflexive, visceral response." Id., 67 (*Devlin*, *J.*, concurring in part and dissenting in part). Indeed, according to Judge Devlin, "if angrily calling an African-American man a 'fucking [nigger]' after taunting him with references to a recent police shooting of a young African-American man by a white police officer is not breach of the peace," then the fighting words doctrine no longer has any "continued vitality" under the first amendment. (Internal quotation marks omitted.) Id., 68 (*Devlin*, *J.*, concurring in part and dissenting in part).

We subsequently granted the state's petition for certification to appeal to decide whether the Appellate Court was correct in holding that the defendant's conviction had to be reversed because the language that formed the basis of that conviction was protected by the first amendment.[7] For the reasons that follow, we agree with

[7] Specifically, we certified the following issue: "Did the Appellate Court properly conclude that the defendant's conviction for breach of the peace in the second degree had to be reversed in light of the holding in [*Baccala*] . . . ?" (Citation omitted.) *State* v. *Liebenguth*, supra, 330 Conn. 901.

Judge Devlin and the trial court that, under the circumstances presented, the first amendment does not bar the defendant's conviction because his racist and demeaning utterances were likely to incite a violent reaction from a reasonable person in McCargo's posi-tion.[8]

For purposes of this appeal, there is no dispute that the evidence adduced by the state at trial supports the trial court's factual findings. The sole issue we must decide, then, is whether, contrary to the determination of the Appellate Court, those factual findings and any inferences that reasonably may be drawn therefrom are sufficient to establish the defendant's guilt beyond a reasonable doubt. See, e.g., *State* v. *Parnoff*, 329 Conn. 386, 395, 186 A.3d 640 (2018).

Because the defendant's conviction is predicated on his verbal statements, our determination of the sufficiency of the state's case necessarily depends on whether those statements deserve the protection of the first amendment, despite their patently offensive and objectionable nature. If they do, they cannot serve as the basis for his conviction, which would have to be reversed for evidentiary insufficiency. The defendant having been charged with violating § 53a-181 (a) (5) by use of allegedly "abusive . . . language"; General Statutes § 53a-181 (a) (5); see footnote 1 of this opinion; we therefore must decide whether his language, which was no doubt "abusive" under the commonly understood meaning of that term, nonetheless is entitled to constitutional protection. To make that determination,

[8] The defendant makes no claim that, in the event we disagree with the Appellate Court that his speech was protected by the first amendment to the United States constitution, his conviction nevertheless was barred by the free speech provisions of article first, §§ 4 and 5, of the Connecticut constitution. We therefore have no occasion to consider whether the fighting words exception to the protection afforded speech under the first amendment also constitutes an exception to the free speech guarantees of the state constitution and, if so, whether its scope is coextensive with that of the exception recognized under the first amendment.

we apply the judicial gloss necessary to limit the reach of the breach of the peace statute to ensure that it comports with constitutional requirements. See *State* v. *Baccala*, supra, 326 Conn. 234, 251 (placing gloss on § 53a-181 (a) (5) to avoid possibility of conviction founded on constitutionally protected speech). For present purposes, "the constitutional guarantee of freedom of speech requires that [§ 53a-181 (a) (5)] be confined to language [that], under the circumstances of its utterance, constitutes [unprotected] fighting words—those [that] by their very utterance inflict injury or tend to incite an immediate breach of the peace." (Internal quotation marks omitted.) *State* v. *Beckenbach*, 1 Conn. App. 669, 678, 476 A.2d 591 (1984), rev'd on other grounds, 198 Conn. 43, 501 A.2d 752 (1985). "Accordingly, to establish the defendant's violation of § 53a-181 (a) (5) . . . in light of its constitutional gloss, the state was required to prove beyond a reasonable doubt that the defendant's words were likely to provoke an imminent violent response" under the circumstances in which they were uttered. (Citation omitted.) *State* v. *Baccala*, supra, 250–51.

In view of the fact that the state's case against the defendant implicates his free speech rights, several additional principles govern our review of the issue presented. In certain cases, such as the present one, in which "[the line between speech unconditionally guaranteed and speech that may be legitimately regulated] must be drawn, the rule is that we examine for ourselves the statements [at] issue and the circumstances under which they were made to see if they are consistent with the first amendment." (Internal quotation marks omitted.) Id., 251. In other words, "the inquiry into the protected status of . . . speech is one of law, not fact." (Internal quotation marks omitted.) *State* v. *Parnoff*, supra, 329 Conn. 395. We therefore "apply a de novo standard of review . . . ." (Internal quotation marks omitted.) Id. Accordingly, we have "an obligation to

make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion [in] the field of free expression." (Internal quotation marks omitted.) Id., 395–96. "This independent scrutiny, however, does not authorize us to make credibility determinations regarding disputed issues of fact. Although we review de novo the trier of fact's ultimate determination that the statements at issue constituted [fighting words], we accept all subsidiary credibility determinations and findings that are not clearly erroneous." (Internal quotation marks omitted.) Id., 396.

Recently, in *State* v. *Baccala*, supra, 326 Conn. 237–50, we undertook a thoroughgoing examination of the roots and scope of the fighting words doctrine, which was first articulated by the United States Supreme Court more than seventy-five years ago in *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). See id., 569, 573 (holding that "God damned racketeer" and "damned Fascist" were epithets likely to provoke addressee to retaliate violently, thereby causing breach of the peace (internal quotation marks omitted)). As we explained in *Baccala*; see *State* v. *Baccala*, supra, 237–38; although the first amendment protects nearly all speech, no matter how detestable or odious it may be, that protection does not extend to the extremely narrow category of words that "have a direct tendency to cause acts of violence by the person to whom, individually, the remark is addressed." (Internal quotation marks omitted.) *Chaplinsky* v. *New Hampshire*, supra, 573. In recognizing the fighting words exception to the protection ordinarily afforded speech under the first amendment, the court in *Chaplinsky* reasoned that such words comprise "no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest" in maintaining the peace by preventing the immediate incitement of violence. Id., 572.

It is by now well settled that there are no per se fighting words because words that are likely to provoke an immediate, violent response when uttered under one set of circumstances may not be likely to trigger such a response when spoken in the context of a different factual scenario. See *State* v. *Baccala*, supra, 326 Conn. 238. Consequently, whether words are fighting words necessarily will depend on the particular circumstances of their utterance. See id., 239; see also *State* v. *Hoskins*, 35 Conn. Supp. 587, 591, 401 A.2d 619 (App. Sess. 1978) ("The fighting words concept has two aspects. One involves the quality of the words themselves. The other concerns the circumstances under which the words are used." (Internal quotation marks omitted.)). This contextual approach is also "a logical reflection of the way the meaning and impact of words change over time." *State* v. *Baccala*, supra, 239; see also id. ("[w]hile calling someone a racketeer or a fascist might naturally have invoked a violent response in the 1940s when *Chaplinsky* was decided, those same words would be unlikely to even raise an eyebrow today"). Indeed, due to changing social norms, public discourse has become coarser in the years following *Chaplinsky*; id., 298 (*Eveleigh, J.*, concurring in part and dissenting in part); such that, today, "there are fewer combinations of words and circumstances that are likely to fit within the fighting words exception."[9] *State* v. *Parnoff*, supra, 329

[9] In this regard, we observed in *Baccala* that, "[i]n this day and age, the notion that any set of words are so provocative that they can reasonably be expected to lead an average listener to immediately respond with physical violence is highly problematic." (Emphasis omitted; internal quotation marks omitted.) *State* v. *Baccala*, supra, 326 Conn. 239. Although the United States Supreme Court has not upheld a conviction under the fighting words doctrine since *Chaplinsky*; e.g., C. Calvert, "First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer," 51 Conn. L. Rev. 117, 149 (2019); and, despite scholarly criticism of the doctrine; see, e.g., W. Reilly, Note, "Fighting the Fighting Words Standard: A Call for Its Destruction," 52 Rutgers L. Rev. 947, 947–49 (2000); Note, "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L. Rev. 1129, 1140–46 (1993); the court has never disavowed the doctrine and, from time to time, has referred

Conn. 413 (*Kahn*, *J.*, concurring in the judgment); see also id. ("[a]s certain language is acceptable in more situations, the borders of the fighting words exception contract").

Against this broad jurisprudential backdrop in *Baccala*, we sought to identify the kinds of considerations likely to be relevant in determining, in any given case, whether the words at issue constituted unprotected fighting words. We explained: "A proper contextual analysis requires consideration of the actual circumstances as perceived by a reasonable speaker and addressee to determine whether there was a likelihood of violent retaliation. . . . This necessarily includes a consideration of a host of factors.

"For example, the manner and circumstances in which the words were spoken . . . [and] [t]he situation under which the words are uttered . . . . Thus, whether the words were preceded by a hostile exchange

to it, albeit in dicta, as one of the few historic exceptions to the first amendment's prohibition against content based restrictions on speech. See, e.g., *Brown* v. *Entertainment Merchants Assn.*, 564 U.S. 786, 791, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011) ("From 1791 to the present . . . the [f]irst [a]mendment has permitted restrictions [on] the content of speech in a few limited areas, and has never include[d] a freedom to disregard these traditional limitations. . . . These limited areas . . . such as . . . fighting words . . . represent well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any [c]onstitutional problem . . . ." (Citations omitted; internal quotation marks omitted.)); *Virginia* v. *Black*, 538 U.S. 343, 359, 123 S. Ct. 1536, 155 L. Ed. 2d 535 (2003) ("[A] [s]tate may punish those words [that] by their very utterance inflict injury or tend to incite an immediate breach of the peace. . . . [C]onsequently . . . fighting words—those personally abusive epithets [that], when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke a violent reaction—are generally proscribable under the [f]irst [a]mendment." (Citations omitted; internal quotation marks omitted.)). In any event, the defendant makes no claim that the fighting words doctrine is a dead letter for federal constitutional purposes; he claims, rather, that the words he used were not fighting words and, consequently, that his conviction based on those words is prohibited by the first amendment. In addition, as we previously noted; see footnote 8 of this opinion; the defendant does not raise a claim under the state constitution.

or accompanied by aggressive behavior will bear on the likelihood of such a reaction. . . .

"A proper examination of context also considers those personal attributes of the speaker and the addressee that are reasonably apparent because they are necessarily a part of the objective situation in which the speech was made. . . . Courts have, for example, considered the age, gender, race, and status of the speaker. . . . Indeed, common sense would seem to suggest that social conventions, as well as special legal protections, could temper the likelihood of a violent response when the words are uttered by someone less capable of protecting [himself or herself], such as a child, a frail elderly person, or a seriously disabled person.

"Although . . . the speech must be of such a nature that it is likely to provoke the *average* person to retaliation . . . when there are objectively apparent characteristics that would bear on the likelihood of such a response, many courts have considered the average person with those characteristics. Thus, courts also have taken into account the addressee's age, gender, and race. . . .

"Similarly, because the fighting words exception is concerned with the likelihood of violent retaliation, it properly distinguishes between the average citizen and those addressees who are in a position that carries with it an expectation of exercising a greater degree of restraint. . . . [Consequently, because] a properly trained [police] officer may reasonably be expected to exercise a higher degree of restraint than the average citizen . . . [we] hold police officers to a higher standard than ordinary citizens when determining the likelihood of a violent response by the addressee." (Citations omitted; emphasis in original; footnotes omitted; internal quotation marks omitted.) *State* v. *Baccala*, supra, 326 Conn. 240–44.

In addition, "several courts have considered as part of the contextual inquiry whether the addressee's position would reasonably be expected to cause him or her to exercise a higher degree of restraint than the ordinary citizen under the circumstances." Id., 245. "Finally . . . the fighting words exception is not concerned with creating symmetrical free speech rights by way of establishing a uniform set of words that are constitutionally proscribed. . . . Rather, because the fighting words exception is intended only to prevent the likelihood of an actual violent response, it is an unfortunate but necessary consequence that we are required to differentiate between addressees who are more or less likely to respond violently and speakers who are more or less likely to elicit such a response." (Citation omitted.) Id., 249.

We then summarized: "Accordingly, a proper contextual analysis requires consideration of the actual circumstances, as perceived by both a reasonable speaker and addressee, to determine whether there is a likelihood of violent retaliation. This necessarily includes the manner in which the words were uttered, by whom and to whom the words were uttered, and any other attendant circumstances that were objectively apparent and bear on the question of whether a violent response was likely." Id., 250. The starting point, however, for any analysis of a claim involving the fighting words doctrine must include an examination of the words themselves and the extent to which they are understood to be inflammatory or inciting.

With respect to the language at issue in the present case, the defendant, who is white, uttered the words "fucking niggers" to McCargo, an African-American person, thereby asserting his own perceived racial dominance and superiority over McCargo with the obvious intent of denigrating and stigmatizing him. When used in that way, "[i]t is beyond question that the use of the word 'nigger' is highly offensive and demeaning,

evoking a history of racial violence, brutality, and subordination." *McGinest* v. *GTE Service Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004). Not only is the word "nigger" undoubtedly the most hateful and inflammatory racial slur in the contemporary American lexicon; see id.; but it is probably the single most offensive word in the English language. See, e.g., *Ayissi-Etoh* v. *Fannie Mae*, 712 F.3d 572, 580 (D.C. Cir. 2013) (Kavanaugh, J., concurring) ("[The] epithet ['nigger'] has been labeled, variously, a term that 'sums up . . . all the bitter years of insult and struggle in America,' [L. Hughes, The Big Sea: An Autobiography (Hill and Wang 2d Ed. 1993) p. 269], 'pure anathema to African-Americans,' *Spriggs* v. *Diamond Auto Glass*, 242 F.3d 179, 185 (4th Cir. 2001), and 'probably the most offensive word in English.' [Random House Webster's College Dictionary (2d Rev. Ed. 2000) p. 894]. See generally [A. Haley, Roots: The Saga of an American Family (Doubleday 1976); [H. Lee, To Kill a Mockingbird (J. B. Lippincott Co. 1960)]. . . . No other word in the English language so powerfully or instantly calls to mind our country's long and brutal struggle to overcome racism and discrimination against African-Americans." (Citation omitted.)); R. Kennedy, "The David C. Baum Lecture: 'Nigger!' as a Problem in the Law," 2001 U. Ill. L. Rev. 935, 935 (although "[t]he American language is (and has long been) rife with terms of ethnic, racial, and national insult: kike, mick, wop, nip, gook, honkie, wetback, chink, [etc.] . . . 'nigger is now probably the most offensive word in English' " (footnote omitted)); Dictionary.com, available at https://www.dictionary.com/browse/nigger?s=t ("The term nigger is now probably the most offensive word in English. Its degree of offensiveness has increased markedly in recent years, although it has been used in a derogatory manner since at least the Revolutionary War.").

In fact, because of the racial prejudice and oppression with which it is forever inextricably linked, the word

"nigger," when used by a white person as an assertion of the racial inferiority of an African-American person, "is more than [a] mere offensive utterance . . . . No word . . . is as odious or loaded with as terrible a history." (Internal quotation marks omitted.) *Daso* v. *Grafton School, Inc.*, 181 F. Supp. 2d 485, 493 (D. Md. 2002); see also *In re John M.*, 201 Ariz. 424, 428, 36 P.3d 772 (App. 2001) ("the term is generally regarded as virtually taboo because of the legacy of racial hatred that underlies the history of its use among whites" (internal quotation marks omitted)); *In re Spivey*, 345 N.C. 404, 414, 480 S.E.2d 693 (1997) ("[N]o fact is more generally known than that a white man who calls a black man a 'nigger' within his hearing will hurt and anger the black man and often provoke him to confront the white man and retaliate. The trial court was free to judicially note this fact."). The word being "one of insult, abuse and belittlement harking back to slavery days"; (internal quotation marks omitted) *Taylor* v. *Metzger*, 152 N.J. 490, 510, 706 A.2d 685 (1998); it is uniquely "expressive of racial hatred and bigotry"; (internal quotation marks omitted) *Swinton* v. *Potomac Corp.*, 270 F.3d 794, 817 (9th Cir. 2001), cert. denied, 535 U.S. 1018, 122 S. Ct. 1609, 152 L. Ed. 2d 623 (2002); and "degrading and humiliating in the extreme . . . ." (Citation omitted; internal quotation marks omitted.) *Pryor* v. *United Air Lines, Inc.*, 791 F.3d 488, 496 (4th Cir. 2015). For all these reasons, the word rightly has been characterized as "the most provocative, emotionally-charged and explosive term in the [English] language." (Internal quotation marks omitted.) *Lee* v. *Superior Court*, 9 Cal. App. 4th 510, 513, 11 Cal. Rptr. 2d 763 (1992).

In addition to the defendant's use of the word "niggers," other language and conduct by the defendant further inflamed the situation, rendering it that much more likely to provoke a violent reaction. First, the defendant used the profane adjective "fucking"—a word of emphasis meaning wretched, rotten or

accursed[10]—to intensify the already highly offensive and demeaning character of the word "niggers." Like the term "nigger," however, the term " 'fucking nigger' [is] . . . so powerfully offensive that . . . [it] inflicts cruel injury by its very utterance. It is degrading, it is humiliating, and it is freighted with a long and shameful history of humiliation, the ugly effects of which continue to haunt us all." *Augis Corp.* v. *Massachusetts Commission Against Discrimination*, 75 Mass. App. 398, 409, 914 N.E.2d 916, appeal denied, 455 Mass. 1105, 918 N.E.2d 90 (2009). The defendant's resort to such language underscored for McCargo how especially incensed and insulted the defendant was by virtue of his having been issued the ticket by an African-American parking official. By adding this additional measure of contempt and disgust to the epithet, the defendant only amplified the assaultive nature of the utterance, making it even more hateful and debasing.

Second, the defendant, having directed the term "fucking niggers" at McCargo upon entering his vehicle and learning that McCargo had ticketed him, was not content just to leave and end the confrontation. Instead, after McCargo had entered his vehicle and was starting to drive out of the parking lot, the defendant circled the lot twice, pulled up next to McCargo and, while looking angrily at him, again uttered the term "fucking niggers," this time more loudly than before. The fact that the defendant repeated this epithet only served to exacerbate the provocative and hostile nature of the confrontation. See *Landrum* v. *Sarratt*, 352 S.C. 139, 145, 572 S.E.2d 476 (App. 2002) (whether epithets were uttered repeatedly is factor to be considered in fighting words determination); see also *State* v. *Szymkiewicz*, 237 Conn. 613, 615–16, 623, 678 A.2d 473 (1996) (holding that certain epithets were fighting words due, in part, to repeated nature of utterances).

[10] New Dictionary of American Slang (R. Chapman ed., 1986) p. 151.

Third, the defendant employed additional, racially offensive, crude and foreboding language during his interaction with McCargo. Early on in the defendant's confrontation with McCargo, after learning that he had been issued a ticket, the defendant became angry and loudly asserted that the parking authority, McCargo's employer, was "fucking unbelievable." Almost immediately thereafter, the defendant injected race into the encounter, first stating that McCargo had ticketed him because his car is white and then accusing McCargo of issuing him the ticket because the defendant himself is white. Next, as the defendant walked to his vehicle, he uttered the words, "remember Ferguson." In light of the defendant's other racially charged remarks, his menacing invocation of the extremely controversial shooting of a young, unarmed African-American man by a white police officer had its intended effect: McCargo understood that the defendant was raising the specter of the same race based violence that reportedly had occurred in Ferguson, Missouri. Considering the defendant's offensive remarks together, as we must; see, e.g., *State* v. *Parnoff*, supra, 329 Conn. 401 n.5 (fighting words determination requires consideration of "the totality of the attendant circumstances"); the defendant's reference to Ferguson significantly escalated the already fraught and incendiary confrontation.

Finally, in addition to his offensive and intimidating utterances, certain conduct by the defendant further manifested his extreme anger and hostility toward McCargo. As the two men were speaking outside of their respective vehicles, the defendant stepped toward McCargo while moving his hands and body in an aggressive and irate manner. Frangione witnessed the defendant's conduct and testified that, even from about seventy feet away, the hostility of the encounter made her nervous and upset. Moreover, after entering his car, the defendant drove through the parking lot twice before

leaving, cutting through empty parking spaces so he could pass by McCargo and again angrily confront him. As we observed in *Baccala*, the fact that the defendant's words were accompanied by such aggressive and menacing behavior increased the likelihood of a violent response. See *State* v. *Baccala*, supra, 326 Conn. 241.

As we previously discussed, speech will be deemed to be unprotected fighting words only if it so "touch[es] the raw nerves of [the addressee's] sense of dignity, decency, and personality . . . [that it is likely] to trigger an immediate violent reaction"; (internal quotation marks omitted) *State* v. *Beckenbach*, supra, 1 Conn. App. 678; a standard that, we have said, is satisfied only if the speech is so inflammatory that it "is akin to dropping a match into a pool of gasoline." (Internal quotation marks omitted.) *State* v. *Parnoff*, supra, 329 Conn. 394. We believe this to be the rare case in which that demanding standard has been met. Born of violence, the word "nigger," when uttered with the intent to personally offend and demean, also engenders violence. Indeed, such use of the word "nigger" aptly has been called "a classic case" of speech likely to incite a violent response. *In re Spivey*, supra, 345 N.C. 415; see also *State* v. *Hoshijo ex rel. White*, 102 Haw. 307, 322, 76 P.3d 550 (2003) ("The experience of being called 'nigger' . . . is like receiving a slap in the face. The injury is instantaneous." (Internal quotation marks omitted.)). It therefore is unsurprising that many courts have rejected first amendment challenges to convictions predicated on the use of the word. See, e.g., *In re John M.*, supra, 201 Ariz. 428 ("lean[ing] out of a car window and scream[ing] at an African-American woman, 'fuck you, you god damn nigger,' before the car pulled into a nearby . . . parking lot" was behavior likely to provoke an immediate violent response); *State* v. *Hoshijo ex rel. White*, supra, 321 (speech of student manager of university basketball team who yelled "shut up you [fucking] nigger," "I'm tired of hearing your shit," and

[s]hut your mouth or I'll kick your ass" to African-American spectator constituted unprotected fighting words); *In re J.K.P.*, Docket No. 108,617, 2013 WL 1010694, *1, *3–5 (Kan. App. March 8, 2013) (calling boys in group of African-American children "niggers" during altercation with them constituted fighting words that violated disorderly conduct statute) (decision without published opinion, 296 P.3d 1140 (2013)); *In re Shane EE.*, 48 App. Div. 3d 946, 946–47, 851 N.Y.S.2d 711 (2008) (threats and racial slurs, including " 'we shoot niggers like you in the woods,' " were likely to provoke immediate violent reaction and therefore constituted fighting words); *In re Spivey*, supra, 408, 414 ("loudly and repeatedly address[ing] a black patron [at a bar] . . . using the derogatory and abusive racial epithet 'nigger' " was conduct that "squarely falls within the category of unprotected [fighting words]"); *In re H.K.*, 778 N.W.2d 764, 766–67, 770 (N.D. 2010) (following African-American girl into bathroom during dance, calling her "nigger" and threatening her constituted fighting words likely to incite breach of peace); see also *Bailey* v. *State*, 334 Ark. 43, 53–54, 972 S.W.2d 239 (1998) (stating that word "nigger" was fighting word in context used); *Lee* v. *Superior Court*, supra, 9 Cal. App. 4th 518 (upholding trial court's denial of request by African-American to change his name from Russell Lawrence Lee to "Misteri Nigger" and stating that "men and women . . . of common intelligence would understand [that] . . . [the word nigger] likely [would] cause an average addressee to fight" (internal quotation marks omitted)). To whatever extent public discourse in general may have coarsened over time; see, e.g., *State* v. *Baccala*, supra, 326 Conn. 239; it has not eroded to the point that the racial epithets used in the present case are any less likely to provoke a violent reaction today than they were in previous decades.

In support of his contention that the Appellate Court correctly concluded that his language did not constitute

fighting words, the defendant argues that "a public official [such as McCargo] is expected to exercise a greater degree of self-restraint in the face of provocation than is a civilian." To support this assertion, however, the defendant cites to cases involving offensive language directed at police officers,[11] in particular, *Resek* v. *Huntington Beach*, 41 Fed. Appx. 57 (9th Cir. 2002), in which the court, in concluding that the words " '[t]hat's fucked up, those pigs can't do that' " were not fighting words; id., 59; went on to explain that, "[a]long with good judgment, intelligence, alertness, and courage, the job of police officers requires a thick skin. Theirs is not a job for people whose feelings are easily hurt." Id. Although we agree that police officers generally are expected to exercise greater restraint than the average citizen when confronted with offensive language or unruly conduct, McCargo was not a police officer, and his duties cannot fairly be characterized as similar to those of a police officer. Additionally, McCargo's testimony concerning his five years of experience as a parking enforcement officer—testimony in which he explained that he never before had been on the receiving end of such hostile or offensive language or had ever reported a prior incident to the police—suggests that the abuse McCargo endured during his encounter with the defendant well exceeded that which someone in his position reasonably might be expected to face. Consequently, although we do agree with the Appellate Court that McCargo, like any parking enforcement official, undoubtedly was

[11] The defendant relies on the following cases in which the court determined that certain words directed at a police officer were not fighting words: *Kennedy* v. *Villa Hills*, 635 F.3d 210, 215–16 (6th Cir. 2011) (calling police officer " 'son of a bitch' " and "a 'fat slob' "); *Johnson* v. *Campbell*, 332 F.3d 199, 203, 215 (3d Cir. 2003) (calling police officer who was conducting stop " 'son of a bitch' "); *Duran* v. *Douglas*, 904 F.2d 1372, 1377 (9th Cir. 1990) (shouting profanities and making obscene gestures at police officer); *Barboza* v. *D'Agata*, 151 F. Supp. 3d 363, 367, 371–72 (S.D.N.Y. 2015) ("[f]uck your shitty town bitches" written on payment form accompanying speeding ticket); *State* v. *Nelson*, 38 Conn. Supp. 349, 351 n.1, 355, 448 A.2d 214 (App. Sess. 1982) (calling police officer " 'fucking asshole, a fucking pig' ").

aware that some members of the public might well express frustration and even anger upon receiving a ticket;[12] see, e.g., *State* v. *Liebenguth*, supra, 181 Conn. App. 54; we disagree that the average African-American parking official would have been prepared for and responded peaceably to the kind of racial slurs, threatening innuendo, and aggressive behavior with which McCargo was confronted.

It is true, of course, that McCargo did not react violently despite the highly inflammatory and inciting nature of the defendant's language and conduct. "[Even] [t]hough the fighting words standard is an objective inquiry . . . examining the subjective reaction of an addressee, although not dispositive, may be probative of the likelihood of a violent reaction." (Internal quotation marks omitted.) *State* v. *Parnoff*, supra, 329 Conn. 403. Although McCargo acknowledged that the defendant's racial epithets had shocked and appalled him and that he felt "very bad" and personally insulted by them, he quite rightly opined that he had "handled [him]self very well" under the circumstances. We fully agree, of course, that McCargo handled the incident exceptionally well, but we simply are not persuaded that the average person would have exercised a similar measure of self-control and professionalism under the same circumstances. Thus, the fact that McCargo did not react violently in the face of the defendant's malicious and demeaning insults does not alter our conclusion with respect to the likelihood of a violent reaction to that language. See, e.g., *State* v. *Hoshijo ex rel. White*, supra, 102 Haw. 322 ("[It] is of no consequence . . . [that violence was not precipitated], as the proper standard is whether the words were *likely to provoke a violent response*, not whether violence occurred. Plainly, there is no requirement that violence must occur, merely that

[12] We note, however, that there is nothing in the record to indicate that McCargo received any special training on how to deal with persons who become unusually irate or insulting upon being issued a parking ticket.

there be a likelihood of violence. It is abundantly clear on the facts of this case that there was a likelihood of violence." (Emphasis in original.)); *Little Falls* v. *Witucki*, 295 N.W.2d 243, 246 (Minn. 1980) ("The fact that the addressee and object of the fighting words exercised responsible and mature forbearance in not retaliating cannot be relied [on] by [the] defendant to escape responsibility for his own actions. . . . The focus is properly on the nature of the words and the circumstances in which they were spoken rather than on the actual response. The actual response of the addressee and object of the words is relevant, but not determinative, of the issue of whether the utterances meet the fighting words test.").

We also reject the defendant's contention that his use of the epithets "fucking niggers" cannot provide the basis of his conviction in view of the fact that the defendant and McCargo were in their vehicles on both occasions when the defendant directed those slurs at McCargo. Because the rationale underlying the fighting words doctrine is the state's interest in preventing the immediate violent reaction likely to result when highly offensive language is used to insult and humiliate the addressee, "[t]he potential to elicit [such] an immediate violent response exists only [when] the communication occurs [face to face] or in close physical proximity." *Billings* v. *Nelson*, 374 Mont. 444, 449, 322 P.2d 1039 (2014). This requirement is satisfied in the present case even though both men were in their vehicles when the defendant uttered the slurs. When the defendant did so for the first time, McCargo had pulled his vehicle so close to the defendant's vehicle that the defendant accused McCargo of intentionally blocking him in. On the second such occasion, the defendant turned directly toward McCargo as he drove by McCargo's vehicle and then repeated the slur loud enough so that McCargo would be sure to hear it. At this point, the men were sufficiently close that McCargo could see the angry

expression on the defendant's face and discern that he had uttered the slur louder the second time than he had the first time. At all relevant times, therefore, the two men were in close proximity to and maintained eye contact with one another, so that each could see and hear the other clearly and without difficulty. In such circumstances, it would have been easy enough for McCargo to exit his vehicle and to charge after the defendant, or to ram the defendant's vehicle with his own, or to pursue the defendant out of the parking lot in his own vehicle. Unless the use of a vehicle by the speaker makes it impossible for the addressee to retaliate immediately, courts routinely have held that the likelihood of an immediate violent reaction is not diminished merely because the speaker or addressee was in a vehicle when the offending utterances were made. See, e.g., *In re John M.*, supra, 201 Ariz. 428–29 (passenger in car who yelled " 'fuck you, you god damn nigger' " before car pulled into parking lot was found to have used fighting words likely to provoke violent reaction); *Billings* v. *Nelson*, supra, 450 ("The fact that [the defendant and the driver] were in a car does not mean their speech could not have incited an immediate violent response from a listener on the street. . . . [The victim] was close enough to recognize the [speakers'] faces and to hear their words clearly, even though they did not holler them." (Citation omitted; internal quotation marks omitted.)); *In re S.J.N-K.*, 647 N.W.2d 707, 709, 711–12 (S.D. 2002) (when passenger in vehicle who repeatedly uttered " 'fuck you' " with accompanying middle finger gesture while driver of vehicle cut diagonally across adjacent parking lot and in front of addressee's vehicle, evidence established that passenger's words and gestures constituted unprotected fighting words). But cf. *Sandul* v. *Larion*, 119 F.3d 1250, 1252, 1255 (6th Cir.) (when passenger in vehicle traveling at high rate of speed shouted " '[fuck] you' " and extended his middle finger at abortion protesters who were located considerable distance away,

there was no face-to-face contact between passenger and protesters, no protester was offended or even acknowledged passenger's behavior, and entire incident was over in matter of seconds, "it was inconceivable that [the passenger's] fleeting actions and words would provoke the type of lawless action" necessary to satisfy fighting words standard), cert. dismissed, 522 U.S. 979, 118 S. Ct. 439, 139 L. Ed. 2d 377 (1997).

