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CONNECTICUT REPORTS

Vol. 346

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF THE

STATE OF CONNECTICUT

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J. XAVIER PRYOR *v.* TIMOTHY BRIGNOLE ET AL.
(SC 20581)
(SC 20583)

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

Syllabus

The plaintiff attorney, who previously had been employed by the defendant law firm, L Co., sought to recover damages for breach of a contractual nondisparagement clause in connection with anonymous letters that the defendant B, who owned and managed L Co., allegedly sent to various news outlets. In the letters, B identified the plaintiff, described an incident in which the plaintiff was arrested and charged with certain serious crimes, and opined that the plaintiff's conduct was of public concern because it implicated his fitness to practice law. B also claimed that the judicial system was likely to conceal the matter because the plaintiff was an attorney. The defendants each filed a special motion to dismiss the plaintiff's complaint pursuant to the statute (§ 52-196a (b)) permitting the trial court to dismiss a complaint that is based on, inter alia, the opposing party's exercise of his or her constitutional right to free speech on a matter of public concern. The trial court denied the defendants' special motions to dismiss, however, concluding that they could not meet their initial burden of showing, by a preponderance of the evidence, that they were being sued because B exercised his right of free speech, insofar as B had denied sending the anonymous letters and, thus, had denied engaging in any speech at all. The defendants subsequently filed with the Appellate Court separate appeals from the trial court's denial of their special motions to dismiss. The plaintiff moved to dismiss the appeals for lack of a final judgment, and, over the defendants' objections, the Appellate Court granted the plaintiff's motions and dismissed the appeals. On the granting of certification, the defendants filed separate appeals with this court.

Held that the Appellate Court improperly dismissed the defendants' appeals from the trial court's denial of their special motions to dismiss for lack of a final judgment, and, accordingly, this court reversed the Appellate

* This case originally was argued on February 24, 2022, before a panel consisting of Chief Justice Robinson, and Justices McDonald, D'Auria, Mullins and Ecker. Thereafter, the court sua sponte ordered that the case be reargued on October 12, 2022, before that same panel. Subsequently, Judge Prescott was added to the panel. He has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this decision.

Court's judgments and remanded the cases to the Appellate Court for further proceedings:

The issue of whether the trial court's denial of the defendants' special motions to dismiss filed pursuant to § 52-196a (b) could constitute an appealable final judgment was resolved in the companion case of *Smith* v. *Supple* (346 Conn. 928), in which this court examined the relevant statutory text, legislative history, and analogous laws of other states, and concluded that § 52-196a affords defendants a substantive right to avoid litigation on the merits and that, pursuant to the second prong of the test for determining the appealability of interlocutory orders set forth in *State* v. *Curcio* (191 Conn. 27), an immediate appeal may be taken in cases in which a defendant can assert a colorable claim that a trial court's denial of a special motion to dismiss has placed at risk the right of the defendant to avoid litigation on the merits.

In the present case, the defendants' special motions to dismiss purportedly invoked the protections afforded by § 52-196a insofar as the plaintiff's complaint was based on a right protected by that statute, namely, B's "right of free speech," as that term is defined in § 52-196a (a) (2).

In construing § 52-196a (a) (2), which requires that the speech occur "in a public forum on a matter of public concern," the courts of this state have interpreted the term "public forum" to include communications to newspapers and other traditional media outlets, and the term "matter of public concern" to include speech about issues of economic or community well-being and other regulatory matters, such as unethical behavior alleged against a regulated professional, it was well established that the commission and prosecution of a crime, and the resulting judicial proceedings, are events of legitimate concern to the public, and it was of no consequence that B denied writing the letters, as the initial analysis concerning whether to grant a special motion to dismiss under § 52-196a (e) (3) turns on the nature of the statements alleged in the plaintiff's complaint.

Accordingly, the defendants had asserted at least a superficially well founded claim that B's conduct of sending the letters to various news outlets concerning the arrest and prosecution of an attorney could be considered conduct furthering communication in a public forum on a matter of public concern.

(*Two justices dissenting in one opinion*)

Argued February 24 and October 12, 2022—officially released May 2, 2023**

** May 2, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

Procedural History

Action to recover damages for, inter alia, breach of contract, and for other relief, brought to the Superior Court in the judicial district of Hartford, where the court, *Budzik*, *J.*, denied the defendants' special motions to dismiss, from which the defendants filed separate appeals with the Appellate Court, which granted the plaintiff's motions to dismiss the appeals, and the defendants, on the granting of certification, appealed to this court, which consolidated the appeals. *Reversed*; *further proceedings*.

Sarah F. D'Addabbo, with whom was *Mario Cerame*, for the appellants (defendants).

Matthew S. Blumenthal filed a brief for the Connecticut Trial Lawyers Association as amicus curiae.

William Tong, attorney general, *Clare Kindall*, former solicitor general, *Matthew I. Levine*, assistant attorney general, and *Daniel M. Salton*, assistant attorney general, filed a brief for the state of Connecticut as amicus curiae.