Finally, the defendant claims that the Appellate Court correctly concluded that the present case is governed by our analysis and conclusion in *State* v. *Baccala*, supra, 326 Conn. 232, in which we determined that the vulgar language at issue in that case did not constitute fighting words. We reject this argument because *Baccala* is distinguishable from the present case in a number of material respects.[13]

Before doing so, however, it is necessary to recite the relevant facts of *Baccala* and the reasons we reached the conclusion we did. Those facts, as explained in our decision in that case, are as follows. "On the evening of September 30, 2013, the defendant [Nina C. Baccala] telephoned the Stop & Shop supermarket in Vernon to announce that she was coming to pick up a Western Union money transfer so they would not close the customer service desk before she arrived. [Baccala] spoke with Tara Freeman, an experienced assistant store manager who was in charge of the daily operations at the supermarket . . . . Freeman informed [Baccala] that the customer service desk already had closed and that she was unable to access the computer that processed Western Union transactions. [Baccala] became

[13] We note that the defendant further contends that the trial court's requirement that he undergo a cultural diversity course prescribed and approved by his probation officer evidences that the trial court's guilty finding "constitutes a unique and unprecedented attempt to criminalize incivility or racist attitudes." We disagree. The probationary condition falls squarely within the court's considerable sentencing discretion, and, indeed, it is obviously well-founded in light of the defendant's conceded language and conduct.

belligerent, responded that she 'really didn't give a shit,' and called Freeman '[p]retty much every swear word you can think of' before the call was terminated.

"Despite Freeman's statements to the contrary, [Baccala] believed that as long as she arrived at the supermarket before 10 p.m., she should be able to obtain the money transfer before the customer service desk closed. Accordingly, a few minutes after she telephoned, [Baccala] arrived at the supermarket, which was occupied by customers and employees. [She] proceeded toward the customer service desk located in proximity to the registers for grocery checkout and began filling out a money transfer form, even though the lights at the desk were off. Freeman approached [Baccala], a forty year old woman who used a cane due to a medical condition that caused severe swelling in her lower extremities, and asked her if she was the person who had called a few minutes earlier. Although [Baccala] denied that she had called, Freeman recognized her voice. After Freeman informed [Baccala], as she had during the telephone call, that the customer service desk was closed, [Baccala] became angry and asked to speak with a manager. Freeman replied that she was the manager and pointed to her name tag and a photograph on the wall to confirm her status. [Other] employees . . . were standing nearby as this exchange took place.

"[Baccala] proceeded to loudly call Freeman a 'fat ugly bitch' and a 'cunt,' and said 'fuck you, you're not a manager,' all while gesticulating with her cane. Despite [Baccala's] crude and angry expressions . . . Freeman remained professional. She simply responded, '[h]ave a good night,' which prompted [Baccala] to leave the supermarket." Id., 235–36. Following a jury trial, Baccala was convicted of breach of the peace in the second degree in violation of § 53a-181 (a) (5). Id., 233–34, 236. On appeal to this court, we agreed with Baccala that her

conviction was incompatible with the first amendment. See id., 234–35.

We began our analysis of Baccala's claim with the observation that the language she used was both extremely offensive and intentionally demeaning. Id., 251. We nevertheless concluded that her utterances did not rise to the level of fighting words because, under the circumstances, they were not likely to trigger an immediate violent response by the average person in Freeman's position. Id., 254. In reaching this conclusion, we relied primarily on four considerations relative to the circumstances of the encounter. First, the verbal assault that Baccala launched against Freeman on the telephone placed Freeman on notice of the possibility that Baccala would resort to similar language when she arrived at the supermarket a few minutes later. Id., 252. Second, as a person in an "authoritative [position] of management and control," Freeman would be expected to diffuse such a hostile situation by "model[ing] appropriate, responsive behavior, aimed at de-escalating the situation," both for the sake of other customers and store personnel alike. Id., 253. Third, as a store manager, Freeman had a measure of control over the premises insofar as she could demand that Baccala leave if she became abusive, threaten to have Baccala arrested for trespassing if she didn't leave, and follow through on that threat if necessary. Id., 253. Fourth, there was no reason to think that Freeman's professional and restrained response to Baccala's offensive harangue was atypical of the manner in which an average person in Freeman's position would have responded to the same provocation under the same circumstances. See id., 253–54.

In the present case, the first three of the foregoing factors support the conclusion that the defendant's utterances *were*, in fact, fighting words. In contrast to the notice Freeman had received with respect to the likelihood of an angry and offensive, face-to-face out-

burst by Baccala, McCargo had no forewarning of the verbal abuse that the defendant inflicted on him. Unlike Freeman, McCargo was not acting in a supervisory capacity with respect to the safety and well-being of others. Nor did he have any degree of control over the area in which his encounter with the defendant took place.

Only the fourth factor we considered in *Baccala*—the fact that Freeman did not resort to violence in responding to the verbal provocation she confronted—militates against a finding that the average person in the same situation as McCargo, who also refrained from any physical retaliation, likely would have had an immediate violent response to the defendant's verbal attack. In *Baccala*, however, our conclusion that the response of the average supermarket manager in Freeman's situation probably would be no different from Freeman's necessarily was predicated on the existence of the first three factors discussed—*none of which* is present here. Moreover, in *Baccala*, we expressly acknowledged that we might have reached a different conclusion if Baccala had directed the same language at Freeman after Freeman had completed work and left the supermarket. Id., 253. Notably, that situation—in which Freeman would not have been acting in a managerial or supervisory capacity, had no real control over the relevant premises, and was more or less alone with Baccala—is much more like the circumstances McCargo found himself in when he was accosted by the defendant.

Finally, we agree with the observation that "[r]acial insults, relying as they do on the unalterable fact of the victim's race and on the history of slavery and race discrimination in this country, have an even greater potential for harm than other insults." R. Delgado, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," 17 Harv. C.R.-C.L. L. Rev.

133, 143 (1982); see id., 135–36 (explaining that such insult "injures the dignity and self-regard of the person to whom it is addressed, communicating the message that distinctions of race are distinctions of merit, dignity, status, and personhood"); see also *Matusick* v. *Erie County Water Authority*, 757 F.3d 31, 38 n.3 (2d Cir. 2014) (observing that word "nigger" has "unique . . . power to offend, insult, and belittle"); *Toussaint* v. *Brigham & Women's Hospital, Inc.*, 166 F. Supp. 3d 110, 116 n.4 (D. Mass. 2015) ("[t]he word 'nigger' has unique meaning that makes its use particularly egregious"). In light of the uniquely injurious and provocative nature of the term, we also agree that its use is all the more likely to engender the kind of violent reaction that distinguishes fighting words from the vast majority of words that, though also offensive and provocative, are nevertheless constitutionally protected.

For all the foregoing reasons, we conclude that the language the defendant used to demean, intimidate and anger McCargo were fighting words likely to provoke a violent response from a reasonable person under the circumstances. Because the first amendment does not shield such speech from prosecution, the state was free to use it to obtain the defendant's conviction of breach of the peace in the second degree, which, as we have explained, is supported by the evidence. Because the Appellate Court reached a contrary conclusion, that portion of its judgment reversing the defendant's conviction on that charge cannot stand.

The judgment of the Appellate Court is reversed with respect to the defendant's conviction of breach of the peace in the second degree only and the case is remanded to that court with direction to affirm the judgment of conviction on that charge; the judgment of the Appellate Court is affirmed in all other respects.

In this opinion the other justices concurred.

KAHN, J., concurring. I agree with and join the majority's opinion, reversing the judgment of the Appellate Court with respect to the conviction of the defendant, David G. Liebenguth, of breach of the peace in the second degree and remanding the case with direction to affirm the trial court's judgment of conviction on that charge. I write separately, however, to reiterate my opinion that "[t]he continuing vitality of the fighting words exception is dubious and the successful invocation of that exception is so rare that it is practically extinct." *State* v. *Parnoff*, 329 Conn. 386, 411, 186 A.3d 640 (2018) (*Kahn*, *J.*, concurring in the judgment). Despite the diminished scope of the fighting words doctrine, "I assume that the . . . exception remains valid for now, but [remain] . . . mindful that the exception is narrowly construed . . . ." Id., 414. To the extent that the doctrine is viable, I agree with the majority, as well as Justice Ecker's concurring opinion and Judge Devlin's well reasoned view, that when the " 'viciously hostile epithet,' which has deep roots in this nation's long and deplorable history of racial bigotry and discrimination," is used to demean and humiliate a person,[1] it constitutes fighting words. See *State* v. *Liebenguth*, 181 Conn. App. 37, 64–65, 186 A.3d 39 (2018) (*Devlin*, *J.*, concurring in part and dissenting in part). I also note, in particular, that I disagree with the holding and reasoning of *State* v. *Baccala*, 326 Conn. 232, 241–42 and n.7, 163 A.3d 1, cert. denied, U.S. , 138 S. Ct. 510, 199 L. Ed. 2d 408 (2017), to the extent that the case stands for the proposition that personal attributes of the addressee such as age, gender, race, and status should be consid-

[1] I completely agree with the majority that the racial epithet is particularly demeaning and hostile when used toward an African-American person, thereby likely to provoke a violent reaction. I would not, however, preclude a situation in which the same language directed at a non-African American could result in a similar reaction. By way of example, if the same racial slurs were directed with the same intent to an African-American child in the presence of her or his non-African-American parent, that parent may have a similar visceral reaction of violence.

ered when determining whether a reasonable person with those characteristics was likely to respond with violence. Regardless of my ongoing reservations, the majority has correctly applied precedent from the United States Supreme Court and this court to which we remain beholden.

It is axiomatic that the right to free speech is a bedrock principle of the United States, one so essential that the formation of our nation was predicated on its inclusion in the first amendment of the United States constitution. See U.S. Const., amend. I. The right to free speech, however, is not absolute, and the United States Supreme Court has delineated the circumstances under which words fall outside the protections of the first amendment. One such circumstance is speech that constitutes fighting words. The United States Supreme Court first articulated the doctrine in the seminal case of *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 572, 62 S. Ct. 766, 86 L. Ed. 1031 (1942). In that case, the court carved out an exception to protections afforded free speech for words "which by their very utterance inflict injury or tend to incite [violence] . . . ." Id.; see also *Cohen* v. *California*, 403 U.S. 15, 20, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971); *State* v. *Baccala*, supra, 326 Conn. 237. In the more than seventy-five years since *Chaplinsky* was decided, both the United States Supreme Court and the dictates of changing societal norms have diminished the scope and applicability of the fighting words exception.[2] See Note, "The Demise of the *Chap-*

[2] Even if the fighting words doctrine were obsolete, the defendant's conduct could have constituted a violation under other provisions of our criminal statutes, such as General Statutes § 53a-181 (a) (1). In this case, the state charged the defendant with breach of the peace under § 53a-181 (a) (5), the provision that proscribes speech. The defendant, however, engaged in both speech and conduct that could have supported a charge under § 53a-181 (a) (1), which provides that "[a] person is guilty of breach of the peace in the second degree when, with intent to cause inconvenience, annoyance or alarm, or recklessly creating a risk thereof, such person: (1) Engages in fighting or in violent, tumultuous or threatening behavior in a public place . . . ." Alternatively, the state could also have charged the defendant with

linsky Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L. Rev. 1129, 1129 (1993).

The United States Supreme Court has narrowed the application of the fighting words doctrine, including limiting it to "those personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction"; *Cohen* v. *California*, supra, 403 U.S. 20; thereby "seemingly abandon[ing] the suggestion in *Chaplinsky* that there are words that by their very utterance inflict injury . . . ." (Internal quotation marks omitted.) *State* v. *Parnoff*, supra, 329 Conn. 411–12 (*Kahn*, *J.*, concurring in the judgment); see also Note, supra, 106 Harv. L. Rev. 1129. Contemporaneous with judicial constriction of the fighting words exception, societal norms have also evolved, rendering "public discourse . . . more coarse . . . [and resulting in] fewer combinations of words and circumstances that are likely to fit within the fighting words exception. Indeed, given some of the examples of egregious language that have not amounted to fighting words following *Chaplinsky*, it is difficult to imagine examples that rise to the requisite level today." (Citation omitted; internal quotation marks omitted.) *State* v. *Parnoff*, supra, 413 (*Kahn*, *J.*, concurring in the judgment); see also *State* v. *Baccala*, supra, 326 Conn. 239 (calling someone racketeer or fascist, deemed fighting words in *Chaplinsky*, "would be unlikely to even raise an eyebrow today");

disorderly conduct under General Statutes § 53a-182 (a) (1) or (2). Although "the correct application of the exception to first amendment protection is not based on the charge or charges leveled against the defendant but, rather, on the state's theory of the case," by focusing on speech only, the state relied on the fighting words, rather than the true threat, exception to first amendment protection. *State* v. *Parnoff*, supra, 329 Conn. 407 (*Kahn*, *J.*, concurring in the judgment). The point remains that it is the state that determines on which charge and on which exception to first amendment protection it chooses to rely. The state should consider the wisdom of continuing to pursue a doctrine that has been often criticized and rarely upheld.

State v. *Tracy*, 200 Vt. 216, 237, 130 A.3d 196 (2015) ("in this day and age, the notion that *any* set of words are so provocative that they can reasonably be expected to lead an average listener to immediately respond with physical violence is highly problematic" (emphasis in original)).

This judicial constriction, overlaid with current societal norms, calls into question the continued vitality of the fighting words exception. See Note, supra, 106 Harv. L. Rev. 1146. Regardless, "against this small and tortured canvas, the fighting words exception resurfaces occasionally," and the United States Supreme Court "continues to list fighting words among the exceptions to first amendment protection. . . . Therefore, I assume that the fighting words exception remains valid for now, but [remain] . . . mindful that the exception is narrowly construed and poses a significant hurdle for the state to overcome." (Citation omitted.) *State* v. *Parnoff*, supra, 329 Conn. 413–14 (*Kahn*, *J.*, concurring in the judgment).

When determining whether the fighting words exception applies in a given case, the court must consider both "the words used by the defendant" and "the circumstances in which they were used . . . ." *State* v. *Szymkiewicz*, 237 Conn. 613, 620, 678 A.2d 473 (1996). This court recently stated that "[a] proper examination of context also considers those personal attributes of the speaker and the addressee that are reasonably apparent because they are necessarily a part of the objective situation in which the speech was made." *State* v. *Baccala*, supra, 326 Conn. 241. "[W]hen there are objectively apparent characteristics that would bear on the likelihood of [a violent] response, many courts have considered the average person with those characteristics. Thus, courts also have taken into account the addressee's age, gender, and race." Id., 243. The majority in the present case agrees that, "because the fighting words exception is intended only to prevent the likelihood of

an actual violent response, it is an unfortunate but necessary consequence that we are required to differentiate between addressees who are more or less likely to respond violently and speakers who are more or less likely to elicit such a response." (Internal quotation marks omitted.), quoting *State* v. *Baccala*, supra, 249. I disagree with this proposition to the extent that it allows for consideration of the addressee's characteristics beyond "whether the addressee's position would reasonably be expected to cause him or her to exercise a higher degree of restraint than the ordinary citizen under the circumstances" when determining whether he or she would respond violently.[3] *State* v. *Baccala*, supra, 245.

The ultimate inquiry of the fighting words exception is whether a speaker's words would reasonably result in a violent reaction by its intended recipient. See, e.g., *Cohen* v. *California*, supra, 403 U.S. 20. Considering the stereotypes associated with immutable characteristics of the addressee, however, produces discriminatory results "because its application depends on assump-

[3] I observe that the United States Supreme Court has suggested that whether the addressee is a police officer should be considered because "a properly trained officer *may* reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words." (Emphasis added; internal quotation marks omitted.) *Houston* v. *Hill*, 482 U.S. 451, 462, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987), quoting *Lewis* v. *New Orleans*, 415 U.S. 130, 135, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974) (Powell, J., concurring in the result); see also *State* v. *Baccala*, supra, 326 Conn. 263–64 (*Eveleigh*, *J.*, concurring in part and dissenting in part). "Nevertheless, this court has expressly adopted a narrower application of the fighting words standard for speech addressed to police officer[s]," at least in some contexts. *State* v. *Baccala*, supra, 264 (*Eveleigh*, *J.*, concurring in part and dissenting in part); see also *State* v. *DeLoreto*, 265 Conn. 145, 163, 827 A.2d 671 (2003) ("a narrower class of statements constitutes fighting words when spoken to police officers, rather than to ordinary citizens, because of the communicative value of such statements"). To the extent that these cases do not rely on stereotypes related to an addressee's race, gender, age, disability, ethnicity, sexual orientation, or other immutable characteristics, they do not raise the concerns typically associated with the application of the doctrine.

tions about how likely a listener is to respond violently to speech." W. Reilly, "Fighting the Fighting Words Standard: A Call for Its Destruction," 52 Rutgers L. Rev. 947, 948 (2000). This approach essentially requires courts to promulgate stereotypes on the basis of race, gender, age, disability, ethnicity, and sexual orientation, among others, and has led to much of the scholarly criticism of the fighting words exception. See generally Note, supra, 106 Harv. L. Rev. 1129.

I will refrain from enumerating a laundry list of a stereotypes related to violent responses from which flow myriad discriminatory results, but I illustrate one example of a common refrain in society and courts: women are less likely than men to react to offensive situations with physical violence. Id., 1134. Allowing such a stereotype into the analysis of whether a reasonable person in the addressee's circumstances is likely to respond to words with violence creates a situation in which "almost nothing one could say to a woman would be proscribed by the fighting words doctrine . . . ." W. Reilly, supra, 52 Rutgers L. Rev. 948. The overarching result is that groups of people that, for example, are stereotyped as docile due to their gender or ethnicity, or who have physical limitations due to their age or disability that prevent them from responding violently—the precise groups that face persistent discrimination—must endure a higher level of offensive speech before being afforded legal remedies that comport with our constitution. From the speaker's perspective, such a result allows him or her to more readily and viciously verbally assault certain oppressed groups without fear of criminal prosecution.

Although I have strong reservations about the viability and application of the fighting words doctrine because it leads to consideration of stereotypical propensities for violence when assessing an addressee's likely response to the speaker's words, I recognize that the fighting words exception remains binding United

States Supreme Court precedent. As such, I agree with the majority's conclusion that the defendant's use of the phrases "fucking niggers" and to "remember Ferguson" during his encounter with Michael McCargo were likely to provoke a violent response from a reasonable person under the circumstances and, therefore, constituted fighting words not entitled to protection under the first amendment. Although there are no per se fighting words, and statements must be assessed in the context in which they are made, the highly offensive, degrading, and humiliating racial slur that the defendant used is one of the most volatile terms in the English language, and, therefore, it does not stretch logic to conclude that its use in this context would likely cause a reasonable person to respond with violence.

For the foregoing reasons, I respectfully concur.

ECKER, J., concurring. I join the majority opinion because we are bound by United States Supreme Court precedent to apply the fighting words doctrine as currently formulated, and, in my view, the majority reaches the correct result applying that doctrine to the facts of the present case. I write separately lest my silence otherwise be misunderstood as an endorsement of this deeply flawed doctrine.[1] I also wish to draw attention to the looming question that comes into increasingly sharp focus with every decision issued by this court on the topic. That question is whether there may be a more sensible first amendment framework that would better serve to justify the outcome reached today in a manner that fully honors our government's commitment to freedom of speech without, in the process, sacrificing our ability to regulate a narrow category of malicious hate speech—which, for present purposes, may be defined as speech communicated publicly to an addressee, in

[1] As will become clear, my concerns share a great deal in common with those expressed by Justice Kahn in her incisive concurring opinion.

a face-to-face encounter, using words or images that demean the addressee on the basis of his or her race, color, national origin, ethnicity, religion, gender, sexual orientation, disability, or like trait, under circumstances indicating that the speaker intends thereby to cause the addressee severe psychic pain. I do not know when the United States Supreme Court will acknowledge that the current doctrine is untenable or whether it will consider replacing it with a reformulated doctrine focused on the government's interest in regulating hate speech. Nor do I know whether such a hate speech doctrine ultimately would pass muster under the first amendment. Sooner or later, however, I believe that it will become necessary to either shift doctrinal paradigms or admit failure because it has become evident that the existing fighting words doctrine does not provide a sound or viable means to draw constitutional lines in this area.

I

I agree wholeheartedly with my colleagues that the words and sentiments expressed by the defendant, David B. Liebenguth, were vile, repugnant and morally reprehensible. He selected his words for their cruelty and used them as a weapon to inflict psychic wounds as painful, or more so, than physical ones. The defendant crossed a particular line that should never be crossed by anyone in America and then crossed that line again by engaging in after-the-fact conduct indicating a complete lack of contrition. See footnote 4 of the majority opinion. The views expressed in this concurring opinion should not be construed in any way to excuse, defend, or otherwise condone the defendant's words or accompanying conduct.

This brings me directly to the point. I believe that we need not scratch too deeply beneath the surface to see that the defendant is being punished criminally for the content of his speech. It is the reprehensible content of the speech that propels our desire to prohibit it.

Indeed, one very particular meaning intended by the defendant's language is behind this prosecution. The criminality of the defendant's speech does not inhere in his use of the word "nigger" itself because that word can mean very different things depending on the identity, race, affiliation, and cultural milieu of the speaker and the addressee. See R. Kennedy, "The David C. Baum Lecture: 'Nigger!' as a Problem in the Law," 2001 U. Ill. L. Rev. 935, 937.[2] The criminality of the defendant's speech derives from his use of the word as a term of oppression, contempt, and debasement rather than affection or brotherhood.

Therein lies the difficulty under the first amendment, because the quintessential teaching of the constitutional prohibition against any law abridging the freedom of speech is that the government cannot proscribe speech

[2] Professor Randall L. Kennedy, the author of the acclaimed 2002 book entitled "Nigger: The Strange Career of a Troublesome Word," writes with great learning, sensitivity and sophistication on the subject. He explains the "remarkably protean" nature of the word: "It can mean many things. . . . A weapon of racist oppression, 'nigger' can also be a weapon of antiracist resistance as in Dick Gregory's autobiography entitled Nigger, or H. Rap Brown's polemic Die Nigger Die! An expression of deadening contempt, use of the N-word can also be an assertion of enlivened wit as in Richard Pryor's trenchant album of stand up comedy That Nigger's Crazy. A term of belittlement, 'nigger' can also be a term of respect as in 'James Brown is sho nuff nigger.' . . . A term of hostility, nigger can also be a term of endearment as in 'this is my main nigger'—i.e., my best friend. . . . It might just be, as [the journalist Jarvis Deberry] writes, 'the most versatile and most widely applied intensifier in the English language.' " (Footnotes omitted.) R. Kennedy, supra, 2001 U. Ill. L. Rev. 937; see also A. Perdue & G. Parks, "The Nth Decree: Examining Intraracial Use of the N-Word in Employment Discrimination Cases," 64 DePaul L. Rev. 65, 66 (2014) ("[w]hile some members of the black community . . . publicly embrace [the] use of the N-word by and among blacks as a term of endearment, others . . . still view it exclusively as a tool of racial oppression"). The indomitable Charles Barkley has revealed the politically subversive undercurrent that accompanies some uses of the word: "I use the N-word. I'm going to continue to use the N-word . . . . [W]hat I do with my black friends is not up to white America . . . ." (Internal quotation marks omitted.) A. Perdue & G. Parks, supra, 65–66.

on the basis of content. "[A]bove all else," Justice Thurgood Marshall famously observed, "the [f]irst [a]mendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dept.* v. *Mosley*, 408 U.S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972); accord *Brown* v. *Entertainment Merchants Assn.*, 564 U.S. 786, 790–91, 131 S. Ct. 2729, 180 L. Ed. 2d 708 (2011); *Ashcroft* v. *American Civil Liberties Union*, 535 U.S. 564, 573, 122 S. Ct. 1700, 152 L. Ed. 2d 771 (2002); see *Reed* v. *Gilbert*, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015) ("[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests"); *R. A. V.* v. *St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) ("[t]he [f]irst [a]mendment generally prevents [the] government from proscribing speech . . . or even expressive conduct . . . because of disapproval of the ideas expressed" (citations omitted)); see also footnote 8 of this opinion. Speech that offends, provokes, or disrupts cannot be censored by the government merely because it roils calm waters or contravenes our collective sense of civilized discourse. Although the content of such speech at times may be extremely difficult to tolerate, and its value may be impossible to discern, we must never forget that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a

clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest. . . . There is no room under our [c]onstitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups." (Citations omitted.) *Terminiello* v. *Chicago*, 337 U.S. 1, 4–5, 69 S. Ct. 894, 93 L. Ed. 1131 (1949).

The fighting words doctrine is among the very few exceptions to this rule. "[T]he [f]irst [a]mendment has 'permitted restrictions upon the content of speech in a few limited areas' " consisting of " 'historic and traditional categories long familiar to the bar' . . . including obscenity . . . defamation . . . fraud . . . incitement . . . and speech integral to criminal conduct . . . ." (Citations omitted.) *United States* v. *Stevens*, 559 U.S. 460, 468, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); see also *R. A. V.* v. *St. Paul*, supra, 505 U.S. 383, 386 (listing exceptions, including fighting words). The fighting words doctrine, in modified form, appears to remain good law despite widespread criticism and a distinctly underwhelming track record in its place of origin, the United States Supreme Court.[3] See *State* v.

[3] Questions arise about the continued vitality of the fighting words doctrine because the United States Supreme Court has not upheld a single criminal conviction under the doctrine since *Chaplinsky* was decided almost eighty years ago. Note, "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L. Rev. 1129, 1129 (1993). There is no doubt that the doctrine's scope has been narrowed by a series of decisions including, but not by any means limited to, *Cohen* v. *California*, 403 U.S. 15, 20, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) (limiting fighting words to personally abusive epithets spoken in direct and personal confrontation), *Lewis* v. *New Orleans*, 415 U.S. 130, 135, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974) (Powell, J., concurring in the result) (indicating that first amendment protection is broader when addressee is police officer, who "may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words" (internal quotation marks omitted)), and *R. A. V.* v. *St. Paul*, supra, 505 U.S. 386, 391 (recognizing that fighting words are not devoid of expressive value, describing fighting words doctrine as regulation of " 'nonspeech' element of communication," and holding that statute prohibiting particular fighting

Parnoff, 329 Conn. 386, 411, 186 A.3d 640 (2018) (*Kahn*, *J.*, concurring in the judgment) ("[t]he continuing vitality of the fighting words exception is dubious and the successful invocation of that exception is so rare that it is practically extinct").

I understand that we must adhere to the fighting words doctrine until the United States Supreme Court says otherwise. But, although the majority opinion does an admirable job fashioning a silk purse out of this particular sow's ear, I believe that we are better off in the end expressing our concerns openly and displaying a more determined preference for avoiding further entanglement with this untenable doctrine.[4] In my view,

words was unconstitutional because it discriminated on basis of viewpoint of speaker). See, e.g., W. Nevin, " 'Fighting Slurs': Contemporary Fighting Words and the Question of Criminally Punishable Racial Epithets," 14 First Amendment L. Rev. 127, 133–38 (2015) (reviewing post-*Chaplinsky* cases limiting fighting words doctrine); T. Place, "Offensive Speech and the Pennsylvania Disorderly Conduct Statute," 12 Temp. Pol. & Civ. Rts. L. Rev. 47, 51–59 (2002) (same); R. Smolla, "Words 'Which By Their Very Utterance Inflict Injury': The Evolving Treatment of Inherently Dangerous Speech in Free Speech Law and Theory," 36 Pepp. L. Rev. 317, 350 (2009) (noting that "the entire mainstream body of modern [f]irst [a]mendment law . . . has dramatically tightened the rules of immediacy, intent, and likelihood of harm required to justify restrictions on speech on the theory the speech will lead to violence" and suggesting that "the 'inflict[s] injury' prong of *Chaplinksy*" is no longer operative and what remains is "that part of *Chaplinksy* linked to genuine 'fighting words' and the maintenance of physical (as opposed to moral) order"). I nonetheless agree with the majority and Justice Kahn that the fighting words exception to the first amendment has not been overruled and remains binding on this court.

[4] I do not break any new ground in pointing out these defects. See, e.g., B. Caine, "The Trouble With 'Fighting Words': *Chaplinsky* v. *New Hampshire* Is a Threat to First Amendment Values and Should Be Overruled," 88 Marq. L. Rev. 441, 444–45 n.6 (2004) ("While I agree with both scholars and others that *Chaplinsky* ought to be overruled, I must note that the [United States] Supreme Court has paid little attention to their plea. . . . [*Chaplinsky*] is so deeply flawed that it cannot stand, and . . . [it] is an intolerable blot on free speech jurisprudence."); S. Gard, "Fighting Words as Free Speech," 58 Wash. U. L.Q. 531, 536 (1980) ("the fighting words doctrine is nothing more than a quaint remnant of an earlier morality that has no place in a democratic society dedicated to the principle of free expression"); R. O'Neil, "Hate Speech, Fighting Words, and Beyond—Why American Law Is Unique,"

this court's own engagement with the fighting words doctrine to date has resulted in a series of decisions embedding us more deeply in the doctrinal quicksand each time we undertake the futile task of drawing constitutional distinctions between one person's lyric and another's vulgarity.[5] I fear that the doctrine we have embraced disserves us more than we acknowledge by inducing us to believe, or act as if we believe, that we are able to discern a constitutional line distinguishing one angry person screaming a race-based epithet at a municipal parking enforcement officer from another angry person screaming a gender-based epithet at a store manager. See *State* v. *Baccala*, 326 Conn. 232, 235–36, 256, 163 A.3d 1 (calling assistant manager of grocery store "a 'fat ugly bitch' and a 'cunt' " did not constitute fighting words and, therefore, warranted constitutional protection under first amendment), cert. denied, U.S. , 138 S. Ct. 510, 199 L. Ed. 2d 408 (2017).

76 Alb. L. Rev. 467, 471–72 (2012–2013) ("[The] dismissive . . . view of expression [in *Chaplinsky*] that was both unquestionably offensive and provocative now seems not only archaic but also wholly illogical. . . . Seventy years later, *Chaplinsky* remains a persistent source of constitutional confusion. It might have been mercifully overruled long since, but that never happened." (Footnotes omitted.)); W. Reilly, "Fighting the Fighting Words Standard: A Call for Its Destruction," 52 Rutgers L. Rev. 947, 948 (2000) ("The [fighting words doctrine] is discriminatory because its application depends on assumptions about how likely a listener is to respond violently to speech. This approach invites judges or juries to determine whether speech is protected by the [f]irst [a]mendment based on their own prejudices about the listener."); M. Mannheimer, Note, "The Fighting Words Doctrine," 93 Colum. L. Rev. 1527, 1558, 1568–71 (1993) (arguing for modification of fighting words doctrine to add scienter requirement); Note, "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L. Rev. 1129, 1141 (1993) ("Overruling *Chaplinsky* would eliminate a doctrine that accommodates the undesirable 'male' tendency to come to blows. More [important], eliminating the 'fighting words' doctrine would eradicate a tool that governmental officials may use and have used to harass minority groups and to suppress dissident speech.").

[5] See *Cohen* v. *California*, 403 U.S. 15, 25, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) (recognizing that, under fighting words doctrine, "it is . . . often true that one man's vulgarity is another's lyric").

II

The profound and intractable problems inherent in the fighting words doctrine become evident the moment we examine the legal standard that our court uses to determine whether a defendant's speech falls within its scope. The majority correctly describes the analysis. Fighting words is speech that is "likely to provoke a violent response under the circumstances in which [the words] were uttered . . . ." Id., 234. The doctrine purports not to be concerned with the content of the speech per se but, rather, the "likelihood of violent retaliation." Id., 240. Thus, unlike the situation described by George Carlin in his classic comedic monologue about government censorship of obscene language, "Seven Words You Can Never Say on Television,"[6] there is no predetermined list of proscribed fighting words or phrases; context is everything. As the majority aptly observes, "there are no per se fighting words because words that are likely to provoke an immediate, violent response when uttered under one set of circumstances may not be likely to trigger such a response when spoken in the context of a different factual scenario." In determining whether the speech in any particular circumstance is constitutionally protected, the person performing the constitutional line drawing must consider "a host of factors," including not only the words themselves, but "the manner and circumstances in which the words were spoken" and "those personal attributes of the speaker and addressee that are reasonably apparent . . . ." *State* v. *Baccala*, supra, 326 Conn. 240–41; see id., 242–43 ("[c]ourts have . . . considered the age, gender, race, and status of the speaker" and "also have taken into account the addressee's age, gender, and race"). This intensely contextualized and fact specific inquiry strives to remain "objective" in nature. Id., 247. For this reason, the issue is not how the actual addressee in fact responds to the speech, but the likely

[6] G. Carlin, Class Clown (Little David Records 1972).

response of the *average* person in the addressee's shoes. Id.; see *Chaplinsky* v. *New Hampshire*, 315 U.S. 568, 573, 62 S. Ct. 766, 86 L. Ed. 1031 (1942) ("the test [for determining which words are fighting words] is what men of common intelligence would understand would be words likely to cause an average addressee to fight" (internal quotation marks omitted)).

As this description illustrates, the constitutional justification for the fighting words doctrine, as it operates today, does *not* rest on the state's interest in protecting the addressee from the emotional and psychic harm caused by words "which by their very utterance inflict injury . . . ."[7] *Chaplinsky* v. *New Hampshire*, supra,

[7] *Chaplinsky* defined fighting words as "those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." *Chaplinsky* v. *New Hampshire*, supra, 315 U.S. 572. The two parts of this definition have come to be known as the "inflicts injury" prong and the "breach of peace" or "incitement" prong. It is debatable whether the "inflicts injury" prong was ever anything more than dictum. See Note, "The Demise of the *Chaplinsky* Fighting Words Doctrine: An Argument for Its Interment," 106 Harv. L. Rev. 1129, 1129 (1993) (noting that "the prong of *Chaplinsky* that exempted words 'which by their very utterance inflict injury'—dictum in that opinion—has never been used by the [c]ourt to uphold a speaker's conviction"). In any event, it is generally acknowledged that the "inflicts injury" prong no longer serves to justify the fighting words exception. See, e.g., *Purtell* v. *Mason*, 527 F.3d 615, 624 (7th Cir.) ("[a]lthough the 'inflict-injury' alternative in *Chaplinsky*'s definition of fighting words has never been expressly overruled, the [United States] Supreme Court has never held that the government may, consistent with the [f]irst [a]mendment, regulate or punish speech that causes emotional injury but does not have a tendency to provoke an immediate breach of the peace" (emphasis omitted)), cert. denied, 555 U.S. 945, 129 S. Ct. 411, 172 L. Ed. 2d 288 (2008); *Boyle* v. *Evanchick*, United States District Court, Docket No. 19-3270 (GAM) (E.D. Pa. March 19, 2020) (noting "[t]he [United States] Supreme Court's retreat from the broad standard announced in *Chaplinsky*" and abandonment of the "inflicts injury" prong); *UWM Post, Inc.* v. *Board of Regents*, 774 F. Supp. 1163, 1170 (E.D. Wis. 1991) ("[s]ince *Chaplinsky*, the [United States] Supreme Court has . . . limited the fighting words definition so that it now . . . includes [only the 'incitement' prong]"); *People in the Interest of R.C.*, 411 P.3d 1105, 1108 (Colo. App. 2016) ("soon after *Chaplinsky*, the [United States] Supreme Court either dropped the 'inflict[s] injury' category of fighting words altogether or recited the full definition of fighting words without further reference to any distinction between merely hurtful speech and

315 U.S. 572. Instead, the current fighting words doctrine purports to regulate speech on the basis of its *incitement effect*, i.e., the likelihood of inciting the addressee to immediate violence against the speaker. The ascendancy of the incitement rationale as the sole constitutionally legitimate justification for the fighting words doctrine avoids the appearance, discomfiting to some, that the state is censoring speech due solely to the emotional impact that the content of that speech has on the addressee.[8] The allure of the incitement analysis, in other words, lies in its insistence that it is entirely unconcerned with the *content* of the speech

speech that tends to provoke an immediate breach of the peace"), cert. denied, Colorado Supreme Court, Docket No. 16SC987 (November 20, 2017); *State* v. *Drahota*, 280 Neb. 627, 634, 788 N.W.2d 796 (2010) ("the [United States] Supreme Court has largely abandoned *Chaplinsky*'s 'inflict[s] injury' standard"); E. Chemerinsky, Constitutional Law (5th Ed. 2017) § 9 (C) (2) (a), p. 1387 ("the [c]ourt has narrowed the scope of the fighting words doctrine by ruling that it applies only to speech directed at another person that is likely to produce a violent response"); M. Rutzick, "Offensive Language and the Evolution of First Amendment Protection," 9 Harv. C.R.-C.L. L. Rev. 1, 22–27 (1974) (tracing United States Supreme Court's rejection of "inflicts injury" prong in decades since *Chaplinsky*); M. Mannheimer, Note, "The Fighting Words Doctrine," 93 Colum. L. Rev. 1527, 1538–49 (1993) (tracing United States Supreme Court's rejection of "inflicts injury" prong in decades since *Chaplinsky*); Note, supra, 106 Harv. L. Rev. 1137 ("this prong almost certainly has been de facto overruled").

[8] First amendment jurisprudence traditionally recognizes that the government may not censor speech merely because the content or message is insulting or offensive due to its emotional impact on the audience. See, e.g., *Texas* v. *Johnson*, 491 U.S. 397, 414, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989) ("[i]f there is a bedrock principle underlying the [f]irst [a]mendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable"); *Cohen* v. *California*, 403 U.S. 15, 25, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) ("Surely the [s]tate has no right to cleanse public debate to the point where it is grammatically palatable to the most squeamish among us. . . . [I]t is . . . often true that one man's vulgarity is another's lyric."); cf. R. Kennedy, supra, 2001 U. Ill. L. Rev. 943 ("[t]he [fighting words] doctrine is in tension with the dominant (and good) rule in criminal law that prevents 'mere words standing alone . . . no matter how insulting, offensive, and abusive' from constituting the predicate for a provocation excuse"), quoting *United States* v. *Alexander*, 471 F.2d 923, 941 n.48 (D.C. Cir.), cert. denied sub nom. *Murdock* v. *United States*, 409 U.S. 1044, 93 S. Ct. 541, 34 L. Ed. 2d 494 (1972).

under review and regulates solely on the basis of the "nonspeech" element of the communication. See *R. A. V.* v. *St. Paul*, supra, 505 U.S. 386.

Serious problems arise, however, when we use the fighting words exception to regulate offensive speech under the rubric of the incitement rationale. Fighting words is an unusual subcategory of incitement speech—the speaker and listener are adversaries rather than coconspirators, and the speaker ordinarily is not *advocating* violence but, rather, speaking words in a manner likely to stimulate the listener's anger to the boiling point.[9] The fighting words doctrine permits the government to prohibit speech that the government deems likely to incite a physical attack by the addressee *on the speaker himself*. Put another way, this category of speech loses its constitutional protection because it is deemed likely to "cause" another person to punch the speaker in the nose (or worse)—a distinctly counterin-

[9] The incitement analysis has its origins in cases in which a speaker faces criminal prosecution or civil liability for advocating unlawful conduct. See, e.g., *Brandenburg* v. *Ohio*, 395 U.S. 444, 444–45, 89 S. Ct. 1827, 23 L. Ed. 2d 430 (1969) (speech allegedly advocating hate group to engage in racial violence); *Schenck* v. *United States*, 249 U.S. 47, 48–50, 39 S. Ct. 247, 63 L. Ed. 470 (1919) (speech advocating reader to resist military conscription); cf. *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886, 927, 102 S. Ct. 3409, 73 L. Ed. 2d 1215 (1982) (applying *Brandenburg* test to speech allegedly inciting group to cause property damage). Under the *Brandenburg* "incitement" analysis, speech loses its constitutional protection only if it is (1) "directed to inciting or producing imminent lawless action," *and* (2) "likely to incite or produce such action." *Brandenburg* v. *Ohio*, supra, 447. The fighting words doctrine, unlike the *Brandenburg* incitement analysis, contains no intent requirement. See C. Calvert, "First Amendment Envelope Pushers: Revisiting the Incitement-to-Violence Test with Messrs. Brandenburg, Trump, & Spencer," 51 Conn. L. Rev. 117, 131–32 (2019) ("[i]n contrast to *Brandenburg*, the [c]ourt's test for another unprotected category of speech related to violence—fighting words—lacks an intent element"); M. Mannheimer, Note, "The Fighting Words Doctrine," 93 Colum. L. Rev. 1527, 1557 (1993) (observing that fighting words doctrine does not contain "a true incitement requirement because [it] fail[s] to require a critical component of the *Brandenburg* incitement standard—the intent of the speaker to cause violence").

tuitive justification for withdrawing constitutional protection from the speaker. See *Feiner* v. *New York*, 340 U.S. 315, 327 n.9, 71 S. Ct. 303, 95 L. Ed. 295 (1951) (Black, J., dissenting) ("[T]he threat of one person to assault a speaker does not justify suppression of the speech. There are obvious available alternative methods of preserving public order. One of these is to arrest the person who threatens an assault."); B. Caine, "The Trouble with 'Fighting Words': *Chaplinsky* v. *New Hampshire* Is a Threat to First Amendment Values and Should Be Overruled," 88 Marq. L. Rev. 441, 507 (2004) ("[p]unishing the speaker for the violence committed against the speaker is totally at odds with [first amendment principles]"); R. Kennedy, supra, 2001 U. Ill. L. Rev. 942 ("Rather than insisting that the target of the speech control himself, the doctrine tells the offensive speaker to shut up. This is odd and objectionable.").

I wish to focus on two of the most fundamental problems that infect the doctrine as it has been applied in Connecticut. First, as Justice Kahn observes in her concurring opinion, one of the foremost flaws inherent in the fighting words doctrine is that its application turns on the adjudicator's assessment of the addressee's physical ability and psychological or emotional proclivity to respond with violence to the speaker's insulting words. The majority's description of the required legal analysis frankly acknowledges its focus on the speaker's and the addressee's respective age, race, gender, physical condition, and similar characteristics. The doctrine thus confers or withdraws constitutional protection depending on the demographic characteristics of the relevant individuals; vicious and vile words spoken by "a child, a frail elderly person, or a seriously disabled person" may be protected under the first amendment because "social conventions . . . [or] special legal protections . . . could temper the likelihood of a violent response . . . ." *State* v. *Baccala*, supra, 326 Conn. 242. And most important, as the majority, quoting *State* v.

Baccala, supra, 249, acknowledges, " 'an unfortunate but necessary' " part of the constitutional analysis is an assessment of the *addressee's* physical abilities and aggressive tendencies to determine whether the addressee is " 'likely to respond violently . . . .' "

"Unfortunate" is a vast understatement. The fighting words doctrine invites—even requires—stereotyping on the basis of age, gender, race, and whatever other demographic characteristics the adjudicator explicitly or implicitly relies on to decide whether a person is likely to respond to offensive language with immediate violence. In my view, a bright red light should flash when our first amendment doctrine leads us to conclude, for example, that an outrageous slur directed at a physically disabled elderly woman is constitutionally protected but the identical words addressed to a physically fit man walking down the sidewalk will subject the speaker to criminal prosecution. It is no wonder that the fighting words doctrine is considered by many critics to represent a "hopeless anachronism that mimics the macho code of barroom brawls." K. Sullivan, "The First Amendment Wars," New Republic, September 28, 1992, p. 40; id. (observing that fighting words doctrine "give[s] more license to insult Mother Teresa than Sean Penn just because she is not likely to throw a punch"); see A. Carr, "Anger, Gender, Race, and the Limits of Free Speech Protection," 31 Hastings Women's L.J. 211, 227 (2020) (describing *Chaplinsky* as reflecting "a gendered . . . perspective" enshrining "a 'hypermasculine' exemption from presumed 'gentlemanly' expectations of conduct among men"); S. Gard, "Fighting Words as Free Speech," 58 Wash. U. L.Q. 531, 536 (1980) (opining that fighting words doctrine represents "a quaint remnant of an earlier morality that has no place in a democratic society"); K. Greenawalt, "Insults and Epithets: Are They Protected Speech?," 42 Rutgers L. Rev. 287, 293 (1990) ("Many speakers who want to humiliate and wound would also welcome a fight. But in many of the

cruelest instances in which abusive words are used, no fight is contemplated: white adults shout epithets at black children walking to an integrated school; strong men insult much smaller women."); R. Kennedy, supra, 2001 U. Ill. L. Rev. 943 (fighting words doctrine "gives more leeway to insult a nun than a prizefighter because she is less likely to retaliate"); W. Reilly, "Fighting the Fighting Words Standard: A Call for Its Destruction," 52 Rutgers L. Rev. 947, 956 (2000) (observing that fighting words doctrine permits "speech to be [regulated] . . . when directed at someone who would react violently to a verbal assault, but [prohibits regulation] . . . when directed at someone with a more pacific bent").[10]

[10] Professor Kathleen Sullivan is correct to label the doctrine gendered and anachronistic, although its historical roots trace back to the nineteenth century gentlemanly ritual of the duel rather than the timeless working-class custom of barroom brawling. Ironically, as Professor Jeffrey Rosen has observed, "[t]he [social] foundation of the [fighting words] doctrine had collapsed long before the [United States] Supreme Court enshrined it as marginal constitutional law in 1942 [in *Chaplinksy*]." J. Rosen, "Fighting Words," Legal Affairs, May/June, 2002, p. 18. "Legal bans on fighting words," explains Rosen, "grew out of the [nineteenth century] efforts to discourage the practice of dueling, and they evolved from a [class-based] culture of honor and hierarchy" that we would no longer recognize in contemporary America. Id., p. 16. The concept of fighting words emanates from a "highly ritualized code of honor [that] led American gentlemen in the [nineteenth] century to fight duels, to prove their social status and worthiness for leadership. . . . [D]ueling depended on a strong consensus about the social pecking order. If you were insulted by a social equal, you redeemed your honor by challenging him to a duel. If you wanted to insult a social inferior, you displayed your contempt by bludgeoning him with a cane. In a culture based on honor, there was broad agreement about what kinds of insults could be avenged only by demanding satisfaction in a duel." Id. States attempted—apparently with little success—to put an end to this cultural artifact by enacting laws criminalizing the utterance of words considered so insulting as to necessitate a violent response. Id.; see also K. Greenberg, Honor and Slavery (Princeton University Press 1996) c. 1, pp. 14–15 (discussing history of antidueling laws); J. Freeman, Affairs of Honor (Yale University Press 2001) c. 4, pp. 159–198 (discussing social meaning and national importance of dueling in America during early nineteenth century). Professor Freeman's discussion in particular demonstrates that participation in these "affairs of honor" was not considered optional. See J. Freeman, supra, pp. 159–164 (discussing Alexander Hamilton's tormented desire to avoid proceeding with duel demanded by Aaron Burr and Hamilton's reluctant conclusion that duel was impossible to avoid). "The laws of honor," writes Professor Freeman, "indicated when insults could not be ignored . . . ." Id., p. 171. Our country's

The doctrine in no way avoids this analytical abyss by focusing its inquiry on the personal characteristics of the "average" addressee rather than the actual listener. To the contrary, styling the test in faux objective garb only makes things worse because there is no empirical basis for such an inquiry; no such average person exists, no metric for assessment exists, and, to the best of my knowledge, nothing that we would consider valid social science is available to assist the decision maker. The first amendment becomes a Rorschach blot onto which the adjudicating authority (and, before it reaches the adjudicator, the arresting officer and state prosecutor) projects his or her own stereotypes, preconceptions, biases and fantasies about race, ethnicity, sexual orientation, gender, religion, and other "identity" characteristics of the addressee to decide whether a person with those demographics probably would react with immediate violence.[11] This is especially the case when

dominant social code no longer compels us to defend our honor with violence; to the contrary, it is considered honorable to respond to insults by walking away, as the parking enforcement officer, Michael McCargo, did in the present case.

[11] There is a substantial body of social science literature on implicit bias, which is generally defined as subconscious "stereotypes and prejudices that can negatively and nonconsciously affect behavior . . . ." L. Richardson, "Arrest Efficiency and the Fourth Amendment," 95 Minn. L. Rev. 2035, 2039 (2011). One such implicit bias "consists of the cultural stereotype of blacks, especially young men, as violent, hostile, aggressive, and dangerous." Id.; see also A. Rutbeck-Goldman & L. Richardson, "Race and Objective Reasonableness in Use of Force Cases: An Introduction to Some Relevant Social Science," 8 Ala. C.R. & C.L. L. Rev. 145, 149 (2017) ("[s]ocial science research over the last few decades suggests that we unconsciously associate [b]lack men with danger, criminality, and violence"). Implicit biases "linking [b]lacks with aggression have been shown to cause people to judge the behavior of a [b]lack person as more aggressive than the identical behavior of a [w]hite person," leading to higher rates of police violence and incarceration. K. Spencer et al., "Implicit Bias and Policing," 10 Soc. & Personality Psychol. Compass 50, 54 (2016); see also L. Richardson, supra, 2039 ("As a result of implicit biases, an officer might evaluate behaviors engaged in by individuals who appear black as suspicious even as identical behavior by those who appear white would go unnoticed. In other words, even when officers are not intentionally engaged in conscious racial profiling, implicit biases can lead to a lower threshold for finding identical behavior suspicious when engaged in by blacks than by whites."). Implicit biases are not limited to race; they also perpetuate subconscious gender stereotypes. Many individu-

it comes to the predominant twenty-first century brand of insults, epithets, and slurs, which so often target the group identity of the addressee. The fighting words doctrine in its current form confers or withdraws first amendment protection on the basis of nothing more substantial than our own stereotypes and biases regarding those very demographic features. This is "I know it when I see it" run amuck.[12]

The sharp contrast between this court's holdings in *Baccala* and the present case demonstrate the point. The majority does its best to distinguish *Baccala* on some basis other than gender and race, but the stark

als view women as "meek or submissive"; J. Cuevas & T. Jacobi, "The Hidden Psychology of Constitutional Criminal Procedure," 37 Cardozo L. Rev. 2161, 2181 (2016); and, thus, not prone to engage in violent behavior. This is not true, however, for women of color. Black women are often viewed as "hot-tempered, combative, and uncooperative," leading to higher rates of police violence and incarceration. F. Freeman, Note, "Do I Look Like I Have an Attitude? How Stereotypes of Black Women on Television Adversely Impact Black Female Defendants Through the Implicit Bias of Jurors," 11 Drexel L. Rev. 651, 655 (2019); see also N. Amuchie, " 'The Forgotten Victims' How Racialized Gender Stereotypes Lead to Police Violence Against Black Women and Girls: Incorporating an Analysis of Police Violence into Feminist Jurisprudence and Community Activism," 14 Seattle J. Soc. Just. 617, 646 (2016) ("[b]lack women and girls are viewed as [nonfeminine] or [unladylike], which leads to high levels of violence against them and excessive policing"). America, of course, has no monopoly on group stereotypes of this nature. See, e.g., P. Lerner et al., "Introduction: German Jews, Gender, and History," in Jewish Masculinities (B. Baader et al. eds., 2012) p. 1 ("[t]he idea that Jewish men differ from non-Jewish men by being delicate, meek, or effeminate in body and character runs deep in European history").

[12] See *Jacobellis* v. *Ohio*, 378 U.S. 184, 197, 84 S. Ct. 1676, 12 L. Ed. 2d 793 (1964) (Stewart, J., concurring) (confessing his inability to define pornography in words but explaining that "I know it when I see it"). Justice Potter Stewart's candor is admirable and refreshing, but it is also troubling to those who believe that "the exercise of judicial power is not legitimate if it is based . . . on subjective will rather than objective analysis, on emotion [or instinct] rather than reasoned reflection." P. Gewirtz, Essay, "On 'I Know It When I See It,' " 105 Yale L.J. 1023, 1025 (1996). Some commentators, including Professor Gewirtz, consider such criticism unfair on the ground that it "mischaracterizes and understates the role that emotion and nonrational elements properly play in forming judicial [decision-making and opinion writing]." Id. I am not unsympathetic to Professor Gewirtz' general point, but my heart and mind are in agreement that "I know it when I see it" jurisprudence has no place in first amendment law.

reality of differential treatment remains.[13] In my view, the various distinctions drawn between that case and

[13] To cite one illustrative example of what I consider the unconvincing arguments offered by the majority to explain why the offensive speech was protected in *Baccala* but not here, the majority compares the nature of the addressee's job as an assistant store manager in *Baccala* to that of Michael McCargo, the parking enforcement officer in the present case, and opines that the store employee's supervisory status made her more likely to "[model] appropriate, responsive behavior, aimed at de-escalating the situation . . . ." (Internal quotation marks omitted.), quoting *State* v. *Baccala*, supra, 326 Conn. 253. Unlike the majority, I would place far greater weight on the fact that the addressee in this case was a government employee, not a private individual, as in *Baccala*. This factor, though not dispositive, traditionally and commonsensically weighs strongly in favor of according the speaker greater first amendment protection. See, e.g., *Houston* v. *Hill*, 482 U.S. 451, 462, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987) ("a properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen, and thus be less likely to respond belligerently to fighting words" (internal quotation marks omitted)), quoting *Lewis* v. *New Orleans*, 415 U.S. 130, 135, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974) (Powell, J., concurring in the result); *United States* v. *Poocha*, 259 F.3d 1077, 1081 (9th Cir. 2001) ("the area of speech unprotected as fighting words is at its narrowest, if indeed it exists at all, with respect to criminal prosecution for speech directed at public officials"); *Abudiab* v. *San Francisco*, 833 F. Supp. 2d 1168, 1175 (N.D. Cal. 2011) (parking control officer, "as a public official whose duties often incite the vitriol of the public, and who consequently is authorized to use force against members of the public (deployment of pepper spray in self-defense) . . . should be held to a higher standard of conduct in terms of his reaction to mere criticisms, profane and otherwise, of the manner in which he conducts his official duties"), aff'd sub nom. *Abudiab* v. *Georgopoulos*, 586 Fed. Appx. 685 (9th Cir. 2013); *In re Nickolas S.*, 226 Ariz. 182, 188, 245 P.3d 446 (2011) ("a student's profane and insulting outburst" was not fighting words because "Arizona teachers exemplify a higher level of professionalism"); *State* v. *Baccala*, supra, 326 Conn. 244 ("a majority of courts, including ours, hold police officers to a higher standard than ordinary citizens when determining the likelihood of a violent response by the addressee"). To be sure, McCargo was not a police officer, but he was employed as an agent of the government to walk the streets imposing monetary fines on members of the public for municipal parking violations. Parking enforcement officers, as the bearers of bad news, are in a very unpopular line of work and can expect to be subjected to varying levels of verbal abuse. See, e.g., T. Barrett, The Dangerous Life of a Parking Cop, The Tyee (April 2, 2004), available at https://thetyee.ca/Life/2004/04/02/The_Dangerous_Life_of_a_Parking_Cop/ (last visited August 26, 2020) (reviewing film about "the life of a parking enforcement officer," who explained that "physical assaults are rare, but verbal abuse is something that happens almost every day"); J. McKinley, "San Franciscans Hurl Their Rage at Parking Patrol," N.Y. Times, January 6, 2007, p. A12 (abuse on parking control officers is "common, often frightening and, occasionally, humiliating").

the present case, though unquestionably reflecting the good-faith assessment of the subscribing justices, reinforce rather than remove valid concerns regarding the arbitrary, subjective, and gendered nature of the fighting words doctrine. An observer would be excused for thinking that these outcomes reflect, and may tend to perpetuate, nothing more substantial than our deeply ingrained stereotypes regarding the traditional gender traits of the "average" woman, at least the "average" white woman. See footnote 11 of this opinion.[14]

The potential for discriminatory enforcement, or at the very least the perception that a "realistic possibility that official suppression of ideas is afoot," is anathema to our most fundamental first amendment values. *R. A. V.* v. *St. Paul*, supra, 505 U.S. 390. In the hands of even the most responsible police officers, prosecutors, judges and juries, this legal standard is sure to produce incongruous and inexplicable results, even if all participants—including the speaker and the addressee—share

[14] The particular facts of the present case, and our consensus regarding the correct result here, ought not obscure the reality that demographic stereotypes and implicit biases relating to race will continue to plague this doctrine. Conscious or unconscious racial stereotypes help to explain why some speech is deemed likely to incite violence, whereas other speech is not. See, e.g., A. Carr, supra, 31 Hastings Women's L.J. 229–30 ("For nonwhite Americans, racist stereotypes and diverging governmental and cultural norms about expressing public anger compound the complexities of [speech regulation]. Moreover, the state's responses to different individuals and groups' public displays of anger—as in protest actions—vary on the basis of race. For example, the recent cases of mass protests in Ferguson [Missouri, in 2014] and the Women's Marches (2017 onward) displayed enormous disparities: police responses to the [majority black] protesters in Ferguson were militarized and violent compared to the anodyne permissiveness of authorities toward the visibly white Women's March organizers and attendees. . . . Those [state individual] contexts include, among others, racist patterns of policing and incarceration, as well as profoundly asymmetric rates of arrest and prosecution. These considerations form a daunting backdrop for nonwhite (and non-male) listeners . . . in ways not contemplated by the [c]ourt in *Chaplinsky* and later cases. Black and brown Americans have myriad deeply rooted claims for condemning state authorities, for angrily castigating them in terms far harsher than Chaplinsky's censured utterance, but they also face far greater chances of harm if they choose to do so. Censure limits free speech rights; speaking out against racist systems often deprives speakers of color their very lives." (Footnotes omitted.)).

a relatively homogenous set of cultural norms and expectations. Under the auspices of less enlightened administrating authorities, the doctrine, in my view, "contains an obvious invitation to discriminatory enforcement . . . ." (Internal quotation marks omitted.) *Houston* v. *Hill*, 482 U.S. 451, 465 n.15, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987). The wide degree of subjectivity necessitated by the legal standard "furnishes a convenient tool for 'harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure' "; *Papachristou* v. *Jacksonville*, 405 U.S. 156, 170, 92 S. Ct. 839, 31 L. Ed. 2d 110 (1972), quoting *Thornhill* v. *Alabama*, 310 U.S. 88, 97–98, 60 S. Ct. 736, 84 L. Ed. 1093 (1940); and "confers on [the] police a virtually unrestrained power to arrest and charge persons with a violation." *Lewis* v. *New Orleans*, 415 U.S. 130, 135, 94 S. Ct. 970, 39 L. Ed. 2d 214 (1974) (Powell, J., concurring in the result).

This brings me to the second fundamental problem with the fighting words doctrine, which is that such an intensely contextualized, fact specific, and inherently subjective analysis in the area of free speech creates major constitutional concerns under due process vagueness principles. The underlying vice addressed by the void for vagueness doctrine is basic to the rule of law: "As generally stated, the [void for vagueness] doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement. . . . Although the doctrine focuses both on actual notice to citizens and arbitrary enforcement, [the court has] recognized recently that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine—the requirement that a legislature establish minimal

guidelines to govern law enforcement.' . . . Where the legislature fails to provide such minimal guidelines, a criminal statute may permit 'a standardless sweep [that] allows policemen, prosecutors, and juries to pursue their personal predilections.' " (Citations omitted.) *Kolender* v. *Lawson*, 461 U.S. 352, 357–58, 103 S. Ct. 1855, 75 L. Ed. 2d 903 (1983); see also *Grayned* v. *Rockford*, 408 U.S. 104, 108–109, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, [when] a vague statute abut[s] upon sensitive areas of basic [f]irst [a]mendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked." (Footnotes omitted; internal quotation marks omitted.)).

The defendant in the present case has not challenged General Statutes § 53a-181 (a) (5) on vagueness grounds, and, accordingly, it is not necessary or appropriate at this time to decide whether the statute is saved by this court's narrowing construction, which limits its coverage to fighting words as we have defined that term in

the prescribed analysis.[15] In my opinion, our recent decisions, including the decision issued today, have not made that future task any easier.

To summarize, the facts of the present case obscure the mischief inherent in the fighting words doctrine, as applied by this court. I feel confident that every judge in Connecticut would agree without reservation that the particular words spoken by the defendant occupy a singular category of offensive content as a result of our country's history. They are unique in their brutality. I therefore agree fully with the view expressed by Judge Devlin that "angrily calling an African-American man a 'fucking [nigger]' after taunting him with references to a recent police shooting of a young African-American man by a white police officer" must fall within the scope of the fighting words doctrine. *State* v. *Liebenguth*, 181 Conn. App. 37, 68, 186 A.3d 39 (2018) (*Devlin, J.*, concurring in part and dissenting in part). But, for the reasons set forth in this concurring opinion, I also believe that the fighting words doctrine does not provide a sensible way to determine the circumstances under which the government may prosecute the utterance of such vile and repugnant speech.

III

This court's own recent experience applying the fighting words doctrine, as well as the many similar cases

[15] I doubt that anyone would dispute that the actual statutory language promulgated by our legislature, which criminalizes the use of "abusive or obscene language" in a public place "with intent to cause inconvenience, annoyance or alarm"; General Statutes § 53a-181 (a) (5); plainly cannot pass muster under the void for vagueness doctrine without the aid of a workable narrowing construction. See *Gooding* v. *Wilson*, 405 U.S. 518, 523, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972) (striking down Georgia's breach of peace statute in absence of such limiting construction while observing that "[its] decisions since *Chaplinsky* have continued to recognize state power constitutionally to punish 'fighting' words under carefully drawn statutes not also susceptible of application to protected expression"); see also *Plummer* v. *Columbus*, 414 U.S. 2, 2–3, 94 S. Ct. 17, 38 L. Ed. 2d 3 (1973) (striking down municipal ordinance providing that "[n]o person shall abuse another by

adjudicated by state courts around the country, powerfully illustrates why the United States Supreme Court should consider fashioning a more defensible and administrable first amendment framework for deciding when the government may criminalize the kind of hate speech uttered by the defendant in the present case. To best serve its purpose, the reformulated doctrine should directly confront the fundamental constitutional issue underlying many of these cases, which is whether and under what circumstances the first amendment permits the government to protect its citizenry from the kind of psychic and emotional harm that results when a speaker with malicious intent subjects another person to outrageously degrading slurs in a personal, face-to-face encounter. I cannot predict the outcome of such a doctrinal reexamination, but, in my view, it would benefit us all if the Supreme Court undertakes the challenge before too long. Our current doctrine, operating by indirection and proxy through a hypothetical, stereotype-driven assessment of the likelihood that the words will incite violence, is as unworthy as it is unworkable, and every new case decided under its purview creates additional cause for concern.

In the meantime, I agree with the majority that, under our current first amendment case law, if anything is fighting words, then the words spoken by this defendant under these factual circumstances fit the bill. I concur in the majority opinion for this reason.

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using menacing, insulting, slanderous, or profane language" (internal quotation marks omitted)).

ORDERS

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MSW ASSOCIATES, LLC *v.* PLANNING AND ZONING DEPARTMENT OF THE CITY OF DANBURY

The defendant's petition for certification to appeal from the Appellate Court, 202 Conn. App. 707 (AC 43052), is denied.

Daniel E. Casagrande, in support of the petition.

Kenneth R. Slater, Jr., and *Ann M. Catino*, in opposition.

Decided May 25, 2021

EDWIN SANCHEZ *v.* COMMISSIONER OF CORRECTION

The petitioner Edwin Sanchez' petition for certification to appeal from the Appellate Court, 203 Conn. App. 752 (AC 43047), is denied.

James E. Mortimer, assigned counsel, in support of the petition.

Brett R. Aiello, deputy assistant state's attorney, in opposition.

Decided May 25, 2021

SALVATORE GIBILISCO *v.* TILCON CONNECTICUT, INC.

The defendant's petition for certification to appeal from the Appellate Court, 203 Conn. App. 845 (AC 43294), is denied.

ECKER, J., did not participate in the consideration of or decision on this petition.

Elizabeth R. McKenna, in support of the petition.

Matthew D. Paradisi and *Michael J. Reilly*, in opposition.

Decided May 25, 2021

THOMAS STEELE *v.* COMMISSIONER OF CORRECTION

The petitioner Thomas Steele's petition for certification to appeal from the Appellate Court, 203 Conn. App. 904 (AC 43903), is denied.

James E. Mortimer, assigned counsel, in support of the petition.

Rocco A. Chiarenza, assistant state's attorney, in opposition.

Decided May 25, 2021

STATE OF CONNECTICUT *v.* WAYNE A. KING

The defendant's petition for certification to appeal from the Appellate Court, 204 Conn. App. 1 (AC 42764), is granted, limited to the following issue:

"Did the Appellate Court correctly conclude that the elements of the Florida offenses of which the defendant previously had been convicted were substantially the same as the elements of General Statutes § 14-227a (a) for enhancement purposes under § 14-227a (g) (3)?"

Joshua R. Goodbaum, assigned counsel, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided May 25, 2021

JOSE JIMENEZ *v.* COMMISSIONER OF CORRECTION

The petitioner Jose Jimenez' petition for certification to appeal from the Appellate Court, 204 Conn. App. 901 (AC 43452), is denied.

ECKER, J., did not participate in the consideration of or decision on this petition.

Robert L. O'Brien, assigned counsel, in support of the petition.

Melissa Patterson, senior assistant state's attorney, in opposition.

Decided May 25, 2021

LUIS LEBRON *v.* COMMISSIONER OF CORRECTION

The petitioner Luis Lebron's petition for certification to appeal from the Appellate Court, 204 Conn. App. 44 (AC 43579), is denied.

Vishal K. Garg, in support of the petition.

James A. Killen, senior assistant state's attorney, in opposition.

Decided May 25, 2021

DAVID BRIDGES *v.* COMMISSIONER OF CORRECTION

The petitioner David Bridges' petition for certification to appeal from the Appellate Court (AC 42013) is denied.

*David Bridg*es, self-represented, in support of the petition.

Sarah Hanna, assistant state's attorney, in opposition.

Decided May 25, 2021

IN RE AMANDA L.

The petition of the respondent mother and the respondent father for certification to appeal from the Appellate Court (AC 44518/AC 44519) is dismissed.

D'AURIA, J., did not participate in the consideration of or decision on this petition.

Kimberly A., self-represented, and *Anthony L.*, self-represented, in support of the petition.

John E. Tucker, assistant attorney general, in opposition.

Decided May 25, 2021

IN RE AMANDA L.

The petition of the respondent mother and the respondent father for certification to appeal from the Appellate Court (AC 44518/AC 44519) is dismissed.

D'AURIA, J., did not participate in the consideration of or decision on this petition.

Kimberly A., self-represented, and *Anthony L.*, self-represented, in support of the petition.

John E. Tucker, assistant attorney general, in opposition.

Decided May 25, 2021

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CONNECTICUT APPELLATE REPORTS

Vol. 205

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

ALLCO RENEWABLE ENERGY LIMITED ET AL. *v.* FREEDOM OF INFORMATION COMMISSION ET AL.

(AC 42992)

Bright, C. J., and Elgo and Alexander, Js.

Syllabus

The plaintiffs, a solar development company and its principal, appealed to this court from the judgment of the trial court dismissing their appeal from the final decision of the defendant Freedom of Information Commission. The plaintiffs requested certain records from the defendant Department of Energy and Environmental Protection relating to its request for proposals issued to solicit offers from developers for large-scale clean energy contracts. The RFP indicated that each bidder was to submit a public version of its proposal, with any confidential business information redacted, as well as an unredacted version of the proposal that identified all confidential and proprietary information. The RFP informed bidders that the department would disclose certain information in its final determination but that it would take reasonable steps to protect confidential information. The department retained independent consultants to evaluate the costs and benefits of the proposals submitted using a market simulation model. The result of the analysis was an answer key that compiled the data submitted by the bidders, including

confidential, proprietary information. The department denied the plaintiffs' request for the release of the answer key, stating that it was a trade secret exempt from disclosure requirements pursuant to the applicable provision (§ 1-210 (b) (5)) of the Freedom of Information Act (§ 1-200 et seq.). The plaintiffs appealed from the department's denial to the commission, which, following a hearing, denied the appeal. The plaintiffs then appealed to the trial court, which affirmed the decision of the commission, and the plaintiffs appealed to this court. *Held*:

1. The trial court properly determined that the commission's conclusion that the answer key met the trade secret criteria set forth in § 1-210 (b) (5) (A) (i) was supported by substantial evidence: the department engaged in trade by coordinating the RFP and using the answer key to analyze the proposals, as the process required making a significant investment within a highly competitive industry for the benefit of ratepayers across the state; moreover, even though the department did not have any direct competitors in the renewable energy industry, it was a participant with a direct interest in ensuring competitive rates because it had a statutory duty to obtain value for ratepayers; furthermore, there was sufficient evidence to find that the answer key held economic value to the department based on the resources expended to develop it, its value to the market, and the significance of the resulting projects to ratepayers, and that the answer key's value derived from its secrecy, as its confidentiality was required to maintain the integrity of the state's procurement process.
2. The trial court properly determined that the commission's conclusion that the bidders and the department intended for the information submitted to be given and maintained as confidential information in accordance with § 1-210 (b) (5) (A) (ii) and (B) was supported by substantial evidence: the commission's determination that reasonable efforts were made to maintain the secrecy of the information was supported by testimony given at the commission hearing indicating that nondisclosure agreements were made, that bidders relied on the department's guarantees of confidentiality, and that certain bidders pursued protective orders with respect to the information; moreover, based on the testimony at the hearing, there was substantial evidence to support the conclusion that the information was "given in confidence" in accordance with § 1-210 (b) (5) (B) because, although the RFP stated that the department intended to disclose certain bid information in its final determination, the department gave express assurances of, and the bidders had resulting expectations of, confidentiality with respect to a majority of the information.

Argued November 19, 2020—officially released June 8, 2021

Procedural History

Appeal from the decision of the named defendant dismissing the plaintiffs' complaint regarding a records

request submitted to the defendant Department of Energy and Environmental Protection, brought to the Superior Court in the judicial district of New Britain, where the court, *Huddleston*, *J.*, rendered judgment dismissing the appeal, from which the plaintiffs appealed to this court. *Affirmed.*

Michael Melone, for the appellants, with whom, on the brief, was *Thomas Melone*, self-represented, the appellant (plaintiffs).

Paula S. Pearlman, commission counsel, for the appellee (named defendant).

Robert Snook, assistant attorney general, with whom, on the brief, were *William Tong*, attorney general, and *Clare Kindall*, solicitor general, for the appellee (defendant Department of Energy and Environmental Protection).

Opinion

ELGO, J. The plaintiffs, Allco Renewable Energy Limited (Allco) and its principal Thomas Melone, appeal from the judgment of the Superior Court dismissing their appeal from the final decision of the defendant Freedom of Information Commission (commission), in which the court concluded that the commission properly dismissed the plaintiffs' request for certain documents of the codefendant Department of Energy and Environmental Protection (department).[1] On appeal, the plaintiffs claim that the court improperly concluded that the commission correctly applied General Statutes § 1-210 (b) (5) (A) and (B) of the Freedom of Information Act (act), General Statutes § 1-200 et seq. We affirm the judgment of the Superior Court.

The following undisputed facts, which were found by the commission, are relevant to this appeal. On November 12, 2015, the department issued a request for proposals (RFP), pursuant to No. 13-303 of the 2013 Public

[1] The commission has adopted the brief of the department in this appeal.

Acts and No. 15-107 of the 2015 Public Acts.[2] The RFP, issued in coordination with officials from Massachusetts and Rhode Island for the purpose of meeting clean energy goals in a cost-effective manner, sought to solicit offers from developers for large-scale clean energy contracts. Parties in each state then would "select the project(s) that is/are most beneficial to its customers and consistent with its particular Procurement Statutes. Consequently, evaluation and selection [would] involve an iterative process by which, after an initial threshold examination followed by a quantitative analysis of the bids, the parties from each state [would] review and rank bids based on the qualitative requirements of their respective state."

The RFP also established an "Evaluation Team" (team), comprised of "the soliciting parties, electric distribution companies (EDCs)[3] . . . the Connecticut Procurement Manager, the Connecticut Office of Consumer Counsel, the Connecticut Attorney General and the Massachusetts Department of Energy Resources, who evaluated and ranked the bids." (Footnote added.)

[2] An Act Concerning Connecticut's Clean Energy Goals; Public Acts 2013, No. 13-303, §§ 6 and 7; was codified at General Statutes §§ 16a-3f and 16a-3g. An Act Concerning Affordable and Reliable Energy; Public Acts 2015, No. 15-107, § 1; was codified at General Statutes § 16a-3j. These three statutes provide for the department to solicit from providers of Class I renewable energy sources proposals that are in the interest of ratepayers.

[3] General Statutes § 16-1 (23) defines "electric distribution company" as "any person providing electric transmission or distribution services within the state, but does not include: (A) A private power producer, as defined in section 16-243b; (B) a municipal electric utility established under chapter 101, other than a participating municipal electric utility; (C) a municipal electric energy cooperative established under chapter 101a; (D) an electric cooperative established under chapter 597; (E) any other electric utility owned, leased, maintained, operated, managed or controlled by any unit of local government under any general statute or special act; (F) an electric supplier; (G) an entity approved to submeter pursuant to section 16-19ff; or (H) a municipality, state or federal governmental entity authorized to distribute electricity across a public highway or street pursuant to section 16-243aa . . . ."

The team retained independent consultants, most notably Levitan & Associates, Inc. (Levitan), to aid its evaluation and solicited input from ISO New England, Inc., a federally regulated grid operator for the New England region. The RFP informed bidders that the department would disclose certain information in its final determination and would take reasonable steps where necessary to protect confidential information. Representatives of utility companies on the team signed an agreement known as the "Utility Standard of Conduct," which prohibited discussion of the RFP between EDC personnel on the team and EDC personnel involved in bid preparation.

Various companies submitted a total of thirty-one proposals. After receiving the bids,[4] the department selected nine projects in Connecticut, including two proposed by the wind power development companies Antrim Wind Energy, LLC (Antrim), and Cassadaga Wind, LLC (Cassadaga). Accordingly, the department notified the EDCs and directed them to negotiate contracts with the nine selected projects. Six of the project proposals, including Cassadaga's proposal, resulted in agreed upon, long-term contracts with the state of Connecticut. These projects were then subject to regulatory review by the Public Utilities Regulatory Authority (PURA) and were approved on September 13, 2017.

Allco is a solar development company that competes in the market at issue and had submitted unsuccessful

[4] The trial court noted that it "recognize[d] the distinction between bids submitted pursuant to an invitation for bids and proposals submitted in response to a request for proposals. See *Hartford* v. *Freedom of Information Commission*, 41 Conn. App. 67, 70 n.3, 674 A.2d 462 (1996). There is no dispute that the proceeding at issue in this appeal was a request for proposals. Nevertheless, the RFP itself described the responses to the RFP as 'bids' and the developers submitting such responses as 'bidders.' . . . The commission followed this colloquial usage in its decision, and the court will similarly follow it herein." (Citation omitted.) We similarly follow this convention in this opinion.

bids in several other renewable energy procurements by the department in the past. On December 1, 2016, the plaintiffs submitted a freedom of information request via e-mail to the department. In that request, the plaintiffs sought disclosure of responses to the RFP made by several bidders, including Antrim and Cassadaga, as well as "any record or file made by the [department] in connection with the contract award process." The department denied the request in an e-mail sent on January 17, 2017. In that response, the department stated in relevant part that it "does not have any records to produce in response to this request because they are exempt from disclosure under the [act] . . . §§ 1-210 (b) (24), 1-210 (b) (4), and 1-210 (b) (5)."[5]

The plaintiffs appealed from the department's denial to the commission on February 16, 2017. The commission held a contested hearing, in which Antrim and Cassadaga intervened, on October 16, November 9 and November 17, 2017. At the hearing, the department provided the plaintiffs with a compact disc containing unredacted copies of documents that did not fall within the relied on exemptions. The plaintiffs narrowed the scope of their request to records concerning the Antrim and Cassadaga proposals, as well as the content of a document known as the "Levitan Answer Key" (answer key). At the time of this appeal, only the disclosure of the answer key remains at issue.

Following the hearing, the commission reviewed unredacted copies of the disputed records in camera. The commission then issued a written decision in which it found that the answer key was "in its entirety . . . of the kind included in the nonexhaustive list contained in [§ 1-210 (b) (5) (A)]. . . . It is found that the [a]nswer [k]ey (i) derives independent economic value, actual

[5] The department later abandoned its claims under § 1-210 (b) (4) and (24), and the commission did not address them in its decision.

or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and (ii) is the subject of efforts that were reasonable under the circumstances to maintain secrecy." (Citation omitted; internal quotation marks omitted.) The commission, therefore, denied the plaintiffs' appeal with respect to the answer key. From that decision, the plaintiffs appealed to the Superior Court. In a detailed memorandum of decision dated March 18, 2019, the court affirmed the decision of the commission, and this appeal followed.

On appeal, the plaintiffs claim that the court improperly concluded that the commission correctly determined that (1) the answer key qualified as a "trade secret" within the ambit of § 1-210 (b) (5) (A) and (2) the information in the answer key was both given and kept in secrecy in accordance with § 1-210 (b) (5) (A) and (B). In response, the department argues that the information in the answer key fully satisfies the definition of a "trade secret" and that it was subject to strict confidentiality. We agree with the department.

We begin by setting forth the relevant legal principles and applicable standard of review. "It is well established that [j]udicial review of [an administrative agency's] action is governed by the Uniform Administrative Procedure Act [(UAPA), General Statutes § 4-166 et seq.] . . . and the scope of that review is very restricted. . . . With regard to questions of fact, it is neither the function of the trial court nor of this court to retry the case or to substitute its judgment for that of the administrative agency. . . .

"Even as to questions 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. . . . Conclusions of law reached by the administrative agency must stand

if the court determines that they resulted from a correct application of the law to the facts found and could reasonably and logically follow from such facts. . . . Ordinarily, this court affords deference to the construction of a statute applied by the administrative agency empowered by law to carry out the statute's purposes. . . . Cases that present pure questions of law, however, invoke a broader standard of review than is . . . involved in deciding whether, in light of the evidence, the agency has acted unreasonably, arbitrarily, illegally or in abuse of its discretion. . . . Furthermore, when a [public] agency's determination of a question of law has not previously been subject to judicial scrutiny . . . the agency is not entitled to special deference." (Internal quotation marks omitted.) *Dept. of Public Safety* v. *Freedom of Information Commission*, 298 Conn. 703, 716, 6 A.3d 763 (2010). "This court is required to defer to the subordinate facts found by the commission, if there is substantial evidence to support those findings." (Internal quotation marks omitted.) *Dept. of Public Utilities* v. *Freedom of Information Commission*, 55 Conn. App. 527, 531, 739 A.2d 328 (1999). "Substantial evidence exists if the administrative record affords a substantial basis of fact from which the fact in issue can be reasonably inferred. . . . This substantial evidence standard is highly deferential and permits less judicial scrutiny than a clearly erroneous or weight of the evidence standard of review. . . . The reviewing court must take into account [that there is] contradictory evidence in the record . . . but the possibility of drawing two inconsistent conclusions from the evidence does not prevent an administrative agency's finding from being supported by substantial evidence . . . . The burden is on the [plaintiffs] to demonstrate that the [agency's] factual conclusions were not supported by the weight of substantial evidence on the whole record." (Internal quotation marks omitted.) *Sams* v. *Dept.*

of Environmental Protection, 308 Conn. 359, 374, 63 A.3d 953 (2013).

The department is a public agency within the meaning of General Statutes § 1-200 (1). Public agencies "within the meaning of § 1-200 (1) . . . [are] . . . required under the act to disclose public records unless disclosure is otherwise limited or prohibited by law."[6] *University of Connecticut* v. *Freedom of Information Commission*, 303 Conn. 724, 733, 36 A.3d 663 (2012) (*UConn*); see also *Maher* v. *Freedom of Information Commission*, 192 Conn. 310, 314–15, 472 A.2d 321 (1984) ("[s]ince . . . the [agency at issue here] is a [public] agency for purposes of the [act], [it] is bound . . . to maintain its records as public records available for public inspection unless these records fall within one of the statutory exemptions to disclosure").

The act sets forth several exemptions that "reflect a legislative intention to balance the public's right to know what its agencies are doing, with the governmental and private needs for confidentiality. . . . [I]t is this balance of the governmental and private needs for confidentiality with the public right to know that must govern the interpretation and application of the [act]. The general rule, under the act, however, is disclosure. . . . Exceptions to that rule will be narrowly construed in light of the underlying purpose of the act . . . and the burden of proving the applicability of an exemption rests upon the agency claiming it." (Internal quotation marks omitted.) *Maher* v. *Freedom of Information Commission*, supra, 192 Conn. 315. "[D]isclosure under the act does not turn on the motive for the request. Nonetheless . . . the question of whether . . . persons . . . could obtain economic value from the disclosure would be relevant in assessing whether the information constitutes a trade secret." *UConn*, supra, 303 Conn. 728 n.5.

[6] General Statutes § 1-200 (5) defines "public records" as "any recorded data or information relating to the conduct of the public's business prepared, owned, used, received or retained by a public agency . . . ."

Section 1-210 provides in relevant part: "(b) Nothing in the [act] shall be construed to require disclosure of . . . (5) (A) Trade secrets, which for purposes of the [act], are defined as information, including formulas, patterns, compilations, programs, devices, methods, techniques, processes, drawings, cost data, customer lists, film or television scripts or detailed production budgets that (i) derive independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from their disclosure or use, and (ii) are the subject of efforts that are reasonable under the circumstances to maintain secrecy . . . ." The trade secret exemption codified in § 1-210 (b) (5) (A) analyzes "the nature and accessibility of the information, not . . . the status or characteristics of the entity creating and maintaining that information." *UConn*, supra, 303 Conn. 734. "[T]o constitute a trade secret, information must be of the kind included in the nonexhaustive list contained in the statute." *Elm City Cheese Co.* v. *Federico*, 251 Conn. 59, 70, 752 A.2d 1037 (1999). "[T]o qualify for a trade secret exemption . . . [a] substantial element of secrecy must exist, to the extent that there would be difficulty in acquiring the information except by the use of improper means." (Internal quotation marks omitted.) *Director, Dept. of Information Technology* v. *Freedom of Information Commission*, 274 Conn. 179, 194, 874 A.2d 785 (2005) (*Director*).

Our Supreme Court previously construed the term "trade secret" in *Town & Country House & Homes Service, Inc.* v. *Evans*, 150 Conn. 314, 318–20, 189 A.2d 390 (1963) (*Town & Country*). In that case, relying on the commentary to § 757 of the Restatement of Torts, the court stated that "[s]ome of the factors to be considered in determining whether given information is a trade secret are (1) the extent to which the information is known outside the business; (2) the extent to which it

is known by employees and others involved in the business; (3) the extent of measures taken by the employer to guard the secrecy of the information; (4) the value of the information to the employer and to his competitors; (5) the amount of effort or money expended by the employer in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others." *Town & Country*, supra, 319; see 4 Restatement, Torts § 757, comment (b), p. 6 (1939).

This court has referenced the definition of trade secrets set forth in *Town & Country* when applying the trade secret exemption under the act. See *Dept. of Public Utilities* v. *Freedom of Information Commission*, supra, 55 Conn. App. 531–32. At its core, "[t]he basis for the protection of trade secrets is that the recipient obtains through a confidential relationship something he did not know previously." *Allen Mfg. Co.* v. *Loika*, 145 Conn. 509, 517, 144 A.2d 306 (1958). "The question of whether information sought to be protected . . . rises to the level of a trade secret is one of fact for the trial court." (Internal quotation marks omitted.) *Elm City Cheese Co.* v. *Federico*, supra, 251 Conn. 68.

I

The plaintiffs first claim that the court improperly concluded that the commission correctly determined that the answer key at issue was exempt pursuant to § 1-210 (b) (5) (A). They argue that, under § 1-210 (b) (5) (A) (i), the answer key cannot be a trade secret in light of our Supreme Court's decision in *UConn* because the department did not engage in "trade." We do not agree.

The following additional facts were found by the commission. Connecticut, Massachusetts, and Rhode Island coordinated to issue requests for proposals. The goal of each state's RFP was to procure renewable energy contracts so as to help meet clean energy goals in a

manner that would provide savings for ratepayers. The team constituted a collaboration between a number of prominent parties including, among others, the department, the EDCs, several Connecticut agencies, and the Massachusetts Department of Energy Resources. It also solicited input from independent contractors, most notably Levitan, and the regional grid operator, ISO New England, Inc. The department invested "significant resources" in organizing the RFP, disbursing $330,000 for the contract with Levitan and dedicating hundreds of work hours to the procurement process.

The commission found that the renewable energy industry was highly competitive and that the information at issue was "highly market sensitive and unique to the particular RFP proposals." After it was retained by the department, Levitan evaluated the costs and benefits of bids using a market simulation model known as "Aurora." The result of this analysis constituted the answer key, which the department asserted was "a compilation of extraordinarily complicated data, huge amounts of data and includes . . . confidential proprietary information submitted by all bidders, and cannot be replicated." (Internal quotation marks omitted.) The department argued before the commission that the confidentiality of the answer key was "essential to maintaining the integrity of the state's procurement process, confidence of prospective bidders in future RFPs, and quality and competitiveness of the bids received." The department also asserted that future RFPs would be impacted because bidders could discern confidential information from the answer key that would provide them with an advantage.[7] Moreover, the department contended that disclosure would not only chill future

[7] At oral argument before this court, the department argued that, even though the answer key is geared toward the 2015 RFP, pricing information can be "back[ed] out" and the department's process could be reverse engineered to obtain future forecasts from past prices.

bids, but also impair the ability of participating states to meet their goals because bidders would be able to adjust their proposals to gain a competitive advantage. In particular, the department cited the "millions of Connecticut ratepayer dollars" at risk if the answer key were to be mishandled and testified that the RFP's projected savings amounted to approximately $330 million.

In its written decision, the commission found that the answer key contained "highly market sensitive" information and derived independent economic value from its secrecy and, accordingly, that it is a trade secret exempt from disclosure under § 1-210 (b) (5) (A). On appeal, the Superior Court upheld the commission's findings, noting that, "[a]s several witnesses testified at the hearing, the market for clean energy is intensely competitive. Development costs are high and the availability of opportunities to contract with utilities for the sale of electricity are very limited. The RFP required developers to provide highly sensitive commercial information, including operational and financial information that were closely guarded by the developers." Regarding the answer key, the court noted: "According to the department's witnesses, the . . . answer key itself is the output of an extensive and complicated computer modeling of energy production for every hour of twenty years, calculated for each of the projects proposed in response to the RFP. The input that went into the modeling included the confidential information provided by developers. . . . The output itself—that is, the four page spreadsheet for which the department asserted the trade secret exemption—discloses the final ranking of the projects, information about the costs and benefits of each proposal, and . . . scores for each project. A person knowledgeable about the industry could use the information presented in the . . . answer key to back out other information that would reveal confidential pricing information . . . ." The court also noted the

department's concern that disclosure of the answer key would reveal not only confidential developer information but also sensitive information about the department's own analyses. Analyzing the information in the answer key under the *Town & Country* test and the evidence on the record, the court concluded that "the information in the [answer key] is evidence of the kind identified in § 1-210 (b) (5) (A)."

On appeal, the plaintiffs now argue that the department cannot claim trade secret protection for the answer key because it did not "engag[e] in trade" by conducting the RFP. In *UConn*, supra, 303 Conn. 727, on which the plaintiffs principally rely, an alumni group sought disclosure of various databases containing the information of donors, subscribers, and ticket buyers. The court held that the definition of trade secret under §1-210 (b) (5) (A), on its face, "focuses exclusively on the nature and accessibility of the information"; id., 734; rejecting the commission's argument that the university, as a public agency, could not claim trade secret protection because it "is not principally engaged in a trade." Id., 726. *UConn* establishes that a public agency may hold a trade secret regardless of whether it regularly engages in trade, so long as the nature and accessibility of the document at issue qualifies it as a trade secret. Id., 734. In distinguishing *UConn* from the present case, the plaintiffs contrast the conduct of the university in "marketing and selling" school event tickets with the department's conduct as a "regulator." They assert that the nature of the information must include being used in a trade, stating: "If there is no trade, there is no trade secret." They argue that extending the exemption to the answer key would effectively read the word "trade" out of the term "trade secret" because the department did not engage in trade when it promulgated and administered the RFP.

To assess the plaintiffs' claim, we begin with the language of the act. In defining a trade secret for the purposes of the act, § 1-210 (b) (5) (A) highlights economic value and secrecy as the two determinative factors.[8] "Trade secret" is a legal term of art. "If the information meets the statutory criteria, it is a trade secret . . . ." *UConn*, supra, 303 Conn. 734. The term is defined in § 1-210 (b) (5) (A) (i) as deriving "independent economic value, actual or potential, from not being generally known to . . . other persons who can obtain economic value from [its] disclosure or use." If information qualifies as a trade secret under the statutory criteria, it is then also true that "*the entity creating that information would be engaged in a trade for purposes of the act* even if it was not so engaged for all purposes." (Emphasis added.) *UConn*, supra, 734. Furthermore, as the trial court noted, in accordance with the holding of *UConn*, "to address the nature of the information at

[8] Section 1-210 (b) (5) (A) requires only that the information derives independent economic value from its secrecy and is the subject of reasonable efforts to maintain that secrecy. Accordingly, the department may still claim a trade secret on the basis of the information's value even if the economic benefit ultimately goes to the ratepayers. In arguing that the holder of a trade secret must receive an economic benefit itself, the plaintiffs cite the Restatement (Third) of Unfair Competition, which transferred and modernized the section of the 1939 Restatement of Torts addressed in *Town & Country*. It defines a trade secret as "any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others." Restatement (Third), Unfair Competition § 39, p. 425 (1995). We are not persuaded that this subsequent iteration of the Restatement supports a contrary conclusion. First, it extends beyond businesses to "other enterprise[s]"; comment (d) to § 39 clarifies that "nonprofit entities such as charitable, educational, governmental, fraternal, and religious organizations can also claim trade secret protection for economically valuable information . . . ." Id., comment (d), p. 429; see also *UConn*, supra, 303 Conn. 734–35 (noting that the trade secret definition in § 1-210 (b) (5) (A) "mirrors the definition under Connecticut's Uniform Trade Secrets Act," which includes government agencies in its definition of "person"). Second, the language of § 39 also does not, on its face, require that the economic advantage must accrue to the entity claiming trade secret protection itself.

issue, the analysis must consider the competitive nature of the industry involved . . . .''

The inquiry necessarily considers the extent to which the economic value of the thing being assessed inheres in the secrecy by which it is developed and maintained.[9] A ''substantial element of secrecy must exist, to the extent that there would be difficulty in acquiring the information except by the use of improper means.'' (Internal quotation marks omitted.) *Director*, supra, 274 Conn. 194. Beyond that, ''[i]t is not possible to state precise criteria for determining the existence of a trade secret. The status of information claimed as a trade secret must be ascertained through a comparative evaluation of all the relevant factors, including the value, secrecy, and definiteness of the information . . . .''[10] Restatement (Third), Unfair Competition § 39, comment (d), p. 430 (1995). Our review of the record reveals that the nature of the information in the answer key inherently relates to trade and that its value is a function of the secrecy involved in both its development and use.

First, the department fundamentally engaged in commerce in this case. General Statutes § 22a-2d charges the department with fulfilling goals for the purposes of energy policy and regulation, which include ratepayer cost maintenance.[11] The commission found that the RFP

[9] Similarly, the *Town & Country* test, generally stated, looks to the information's availability, value, and cost of development and to the measures taken to maintain its secrecy. See *Town & Country*, supra, 150 Conn. 319. At its core, the test effectively seeks to conduct a cost-benefit analysis between the countervailing interests of privacy and full disclosure.

[10] We note that, although a case specific evaluation of the nature of the information still is required, information like that contained in the answer key often qualifies as a trade secret. Our Supreme Court has stated that ''financial details [such as] costs, pricing and bidding . . . fully meet the definition of trade secrets set forth in [*Town & Country*] . . . .'' *Triangle Sheet Metal Works, Inc.* v. *Silver*, 154 Conn. 116, 126, 222 A.2d 220 (1966).

[11] General Statutes § 22a-2d (a) provides in relevant part: ''There is established a Department of Energy and Environmental Protection, which shall have jurisdiction relating to the preservation and protection of the air, water and other natural resources of the state, energy and policy planning and

was a multistate effort to meet clean energy goals and achieve cost savings for ratepayers. It further found that the renewable energy procurement process is highly competitive and that the department "invested significant resources . . . including . . . $330,000 on the contract with Levitan," with the expectation of significant ratepayer savings in the amount of $330 million. Although "the primary economic value identified" accrued to the ratepayers, the department played a key role in generating that value. The court described the department as acting "at least in part as a procurement agent" for the EDCs. Accordingly, this case features a state entity that, as a commercial actor, has made a significant investment within a heavily competitive industry for the benefit of ratepayers across the state. Therefore, like the state treasurer who analyzes investments for the benefit of the state, here the department engages in trade by coordinating the RFP and using the answer key to analyze multimillion dollar proposals to benefit the state and its ratepayers.

The plaintiffs argue that the answer key cannot be a "trade" secret because "there is no value [in] the information to the competitors (because there are none)." The plaintiffs read the fourth *Town & Country* factor too narrowly.[12] The department has a statutory duty to obtain value for ratepayers. Thus, although it has

regulation and advancement of telecommunications and related technology. For the purposes of energy policy and regulation, the department shall have the following goals: (1) Reducing rates and decreasing costs for Connecticut's ratepayers, (2) ensuring the reliability and safety of our state's energy supply, (3) increasing the use of clean energy and technologies that support clean energy, and (4) developing the state's energy-related economy. . . . The Public Utilities Regulatory Authority within the department shall be responsible for all matters of rate regulation for public utilities and regulated entities under title 16 and shall promote policies that will lead to just and reasonable utility rates. . . ."

[12] The plaintiffs' appeal centers most prominently on the fourth factor. We note that the court also found that the remaining five factors of the *Town & Country* test support the classification of the answer key as a trade secret.

no *direct* competitors, the department is nevertheless a participant in the industry with a direct interest in ensuring competitive rates. There is no rational reason to exclude the department from trade secret protection simply because it seeks to cultivate a competitive market of bidders as opposed to being itself a bidder in the industry.

Second, the court concluded that there was sufficient evidence before the commission for it to find both that (1) the information held economic value to the department on the basis of the evidence presented concerning the resources expended to develop it, its value to the market, and the significance of the projects to ratepayers and (2) the information's value to the department derived from its being held confidential from the market at large. Our review of the record confirms that these findings were fully supported by the evidence. The purpose of the RFP was to obtain significant savings to ratepayers at a statewide level. The commission found that the renewable energy market is highly competitive. If made public, as the department testified, bidders would be able to extract sensitive details about developer submitted pricing information and departmental analyses, including details that would aid in future bids. Significant consequences, thus, could result to ratepayers in the state. Although the plaintiffs question the necessity of the answer key's secrecy, we cannot disturb the commission's conclusion when the evidence in the record supports it. The record as a whole reflects that the answer key's entire benefit relies on the department holding it in confidence in order to ensure the integrity of the undertaking for public benefit.

The plaintiffs' hyperbolic argument that classifying the department's conduct as a trade would render the act "useless, as every government agency could claim an exemption," misses the point. If acting as a regulator could never constitute trade, then it would eviscerate

the ability of a public agency to raise the trade secret exemption when necessitated by the public interest. As our Supreme Court has observed, the act "does not confer upon the public an absolute right to all government information." *Wilson* v. *Freedom of Information Commission*, 181 Conn. 324, 328, 435 A.2d 353 (1980). Rather, it "reflects a legislative intention to balance the public's right to know what its agencies are doing, with the governmental and private needs for confidentiality." Id. *Wilson* directs the court to balance these countervailing interests as they apply to the case before it, in order to determine the applicability of the exemptions in the act. See *Commissioner of Consumer Protection* v. *Freedom of Information Commission*, 207 Conn. 698, 701, 542 A.2d 321 (1988).

The present case actually provides a more compelling rationale for secrecy than that which was provided in *UConn*. The enterprise undertaken by the department aims to provide added benefit for ratepayers, as directed by statute. In other words, this case represents a quintessential example of a public agency acting on its statutory mandate to protect the public interest. See footnote 11 of this opinion. The state has an interest in the benefits that accrue from the RFP process. See *UConn*, supra, 303 Conn. 736–37 ("It cannot reasonably be questioned that the university expends considerable resources of the state . . . . The state's ability to recoup costs or reap the financial benefits for such efforts would be seriously undermined if any member of the public could obtain such information simply by filing a request under the act. . . . Although the act embodies a public policy in favor of disclosure, that presumption is subject to clear limits within which the university may claim an exemption." (Citations omitted.)) Here, the stakes are considerably higher than what was at issue in *UConn*. The present case deals not with an institution's customer lists but with statewide utilities delivering value

to the public. We further note the need for caution when a party seeking disclosure is not a disinterested member of the public but an industry competitor that participates in bidding processes conducted by the department. See id., 728 n.5.

In light of the foregoing, we conclude that the court properly determined that the commission's conclusion that the answer key required confidentiality was supported by substantial evidence and that the department met its burden of proving that the answer key met the statutory trade secret criteria. Accordingly, the plaintiffs' first claim fails.

II

The plaintiffs next claim that the answer key does not constitute a "secret" within the term "trade secret." In support of this contention, the plaintiffs raise two arguments. First, they argue that the Superior Court misapplied the "secrecy" requirement of § 1-210 (b) (5) (A) (ii) in this case because the department did not make reasonable efforts to maintain the secrecy of the information in the answer key. Second, they argue that the information was not "given in confidence" to the department under § 1-210 (b) (5) (B)[13] because the developers did not have a reasonable expectation that their information would be kept private. We disagree.

The following additional facts, as found by the commission, are relevant to this claim. When the department issued the RFP, it "required bidders to submit copies of a 'public version' of each proposal. If a bidder chose to redact information that it deemed to be 'confidential business information' from the public version of its proposal, then it was also required to submit an unredacted

[13] General Statutes § 1-210 provides in relevant part: "(b) Nothing in the [act] shall be construed to require disclosure of . . . (5) . . . (B) Commercial or financial information given in confidence, not required by statute . . . ."

version of the proposal and to identify all confidential or proprietary information, including pricing. The public version of each proposal was posted on the public website established for the New England Clean Energy RFP." The RFP required that any communications concerning it be submitted via e-mail to the team and prohibited bidders from direct contact with any member of the team and any related consultant.

"The RFP informed bidders that: 'The [e]valuation [t]eam shall use commercially reasonable efforts to treat the confidential information that it receives from bidders in a confidential manner and will not use such information for any purpose other than in connection with this RFP. . . . If confidential information is sought in any regulatory or judicial inquiry or proceeding or pursuant to a request for information by a government agency with supervisory authority over any of the EDCs, reasonable steps shall be taken to limit disclosure and use of said confidential information through the use of nondisclosure agreements or requests for orders seeking protective treatment, and bidders shall be informed that the confidential information is being sought.' "

"The RFP also advised bidders that: 'As it has done with previous RFPs, [the department] intends to disclose certain bid information in its final determination once contract negotiations are completed and a filing is made with PURA . . . . At this time, [the department] anticipates such disclosure will include some information attributed to named projects responsive to the [Connecticut] portion of the RFP: specifically, the qualitative and quantitative score and threshold eligibility determinations attributed to specific projects responsive to the [Connecticut] portion of this RFP, and pricing data for winning bids. [The department] may also disclose aggregate or average pricing data for all bids responsive to the [Connecticut] portion of the RFP but without attribution to specific projects.' "

Appendix G of the RFP stated, as pertaining to Connecticut: "With this submission of information claimed and labeled as confidential, you must provide the legal basis for your confidentiality claim, describe what efforts have been taken to keep the information confidential, and provide whether the information sought to be protected has an independent economic value by not being readily known in the industry. With your legal support and reasonable justification for confidentiality . . . the Connecticut state agencies participating on the Soliciting Parties will be better equipped to safeguard your confidential information should it become the subject of [an inquiry under the act]. . . . All information for winning bidders, including confidential information, will be released and become public 180 days after contracts have been executed and approved by all relevant regulatory authorities, unless otherwise ordered by the Connecticut PURA."

Representatives from both intervenors testified at the hearing before the commission that they relied on the department's assurances of discretion. Cassadaga submitted its proposal in both redacted and unredacted form with the understanding that the department would keep its information confidential and notify it in the event of a request for disclosure. Cassadaga also obtained two protective orders from PURA, which remained in effect at the time of the hearings before the commission. A representative from Cassadaga testified that the records in question were sensitive and included information protected by third-party nondisclosure agreements into which Cassadaga had entered. A representative from Antrim testified that its information was also highly sensitive and valuable and, where applicable, covered by third-party nondisclosure agreements. Antrim relied on the RFP's representations in submitting both redacted and unredacted proposals to the department along with

a letter outlining its need for confidentiality. In the absence of the RFP's assurances, Antrim testified that it would not have submitted a proposal.

The commission found that "the renewable energy market and the procurement process for renewable energy is highly competitive, and that the information at issue in this matter including, but not limited to, costs, pricing and bidding information, is highly market sensitive and unique to the particular RFP proposals." The commission further found that the department took various measures to keep the answer key confidential. Namely, "[t]he specific criteria and information provided by [the department] were shared only with those individuals on the [team] and Levitan. Further, within [the department], limited access to the [a]nswer [k]ey was granted only to a small set of employees within its Bureau of Energy and Technology Policy assigned to work on the procurement process.[14] During the PURA regulatory review of the executed contracts, [the department] also sought to protect the [a]nswer [k]ey by filing a motion for protective order, which was granted and still in effect at the time of the hearings in this matter." (Footnote added.)

The commission also found that Levitan and the team members were required to sign nondisclosure agreements. The EDC representatives on the team were further required to sign an agreement, known as the "Utility Standard of Conduct," that barred them from discussing the RFP with EDC personnel involved in the RFP bidding process. Accordingly, the commission concluded, and the court agreed, that the answer key derived independent economic value from its secrecy and, accordingly, that it is a trade secret exempt from disclosure under § 1-210 (b) (5) (A).

[14] The trial court also found that the record contained evidence that unredacted proposals were logged and stored in locked cabinets with limited access.

On appeal, the plaintiffs first argue that the information in the answer key was neither "the subject of efforts that are reasonable under the circumstances to maintain secrecy" in accordance with § 1-210 (b) (5) (A) (ii), nor "[c]ommercial or financial information given in confidence, not required by statute," to the department in accordance with § 1-210 (b) (5) (B), because the department failed to ensure confidentiality by imposing sufficient restrictions in the form of nondisclosure agreements. They insist that there was no evidence to support the commission's findings that nondisclosure agreements existed because testimony was conflicting and the department did not produce the agreements[15] and, thus, they argue that when the Utility Standard of Conduct expired, there was no further obligation of confidentiality. The plaintiffs also advance the closely related argument that the information was not "given in confidence" per § 1-210 (b) (5) (B) on the basis of (1) their claim that nondisclosure agreements were not produced and (2) the department's representations to bidders concerning the public disclosure of information, which they claim meant that the bidders "had no reasonable expectation that their bids would be held in confidence." The plaintiffs' arguments are unavailing.

The requirement of § 1-210 (b) (5) (A) (ii) is highly fact specific and focuses on reasonableness. "The question of whether, in a specific case, a party has made reasonable efforts to maintain the secrecy of a purported trade secret is by nature a highly fact-specific inquiry. . . . What may be adequate under the peculiar facts of one case might be considered inadequate under the facts of another. According to [General Statutes]

[15] At oral argument before this court, the department admitted that it no longer has copies of the nondisclosure agreements but asserted that, at the time of the events at issue, the agreements existed. As discussed in this opinion, the department presented sufficient evidence for the commission to make such a finding.

§ 35-51 (d) (2), the efforts need only be reasonable under the circumstances . . . .'' (Citation omitted; emphasis omitted; internal quotation marks omitted.) *Elm City Cheese Co.* v. *Federico*, supra, 251 Conn. 80. As for the ''given in confidence'' requirement, we have not had occasion previously to interpret it. In its decision, the commission construed the phrase ''commercial or financial information, given in confidence,'' which is contained within § 1-210 (b) (5) (B).[16] Noting that ''Connecticut appellate case law has not defined [the phrase],'' the commission looked to federal case law for guidance, as well as to Connecticut authority in *Lash* v. *Freedom of Information Commission*, 300 Conn. 511, 14 A.3d 998 (2011), *Dept. of Public Utilities* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-99-0498510-S (January 12, 2001) (29 Conn. L. Rptr. 215), and *Chief of Staff* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-98-0492654-S (August 12, 1999) (25 Conn. L. Rptr. 270). The commission concluded that '' 'given in confidence' . . . requires an intent to give confidential information, based on context or inference, such as where there is an express or implied assurance of confidentiality, where the information is not available to the public from any other source, or where the information is such that [it] would not customarily be disclosed by the person who provided it.'' The Superior Court subsequently concluded that ''the commission's construction of the phrases 'given in confidence' and 'not required by statute' was careful, thorough, and consistent with the principles of statutory construction applied by Connecticut's courts.'' We agree with the commission's well reasoned analysis.

[16] Because the plaintiffs do not address the phrase ''required by statute'' in their brief, we focus solely on the ''given in confidence'' requirement of § 1-210 (b) (5) (B).

The record before us belies the plaintiffs' argument that the commission clearly erred in finding that nondisclosure agreements had been made. The commission's finding is supported by the testimony offered at the hearing before the commission. It is further supported by the evidence that Cassadaga and Antrim relied on confidentiality guarantees, as well as on the department's other efforts to maintain secrecy, such as pursuing protective orders. We must defer to the commission's findings of fact, which were sufficiently supported by the evidence before it.

As the court correctly noted, this case readily is distinguishable from *Dept. of Public Utilities* v. *Freedom of Information Commission*, supra, 55 Conn. App. 532, in which there was "no evidence that the study was to be kept confidential." In that case, the lack of a confidentiality agreement or other "efforts to limit . . . dissemination," as well as the wide distribution of the information at issue, defeated the claim of secrecy. Id., 533. The plaintiffs claim that *Dept. of Public Utilities* is "directly on point" because of the lack of nondisclosure agreements in the present case, but the evidence here supports the findings by the commission and the court that nondisclosure agreements had been executed.[17] Similarly, the plaintiffs' reliance on *Elm City Cheese Co.* v. *Federico*, supra, 251 Conn. 86, for the proposition that "precautionary measures [such as] requiring

[17] In the trial court proceeding underlying the appeal in *UConn*, the Superior Court found that the university "also established that it has taken reasonable efforts to maintain the secrecy of the list. It has denied requests for disclosure in the past and has never provided the entire list to anyone outside of the [u]niversity." *University of Connecticut* v. *Freedom of Information Commission*, Superior Court, judicial district of New Britain, Docket No. CV-09-4021320-S (April 21, 2010) (49 Conn. L. Rptr. 856, 862), aff'd, 303 Conn. 724, 36 A.3d 663 (2012). By comparison, the department's efforts in the present case, including the execution of nondisclosure agreements and motions for protective order, similarly reflect an intent to guard the information in the answer key.

employees to sign confidentiality agreements'' are important, is misplaced because, unlike in *Elm City Cheese Co.*, the record here indicates that nondisclosure agreements were produced. The commission was free to weigh the testimony before it and conclude that nondisclosure agreements had bound the team. "[B]ecause the [commission] is the [fact finder] in this case, we decline to appraise and weigh the evidence considered by the [commission] in reaching its determination on the challenged findings." *Board of Education* v. *Freedom of Information Commission*, 208 Conn. 442, 452, 545 A.2d 1064 (1988). Accordingly, we reject the plaintiffs' claim that the time limited Utility Standard of Conduct is the only agreement in play here,[18] and, thus, the plaintiffs' reliance on case law in which time limited nondisclosure agreements were insufficient to afford trade secret protection is inapplicable here.

The plaintiffs also argue that the RFP put bidders on notice that the information was subject to disclosure. Read in full, the RFP plainly advised bidders that certain information would be disclosed and that other information would be kept confidential. The RFP disclosed to bidders that, "[a]s it has done with previous RFPs, [the department] intends to disclose *certain* bid information in its final determination once contract negotiations are completed and a filing is made with PURA . . . ." (Emphasis added.) At the same time, Appendix G of the RFP contained a disclaimer regarding the act, advising that "[w]ith your legal support and *reasonable justification for confidentiality* . . . the Connecticut state agencies participating on the Soliciting Parties *will be*

[18] The plaintiffs argue in their brief that, "[i]f the EDC representatives were required to sign nondisclosure agreements, there would have been no need for them to sign the Utility Standard of Conduct." This speculative contention is not proof of the absence of nondisclosure agreements and, in any case, it asks this court to make a factual finding, which we cannot do. See *Batista* v. *Cortes*, 203 Conn. App. 365, 372, 248 A.3d 763 (2021) (appellate court does not act as fact finder).

better equipped to safeguard your confidential information should it become the subject of a Connecticut Freedom of Information Act inquiry. . . . All information for winning bidders, including confidential information, will be released and become public 180 days after contracts have been executed and approved by all relevant regulatory authorities, *unless otherwise ordered by the Connecticut PURA*." (Emphasis added.) The plain language of the RFP makes clear that if a bidder requested, with appropriate justification, that its information be held confidential, the department would take measures to protect it. Moreover, the RFP, as the court put it, "contained an important qualifier: it indicated that information would be disclosed unless otherwise ordered by PURA." (Internal quotation marks omitted.) The commission found that Cassadaga, per the testimony of its representative, relied on this qualifier in submitting its bid and sought protective orders, which were granted by PURA. Antrim's representative also testified that it relied on the RFP's assurances of confidentiality and discretion. We agree that there was substantial evidence to support the conclusion that the department intended to give express assurances of, and that the bidders had resulting expectations of, confidentiality.

The context of the situation also indicates that confidentiality was implied by the representations and conduct of the parties involved in the RFP. Our review of the record supports the commission's finding that there was a clear understanding between the department and the bidders that sensitive information would be protected. Ignoring the evidence in the record, the plaintiffs argue that the decision of the Superior Court in *Chief of Staff* v. *Freedom of Information Commission*, supra, 25 Conn. L. Rptr. 271, in which the administrative record disclosed that the city of Hartford (city) had given "no express assurance of confidentiality" to developers

responding to an RFP, applies to the present case. However, the court in *Chief of Staff* construed the trade secret exemption as referring to the provision of information both "under an express assurance of confidentiality *or in circumstances from which such an assurance could reasonably be inferred*." (Emphasis added; internal quotation marks omitted.) Id. Turning to that second question, the court stated that "[w]hether there was an implied assurance of confidentiality presents a close question" because a majority of the developers had an understanding of confidentiality with the city, but, fatally, the city had informed the developers that their proposals would be disseminated. Id. The court recognized that "[w]hether the circumstances show an implied assurance of confidentiality is ordinarily a question of fact" and deferred to the commission's factual finding that "the majority of the information was not given in confidence." Id. The cumulative evidence before the commission, namely the testimony concerning nondisclosure agreements and Antrim's and Cassadaga's reliance on the department's representations, sufficiently supported the commission's conclusion that the bidders and the department understood confidentiality to be an important consideration. Moreover, unlike in *Chief of Staff*, the RFP in the present case did not promise full disclosure by its terms. After reviewing the evidence before it, the commission concluded that the answer key was given in confidence.

Applying the commission's construction of the phrase "given in confidence" to the commission's findings, we agree with the trial court that the commission properly concluded that the bidders and the department mutually intended to submit and collect confidential information, respectively. This conclusion is supported by the hearing testimony provided by representatives from Cassadaga and Antrim, which the commission evidently credited. That testimony also supports the department's

assertions regarding the existence of nondisclosure agreements. We therefore conclude that the commission's determination with respect to § 1-210 (b) (5) (B) is supported by the record.

The judgment is affirmed.

In this opinion the other judges concurred.

FRANCIS ANDERSON *v.* COMMISSIONER OF CORRECTION
(AC 42032)

Alvord, Elgo and Cradle, Js.

Syllabus

The petitioner, who had been convicted of assault of a peace officer while incarcerated, sought a writ of habeas corpus, claiming that his trial counsel had rendered ineffective assistance by failing to adequately investigate his case, failing to explain to him the strengths and weaknesses of his case and failing to meaningfully explain the plea offers made to him and the likely range of sentences that he faced. The habeas court rendered judgment denying the petition, concluding, inter alia, that the petitioner had failed to prove that his trial counsel's representation of him was deficient or that he was prejudiced by this alleged deficiency. Thereafter, the habeas court granted the petition for certification to appeal, and the petitioner appealed to this court. On appeal, the petitioner claimed that the habeas court incorrectly concluded that his trial counsel did not provide ineffective assistance by failing to pursue a defense of lack of capacity due to mental disease or defect. *Held* that the judgment of the habeas court denying the petition for a writ of habeas corpus was affirmed; the habeas court having thoroughly addressed the petitioner's argument raised in this appeal, this court adopted the habeas court's well reasoned decision as a proper statement of the relevant facts, issues and the applicable law on those issues.

Argued February 9—officially released June 8, 2021

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland and tried to the court, *Farley*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

James P. Sexton, assigned counsel, with whom, on the brief, were *Megan L. Wade* and *Meryl R. Gersz*, assigned counsel, for the appellant (petitioner).

Nancy L. Chupak, senior assistant state's attorney, with whom, on the brief, were *Matthew C. Gedansky*, state's attorney, and *Jaclyn Preville Delude*, supervisory assistant state's attorney, for the appellee (respondent).

Opinion

CRADLE, J. The petitioner, Francis Anderson, appeals from the judgment of the habeas court denying his petition for a writ of habeas corpus. On appeal, the petitioner claims that the habeas court incorrectly concluded that his trial counsel did not provide ineffective assistance by failing to pursue a defense of lack of capacity due to mental disease or defect (lack of capacity). We affirm the judgment of the habeas court.[1]

On March 3, 2011, the petitioner pleaded guilty to two counts of assault of a peace officer in violation of General Statutes (Rev. to 2009) § 53a-167c. The petitioner's conviction resulted from events that transpired on September 30, 2009, when the petitioner, while serving a prior sentence, assaulted two officers from the Department of Correction. The trial court, *Hon. Terence A. Sullivan*, judge trial referee, sentenced the petitioner to a total effective sentence of five years of incarceration, to be served consecutively to any previous sentence he already was serving.

[1] The petitioner also challenges the habeas court's determination that he failed to prove that he was prejudiced by his counsel's representation of him. Because we conclude that the habeas court correctly determined that his counsel's performance was not constitutionally deficient, we do not reach the petitioner's prejudice claim. See, e.g., *Sanchez* v. *Commissioner of Correction*, 314 Conn. 585, 606, 103 A.3d 954 (2014) (reviewing court can find against petitioner on either performance or prejudice prong of ineffective assistance of counsel claim).

On February 19, 2013, the petitioner filed an amended petition for a writ of habeas corpus.[2] In his amended petition, the petitioner claimed that his trial counsel, Douglas Ovian, provided ineffective assistance by failing to adequately investigate his case, failing to explain to him the strengths and weaknesses of his case and failing to meaningfully explain the plea offers made to him and the likely range of sentences that he faced.

On July 25, 2018, following a three day trial and the filing of posttrial briefs by the parties, the habeas court, *Farley*, *J.*, issued a memorandum of decision in which it concluded that the petitioner failed to prove that Ovian's representation of him was deficient or that he was prejudiced by this alleged deficiency. In so concluding, the habeas court began by noting that "[t]he petitioner's case, as presented at trial and in his posttrial brief, focuses specifically upon his attorney's failure to adequately explore and explain a potential defense of lack of capacity, as an alternative to his guilty pleas, and to otherwise provide an effective defense based on the petitioner's mental health issues." The court then set forth the following relevant facts. "[The petitioner] has a long history of violent behavior and mental illness. In the underlying case, [the petitioner] was charged with assaulting two correctional officers when they entered his cell immediately after having, in [the petitioner's] opinion, mistreated another inmate with mental illness. This was not the first such occasion. [The petitioner] has a long history of assaults against correctional officers and others. His psychological issues and behavioral problems date back to his childhood and he has been in and out of correctional facilities since his youth. The incident underlying the conviction that is the subject of this habeas petition occurred in September, 2009, at Northern Correctional Institution. [The petitioner] was

[2] The petitioner initially filed a petition for a writ of habeas corpus on May 19, 2011.

charged with two counts of assault [of a peace officer] in violation of General Statutes (Rev. to 2009) § 53a-167c, class C felonies, as well as an infraction for failure to comply with fingerprinting [requirements] in violation of General Statutes § 29-17. The felony counts exposed him to up to twenty years of incarceration and any sentence was required by statute to run consecutively to the sentence he was serving at the time. Subsequently, accounting for his prior history, the state filed [a] part B [information] charging [the petitioner] as a persistent felony offender in violation of General Statutes § 53a-40 (g) and as a persistent serious felony offender in violation of General Statutes § 53a-40 (c). These additional charges increased [the petitioner's] exposure to up to forty years of incarceration. On March 3, 2011, after a jury had been selected, [the petitioner] pleaded guilty to the two assault counts under an open plea, the state having agreed to drop the part B counts in exchange for the guilty plea. Thus, at sentencing [the petitioner] faced a total exposure of twenty years. He was sentenced to five years to serve on each of the two counts, to run concurrently with each other and consecutive to the sentence he was then serving. . . .

"Following [the petitioner's] arraignment on the original charges . . . Ovian was assigned to represent him. At the time . . . Ovian had over twenty years of experience with the Division of Public Defender Services and had served as a public defender in the Tolland judicial district for over three years. [The petitioner] made numerous appearances in court prior to trial. . . . Ovian met with [the petitioner] on these occasions and had the opportunity to explore at length with him the underlying events and his criminal and psychological history. . . . Ovian directed his staff to compile a record of [the petitioner's] mental health history and treatment and to prepare a summary of that history, as well as [the petitioner's] criminal history. Extensive records were obtained, dating back to a psychological evaluation performed by . . . Donald Grayson in 2000,

which in turn reviewed [the petitioner's] prior records. It is not clear, however, that . . . Ovian had the entirety of [the petitioner's] mental health records, in particular a 1982 report from Riverview School prepared when [the petitioner] was twelve years old, records from a prior commitment to [what is now] Whiting Forensic [Hospital (Whiting)] in 2005, and some community treatment in 2007. The summary prepared for . . . Ovian, however, does reference the 2005 admission to Whiting, as well as [the petitioner's] childhood history.

"Over the course of the pretrial proceedings in the case . . . Ovian regularly discussed [the petitioner's] mental health issues with him and how those issues might relate to a defense strategy in the case. These discussions included a 'colloquial' discussion of a potential lack of capacity defense. By 'colloquial' . . . Ovian means a discussion in layman's terms, as distinguished from a technical, legal discussion. The petitioner makes much of the fact that . . . Ovian does not have written notes concerning the discussion of a lack of capacity defense with him. . . . Ovian, however, freely acknowledged areas of his recollection that were unclear and deferred to [the petitioner's] recollection on occasion. He was very clear in recalling that he did address the subject of a potential lack of capacitydefense with [the petitioner] and the court credits his testimony on that point despite [the petitioner's] contradictory testimony. It is [the petitioner's] testimony the court finds is not credible. According to [the petitioner] . . . Ovian never discussed the following subjects with him: the facts of the case; the strengths and weaknesses of the case; the minimum and maximum penalties he faced; a plea offer from the state of eighteen months to serve; the option of a court trial rather than a jury trial; and a potential lack of capacity defense. [The petitioner] does acknowledge that he discussed his mental health

issues with . . . Ovian, but he maintains that . . . Ovian ignored those issues. The court does not find [the petitioner's] testimony concerning how . . . Ovian conducted the defense and the nature of his dealings with . . . Ovian to be credible.

"Following his initial meetings with [the petitioner] and the review of his mental health history . . . Ovian was of the view that a lack of capacity defense was not a viable option for [the petitioner]. The history reflected diagnoses of post-traumatic stress disorder [PTSD], personality disorder, borderline intellectual functioning and substance abuse. Despite the extensive mental health history, however, it was . . . Ovian's view that the facts did not support a claim that [the petitioner] lacked the capacity either to appreciate the wrongfulness of his conduct or to control his conduct within the requirements of the law. In addition to his assessment that a lack of capacity defense was not viable . . . Ovian also considered the pursuit of that defense as strategically unsound because it would potentially expose [the petitioner] to a period of confinement significantly longer than what could be negotiated in a plea agreement with the state. . . . Ovian raised the subject of [the petitioner's] extensive mental health history with the state in plea negotiations. At one point . . . Ovian obtained a plea offer from the state that would have resulted in an agreed upon sentence of eighteen months to serve. [The petitioner], however, rejected that offer.

"[Ovian] discussed the merits of a lack of capacity defense, in addition to the strategic disadvantages of pursuing that defense, with [the petitioner]. He also checked his own opinion of the merits of such a defense by obtaining an expert opinion on the issue. At the time of jury selection . . . Ovian referred [the petitioner] to . . . Kenneth Selig, a psychiatrist and an attorney, for evaluation. . . . Ovian testified that, among other things, he discussed the viability of a lack of capacity

defense with . . . Selig and, based on that discussion, reaffirmed his view that it was not a viable defense for [the petitioner]. . . . Ovian relayed that opinion to [the petitioner]. [The petitioner] denies ever meeting with . . . Selig, but the transcripts of the proceedings in the underlying case are consistent with the facts as described by . . . Ovian and include references to the lack of capacity issue.

"[The petitioner's] chief concern throughout . . . Ovian's representation was the inadequate mental health care he received as an inmate. This became a focus of the defense strategy in the case, particularly after a video of the underlying events undermined [the petitioner's] claim of self-defense. As the trial approached . . . Ovian pursued a strategy he hoped would limit the potential period during which [the petitioner] would be confined and at the same time raise the possibility that the nature of his confinement would be substantially the same as if he had successfully pursued a lack of capacity defense. To this end . . . Ovian's referral to . . . Selig was aimed at determining whether there were any undiagnosed mental health conditions applicable to [the petitioner] that should be weighed in his sentencing. . . . That effort was unavailing. [Ovian] persisted, however, and negotiated an open plea agreement on the assault charges, subject to the state's further agreement that [the petitioner] would be referred for a psychiatric examination pursuant to General Statutes § 17a-566.[3] That process opened

[3] General Statutes § 17a-566 provides in relevant part: "(a) Except as provided in section 17a-574 any court prior to sentencing a person convicted of an offense for which the penalty may be imprisonment in the Connecticut Correctional Institution at Somers . . . may if it appears to the court that such person has psychiatric disabilities and is dangerous to himself or others, upon its own motion or upon request of any of the persons enumerated in subsection (b) of this section and a subsequent finding that such request is justified, order the commissioner to conduct an examination of the convicted defendant by qualified personnel of the hospital. Upon completion of such examination the examiner shall report in writing to the court. Such report shall indicate whether the convicted defendant should be committed to the

up the prospect that [the petitioner] could plead guilty, cap his exposure to incarceration and still be held in the custody of the Department of Mental Health and Addiction Services at [Whiting]. Despite [the petitioner's] claim to the contrary, the court finds that . . . Ovian explained this strategy and this process to [the petitioner] and informed him that the results of the § 17a-566 examination were uncertain.

"On March 3, 2011, [the petitioner] pleaded guilty under the *Alford* doctrine[4] pursuant to the plea agreement negotiated by . . . Ovian. He was thoroughly canvassed by the court and then referred for an initial examination pursuant to § 17a-566. In advance of the examination, [the petitioner] took issue with one of the examiners assigned to the matter, claiming that she had a bias against him. . . . Ovian looked into that claim, which was counter to his own experience with the examiner, by speaking with her and becoming assured it would not be an issue. The examiners concluded, however, that despite [the petitioner's] extensive history of mental illness and behavioral difficulties, he

diagnostic unit of the hospital for additional examination or should be sentenced in accordance with the conviction. . . .

"(b) The request for such examination may be made by the state's attorney or assistant state's attorney who prosecuted the defendant for an offense specified in this section, or by the defendant or his attorney in his behalf. . . ."

In 2018, the statute was amended to replace references to "division" and "institute" with "hospital" to reflect the name change of the Whiting Forensic Division of Connecticut Valley Hospital, formerly Whiting Forensic Institute, to Whiting Forensic Hospital.

[4] "Under *North Carolina* v. *Alford*, [400 U.S. 25, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970)], a criminal defendant is not required to admit his guilt . . . but consents to being punished as if he were guilty to avoid the risk of proceeding to trial. . . . A guilty plea under the *Alford* doctrine is a judicial oxymoron in that the defendant does not admit guilt but acknowledges that the state's evidence against him is so strong that he is prepared to accept the entry of a guilty plea nevertheless." (Internal quotation marks omitted.) *State* v. *Walker*, 187 Conn. App. 776, 778 n.2, 204 A.3d 38, cert. denied, 331 Conn. 914, 204 A.3d 703 (2019).

could be treated appropriately by the Department of Correction and no referral to [Whiting] was recommended. This conclusion was consistent with the opinion expressed orally to . . . Ovian by . . . Selig. [The petitioner] took issue with the results of the examination but, because they were consistent with . . . Selig's conclusions . . . Ovian did not challenge them. Rather than antagonize the state with a request for a continuance and the retention of yet another expert, which . . . Ovian believed might negatively impact the state's position at sentencing . . . Ovian proceeded with the presentence investigation process and sentencing, where the court would have access to the § 17a-566 report and additional background information. The transcript of the sentencing hearing reflects the fact that the court had been provided with the available mental health information, including the § 17a-566 report, that detailed [the petitioner's] childhood abuse, troubled past and extensive psychiatric history. . . . Ovian leaned on those materials in presenting his argument to the court and even invited the court to order further examination of [the petitioner], despite the recommendations in the § 17a-566 report. The court's remarks reflect that these issues were considered by the court in deciding upon a sentence.

"After disposition of the 2009 case, [the petitioner] was again charged with assaulting a correction officer in July, 2012. Attorney Cynthia Love represented [the petitioner] on that charge, which was prosecuted in Norwich. . . . Love referred [the petitioner] for evaluation by . . . Andrew Meisler, a clinical and forensic psychologist. Meisler authored a report dated February 13, 2013, offering his opinions on [the petitioner's] mental condition and the factors that contributed to the 2012 incident. In addition to [the petitioner's] prior diagnoses . . . Meisler diagnosed [the petitioner] with '[c]omplex PTSD' which, as he explained at trial in

this case, is a diagnosis that has been considered for recognition but is not currently recognized by the Diagnostic and Statistical Manual of Mental Disorders (DSM-5). It distinguishes a subset of individuals with PTSD who, based on the nature of their underlying trauma, suffer 'much greater disruptions in relationship to others, self-regulation . . . .' In the case of [the petitioner] . . . Meisler's opinion is that certain triggers in his environment cause [the petitioner] to lose the ability to control his behavior. . . . Meisler perceives a pattern of events that lead [the petitioner] into a violent incident, including a change in his surroundings combined with a decrease or elimination of medication therapy and a circumstance in which [the petitioner] perceives a threat that triggers an impulsive, violent reaction.

"With . . . Meisler's support, [the petitioner] went to trial on the 2012 charges and was acquitted on a lack of capacity defense in July, 2013. . . . Meisler was subsequently disclosed as an expert in this case. Pointing out that the 2009 incident followed a transfer of [the petitioner] to Northern Correctional Institution, what . . . Meisler views as a 'negative assessment by psychiatric staff at Northern [Correctional Institution]' and a discontinuance of medications . . . Meisler believes [that the petitioner] was destabilized at the time of the 2009 incident as well. In response to what [the petitioner] perceived to be unfair treatment of another inmate by correction officers . . . Meisler opines that when [the petitioner] assaulted the correction officers in 2009, he was 'suffering from acute mental illness with marked impairments in emotional regulation and impulse control that prevented him from controlling his behavior in accordance with the law.' " (Footnotes added and omitted.)

With that factual underlayment, the court then addressed the petitioner's claim that Ovian's representation of him was constitutionally deficient because he

failed to present a lack of capacity defense.[5] The court reasoned: "The outcome of [the petitioner's] trial arising out of the 2012 charge of assaulting a correction officer unavoidably enhances the effect of hindsight on the defense strategy pursued by . . . Ovian in connection with the 2009 charges. It is essential, therefore, to emphasize that the court has a responsibility in this case to reconstruct the circumstances as they were presented to . . . Ovian and to evaluate the representation he provided from his perspective at the time, not through the prism of hindsight. While . . . Ovian did not consider a lack of capacity defense viable on its merits, he also perceived it as potentially counterproductive. With charges pending that exposed [the petitioner] to forty years of incarceration, a successful lack of capacity defense would nevertheless have left [the petitioner] at risk of being confined for a very long time, subject to future determinations concerning his eligibility for release. See General Statutes § 17a-580 et seq. This prospect stood in contrast to the period of confinement under consideration by the state in plea negotiations, as little as eighteen months at one point.

[5] The habeas court stated that the petitioner claimed, at trial and in his posttrial brief, that Ovian's representation of him was deficient because Ovian "conducted the majority of the defense without consulting with an expert regarding a potential lack of capacity defense, waiting until the eve of trial to retain . . . Selig; failed to properly supervise his staff charged with the responsibility to compile the records of [the petitioner's] mental health history; failed to obtain all the mental health records and provide them to . . . Selig; failed to keep [the petitioner] informed and failed to explain to him all potential defenses and the potential mitigating impacts arising out of his mental health condition; limited the scope of . . . Selig's inquiry to what treatment would be appropriate for [the petitioner] were he to be released to the community; failed to retain an expert and challenge the recommendations in the § 17a-566 report; failed to make proper use of the § 17a-566 report and other mental health records at the sentencing hearing; and failed to maintain thorough notes on all the conversations he had while conducting [the petitioner's] defense." Because the petitioner's challenge on appeal is focused on Ovian's failure to obtain all of the petitioner's mental health records and to present a lack of capacity defense, we focus on the portions of the habeas court's analysis that address those issues.

. . . Ovian discussed this strategic consideration with [the petitioner], in addition to the merits of a lack of capacity defense. . . .

"Meisler's testimony in this case establishes, to the court's satisfaction, that a plausible defense of lack of capacity could have been developed and pursued by . . . Ovian. Given the serious and persistent mental health issues exhibited by [the petitioner], and the correlation between those issues and his violent behavior, it was something to consider and the court finds . . . Ovian took the initial steps to look into that defense. Having done so, it was incumbent upon him to obtain a complete mental health history and to obtain a thoroughly informed expert opinion on how [the petitioner's] mental health issues might impact his defense. Having recognized that responsibility . . . Ovian did not carry it out completely. He delegated the task of obtaining the complete history and did not ensure that task had been properly completed. He recognized the need to consult with an expert early on in the case, but did not do so until the time of jury selection. To the extent that his performance is subject to criticism, these are the principal considerations."

The habeas court analogized the factual circumstances in this case to those presented in this court's earlier decision in *Ramos* v. *Commissioner of Correction*, 172 Conn. App. 282, 159 A.3d 1174, cert. denied, 327 Conn. 904, 170 A.3d 1 (2017). The court explained that, in *Ramos*, the petitioner's counsel had "requested his medical records from the Department of Correction . . . and, upon receipt, forwarded them to . . . Peter Zelman, a forensic psychiatrist. The records obtained from [the Department of Correction], however, belonged to another inmate with the same name but with far fewer psychiatric issues and a much less severe drug history than the petitioner. This error was not discovered by [the petitioner's counsel] during her representation of the petitioner. The habeas petition alleged [the

petitioner's counsel] rendered ineffective assistance based on her failure to ensure that the records relied upon by . . . Zelman were accurate. The court agreed that counsel had fallen short of her responsibilities because she had 'assumed an obligation to conduct her investigation in a constitutionally adequate manner, which required her to obtain and furnish accurate medical information to the expert with whom she consulted . . . so that the expert's opinion would be well-grounded and she could appropriately rely upon it in developing her case strategy and advising her client whether to go to trial.' Id., 300–301."

With *Ramos* in mind, the habeas court reasoned: "Like [the petitioner's counsel in *Ramos*] . . . Ovian erred by not ensuring that his office had obtained a complete set of [the petitioner's] mental health records. It was not his intention to do anything less than that and he relied on his staff to complete that task, but still it remained his responsibility."[6]

The court continued: "The court's analysis of . . . Ovian's performance is complicated by the fact that there was a substantial strategic consideration overlaying the incomplete investigation of a defense based on lack of capacity. Even if . . . Ovian had determined that a lack of capacity defense was conceivable, it was also his view that pursuing that defense was not the wisest strategy, given the difference between [the petitioner's] exposure and the prison time being contemplated in plea negotiations. [Ovian] believed that [the

[6] We note that, in *Ramos*, the habeas court did not find that the petitioner's counsel was constitutionally ineffective. This court rejected the petitioner's challenge to the habeas court's judgment in *Ramos* on the ground that he failed to satisfy the prejudice prong of his ineffective assistance claim. See *Ramos* v. *Commissioner of Correction*, supra, 172 Conn. App. 301–302. This court noted, however, that it was "at least debatable among jurists of reason whether the making of such a mistake when reviewing critical medical records that purportedly belong to one's own client satisfies the minimum requirements of our state and federal constitutions as to the adequacy of trial counsel's performance." Id., 301.

petitioner's] mental health issues could be put to better use in attempting to negotiate a plea agreement that would limit the length of [the petitioner's] confinement and also create an opportunity to argue that [the petitioner] should be confined at Whiting. That is the strategy he discussed with [the petitioner] extensively and the one that ultimately played out at the time of the plea and sentencing. . . .

"First, the court does not agree that . . . Ovian's pursuit of a mitigation strategy on the basis of [the petitioner's] mental health problems, rather than a lack of capacity defense, was deficient. This was a strategic decision, explained in detail to [the petitioner], which was not principally based upon the merits of a potential lack of capacity defense, but rather a strategy that . . . Ovian believed was in [the petitioner's] overall best interests. '[T]o establish deficient performance by counsel, a defendant must show that, considering all of the circumstances, counsel's representation fell below an objective standard of reasonableness as measured by prevailing professional norms . . . . Moreover, strategic decisions of counsel, although not entirely immune from review, are entitled to substantial deference by the court.' . . . *Skakel* v. *Commissioner of Correction*, 329 Conn. 1, 31, [188 A.3d 1] (2018), [cert. denied, U.S. , 139 S. Ct. 788, 202 L. Ed. 2d 569 (2019)]. While strategic decisions do not excuse inadequate investigations, 'strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.' Id., 32, quoting *Strickland* v. *Washington*, [466 U.S. 668, 690–91, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)]. In this case, based on the totality of the circumstances, the court concludes that . . . Ovian's decision to pursue a mitigation strategy met the standard of objective reasonableness, even though he and . . . Selig did not have a complete set of [the petitioner's] mental health records. They both did have

access to . . . Grayson's 2000 evaluation, which . . . Meisler himself characterized as 'a thorough record review and evaluation,' as well as [the petitioner's] extensive, more recent records from [the Department of Correction]. Whatever information the missing records might have added, the court concludes they would not have changed . . . Ovian's strategy, which was based upon his perception that it was not in [the petitioner's] best interests to pursue a lack of capacity defense. That was a strategic decision entitled to substantial deference. See *Pladsen* v. *Commissioner of Correction*, 96 Conn. App. 849, [850–51], 902 A.2d 704 (2006) (same strategy pursued by . . . Ovian was not ineffective assistance of counsel)."[7] (Citations omitted.)

On the basis of the foregoing, the court concluded: "In sum, while . . . Ovian's performance may be subject to some legitimate criticism relating to the failure to obtain a complete medical history . . . in the totality of the circumstances these shortcomings do not constitute 'errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the [s]ixth [a]mendment.' *Skakel* v. *Commissioner of Correction*, supra, 329 Conn. 30, quoting *Strickland* v. *Washington*, [supra] 466 U.S. 687." The court also concluded that the petitioner failed to prove that he was prejudiced by Ovian's allegedly deficient representation of him. Accordingly, the court denied the petition for a writ of habeas corpus. The court thereafter granted the petitioner's petition for certification to appeal, and this appeal followed.

The standard of review in a habeas corpus proceeding challenging the effective assistance of trial counsel is well settled. "To succeed on a claim of ineffective assis-

[7] We note that Meisler acknowledged that Grayson's report, which Ovian had obtained and forwarded to Selig, provided a thorough review of the petitioner's mental health history. Therefore, any records obtained by Ovian pertaining to the time period covered in Grayson's report would have been cumulative of the records that Ovian had obtained and given to Selig.

tance of counsel, a habeas petitioner must satisfy the two-pronged test articulated in *Strickland* v. *Washington*, [supra, 466 U.S. 687]. *Strickland* requires that a petitioner satisfy both a performance prong and a prejudice prong. To satisfy the performance prong, a claimant must demonstrate that counsel made errors so serious that counsel was not functioning as the counsel guaranteed . . . by the [s]ixth [a]mendment. . . . To satisfy the prejudice prong, a claimant must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. . . . Because both prongs . . . must be established for a habeas petitioner to prevail, a court may dismiss a petitioner's claim if he fails to meet either prong. . . .

"On appeal, [a]lthough the underlying historical facts found by the habeas court may not be disturbed unless they [are] clearly erroneous, whether those facts constituted a violation of the petitioner's rights [to the effective assistance of counsel] under the sixth amendment is a mixed determination of law and fact that requires the application of legal principles to the historical facts of [the] case. . . . As such, that question requires plenary review by this court unfettered by the clearly erroneous standard." (Citations omitted; internal quotation marks omitted.) *Jordan* v. *Commissioner of Correction*, 197 Conn. App. 822, 830–31, 234 A.3d 78, cert. granted, 335 Conn. 931, 236 A.3d 218 (2020).

On appeal, the petitioner claims that the habeas court erred in rejecting his claim that Ovian rendered ineffective assistance of counsel by failing to pursue a lack of capacity defense. Specifically, the petitioner claims that the habeas court erred in concluding that Ovian's representation was not deficient because it erroneously assumed that Ovian would still have pursued a mitigation strategy, versus a lack of capacity defense, if he had obtained all of the petitioner's medical records, and his trial strategy did not advance the petitioner's

litigation objective, which, in this case, was to obtain mental health treatment at Whiting.

We have examined the record on appeal, the briefs and arguments of the parties, and conclude that the judgment of the habeas court, *Farley*, *J.*, should be affirmed. Because the habeas court thoroughly addressed the petitioner's argument raised in this appeal that Ovian's representation of him was constitutionally deficient, we adopt its well reasoned decision, as quoted at length herein, as a proper statement of both the facts and the applicable law on that issue. Any further discussion by this court would serve no useful purpose. See, e.g., *Woodruff* v. *Hemingway*, 297 Conn. 317, 321, 2 A.3d 857 (2010); *Brander* v. *Stoddard*, 173 Conn. App. 730, 732, 164 A.3d 889, cert. denied, 327 Conn. 928, 171 A.3d 456 (2017).

The judgment is affirmed.

In this opinion the other judges concurred.

MARY JACKSON ET AL. *v.* PENNYMAC LOAN SERVICES, LLC
(AC 43042)

Bright, C. J., and Prescott and Flynn, Js.

Syllabus

The plaintiffs appealed from the trial court's dismissal of their action against the defendant, a mortgage servicing company, in which they alleged that the defendant violated the mortgage release statute (§ 49-8) by failing to provide a timely and valid release of their mortgage. The court dismissed the action for lack of subject matter jurisdiction due to the plaintiffs' alleged failure to demonstrate their compliance with the requirements of § 49-8 (c) regarding the statutory demand notice for release of the mortgage. This ground was not argued by the defendant in its motion to dismiss. On appeal, the plaintiffs claimed that the trial court deprived them of due process by dismissing their action on a ground that the court raised sua sponte without affording them notice or an opportunity to be heard. *Held*:

1. The trial court improperly granted the motion to dismiss, as that court improperly addressed, sua sponte, the issue of the plaintiffs' alleged noncompliance with the statutory demand notice requirements in § 49-8 (c) without first providing the plaintiffs with notice or a reasonable opportunity to submit evidence of their compliance with those requirements; the plaintiffs were not given the opportunity to contest whether they were required to demonstrate on the notice that was attached to the complaint that the notice had been received by the defendant or its attorney, and the defendant's special defenses that alleged that the plaintiffs failed to satisfy all conditions precedent, including sending the required written demand notice to the defendant, were insufficient to place the plaintiffs on notice that they were required to demonstrate that they complied with the notice requirements of § 49-8 (c); moreover, any alleged failure to satisfy the written demand notice requirements did not deprive the court of jurisdiction to hear the matter, but rather impacted the court's authority to grant the relief sought by the plaintiffs; furthermore, regardless of whether the issue was jurisdictional or simply related to the court's authority, due process required the defendant to have raised in its motion to dismiss the issue of the plaintiffs' compliance with the statutory demand notice requirements of § 49-8 (c) or, failing that, required the court to have provided the parties with notice that the statutory demand notice requirements issue was to be decided before it granted the defendant's motion to dismiss on that ground.
2. The defendant could not prevail on its claim that the dismissal of the plaintiffs' action could be affirmed on the alternative ground that they were not aggrieved pursuant to § 49-8 because they did not suffer any harm and, therefore, did not have standing, as § 49-8 was a penalty statute that did not require the plaintiffs to suffer actual damages; the defendant did not provide evidence that it complied with the statute (§ 49-9a) that would have upheld the defendant's release of mortgage that contained a "scrivener's error," and the plain language of § 49-8 provided damages for aggrieved persons if the mortgagee fails to execute or deliver a timely release of mortgage, and the plaintiffs, who allegedly did not receive a timely release of the mortgage on their property after they undisputedly sold the property in a short sale, were accordingly aggrieved persons within the meaning of § 49-8.

Argued November 12, 2020—officially released June 8, 2021

Procedural History

Action to recover damages for the defendant's failure to timely release a certain mortgage, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Wilson, J.*; dismissed the

plaintiffs' action, and the plaintiffs appealed to this court. *Reversed*; *further proceedings*.

Sabato P. Fiano, with whom, on the brief, was *Lori A. DaSilva-Fiano*, for the appellants (plaintiffs).

Jeffrey C. Ankrom, with whom, on the brief, was *Donald E. Frechette*, for the appellee (defendant).

Opinion

FLYNN, J. The plaintiffs, Mary Jackson and Johnnie Jackson, appeal from the judgment of the trial court granting the motion of the defendant, Pennymac Loan Services, LLC, to dismiss the action of the plaintiffs in which they alleged that the defendant violated General Statutes § 49-8 (c) by failing to provide a timely release of their mortgage. The defendant did not argue in its motion that the action should be dismissed for lack of subject matter jurisdiction due to the plaintiffs' alleged failure to satisfy the requirements of § 49-8 (c) regarding a statutory demand notice for release of the mortgage. Nevertheless, the court dismissed the action on that ground. On appeal, the plaintiffs claim that the court deprived them of due process by dismissing their action on a ground that the court had raised sua sponte without affording them notice or an opportunity to be heard. We agree with the plaintiffs that neither the defendant's motion to dismiss nor the court alerted them that their alleged noncompliance with the statutory demand notice requirements in § 49-8 (c) was at issue and, accordingly, we reverse the judgment of the trial court.

At the outset, we note that at the center of the plaintiffs' appeal is § 49-8, which concerns, inter alia, the release of a satisfied mortgage, and provides in relevant part: "(a) The mortgagee or a person authorized by law to release the mortgage shall execute and deliver a release to the extent of the satisfaction tendered before or against receipt of the release: (1) Upon the

satisfaction of the mortgage . . . . (c) The mortgagee or plaintiff or the plaintiff's attorney, as the case may be, shall execute and deliver a release within sixty days from the date a written request for a release of such encumbrance (1) was sent to such mortgagee, plaintiff or plaintiff's attorney at the person's last-known address by registered or certified mail, postage prepaid, return receipt requested, or (2) was received by such mortgagee, plaintiff or plaintiff's attorney from a private messenger or courier service or through any means of communication, including electronic communication, reasonably calculated to give the person the written request or a copy of it. The mortgagee or plaintiff shall be liable for damages to any person aggrieved at the rate of two hundred dollars for each week after the expiration of such sixty days up to a maximum of five thousand dollars or in an amount equal to the loss sustained by such aggrieved person as a result of the failure of the mortgagee or plaintiff or the plaintiff's attorney to execute and deliver a release, whichever is greater, plus costs and reasonable attorney's fees."

The following facts and procedural history, as stated by the trial court, are relevant to the resolution of the plaintiffs' claims on appeal. "On May 7, 2018, the plaintiffs . . . filed a two count complaint against the defendant . . . alleging the following facts. The plaintiffs owned property known as 261 Winthrop Avenue in New Haven, Connecticut (property). [The] property was encumbered by a mortgage given by the plaintiffs, dated October 13, 2010, and recorded on October 15, 2010, in the New Haven land records (land records) that, after several assignments, was assigned to the defendant by assignment dated January 2, 2014, and recorded on January 14, 2014, in the land records. On or about January 20, 2016, the plaintiffs paid off the mortgage to the defendant by wire transfer in accordance with the defendant's payoff statement, which the plaintiffs and the defendant had negotiated. The

defendant was notified of the statutorily mandated sixty day period to issue a valid release of the mortgage pursuant to . . . § 49-8, but the defendant failed to timely provide a proper and valid executed release of mortgage within that time period. The defendant violated § 49-8 and is liable for statutory damages in the amount of $5000, plus reasonable attorney's fees and costs." (Footnotes omitted.) The court further stated that the defendant filed an answer and special defenses in which it alleged that it was assigned the subject mortgage on the property and received sufficient funds to pay off the mortgage, however, the defendant denied that it had failed to provide a proper and valid release. The defendant moved to dismiss the action for lack of subject matter jurisdiction on the grounds that the plaintiffs were neither classically nor statutorily aggrieved. Alternatively, the defendant sought summary judgment.

In a decision filed May 21, 2019, the court granted the defendant's motion to dismiss. The court determined that "§ 49-8 is a penalty statute, and the plaintiffs can be, potentially, statutorily aggrieved simply by not having received a timely valid release from the defendant within sixty days of the requisite notice/request for release of mortgage having been sent and/or received . . . . The plaintiffs can only be aggrieved pursuant to § 49-8 if they have strictly complied with the statutory notice provisions." Although the court never notified the plaintiffs that it was considering granting the motion to dismiss on grounds that it had raised sua sponte concerning the plaintiffs' compliance with the statutory demand notice requirements in § 49-8 (c), it, nonetheless, did so. It concluded that the plaintiffs had not complied with these requirements: "First, the plaintiffs fail to indicate on the notice itself, and fail to present other evidence in support, that the notice was 'sent' to the defendant by registered or

certified mail, return receipt requested, as required by the statute. Second, the plaintiffs fail to indicate on the notice itself, and fail to present other evidence in support, that the notice was 'received' by the defendant or the defendant's attorney from a private messenger or courier service or through any means of communication, including electronic communication, as required by statute. . . . The court has further reason to doubt that the plaintiffs have sufficiently complied with the requirements in the statute; specifically, that the plaintiffs sent such notice to the defendant's last known address. In the assignment of the mortgage to the defendant, the address for the defendant is listed as: 6101 Condor Drive, Moorpark, CA 93021-2603. . . . The notice, however, lists a different zip code than the one provided on the assignment. The notice is addressed with the zip code 93201." (Internal quotation marks omitted.) The court concluded that, because "the plaintiffs have not met their burden of establishing that they complied with statutory demand notice in § 49-8, the court lacks subject matter jurisdiction. Therefore, the defendant's motion to dismiss is granted. In light of the court's ruling on the motion to dismiss, it need not address the alternate motion for summary judgment." This appeal followed.

I

The plaintiffs claim that the court violated their right to due process when it granted the defendant's motion to dismiss on grounds that the court had raised sua sponte. The plaintiffs specifically contend that the defendant did not raise in its motion to dismiss the issue of their alleged failure to satisfy the statutory demand notice requirements in § 49-8 (c), and that the court did not give them notice or an opportunity to be heard and present evidence of their compliance on that issue before it determined that their failure to satisfy those statutory requirements caused them to lack standing. We agree.

The following principles guide our analysis. Our review of the court's decision on a motion to dismiss is plenary. See *Izzo* v. *Quinn*, 170 Conn. App. 631, 636, 155 A.3d 315 (2017). Additionally, our review of whether a party has been deprived of due process is a question of law over which our review is plenary. See *Mikucka* v. *St. Lucian's Residence, Inc.*, 183 Conn. App. 147, 160–61, 191 A.3d 1083 (2018).

The language of § 49-8 (c) indicates that the defendant is required to provide a release of mortgage, to the extent of the satisfaction, within sixty days from the date that the plaintiffs properly sent a written demand for release of such mortgage or from the date that it was properly received. General Statutes § 49-8 (c). The issue of the plaintiffs' alleged failure to comply with the statutory demand notice requirements in § 49-8 (c), however, was not raised by the defendant in its motion to dismiss, in its accompanying memorandum of law, or during argument on the motion to dismiss. Rather, in its motion to dismiss, the defendant claimed that the plaintiffs lacked standing because "they never suffered any harm and thus are neither classically nor statutorily aggrieved." In its memorandum of law in support of its motion to dismiss, the defendant argued that the plaintiffs did not suffer an injury because the defendant had provided a release of mortgage that was effective to discharge the mortgage, despite a "typographical error," and that the plaintiffs were not aggrieved because they were not the owners of the property.

Although the plaintiffs, in their complaint, alleged an injury to an interest protected by § 49-8, the court determined that the plaintiffs were not aggrieved because they had failed to *demonstrate*, by the notice itself or by other evidence, that they had complied strictly with the requirements regarding a statutory demand notice for release of mortgage in § 49-8 (c). "A fundamental premise of due process is that a court

cannot adjudicate any matter unless the parties have been given a reasonable opportunity to be heard on the issues involved . . . . Generally, when the exercise of the court's discretion depends on issues of fact which are disputed, due process requires that a trial-like hearing be held, in which an opportunity is provided to present evidence and to cross-examine adverse witnesses." (Citation omitted; internal quotation marks omitted.) *Szot* v. *Szot*, 41 Conn. App. 238, 241, 674 A.2d 1384 (1996); see also *Conboy* v. *State*, 292 Conn. 642, 652, 974 A.2d 669 (2009) ("where a jurisdictional determination is dependent on the resolution of a critical factual dispute, it cannot be decided on a motion to dismiss in the absence of an evidentiary hearing to establish jurisdictional facts").

We conclude that the court improperly addressed, sua sponte, the issue of the plaintiffs' alleged noncompliance with the statutory demand notice requirements in § 49-8 (c) without first providing the plaintiffs with notice or a reasonable opportunity to submit evidence of their compliance with those requirements. Additionally, the plaintiffs did not have an opportunity to contest whether they were required to demonstrate on the notice that was attached to the complaint that the notice had been received by the defendant mortgagee or its attorney.

The defendant argues that the court properly concluded that the plaintiffs failed to demonstrate that they had complied with the statutory written demand notice for release of mortgage requirements in § 49-8 (c). The defendant argues that the plaintiffs "had sufficient opportunity to demonstrate they fulfilled all conditions precedent" and that the plaintiffs "refused to present any evidence" of their compliance with the statutory demand notice requirements in § 49-8 (c). The defendant's argument, however, *presumes* that the plaintiffs knew that compliance with the statutory demand notice

requirements in § 49-8 (c) was at issue in the motion to dismiss and that they had an opportunity to present evidence. This argument *ignores* the dispositive fact that neither the defendant movant nor the court notified the plaintiffs that an issue to be decided by the court in ruling on the defendant's motion to dismiss was whether the plaintiffs had complied with those statutory requirements.

The defendant, nonetheless, contends that the plaintiffs somehow were on notice that the court might grant the motion to dismiss, sua sponte, on grounds relating to the plaintiffs' compliance with the statutory demand notice requirements in § 49-8 (c) by virtue of the defendant's special defenses. The defendant raised as a special defense to the complaint that the plaintiffs failed to satisfy all conditions precedent, including sending the required written demand notice to the defendant. We are not persuaded.

If the defendant wanted to place the plaintiffs on notice that it was seeking to have the court address this issue when ruling on its motion to dismiss, it needed to raise the issue *in connection* with its motion to dismiss. The defendant's special defenses did not place the plaintiffs on notice that the issue, which was never raised in the motion to dismiss, could be the dispositive basis for the court's decision. "The purpose of requiring written motions is not only the orderly administration of justice . . . but the fundamental requirement of due process of law." (Citation omitted; internal quotation marks omitted.) *Berglass* v. *Berglass*, 71 Conn. App. 771, 783, 804 A.2d 889 (2002).

The defendant next cites *Ghent* v. *Meadowhaven Condominium, Inc.*, 77 Conn. App. 276, 823 A.2d 355 (2003), as authority for its contention that it was the plaintiffs' burden, somehow, to anticipate that the court would raise, sua sponte, the issue of their alleged non-

compliance with the statutory demand notice requirements in § 49-8 (c), which the defendant argues is a condition precedent that must be satisfied in order for the trial court to have subject matter jurisdiction. The defendant contends that the plaintiffs' failure to satisfy that condition precedent warrants this court's dismissal of the appeal for lack of jurisdiction. We disagree.

This court decided in *Ghent* that the requirements in "[General Statutes] §§ 49-8 and 49-13 act as a limitation on the trial court's general authority to grant relief, but do not involve its subject matter jurisdiction . . . ." Id., 278 n.1. "A court does not truly lack subject matter jurisdiction if it has competence to entertain the action before it. . . . Although related, the court's authority to act pursuant to a statute is different from its subject matter jurisdiction. The power of the court to hear and determine, which is implicit in jurisdiction, is not to be confused with the way in which that power must be exercised in order to comply with the terms of the statute." (Citations omitted; internal quotation marks omitted.) *Amodio* v. *Amodio*, 247 Conn. 724, 728, 724 A.2d 1084 (1999). Consequently, any alleged failure to satisfy the written demand notice requirement, does not deprive the court of jurisdiction to hear the matter, but rather it impacts the court's authority to grant the relief sought by the plaintiffs. Furthermore, regardless of whether the issue is jurisdictional or simply relates to the trial court's authority, due process requires the movant to have raised in its motion to dismiss the issue of the plaintiffs' compliance with the statutory demand notice requirements in § 49-8 (c) or, failing that, requires that the court to have provided the parties with notice that the issue was to be decided before it granted the defendant's motion to dismiss on that ground. Lack of that notice prevented the plaintiffs from presenting evidence that they had complied with the statutory demand notice requirements in § 49-8 (c).

II

The defendant argues that the court's granting of the motion to dismiss should be affirmed on the alternative grounds that the plaintiffs were not aggrieved pursuant to § 49-8 and, therefore, did not have standing because they (1) did not suffer any damages and cannot demonstrate any legally cognizable harm, (2) did not suffer any possibility of harm, and (3) are not the owners of the property. The defendant raised these issues in its motion to dismiss and the court, in its memorandum of decision, disagreed with the defendant's standing arguments. We also are not persuaded by these arguments.

Our review of a court's legal conclusion regarding standing is plenary. *Heinonen* v. *Gupton*, 173 Conn. App. 54, 59, 162 A.3d 70, cert. denied, 327 Conn. 902, 169 A.3d 794 (2017). To establish statutory standing, the plaintiffs must "claim injury to an interest protected by that legislation." (Internal quotation marks omitted.) *State Marshal Assn. of Connecticut, Inc.* v. *Johnson*, 198 Conn. App. 392, 402, 234 A.3d 111 (2020). Statutory interpretation involves a question of law over which our review is plenary. *Friezo* v. *Friezo*, 281 Conn. 166, 180, 914 A.2d 533 (2007).

Section 49-8 sounds in tort and prescribes damages for a breach of the statutory duty to release a mortgage. *Bellemare* v. *Wachovia Mortgage Corp.*, 284 Conn. 193, 200–201, 931 A.2d 916 (2007). In their complaint, the plaintiffs claimed an injury to an interest protected by § 49-8, namely, the defendant's failure to release the mortgage timely following their satisfaction of the mortgage, which is sufficient to demonstrate standing under the statute. "A statutorily aggrieved person need not have sustained any injury." *Lewis* v. *Planning & Zoning Commission*, 62 Conn. App. 284, 297, 771 A.2d 167 (2001).

Section 49-8 (c) specifies that the mortgagee is liable to an aggrieved person for the greater of either $200 for each week after the expiration of the sixty days up to a maximum of $5000 or an amount equal to the loss sustained by the aggrieved person as a result of the failure to execute and deliver a release. General Statutes § 49-8 (c). This court held in *Bellemare* v. *Wachovia Mortgage Corp.*, 94 Conn. App. 593, 602, 894 A.2d 335 (2006), aff'd, 284 Conn. 193, 931 A.2d 916 (2007), that, "even though § 49-8 allows the aggrieved party to recover actual damages, the statute does not require that the aggrieved party suffer actual damages in order to recover. In that light, it is apparent that the right vested in mortgagors by § 49-8 is to exact a penalty on a mortgagee who fails, on proper demand, to provide a release of mortgage within the statutorily prescribed time. Because the wronged party is entitled to an award of damages irrespective of whether there has been a showing of actual damages, the statute best can be understood as a coercive means to penalize those who violate its prescriptions." Because § 49-8 is a penalty statute that does not require the plaintiffs to suffer actual damages, the defendant cannot prevail on its argument that the plaintiffs lack standing because they did not suffer actual damages.

The defendant further argues that the plaintiffs lacked standing because they have not suffered any possibility of harm. The defendant contends that the original release can be considered valid pursuant to General Statutes § 49-9a, despite a "scrivener's error." The defendant noted in its appellate brief that it had executed the release as the attorney-in-fact for Bank of America, N.A., when the defendant, as the mortgagee, should have executed the release in its own name, Pennymac Loan Services, LLC. The release states that "Bank of America, N.A., is the holder of a certain Mortgage that was made by Mary L. Jackson and Johnnie Jackson . . . Bank of America, N.A., does hereby

acknowledge that it has received full payment and satisfaction . . . and in consideration thereof, does hereby cancel and release said Mortgage." The release was signed by "Bank of America, N.A., by Pennymac Loan Services, LLC, its Attorney-in-Fact . . . Kristopher Sandberg." In its memorandum of law in support of its motion to dismiss, the defendant noted that although it, and not Bank of America, N.A., was the mortgagee, pursuant to the savings clause of § 49-9a, a release is valid as if it had appeared in the name of the mortgagee. Section 49-9a (a) provides in relevant part that "a release of mortgage executed by any person other than an individual that is invalid because it is not issued or executed by, or fails to appear in the name of the record holder of the mortgage on one, two, three or four-family residential real property located in this state . . . shall be as valid as if it had been issued or executed by, or appeared in the name of, the record holder of the mortgage . . . provided *an affidavit is recorded* in the land records of the town where the mortgage was recorded [and states certain facts as specified in subdivisions (1) through (4) of subsection (a)]." (Emphasis added.) The court determined that it was not necessary to address the defendant's argument regarding § 49-9a. The court noted that, even if that statute were applicable, the statute requires that an affidavit be recorded in the land records as a condition precedent, and the defendant failed to provide the court with a copy of such an affidavit and that the defendant's attorney noted that he had not filed such an affidavit. We agree with the court that in the absence of evidence of the recording of an affidavit pursuant to § 49-9a (a), the defendant could not invoke that statute.

Alternatively, the defendant contends that the original release was effective despite a "scrivener's error" and further argues that, regardless of the effectiveness of the original release, the corrected release was retro-

actively effective as to the date of the recording of the original release. The court was not persuaded by these arguments and neither are we. In order to establish standing, the plaintiffs need only "a colorable claim of injury," and they can establish aggrievement by demonstrating "a possibility, as distinguished from a certainty, that some legally protected interest . . . has been adversely affected." (Internal quotation marks omitted.) *AvalonBay Communities, Inc.* v. *Orange*, 256 Conn. 557, 568, 775 A.2d 284 (2001). The plaintiffs allege in their complaint that they paid off the mortgage and that the defendant failed to timely release the mortgage after having been given notice. These allegations contain a colorable claim of injury. The issues of whether the original release was valid or whether the corrected release cured any defect do not implicate standing. Instead, those issues relate to the merits of the plaintiffs' claim that the defendant violated § 49-8 by failing to release the mortgage timely.

The defendant additionally argues, as an alternative ground for affirmance, that the plaintiffs did not suffer any monetary damages and, therefore, lack standing because they were not the owners of the property and had received forgiveness of $72,256.44 through a short sale of the property. In their complaint, the plaintiffs alleged that the defendant failed to provide a valid timely release of mortgage and that "[a]t all times herein mentioned" the plaintiffs were the owners of the property. Attached as an exhibit to the complaint was a copy of a document in which the defendant approved the plaintiffs' request for a short sale of the property and provided that, if certain terms, which included the defendant receiving the net proceeds from the sale, were met then the defendant would release the mortgage upon its satisfaction. Also attached to the complaint was a copy of a January 25, 2016 wire transfer receipt showing the negotiated payment from the plaintiffs to the defendant. The defendant attached to its

"motion to dismiss or, in the alternative, for summary judgment" an affidavit of Johnny Morton, a foreclosure operations supervisor of the defendant, in which Morton stated that, in January, 2016, the defendant agreed to accept all net proceeds of a short sale of the property in exchange for satisfaction of the mortgage, and that, on January 25, 2016, the defendant was paid in full satisfaction of the mortgage. In its memorandum of law in opposition to the defendant's motion to dismiss, the plaintiffs do not dispute the existence of a short sale, but contend that they have standing to bring an action pursuant to § 49-8 because Superior Court case law indicates that a homeowner who gave a warranty deed to an eventual buyer of the property has a legally protected interest in providing clear and marketable title to that property. See *New England Home Buyers, LLC* v. *DMR Builders, LLC*, Superior Court, judicial district of Waterbury, Docket No. CV-08-5011625-S (May 5, 2009).

Although the trial court did not find facts relating to the ownership of the property, it is undisputed that there was an agreement for a short sale of the property. The court concluded that the defendant could not prevail on its arguments regarding standing and stated that "[t]he statute clearly contemplates that a mortgagor can bring an action pursuant to § 49-8, and that a party does not have to suffer actual loss or injury in order to be 'aggrieved' pursuant to this statute," and determined that the plaintiffs, as the mortgagors, were potentially aggrieved parties pursuant to § 49-8 if they satisfied the statutory demand notice provision of the statute.

The defendant has not cited any case law, nor are we aware of any, that provides that *mortgagors* who alleged in their complaint that the mortgagee failed to timely release their mortgage, somehow, are not aggrieved pursuant to § 49-8. The plain language of § 49-8 (c) provides that "[t]he mortgagee . . . shall be liable for damages to *any person aggrieved* . . . ." (Emphasis

added.) This court's decision in *Hall* v. *Kasper Associates*, *Inc.*, 81 Conn. App. 808, 846 A.2d 228 (2004), reinforces the notion that the ability to be aggrieved pursuant to § 49-8 (c) is not exclusive to property owners. In *Hall*, the seller's attorney who had signed an agreement that indemnified the title insurer from any loss suffered as a result of an unreleased mortgage encumbrance was a "person aggrieved" pursuant to § 49-8 (c). Id., 812–13.

Even if we were to conclude that the statute is ambiguous; see General Statutes § 1-2z; we nonetheless would reach the same conclusion in light of the following legislative history. In *Bellemare* v. *Wachovia Mortgage Corp.*, supra, 94 Conn. App. 604–605, which concerned whether the trial court properly determined that the tort statute of limitations applied to the claim of the plaintiff mortgagor, who had sold her home, that the defendant mortgagee failed to deliver a timely release of mortgage upon her satisfaction of the mortgage, this court noted: "[I]n 1986, during the hearings to amend § 49-8a, the cousin of § 49-8, Representative William L. Wollenberg noted the 'constant problem in the real estate [world] with mortgage releases . . . . When it comes time to sell a house or any real estate a release of that mortgage is necessary. . . . What has developed is an extreme difficulty in getting out of state mortgage companies and financial people . . . [t]o . . . give you the pay off, let alone a formal release of the mortgage for the land records.' 29 H.R. Proc., Pt. 11, 1986 Sess., pp. 4167–68. . . . [I]n 1995, § 49-8 was amended as part of 'An Act Concerning Release or Satisfaction of a Mortgage Lien.' Public Acts 1995, No. 95-102, § 1. The stated purpose of 'An Act Concerning Release or Satisfaction of a Mortgage Lien' was to 'revise the procedure for the release or satisfaction of a mortgage lien by increasing incentives to assure lenders comply with laws requiring releases and by enhancing the remedies and options available to mortgagors and attorneys when

lenders fail to comply.' . . . Accordingly, the legislative history and statutory scheme of § 49-8 establish that the statute was enacted and continues not only to protect property owners, but it has a more general purpose of enhancing the marketability of titles and facilitating economic intercourse in deeded transactions. See id.; Conn. Joint Standing Committee Hearings, Banks, 1979 Sess., pp. 283–84; 29 H.R. Proc., Pt. 11, 1986 Sess., pp. 4166–68." (Citations omitted; emphasis omitted.)

The plain language of the statute provides damages for aggrieved persons if the mortgagee fails to execute or deliver a timely release of mortgage. See General Statutes § 49-8 (c). The legislative history makes clear that the statute is meant to facilitate the marketability of properties by penalizing mortgagees who fail to provide mortgagors with a timely release of mortgage. The plaintiff mortgagors, who allegedly did not receive a timely release of the mortgage on their property after they undisputedly sold the property in a short sale, are aggrieved persons within the meaning of § 49-8 (c). Accordingly, we determine that the defendant cannot prevail on its standing arguments.

We conclude that the court improperly granted the defendant's motion to dismiss because it, sua sponte, raised and addressed the issue regarding the plaintiffs' compliance with the statutory demand notice requirements of § 49-8 (c) without providing them with notice or an opportunity to be heard. We do not agree with the defendant that the court's decision can be affirmed on the alternative grounds it has raised.

The judgment is reversed and the case is remanded for further proceedings in accordance with this opinion.

In this opinion the other judges concurred.

ELIYAHU MIRLIS *v.* YESHIVA OF NEW HAVEN, INC.
(AC 44016)

Alvord, Elgo and Cradle, Js.

Syllabus

The plaintiff sought to foreclosure a judgment lien on certain real property owned by the defendant in connection with an unsatisfied judgment from a previous case involving the parties. The plaintiff submitted an appraisal before the trial court valuing the property at $960,000, and the defendant submitted an appraisal valuing the property at $390,000. Following a hearing, the court found the fair market value of the property to be $620,000, and rendered a judgment of strict foreclosure in favor of the plaintiff, from which the defendant appealed to this court. *Held* that the trial court did not improperly determine the fair market value of the property: the record contained ample documentary and testimonial evidence regarding the valuation of the property in question; moreover, in light of the significant disagreements between the expert appraisers offered by the parties, the court reasonably could conclude that a compromise figure best reflected the fair market value of the property.

Argued February 9—officially released June 8, 2021

Procedural History

Action to foreclose a judgment lien on certain of the defendant's real property, and for other relief, brought to the Superior Court in the judicial district of New Haven, where the court, *Spader*, *J.*, granted the plaintiff's motion for summary judgment as to liability only; thereafter, the matter was tried to the court, *Baio*, *J.*; subsequently, the court granted the defendant's motion to substitute a cash bond subject to certain conditions; thereafter, the court, *Baio*, *J.*, rendered judgment of strict foreclosure, from which the defendant appealed to this court. *Affirmed.*

Jeffrey M. Sklarz, for the appellant (defendant).

John L. Cesaroni, with whom, on the brief, was *James M. Moriarty*, for the appellee (plaintiff).

Opinion

ELGO, J. The defendant, Yeshiva of New Haven, Inc.,[1] appeals from the judgment of strict foreclosure rendered by the trial court in favor of the plaintiff, Eliyahu Mirlis. On appeal, the defendant claims that the court improperly determined the valuation of the property in question. We affirm the judgment of the trial court.

The relevant facts are not in dispute. The defendant is a Connecticut corporation that operated an orthodox Jewish high school in New Haven. In 2016, the plaintiff brought an action in federal court against the defendant and Daniel Greer,[2] "alleging that Greer, a rabbi and the former chief administrator of [the defendant], sexually abused him for several years while he was a student at the high school." *Mirlis* v. *Greer*, 952 F.3d 36, 40 (2d Cir. 2020), cert. denied, U.S. , 141 S. Ct. 1265, 209 L. Ed. 2d 8 (2021). Following a trial, the jury returned a verdict in favor of the plaintiff. The United States District Court for the District of Connecticut rendered judgment accordingly and entered a total award of $21,749,041.10, which included punitive damages and offer of compromise interest. The United States Court of Appeals for the Second Circuit subsequently affirmed the propriety of that judgment. Id., 51.

At all relevant times, the defendant owned real property known as 765 Elm Street in New Haven (property). When the judgment in his federal case went unsatisfied, the plaintiff filed a judgment lien on the property, which was recorded on the New Haven land records.[3] He then

[1] In its complaint, the plaintiff named the defendant in full as "Yeshiva of New Haven, Inc. FKA The Gan, Inc. FKA The Gan School, Tikvah High School and Yeshiva of New Haven, Inc."

[2] Greer is not a party to this foreclosure action.

[3] That judgment lien states in relevant part: "The judgment obtained by [the plaintiff] was in the amount of . . . $21,749,041.10, as of June 6, 2017. No amount of the judgment obtained by [the plaintiff] against [the defendant] has been paid to date, and the entire amount is due thereon."

commenced this action in the Superior Court to foreclose on that lien.

On November 8, 2017, the plaintiff filed a motion for summary judgment as to liability only. The defendant did not oppose that motion, which the court granted on January 16, 2018. The plaintiff thereafter filed a motion for a judgment of strict foreclosure, which was accompanied by an eighty-three page written appraisal of the property. That appraisal concluded that the fair market value of the property was $960,000. The defendant filed an objection to the motion for strict foreclosure, claiming that "there is a dispute as to the value" of the property. Appended to the defendant's opposition was a two page written appraisal that specified a fair market value of $375,000 for the property. The defendant later submitted a more comprehensive written appraisal that estimated the fair market value of the property at $390,000.

The court held an evidentiary hearing on the valuation dispute, at which each party submitted the testimony and written report of their respective appraisers. Both expert appraisers testified that they had used the sales comparison approach to determine the property's fair market value. Utilizing that approach, the defendant's appraiser, Patrick Wellspeak, initially estimated the value of the property to be $500,000 in light of comparable sales. Wellspeak then explained that he deducted $110,000 from that estimate due to "environmental issues" on the property, which resulted in a fair market value of $390,000. Wellspeak conceded that his conclusions with respect to those issues were predicated on a report prepared by Derrick Jones, who identified environmental issues that allegedly existed on the property.[4] On cross-examination, Wellspeak was asked if he did

[4] In his testimony, Wellspeak stated: "So Mr. Jones identified four primary environmental issues. One was dealing with an underground storage tank. The other was lead in the water for the drinking fountains. A third was lead paint on the windows. And the fourth was asbestos in the flooring."

anything apart from reviewing Jones' report and speaking with him to assess the environmental condition of the property; Wellspeak replied, "No, those would be the only things that I did, reviewed his report and then had conversations with him."

The plaintiff's appraiser, Patrick Craffey, concluded that the fair market value of the property in light of comparable sales was $960,000. Craffey testified that he first "became aware" of Jones' report after he had performed his appraisal and explained that the report did not change his conclusions as to the value of the property, as his appraisal was "made irrespective of any environmental contamination."

In its subsequent memorandum of decision, the court began by noting that, in reaching its conclusions, it had "carefully and fully considered and weighed all of the evidence received at the hearing; evaluated the credibility of the witnesses; assessed the weight, if any, to be given specific evidence and measured the probative force of conflicting evidence; reviewed all exhibits, relevant statutes, and case law; and has drawn such inferences from the evidence, or facts established by the evidence, that it deems reasonable and logical." The court noted that both appraisers had utilized the sales comparison method to determine fair market value and had agreed that the highest and best use of the property was as a school. The court further found that the parties' respective appraisers, "while employing the same . . . method for valuation . . . took different approaches in doing so. . . . [T]he parties each took issue with the properties chosen by the other appraiser in determining the comparative sales." The court also noted that, unlike Craffey, Wellspeak had considered "environmental impact on the fair market value."

The court emphasized that "[t]he ultimate opinions regarding valuation were at considerable variance. Both parties take issue with the comparable sales considered

by the other, and each takes issue with the other's treatment of environmental concerns." The court continued: "When confronted with conflicting evidence as to valuation, the trier may properly conclude that under all the circumstances a compromise figure most accurately reflects fair market value." The court then found, in light of "all of the evidence presented," that the fair market value of the property was $620,000. The court thereafter rendered a judgment of strict foreclosure in favor of the plaintiff, and this appeal followed.

On appeal, the defendant claims that the court improperly determined the fair market value of the property, contending that "no evidence" supported its valuation. We disagree.

Under Connecticut law, a judgment lien on real property may be foreclosed in the same manner as a mortgage on that property. General Statutes § 52-380a (c). The standard of review that governs mortgage foreclosure proceedings thus applies to this judgment lien foreclosure appeal. "It is in the trial court's province to determine the valuation of mortgaged property, usually guided by expert witnesses, relevant circumstances bearing on value, and its own knowledge. . . . The trial court also determines the credibility and weight accorded to the witnesses, their testimony, and the evidence admitted. . . . Thus, the trial court's conclusion regarding the fair market value of the mortgaged property will be upheld unless there was an error of law or a legal or logical inconsistency with the facts found. . . . Its determination of valuation will stand unless it appears on the record . . . that the [trial] court misapplied or overlooked, or gave a wrong or improper effect to, any test or consideration which it was [its] duty to regard." (Citations omitted; internal quotation marks omitted.) *J.E. Robert Co.* v. *Signature Properties, LLC*, 320 Conn. 91, 96, 128 A.3d 471 (2016).

In the present case, the court was presented with conflicting expert testimony concerning the proper val-

uation of the property in question. Those experts disagreed on precisely which sales should be considered under the sales comparison approach to valuation,[5] as well as the extent to which environmental concerns factored into the analysis. As a result, there was a significant discrepancy between the $960,000 valuation of the property provided by the plaintiff's appraiser and the $390,000 valuation provided by the defendant's appraiser.

As our Supreme Court has explained, "the trial court *may* set the property value at a compromise figure when confronted with conflicting expert testimony as to valuation . . . ." (Emphasis in original.) *Eichman* v. *J & J Building Co.*, 216 Conn. 443, 452, 582 A.2d 182 (1990). In *New Haven Savings Bank* v. *West Haven Sound Development*, 190 Conn. 60, 67, 459 A.2d 999 (1983), the trial court "was confronted with conflicting expert opinion testimony concerning valuation of the subject property." Although the defendants in that case—like the defendant here—claimed on appeal that "there was 'no evidence' upon which the court could have reached its valuation figure," our Supreme Court rejected that claim, stating: "When confronted with conflicting evidence as to valuation, the trier may properly conclude that under all the circumstances a compro-

[5] The plaintiff's appraiser selected four comparable sales for purposes of his May 30, 2019 valuation of the property: (1) the January, 2019 sale of the Paier College of Art in Hamden for $1 million; (2) the August, 2017 sale of Learn Academy in New London for $1.9 million; (3) the October, 2014 sale of a Montessori school in West Hartford for $1,450,000; and (4) the June, 2014 sale of Museum Academy in Bloomfield for $2.8 million. His report provided details on all four sales, as well as a sales comparison analysis and market conditions adjustment. By contrast, the defendant's appraiser selected five different sales for purposes of his August 2, 2019 valuation of the property: (1) the April, 2019 sale of a school property on Greene Street in New Haven for $1.2 million; (2) the December, 2018 sale of a school property on Clifford Street in Hartford for $1,411,000; (3) the June, 2017 sale of a school property on Whalley Avenue in New Haven for $1,525,000; (4) the April, 2016 sale of a school property on Cedar Grove in New London for $600,000; and (5) the June, 2015 sale of an office building on State Street in New Haven for $552,500.

mise figure most accurately reflects fair market value." Id., 70. The court further held that "such an approach, which was clearly an effort to give due regard to all circumstances, was reasonable." Id.; accord *Whitney Center*, *Inc.* v. *Hamden*, 4 Conn. App. 426, 429–30, 494 A.2d 624 (1985) (applying *New Haven Savings Bank* and concluding that trial court properly determined that " 'this is a case where under all the circumstances a compromise figure will most accurately reflect the fair market value' "). That logic applies equally to the present case.

Contrary to the contention of the defendant, the record before us contains ample documentary and testimonial evidence regarding the valuation of the property in question. Moreover, in light of the significant disagreements between the expert appraisers offered by the parties, the court reasonably could conclude that a compromise figure best reflected the fair market value of the property. Accordingly, the defendant's challenge to that valuation fails.[6]

The judgment is affirmed.

In this opinion the other judges concurred.

[6] We are compelled to note that, in its principal appellate brief, the defendant also argues that this court "should reverse the foreclosure judgment," stating in full: "Since the defendant has an absolute right to substitute a bond in lieu of the judgment lien, the foreclosure judgment should not have entered. . . . The plaintiff did not appeal this decision of the trial court." (Citation omitted.) The defendant has provided neither legal authority nor analysis to substantiate that bald assertion. "[Our Supreme Court] repeatedly [has] stated that [w]e are not required to review issues that have been improperly presented to this court through an inadequate brief. . . . Analysis, rather than mere abstract assertion, is required in order to avoid abandoning an issue by failure to brief the issue properly." (Internal quotation marks omitted.) *Taylor* v. *Mucci*, 288 Conn. 379, 383 n.4, 952 A.2d 776 (2008); see also *Northeast Ct. Economic Alliance*, *Inc.* v. *ATC Partnership*, 272 Conn. 14, 51 n.23, 861 A.2d 473 (2004) ("[i]nasmuch as the plaintiffs' briefing of the . . . issue constitutes an abstract assertion completely devoid of citation to legal authority or the appropriate standard of review, we exercise our discretion to decline to review this claim as inadequately briefed"); *Russell* v. *Russell*, 91 Conn. App. 619, 635, 882 A.2d 98 (parties must analyze relationship between facts of case and applicable law), cert. denied, 276 Conn. 924, 925, 888 A.2d 92 (2005). We therefore decline to review that abstract assertion.

GEORGE BERKA *v.* CITY OF MIDDLETOWN ET AL.
(AC 43853)

Alvord, Elgo and Albis, Js.

Syllabus

The plaintiff appealed to the Superior Court from the decision of the defendant citation hearing officer for the defendant city of Middletown upholding a citation assessed against him for violating the city's anti-blight ordinance. The court upheld six of the seven blight violations alleged against the plaintiff and calculated a resulting fine, from which the plaintiff appealed to this court. *Held*:

1. The trial court properly granted the defendants' motion to strike the plaintiff's request for a jury trial; the plaintiff cited no authority that would support his challenge to the plain language of the rule of practice (§ 23-51) that governs petitions to reopen citation assessments and provides that there is no right to a hearing before a jury in such circumstances.
2. The plaintiff could not prevail on his claim that the citation hearing officer had a conflict of interest: the plaintiff never raised this issue before the citation hearing officer, which precluded him from raising the issue on appeal; moreover, even if the citation hearing officer had a conflict of interest, the hearing on appeal before the trial court was a de novo proceeding, and any possible prejudice would have been cured because the decision of the trial court, not that of the citation hearing officer, was on appeal.
3. This court declined to address the merits of the plaintiff's constitutional claims as they were not properly before the trial court, which never ruled on them, and could not be reviewed for the first time on appeal: the plaintiff filed a request to amend his complaint that included constitutional claims three days prior to the de novo hearing, and his attempted amendment failed to comport with the requirements of the rules of practice (§§ 10-1 and 10-60) regarding the amendment of pleadings, such that the court sustained the defendants' objection to the plaintiff's request to amend; accordingly, the court did not abuse its discretion in refusing to permit the plaintiff to amend his petition or to argue those constitutional issues at the de novo hearing.
4. The trial court's factual findings challenged by the plaintiff on appeal were not clearly erroneous; the findings were supported by evidence in the record, and this court was not left with a definite and firm conviction that any mistake had been committed.

Argued February 3—officially released June 8, 2021

Procedural History

Petition to reopen a citation assessment issued by the named defendant, brought to the Superior Court in the judicial district of Middlesex, where the court, *Domnarski*, *J.*, granted the defendants' motion to strike the plaintiff's claim for a jury trial; thereafter, the court, *Hon. Edward S. Domnarski*, judge trial referee, rendered judgment denying the petition, from which the plaintiff appealed to this court. *Affirmed.*

George Berka, self-represented, the appellant (plaintiff).

Brig Smith, general counsel, for the appellees (defendants).

Opinion

ALBIS, J. The plaintiff, George Berka, appeals from the judgment of the trial court denying his petition to reopen a municipal blight citation assessment and upholding a failure to pay fines notice issued by the defendant city of Middletown (city), with respect to six blight violations that existed on the plaintiff's rental property located at 5 Maple Place in Middletown (property). Specifically, the plaintiff claims that (1) he should have been granted a jury trial, (2) he should have been allowed to raise constitutional issues related to the blight ordinance at his appeal hearing, (3) the blight citation violated his constitutional rights, (4) boarded windows should not constitute blight, (5) it was neither fair nor reasonable to expect him to pour concrete and to paint in the winter, (6) the blight enforcement officer was not qualified to make structural assessments about the property, (7) the siding on his home was not "seriously damaged," (8) the outside structural walls of his home were watertight, (9) there was no garbage, rubbish, or refuse being stored or accumulated in public view, and

(10) the hearing officer, defendant Sylvia K. Rutkowska,[1] had a conflict of interest. We disagree, and, accordingly, affirm the judgment of the trial court.

The following chronology is drawn from the trial court's memorandum of decision. "By letter dated January 10, 2018, the [city] gave the plaintiff a notice of blight for [the property] . . . . The notice referred to seven blight conditions.[2] . . . The [city] issued the plaintiff a blight citation on February 14, 2018, for the seven separate violations of the blight ordinance and imposed a $100 per day civil fine for each violation. . . . On March 28, 2018, the [city] issued a failure to pay fines notice for blight violations. . . . The failure to pay fines notice stated that accumulated fines totaled $29,400 (42 days x $700). The notice also advised the plaintiff of his right to appeal. An appeal hearing was conducted by a citation hearing officer on May 2, 2018. The hearing officer issued a revised notice of decision/assessment on May 7, 2018, assessing fines through the date of the appeal, which resulted in a total of $53,900 (77 days x $700)." (Citations omitted; footnote added.)

The plaintiff appealed that decision to the Superior Court by filing a petition to reopen a municipal blight citation assessment pursuant to General Statutes § 7-

[1] In this opinion we refer to the city and Rutkowska individually by name where necessary and collectively as the defendants.

[2] In its decision, the court noted the blight conditions referenced in the notice of blight as follows: "(1) missing, broken or boarded windows or doors, if the building is not vacant or abandoned . . . (2) broken glass, crumbling stone or other conditions reflective of deterioration or inadequate maintenance . . . (3) a collapsing or missing exterior wall, roof, floor, stairs, porch, railings, basement hatchways, chimneys, gutters, awnings or other features . . . (4) siding or roofing that is seriously damaged, missing, faded or peeling; (5) the outside structure walls are not weather[tight] [or] watertight, that is evidenced by having any holes, loose boards, or any broken, cracked or damaged siding that admits rain, cold air, dampness, rodents, insects or vermin . . . (6) garbage, rubbish, refuse, accumulating refuse, putrescible items, trash or other accumulated debris that is being stored or accumulated in public view . . . [and] (7) abandoned or inoperable vehicles are improperly stored on the premises . . . ." (Citations omitted.)

152c (g) and Practice Book § 23-51,[3] and the court held a de novo hearing on the petition on November 7, 2019.[4] At that hearing, the court heard testimony from Michelle Ford, the blight enforcement officer for the city at the time of the May 2, 2018 hearing. Ford testified that she had inspected the subject property on February 13, 2018, and March 27, 2018, that she took photographs of the alleged blight conditions on both occasions, and that she issued the blight citation and failure to pay fines notices. In its January 16, 2020 memorandum of decision, the court upheld six of the seven blight violations.[5] The court explained that it had "carefully considered Ford's testimony and thoroughly reviewed the [inspection] photographs," and that it found that six violations existed on, and the fines accrued from, February 14, 2018, through March 27, 2018. The court calculated the resulting fine as $25,200 (42 days x $600). This appeal followed. Additional facts will be set forth as necessary.

[3] General Statutes § 7-152c (g) provides: "A person against whom an assessment has been entered pursuant to this section is entitled to judicial review by way of appeal. An appeal shall be instituted within thirty days of the mailing of notice of such assessment by filing a petition to reopen assessment, together with an entry fee in an amount equal to the entry fee for a small claims case pursuant to section 52-259, at a superior court facility designated by the Chief Court Administrator, which shall entitle such person to a hearing in accordance with the rules of the judges of the Superior Court."

Practice Book § 23-51 provides: "(a) Any aggrieved person who wishes to appeal a parking or citation assessment issued by a town, city, borough or other municipality shall file with the clerk of the court within the time limited by statute a petition to open assessment with a copy of the notice of assessment annexed thereto. A copy of the petition with the notice of assessment annexed shall be sent by the petitioner by certified mail to the town, city, borough or municipality involved.

"(b) Upon receipt of the petition, the clerk of the court, after consultation with the presiding judge, shall set a hearing date on the petition and shall notify the parties thereof. There shall be no pleadings subsequent to the petition.

"(c) The hearing on the petition shall be de novo. There shall be no right to a hearing before a jury."

[4] The parties refer to the petition as a "complaint."

[5] With respect to the seventh alleged violation, the court found that there was no evidence to establish that the trailer stored on the plaintiff's property was mechanically inoperable.

I

The plaintiff claims that he was entitled to a jury trial in his appeal of the blight citation. We disagree.

The following additional facts are relevant to our resolution of this claim. On November 13, 2018, the plaintiff requested a jury trial of his appeal. On October 30, 2019, the defendants filed a motion to strike the plaintiff's request for a jury trial on the ground that there is no right to a jury trial in citation assessment appeals pursuant to Practice Book § 23-51 (c). On November 6, 2019, the court granted the defendants' motion.

The plaintiff's claim is governed by Practice Book § 23-51, which is titled "Petition To Open Parking or Citation Assessment," and provides in subsection (c) that "[t]he hearing on the petition shall be de novo. There shall be no right to a hearing before a jury." Nevertheless, the plaintiff argues that "blight citations are grouped together with parking tickets, which are generally around $20 . . . . Perhaps the authors here had these types of 'small' citations in mind when writing this section, and it is understandable that they likely saw these small citations as 'too trivial' to warrant a jury trial. However, a $53,900 blight fine is a 'far cry' from a $20 parking ticket! Doesn't a case in which a person's home is on the line deserve a hearing before a jury?" The plaintiff cites no authority that would support his challenge to the plain language of § 23-51. We are not persuaded, and, accordingly, the trial court properly granted the defendants' motion to strike the plaintiff's request for a jury trial.

II

The plaintiff next claims that Rutkowska "may have had a conflict of interest." He claims that "[p]rior to being permitted to appeal his blight citation to the Supe-

rior Court, [he was required to] attend a hearing on the matter before the city officials and a 'citation hearing officer,' whom the city designates. Th[e] hearing officer who presided over this hearing . . . Rutkowska, is actually a local attorney, who has business dealings and an attorney-client relationship with the city." (Emphasis omitted.) The plaintiff, therefore, claims that Rutkowska was unlikely to be objective and that her potential conflict of interest "may have caused the plaintiff to be prejudiced . . . ."

At oral argument before this court, the plaintiff conceded that he never raised this issue at the hearing before Rutkowska. The failure to raise the claim of bias of the administrative hearing officer at the time of the hearing precludes the plaintiff from raising the issue on appeal. See *Moraski* v. *Connecticut Board of Examiners of Embalmers & Funeral Directors*, 291 Conn. 242, 261–62, 967 A.2d 1199 (2009). Moreover, even if Rutkowska did have a conflict of interest, as the plaintiff claimed, the hearing on appeal before the trial court was a de novo proceeding, and, therefore, any possible prejudice would be cured. Because the decision of the trial court, and not that of Rutkowska, is currently on appeal, we agree with the court that the de novo hearing on appeal before the trial court cured any possible prejudice to the plaintiff.

III

We next turn to the plaintiff's two constitutional arguments. The plaintiff claims that (1) he should have been permitted to raise constitutional issues with respect to his blight citation during the appeal hearing, and (2) the blight citation violated the first, fourth, fifth, and eighth amendments to the United States constitution. We conclude that the trial court did not abuse its discretion in denying the plaintiff's requests to raise those constitutional claims, and, consequently, we decline to address them on their merits.

The following additional facts are relevant to our resolution of these claims. On November 4, 2019, the plaintiff filed a request to amend the complaint and an amended complaint[6] that included his constitutional claims. The defendants objected to that request on November 5, 2019, and the court sustained their objection on December 5, 2019. Nevertheless, the plaintiff notes in his appellate brief that, "during the hearing, the plaintiff had again asked the judge if he could present testimony as to why he believed this entire blight citation to be unconstitutional in the first place, and, again, the judge denied the plaintiff's request."

Practice Book § 10-60 provides in relevant part: "(a) . . . [A] party may amend his or her pleadings . . . at any time . . . in the following manner: (1) By order of judicial authority; or (2) By written consent of the adverse party; or (3) By filing a request for leave to file an amendment together with . . . (B) an additional document showing the portion or portions of the original pleading or other parts of the record or proceedings with the added language underlined and the deleted language stricken through or bracketed. . . .

"(b) The judicial authority may restrain such amendments so far as may be necessary to compel the parties to join issue in a reasonable time for trial. . . ." "Whether to allow an amendment is a matter left to the sound discretion of the trial court. [An appellate] court will not disturb a trial court's ruling on a proposed amendment unless there has been a clear abuse of that discretion. . . . It is the [amending party's] burden . . . to demonstrate that the trial court clearly abused its discretion." (Internal quotation marks omitted.) *GMAC Mortgage, LLC* v. *Ford*, 144 Conn. App. 165, 184, 73 A.3d 742 (2013).

[6] See footnote 4 of this opinion.

Practice Book § 23-51 provides in relevant part: "(a) Any aggrieved person who wishes to appeal a parking or citation assessment issued by a town, city, borough or other municipality shall file with the clerk of the court within the time limited by statute a petition to open assessment with a copy of the notice of assessment annexed thereto. . . .

"(b) Upon receipt of the petition, the clerk of the court . . . shall set a hearing date on the petition and shall notify the parties thereof. There shall be no pleadings subsequent to the petition."

The record reveals that the plaintiff filed his request to amend on November 4, 2019, merely three days prior to the de novo hearing that was held on November 7, 2019, and that his attempted amendment failed to comport with the requirements of Practice Book §§ 10-1 and 10-60 (a) (3). Accordingly, we conclude that the trial court did not abuse its discretion in refusing to permit the plaintiff to amend his petition or to argue those constitutional issues at the de novo hearing.

Consequently, because the plaintiff's constitutional arguments were not properly before the trial court, which, therefore, never ruled on them, we cannot review them for the first time on appeal. "Our appellate courts, as a general practice, will not review claims made for the first time on appeal." (Internal quotation marks omitted.) *Guzman* v. *Yeroz*, 167 Conn. App. 420, 426, 143 A.3d 661, cert. denied, 323 Conn. 923, 150 A.3d 1152 (2016). "It is well established that [a] party cannot present a case to the trial court on one theory and then seek appellate relief on a different one . . . ." (Internal quotation marks omitted.) *Council* v. *Commissioner of Correction*, 286 Conn. 477, 498, 944 A.2d 340 (2008). "[A]n appellate court is under no obligation to consider a claim that is not distinctly raised at the trial level. . . . [B]ecause our review is limited to matters in the record, we [also] will not address issues not decided

by the trial court." (Citations omitted; internal quotation marks omitted.) *Burnham* v. *Karl & Gelb, P.C.*, 252 Conn. 153, 170–71, 745 A.2d 178 (2000); see also Practice Book § 60-5. Accordingly, we decline to address the merits of the plaintiff's constitutional claims.

IV

Finally, the plaintiff challenges six of the trial court's findings of fact. Specifically, he claims that boarded windows should not constitute blight, that it was neither fair nor reasonable to expect him to pour concrete and to paint in the winter, that the blight enforcement officer was not qualified to make structural assessments about the property, that the siding on his home was not "seriously damaged," that the outside structural walls of his home were watertight, and that there was no garbage, rubbish, or refuse being stored or accumulated in public view. We conclude that the court's factual findings are not clearly erroneous.

"The trier of facts is the judge of the credibility of the testimony and of the weight to be accorded it. . . . [A finding of fact] will not be reversed or modified unless it is clearly erroneous in light of the evidence and the pleadings in the record as a whole. . . . A finding of fact is clearly erroneous when there is no evidence in the record to support it . . . or when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. . . . The weight to be given to the evidence and to the credibility of witnesses is solely within the determination of the trier of fact. . . . In reviewing factual findings, [w]e do not examine the record to determine whether the [court] could have reached a conclusion other than the one reached. . . . Instead, we make every reasonable presumption . . . in favor of the trial court's ruling." (Citation omitted; footnote omitted; internal quotation marks omitted.) *Cohen* v. *Roll-A-*

Cover, *LLC*, 131 Conn. App. 443, 450–51, 27 A.3d 1, cert. denied, 303 Conn. 915, 33 A.3d 739 (2011).

The factual findings challenged by the plaintiff on appeal were supported by evidence in the record, and we are not left with a definite and firm conviction that any mistake has been committed. With respect to the plaintiff's claim that he should not have been required to paint and pour concrete in the winter, we further note that the plaintiff conceded at oral argument before this court that he did not request additional time from the city to comply with those requirements in warmer weather. Additionally, we need not reach the issue of the blight enforcement officer's qualifications, because the trial court determined independently, after reviewing the photographs of the property, that the structural blight conditions existed. The trial court's findings are not clearly erroneous.

The judgment is affirmed.

In this opinion the other judges concurred.

MEMORANDUM DECISIONS

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MEMORANDUM DECISIONS

U.S. BANK NATIONAL ASSOCIATION, TRUSTEE
v. DIANE F. POOLE ET AL.
(AC 42848)

Moll, Alexander and Vertefeuille, Js.

Argued May 19—officially released June 8, 2021

Named defendant's appeal from the Superior Court in the judicial district of Fairfield, *Kamp*, *J.*; *Bruno*, *J.*

Per Curiam. The judgment is affirmed and the case is remanded for the purpose of setting new law days.

MARTIN GRAY *v.* COMMISSIONER
OF CORRECTION
(AC 43894)

Suarez, Clark and DiPentima, Js.

Argued May 19—officially released June 8, 2021

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Seeley*, *J.*

Per Curiam. The judgment is affirmed.

THE BANK OF NEW YORK MELLON
v. DOUGLAS GILMORE ET AL.
(AC 43664)

Bright C. J., and Clark and Bear, Js.

Argued May 18—officially released June 8, 2021

Defendant's appeal from the Superior Court in the judicial district of Fairfield, *Spader*, *J.*

Per Curiam. The judgment is affirmed.

CORY TURNER *v.* COMMISSIONER
OF CORRECTION
(AC 43401)

Alvord, Suarez and Clark, Js.

Argued May 11—officially released June 8, 2021

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Newson*, *J.*

Per Curiam. The appeal is dismissed.

ANTHONY SMALL *v.* COMMISSIONER
OF CORRECTION
(AC 43263)

Alvord, Moll and Cradle, Js.

Argued May 20—officially released June 8, 2021

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Newson*, *J.*

Per Curiam. The judgment is affirmed.

KEVIN F. COLLINS *v.* ODETTA ROGERS
(AC 43703)

Alvord, Suarez and Clark, Js.

Argued May 11—officially released June 8, 2021

Defendant's appeal from the Superior Court in the judicial district of Stamford-Norwalk, *Hon. Mary E. Sommer*, judge trial referee.

Per Curiam. The judgment is affirmed.

BRIAN SMITH *v.* COMMISSIONER OF CORRECTION
(AC 43736)

Prescott, Suarez and Bear, Js.

Submitted on briefs May 20—officially released June 8, 2021

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Bhatt, J.*

Per Curiam. The appeal is dismissed.

THE BANK OF NEW YORK MELLON *v.* ALISON L. HATHEWAY ET AL.
(AC 43430)

Alvord, Moll and Cradle, Js.

Submitted on briefs May 20—officially released June 8, 2021

Defendant's appeal from the Superior Court in the judicial district of New Britain, Tax Session, *Huddleston, J.*

Per Curiam. The judgment is affirmed

CHARLES F. *v.* COMMISSIONER OF CORRECTION
(AC 42780)

Moll, Clark and Eveleigh, Js.

Argued May 24—officially released June 8, 2021

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Newson, J.*

Per Curiam. The appeal is dismissed.

ALLISON C. CONKLIN ET AL. *v.* TEACHERS INSURANCE COMPANY ET AL.
(AC 44107)

Moll, Alexander and Eveleigh, Js.

Argued May 24—officially released June 8, 2021

Plaintiffs' appeal from the Superior Court in the judicial district of Hartford, *Cobb*, *J.*

Per Curiam. The judgment is affirmed.

VERE C. *v.* COMMISSIONER OF CORRECTION
(AC 43563)

Elgo, Cradle and DiPentima, Js.

Argued May 25—officially released June 8, 2021

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Seeley*, *J.*

Per Curiam. The judgment is affirmed.

MARISSA LOWTHERT *v.* FREEDOM OF INFORMATION COMMISSION
(AC 43086)

Alvord, Moll and Alexander, Js.

Argued February 11—officially released June 8, 2021

Plaintiff's appeal from the Superior Court in the judicial district of New Britain, *Aurigemma*, *J.*

Per Curiam. The judgments are affirmed.

PETER TARASCO *v.* COMMISSIONER
OF CORRECTION
(AC 43331)

Elgo, Suarez and Devlin, Js.

Argued May 27—officially released June 8, 2021

Petitioner's appeal from the Superior Court in the judicial district of Tolland, *Newson*, *J.*

Per Curiam. The judgment is affirmed.

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NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF HOUSING

Notice Under the Affordable Housing Appeals Procedure Receipt of an Application for a Certificate of Affordable Housing Completion (aka for a Moratorium) in the Town of Brookfield

In accordance with C.G.S. 8-30-g, the Connecticut Department of Housing is in receipt of a completed application (May 19, 2021) for a Certificate of Affordable Housing Completion (a Moratorium of Applicability) for the Town of Brookfield. A copy of this completed application is available for viewing electronically at the Department of Housing website (www.ct.gov/doh) or at the Connecticut Department of Housing by appointment. For information please call or e-mail to Laura Watson, Economic and Community Development Agent, at (860) 270-8169 or laura.watson@ct.gov.

NOTICES

OFFICE OF STATE ETHICS

Office of State Ethics advisory opinions are published herein pursuant to General Statutes Sections 1-81 (3) and 1-92 (5) and are printed exactly as submitted to the Commission on Official Legal Publications.

Advisory Opinion No. 2021-1, April 22, 2021

Question Presented: **The petitioner, a member of the Connecticut Port Authority's board of directors, asks how the Code's conflict provisions apply to his official activities as a board member relating to two properties, Saybrook Junction (in which he has no ownership interest) and the commercial property located at 75 Crystal Avenue, New London (which he owns).**

Brief Answer: **Mr. Johnson may take official action in his capacity as a member of the Connecticut Port Authority's board of directors only to the extent that he does not have a ''substantial'' conflict under General Statutes § 1-85, and that, if he has a ''potential'' conflict under General Statutes § 1-86 (a), he follows the procedure set forth in that provision for ''member[s] of a state regulatory agency.''**

At its March 18, 2021 regular meeting, the Citizen's Ethics Advisory Board (''Board'') granted the petition for an advisory opinion submitted by John S. Johnson, a member of the board of directors of the Connecticut Port Authority (''CPA'').[1] The Board now issues this advisory opinion in accordance with General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials (''Code'').

Background

In his petition, Mr. Johnson provides the following facts for our consideration:

> There is a question by some that I as a member of the CPA have a conflict of interest because I own commercial property in the vicinity of State Pier and therefore should not be involved in any of the discussions re the operation of the State Pier.
>
> Additionally I have been accused by one member of the public that I own Saybrook Junction in Old Saybrook and ''steered'' CPA to that facility to rent space thereby benefitting me financially.
>
> With regard to the ownership of commercial property located at 75 Crystal Ave, NL, I bought the property in 1999 and have owned it for now 22 years. It is separated from State Pier by the AMTRAK tracks and State Pier Road. The facility is fully rented to three entities, none of who is doing any business with Port of New London or State Pier. One company is a defense contractor Curtis Wright out of North Carolina.

[1] The petition was granted to address Mr. Johnson's *prospective* conduct only, for the Board generally will not respond to a request for an advisory opinion addressing the propriety of a public official's or state employee's past conduct.

> The second tenant is North East Electrical, a wholesale electrical supply house based out of Florida. And the other tenant is ASPLUNDH Construction who use their space as a yard and indoor facility to store and repair their equipment. They are tree surgeons with no affiliation with State Pier.
>
> It is a stretch in my opinion to accuse me of a conflict of interest having owned the building for as long as I have. I was selected by the Governor several years ago to serve on the Board when the CPA was just being stood up as an Authority because of my Maritime experience and my depth of local knowledge about the waterfront etc. I don't feel that any of my votes has ever been slanted to make my property more valuable. My vote on any issues related to State Pier was one vote only and never a deciding vote as to what the future of State Pier was to be. In discussion with the Ethics Commission several months ago, it was my understanding that as a Board member, if we felt there was a conflict of interest, it was our duty and responsibility to recuse. I would certainly do that should I ever perceive such a conflict.
>
> With regard to my ownership of Saybrook Junction where CPA maintains their office, I have never owned and do not own nor do I have any plans to ever own Saybrook Junction. I will admit that prior to CPA renting space, I had an agreement to buy the property, but shortly before I was to take title, the owner was taken to jail for tax fraud and the whole deal fell apart. That agreement to purchase the Saybrook property, occurred at least a year before CPA started their lease with the new owners.
>
> To be accused of owning Saybrook Junction and steering CPA to Old Saybrook is outrageous and uncalled for. I take such accusations personally and do request that this matter also be looked into.

Analysis

On the threshold issue of jurisdiction, persons generally subject to the Code are described in it as either ''Public officials'' or ''State employees.'' The Code defines ''Public official'' to include (among others) ''any member or director of a quasi-public agency''; General Statutes § 1-79 (11); and it defines ''Quasi-public agency'' to include (among other entities) ''the Connecticut Port Authority . . . .'' General Statutes § 1-79 (12). As a member of the CPA board of directors, then, Mr. Johnson is a ''Public official,'' meaning that he is subject to the Code.

The Code provisions most pertinent here are General Statutes §§ 1-85 and 1-86 (a)—which define and proscribe ''substantial'' and ''potential'' conflicts of interests—and our task here is to apply those provisions to Mr. Johnson's *prospective* conduct as a CPA board member concerning two properties: Saybrook Junction and the commercial property located at 75 Crystal Avenue, New London.

1. ''Substantial'' Conflicts of Interests

Section 1-85 contains a general rule and an exception, the general rule being this: A public official has a ''substantial conflict'' and ''may not take official action on [a] matter'' if ''he has *reason to believe or expect* that he, his spouse, a dependent

child, or a *business with which he is associated* will derive a *direct* monetary gain or suffer a *direct* monetary loss . . . by reason of his official activity . . . .'' (Emphasis added.) And the exception is this: A substantial conflict does not exist if such benefit or detriment accrues to any of the listed persons (i.e., self, spouse, etc.) as a member of a profession, occupation, or group to no greater extent than to any other member of the profession, occupation, or group.[2] (For example, a public official whose spouse is a teacher would not have a substantial conflict concerning a matter that would result in a uniform financial benefit to all teachers.)

Before getting to some examples of substantial conflicts under § 1-85, a few definitions (of the italicized terms) are in order:

- ''Reason to believe or expect'': ''A public official . . . has reason to believe or expect the derivation of a direct monetary gain or loss by reason of his or her official activity . . . when there is . . . specific information available to the individual which would clearly indicate to a reasonable person that such a direct benefit or detriment would accrue or when the language of the legislation, regulation or matter in question would so indicate.'' Regs., Conn. State Agencies § 1-81-28 (c).
- ''Business with which he is associated'': ''any . . . entity through which business for profit or not for profit is conducted in which the public official . . . or member of his or her immediate family is a director, officer, owner, limited or general partner, beneficiary of a trust or holder of stock constituting five per cent or more of the total outstanding stock of any class . . . . 'Officer' refers only to the president, executive or senior vice president or treasurer of such business.''[3] General Statutes § 1-79 (2).
- ''Direct'': ''absolute, immediate, or without intervening circumstances.'' Declaratory Ruling 92-C.

With those definitions in mind, we turn to some examples of substantial conflicts under § 1-85. According to the regulations, (1) ''a state employee required, in the course of his or her official duties, to determine whether a consulting contract should be awarded to his or her spouse has a substantial conflict, and may not take official action on the matter''; and (2) ''if a legislator is on the board of directors of a for-profit corporation'' (making it a ''business with which the legislator is associated''), and ''if the corporation applied to the General Assembly for bonding, the legislator/director would have a substantial conflict, and may not take official action on the specific bonding request.'' Regs., Conn. State Agencies § 1-81-28. Similarly, ''an official could not: award a state contract to his business; hire an immediate family member for a state job; or issue a permit or license to [his] company . . . . All these official actions would result in an impermissible 'direct monetary gain' . . . .'' Informal Request for Advisory Opinion No. 2501 (1999).

Another example stems from Informal Request for Advisory Opinion No. 0897 (1992), which is relevant here because it involved a board member of a (then) quasi-public agency, the Connecticut Convention Center Authority (''CCCA''), who wanted to become a member of a partnership that owned property near one of two sites for the planned convention center. The CCCA board member asked whether, ''as a limited partner in the proposed development of a hotel to be built near the planned convention center,'' he must ''abstain from voting on the choice between the two sites which the Site Selection Committee is expected to recommend to the

[2] The term ''group'' ''must be equivalent in size and interests to a 'profession' or 'occupation.' '' Advisory Opinion No. 99-5.

[3] The term ''Business with which he is associated'' does not include the relationship of unpaid director or officer of a non-profit entity. See General Statutes § 1-79 (2).

full [CCCA].'' Apparently, ''the partnership . . . own[ed] a parcel of commercial property near one of the two sites,'' and if the other site was selected, ''the partnership would [have] ma[de] an additional purchase of land, near such other site, upon which to build a hotel.'' The response—which is worth quoting in full, particularly given that it discusses and contrasts two previous advisory opinions involving another CCCA board member—was as follows:

> The Commission is cognizant of two recent advisory opinions issued to the [CCCA] chairperson, E. Clayton Gengras, Jr., in which the Commission stated that Mr. Gengras was not prohibited from taking official action to select a site for the convention center, despite being the income beneficiary of a trust which owns commercial property close to one of the proposed sites. In that case, any financial gain or loss would result from changes in property value attributable to the location of the convention center. Given the fact that the property in question is subject to a 31-year lease to a bank, the consequences of any such changes in the property's value were considered, by the Commission, to be too speculative and remote to constitute a substantial conflict of interest within the meaning of § 1-85. (See . . . Advisory Opinions Nos. 92-8 . . . and 92-16 . . .).
>
> In contrast, under the circumstances described by the petitioner, any action he might take to choose one site over the other could be expected to result in a direct and unique monetary gain or loss for the partnership in question. The partnership does not merely own property near one of the sites, it has also expressed its intention to build a hotel close to the convention center site, wherever that may be. The financial impact of the Authority's decision on the partnership will be direct, immediate and distinct from the impact on persons who may own property near one or both of the proposed sites, but who have not planned a development project specifically linked to the convention center. Therefore, should the petitioner become a limited partner in the hotel development project he has described, he will be required, pursuant to . . . § 1-85, to refrain from voting on the site selection.

Applying all of that here, Mr. Johnson must ask the following question whenever confronted with taking official action on a matter in his capacity as a CPA board member: Is there specific information available to him that would clearly indicate to a reasonable person, or does the language of the matter in question so indicate, that there would be a direct (i.e., immediate) and unique financial impact on him, his spouse, a dependent child, or a ''business with which he is associated''? If the answer is yes, he has a substantial conflict under § 1-85 and is barred from taking official action on the matter.

With respect to the two properties at issue, given that, according to Mr. Johnson, he has no financial interest in Saybrook Junction, he is free to take official action as a CPA board member concerning that property, such as voting on whether to renew the CPA's existing lease at that location. This assumes, of course, that none of the other persons listed in § 1-85—i.e., Mr. Johnson's spouse, a dependent child, or a ''business with which [Mr. Johnson] is associated''—have a financial interest in Saybrook Junction that would be directly and uniquely impacted by the action.

As for the other property, i.e., 75 Crystal Avenue, New London, given that Mr. Johnson owns it, he may not take official action as a CPA board member that would have a direct and unique financial impact on his financial interests by virtue of his ownership of this property.[4] For example, if the CPA board were to vote on whether to lease space at that property, Mr. Johnson would have a substantial conflict and be barred by § 1-85 from taking official action. He would likewise have a substantial conflict and be barred from taking official action with respect to any CPA matter that would have a direct (rather than speculative and remote) and unique (as compared to all other properties in the area) impact on the value of that property.

2. ''Potential'' Conflicts of Interests

Where there is no ''substantial'' conflict because the financial impact on the listed person either would be indirect or would be direct but would fit within § 1-85's exception,[5] there may still be a ''potential'' conflict under § 1-86 (a). A potential conflict exists when a public official, in the discharge of his official duties, ''would be required to take an action that would affect a financial interest of such official . . . such official's . . . spouse, parent, brother, sister, child or the spouse of a child or a business with which such official . . . is associated . . . .'' General Statutes § 1-86 (a). No potential conflict exists if the financial impact is de minimis (i.e., less than $100 per person per year) or indistinct from that of a substantial segment of the general public (e.g., all licensed drivers). General Statutes § 1-86 (a); Regs. Conn. State Agencies § 1-81-30. Potential conflicts, unlike substantial conflicts, do not require ''that the financial impact . . . be direct,'' but ''there . . . must be a reasonable expectation on the part of the individual that there will be some financial impact based on his actions.'' Advisory Opinion No. 93-11.

Advisory Opinion No. 1999-18 represents an apt example of a ''potential'' conflict under § 1-86, for it involved a public official/property owner whose financial interests were indirectly impacted by his official action. In that opinion, the Commission was asked if the Secretary of the Office of Policy and Management (''OPM'') could rule on a property-revaluation waiver submitted by the city of Waterbury, where he was a homeowner. Absent a waiver, the city would lose almost $10 million in state aid, which ''almost certainly'' would trigger an increase in the city's mill rate, followed by an increase in property taxes to the city, followed by an estimated $300 annual increase in the Secretary's property tax. Said the Commission, ''[c]learly, the Secretary of OPM will be required to take an action which would affect his financial interest,'' and ''the interest is neither de minimis (defined . . . as less than $100 per year) nor is it shared by a 'substantial segment' of the general public (defined . . . as equivalent to 'all licensed drivers, all homeowners, all parents, etc.').'' The Commission concluded, therefore, that the OPM Secretary had a potential conflict under § 1-86 (a).

Applying § 1-86 (a) here, Mr. Johnson has a potential conflict if the following holds true: Under existing facts, a reasonable person would ''expect''—i.e., consider it likely, rather than merely conceivable—that action taken by the CPA board would affect his financial interest or the financial interest of the listed family members or a ''business with which he is associated,'' and the financial interest is neither de minimis (< $100) nor shared by a substantial segment of the general public.

[4] Obviously, if the property is owned by a ''business with which [Mr. Johnson] is associated'' (e.g., a limited liability company of which he is an owner), he may not take official action as a CPA board member that would have a direct and unique financial impact on the business's financial interests by virtue of its ownership of the property.

[5] The exception—which is mentioned above on page 4—states: A substantial conflict does not exist if such benefit or detriment accrues to any of the listed persons (i.e., self, spouse, etc.) as a member of a profession, occupation, or group to no greater extent than to any other member of the profession, occupation, or group. General Statutes § 1-85.

With respect to the two properties, Mr. Johnson cannot, based on the facts presented, have a potential conflict concerning Saybrook Junction, considering he has no financial interest in it, and assuming none of the listed family members or any ''business with which he is associated'' do so. As for the property located at 75 Crystal Avenue, New London, if, by virtue of his ownership of it, a reasonable person would expect that action taken by the CPA board would affect his financial interests in an amount exceeding $100, he has a potential conflict. For example, a potential conflict would exist for Mr. Johnson under § 1-86 (a) if a reasonable person would consider it likely that action taken by the CPA board would increase the property's value by $100 or more.

In the event that Mr. Johnson is faced with a potential conflict under § 1-86 (a)—as opposed to a substantial conflict under § 1-85, which always demands recusal—how he is to proceed depends on whether he is what § 1-86 (a) calls a ''member of a state regulatory agency.'' That term is defined via regulation as follows: ''a member of any commission, board, council, *authority* or other similar body which is authorized by law to regulate, i.e., control, administer, or *oversee*, any profession, occupation, industry, activity, fund, *endeavor* or area of conduct.'' (Emphasis added.) Regs., Conn. State Agencies § 1-81-30 (c). The CPA (i.e., the Connecticut Port *Authority*) is certainly an ''authority'' and, under its enabling provisions, is charged with ''oversee[ing]'' an ''endeavor,'' namely, ''the development of Connecticut's ports and harbors . . . .'' General Statutes § 15-31b. Accordingly, as one of its board members, Mr. Johnson is, in fact, a ''member of a state regulatory agency,''[6] meaning that, in the case of a potential conflict, § 1-86 (a) gives him two options:

> either [1] excuse himself . . . from the matter or [2] prepare a written statement signed under penalty of false statement describing the matter requiring action and the nature of the potential conflict and explaining why despite the potential conflict, [he] . . . is able to vote and otherwise participate fairly, objectively and in the public interest. [He] . . . shall deliver a copy of the statement to the Office of State Ethics and enter a copy of the statement in the journal or minutes of the [CPA].

Conclusion

This advisory opinion represents a general overview of how § 1-85 and 1-86 (a) could apply to Mr. Johnson, in his capacity as a CPA board member, in relation to the properties at issue. If, going forward, he has any hesitation as to whether, with respect to any particular CPA matter, he has a substantial or potential conflict under those provisions, the Board urges him to either seek an informal opinion from the Legal Division of the Office of State Ethics or, if necessary, petition this Board for further advice.

By order of the Board,

Dated 4/22/21

/s/Dena M. Castricone
Chairperson

[6] CPA employees (as opposed to CPA board members) are not ''*members* of a state regulatory agency,'' for that term applies only to members of regulatory *panels*. Such employees must, in the case of a potential or substantial conflict, ''prepare a written statement signed under penalty of false statement describing the matter requiring action and the nature of the conflict and deliver a copy of the statement to such . . . employee's immediate superior . . . who shall assign the matter to another employee . . . .'' General Statutes § 1-86 (a).

OFFICE OF STATE ETHICS

Office of State Ethics advisory opinions are published herein pursuant to General Statutes Sections 1-81 (3) and 1-92 (5) and are printed exactly as submitted to the Commission on Official Legal Publications.

Advisory Opinion No. 2021-2, May 20, 2021

Question Presented: **The petitioner, an employee of Capital Community College, asks whether the Code prohibits him from submitting a reference letter, in his personal capacity, on behalf of his second cousin, who is seeking an adjunct position at another state community college.**

Brief Answer: **The ''use of office'' provision in General Statutes § 1-84 (c) does not extend to distant familial relations such as a second cousin and thus does not prohibit a state employee from providing a reference letter recommending his second cousin for a state position.**

At its April 22, 2021 regular meeting, the Citizen's Ethics Advisory Board (''Board'') granted the petition for an advisory opinion submitted by Marcus G. Lawson, an employee of Capital Community College, which is part of the Connecticut State Colleges and Universities (''CSCU'') system. The Board now issues this advisory opinion in accordance with General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials (''Code'').

Background

In his petition, Mr. Lawson provides the following facts for our consideration:

> I work for the Connecticut Community College System in Hartford, Connecticut at Capital Community College. The family member in question has **previously worked** at Gateway Community College, New Haven, Connecticut, and for which **I haven't provided** at the time a reference to her for this earlier, adjunct position.
>
> Needless to say, this is the first time I am providing a reference to this family member in question, and I have not released this reference. The reference that I have stored on my desktop computer has **not** been written on State of Connecticut letter head, nor have I used my State of Connecticut office number, title or any discernable information connecting me to the State of Connecticut is found on this general reference.

(Emphasis in original). Mr. Lawson identifies the relative on whose behalf he seeks to submit a reference letter as ''Jennell Lawson[,] a second cousin of mine.'' He further represents in the petition that he does not share any business endeavors or have a business relationship with this second cousin.

Analysis

On the threshold jurisdiction issue, persons generally subject to the Code are described in it as either ''Public officials'' or ''State employees.'' The Code defines

''State employee'' to include, among others, ''any employee in the executive . . . branch of state government, whether in the classified or unclassified service and whether full or part-time . . . .'' General Statutes § 1-79 (13). According to the Connecticut State Register and Manual (2020), the State System of Higher Education is part of the executive branch of state government, and according to General Statutes § 10a-1, the state system of public higher education includes, among other entities, ''the regional community-technical colleges . . . .'' As an employee of Connecticut's community college system at Capital Community College, then, Mr. Lawson is a ''State employee'' who is subject to the Code.

The relevant provision here is General Statutes § 1-84 (c), which provides, in relevant part, as follows: ''no . . . state employee shall use his public . . . position . . . to obtain financial gain for *himself, his spouse, child, child'sspouse, parent, brother or sister or a business with which he is associated*.'' (Emphasis added). ''Unless there is evidence to the contrary, statutory itemization indicates that the legislature intended the list to be exclusive.'' *Republican Party of Connecticut* v. *Merrill,* 307 Conn. 470, 492–93 (2012). See also Advisory Opinion No. 1995-15 (declining to extend the meaning of ''immediate family'' beyond the listed terms in the Code definition for purposes of applying the ''open and public'' requirements of General Statutes § 1-84 (i)); Request for Advisory Opinion No. 17099 (2019) (''the 'use of office' prohibition under . . . '' 1-84 (c) do[es] not extend to distant familial relations such as [the state employee's] sister's brother-in-law'').

Accordingly, it follows here that, because the legislature did not include ''second cousin'' or ''cousin'' on the § 1-84 (c) list, the Code does not, from a technical standpoint, prohibit the petitioner from providing his second cousin with a reference to assist her in applying for employment with Connecticut's community college system, provided that neither the petitioner, any of the family members listed in § 1-84 (c), nor any ''business with which he is associated,'' as defined in General Statutes § 1-79 (2), will receive any financial benefit from his providing his second cousin with such reference.

With respect to whether there is an appearance of impropriety, ''[t]he Code . . . does not speak of appearance of conflict, only actualities.'' Advisory Opinion No. 90-6. That is not to say that Capital Community College or the CSCU system may not institute (or do not already have) rules that are more restrictive than those in the Code, and we recommend that the petitioner seek advice from his human resources office. See Advisory Opinion No. 2008-3.

By order of the Board,

Dated 5/20/21

/s/Dena M. Castricone
Chairperson

Notice of Application for Reinstatement to the Bar

On May 20, 2021, Justin Freeman filed in the Superior Court for the Judicial District of Hartford, in CV18-6103946-S, an Application for Reinstatement as an Attorney Admitted to the Practice of Law in Connecticut. The Application will be referred to a Standing Committee on Recommendations for Admission to the Bar.

Brandon Pelegano
Chief Clerk
Hartford JD

Supreme Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately two weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2021–2022 court year is as follows: September 8, 2021; October 12, 2021; November 15, 2021; December 13, 2021; January 10, 2022; February 14, 2022; March 21, 2022; and April 25, 2022.

Carl D. Cicchetti
Chief Clerk

Appellate Court Sessions

Notice is hereby given that the calendar of sessions for the next court year has been adopted.

Sessions last approximately three weeks and are subject to change. Any deviation from the calendar as adopted, will be noticed in the court's Docket.

The first day of each of the sessions for the 2021–2022 court year is as follows: September 1, 2021; October 4, 2021; November 8, 2021; January 3, 2022; January 31, 2022; February 28, 2022; April 4, 2022; and May 9, 2022.

Carl D. Cicchetti
Chief Clerk

Docket and Assignment Posting Dates for Supreme and Appellate 2021–2022 Court Years

Docket and case assignment information is available on the Judicial Branch website and at http://appellateinquiry.jud.ct.gov. The electronic posting on the Judicial Branch website is the official notice of the dockets and assignments except for incarcerated self-represented parties and individuals who have an exemption from e-filing who will continue to receive notice by mail. See Practice Book sections 69-1 and 69-3. Notice of the cases the Appellate Court determines should be considered onthe court's motion calendar for dismissal or sanction will also be by mail. The information below provides docket and assignment posting dates for both courts for the 2021 – 2022 court year.

Supreme Court Docket	**Information available on or about**
First Term Docket	Posted to the website June 28, 2021
Second Term Docket	Posted to the website August 20, 2021
Third Term Docket	Posted to the website September 24, 2021
Fourth Term Docket	Posted to the website October 25, 2021
Fifth Term Docket	Posted to the website November 29, 2021
Sixth Term Docket	Posted to the website January 6, 2022
Seventh Term Docket	Posted to the website February 7, 2022
Eighth Term Docket	Posted to the website March 14, 2022
Supreme Court Assignment	**Information available on or about**
First Term Assignment	Posted to the website July 29, 2021
Second Term Assignment	Posted to the website September 16, 2021
Third Term Assignment	Posted to the website October 15, 2021
Fourth Term Assignment	Posted to the website November 19, 2021
Fifth Term Assignment	Posted to the website December 23, 2021
Sixth Term Assignment	Posted to the website January 27, 2022
Seventh Term Assignment	Posted to the website March 2, 2022
Eighth Term Assignment	Posted to the website April 8, 2022
Appellate Court Docket	**Information available on or about**
First Term Docket	Posted to the website July 13, 2021
Second Term Docket	Posted to the website August 23, 2021
Third Term Docket	Posted to the website September 28, 2021
Fourth Term Docket	Posted to the website November 9, 2021
Fifth Term Docket	Posted to the website December 14, 2021
Sixth Term Docket	Posted to the website January 20, 2022
Seventh Term Docket	Posted to the website February 28, 2022
Eighth Term Docket	Posted to the website April 4, 2022

. . . *continued*

Appellate Court Assignment	**Information available on or about**
First Term Assignment	Posted to the website August 13, 2021
Second Term Assignment	Posted to the website September 21, 2021
Third Term Assignment	Posted to the website October 26, 2021
Fourth Term Assignment	Posted to the website December 7, 2021
Fifth Term Assignment	Posted to the website January 13, 2022
Sixth Term Assignment	Posted to the website February 17, 2022
Seventh Term Assignment	Posted to the website March 25, 2022
Eighth Term Assignment	Posted to the website April 28, 2022