Opinion

ROBINSON, C. J. The sole issue in these certified appeals is whether the denial of a special motion to dismiss filed pursuant to our state's anti-SLAPP[1] statute, General Statutes § 52-196a,[2] is an appealable final judg-

[1] "SLAPP is an acronym for strategic lawsuit against public participation . . . ." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 336 Conn. 332, 337 n.4, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021).

[2] General Statutes § 52-196a provides in relevant part: "(b) In any civil action in which a party files a complaint, counterclaim or cross claim against an opposing party that is based on the opposing party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, such opposing party may file a special motion to dismiss the complaint, counterclaim or cross claim.

ment. The defendants, Timothy Brignole and Brignole, Bush & Lewis, LLC (law firm), appeal, upon our granting of their petitions for certification,[3] from the judgments of the Appellate Court, which dismissed their appeals from the order of the trial court denying their special motions to dismiss the underlying civil action brought against them by the plaintiff, J. Xavier Pryor.[4] Specifically, the defendants claim that the Appellate Court improperly dismissed their respective appeals for lack of a final judgment because (1) the legislature expressly provided for an interlocutory appeal of the denial of a special motion to dismiss in subsection (d) of § 52-196a, and (2) the denial of a special motion to dismiss filed

* * *

"(d) The court shall stay all discovery upon the filing of a special motion to dismiss. The stay of discovery shall remain in effect until the court grants or denies the special motion to dismiss and any interlocutory appeal thereof. Notwithstanding the entry of an order to stay discovery, the court, upon motion of a party and a showing of good cause, or upon its own motion, may order specified and limited discovery relevant to the special motion to dismiss.

* * *

"[e] (3) The court shall grant a special motion to dismiss if the moving party makes an initial showing, by a preponderance of the evidence, that the opposing party's complaint, counterclaim or cross claim is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, unless the party that brought the complaint, counterclaim or cross claim sets forth with particularity the circumstances giving rise to the complaint, counterclaim or cross claim and demonstrates to the court that there is probable cause, considering all valid defenses, that the party will prevail on the merits of the complaint, counterclaim or cross claim. . . ."

[3] We granted the defendants' petitions for certification to appeal to consider whether the Appellate Court properly dismissed their respective appeals from the trial court's denial of their special motions to dismiss pursuant to § 52-196a for lack of a final judgment. See *Pryor* v. *Brignole*, 336 Conn. 941, 249 A.3d 353 (2021); *Pryor* v. *Brignole*, 336 Conn. 933, 248 A.3d 3 (2021). This court subsequently consolidated the defendants' certified appeals and ordered joint briefing. See Practice Book § 61-7 (b) (1).

[4] We note that the plaintiff declined to exercise his right to briefing and oral argument in this consolidated appeal and that we granted permission to the state of Connecticut and the Connecticut Trial Lawyers Association to file briefs as amici curiae.

pursuant to the anti-SLAPP statute constitutes an appealable final judgment under the second prong of *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). For the reasons set forth in the companion case that we also decide today, *Smith* v. *Supple*, 346 Conn. 928, A.3d (2023), we conclude that a trial court's denial of a colorable special motion to dismiss filed pursuant to § 52-196a is an appealable final judgment under *Curcio*. Accordingly, we reverse the judgment of the Appellate Court and remand the case to that court for further proceedings according to law.

The record reveals the following relevant facts and procedural history, which are undisputed for purposes of this appeal. Brignole is the owner, manager, and principal of the law firm. The law firm previously employed the plaintiff as an associate attorney. In 2015, the law firm brought a civil action against the plaintiff and another law firm in the Superior Court in the judicial district of Hartford (2015 action). In March, 2018, the plaintiff and the law firm resolved the 2015 action by executing a settlement agreement pursuant to which the plaintiff paid the law firm $45,000 in exchange for a general release of all causes of action brought or which could have been brought in the 2015 action. The settlement agreement also included a nondisparagement clause under which Brignole, in particular, agreed "to not disparage or criticize [the plaintiff] and to not do or say anything that could harm the [plaintiff's] interests or reputation . . . ."

Approximately three months later, the plaintiff was arrested and charged with assault in the third degree, in violation of General Statutes § 53a-61, and risk of injury to a child, in violation of General Statutes § 53-21, in connection with an incident in West Hartford. Thereafter, Brignole sent or caused to be sent to "various news outlets and persons" an anonymous letter bearing the headline "Attorney Beats Wife [i]n Front of

Child," which stated the factual basis for the charges against the plaintiff, identified the plaintiff by his name, date of birth, and office address, and opined that his conduct was a matter of public concern because it implicated his fitness to practice law and because, Brignole claimed, the judicial system was likely to cover up the matter because the plaintiff is an attorney.[5] Brignole addressed each letter with the return address of the plaintiff's law office to make it look like it was sent by a member of the plaintiff's staff.

Subsequently, the plaintiff brought this action against the defendants, claiming that Brignole's actions constituted a breach of the nondisparagement provision of the settlement agreement, could have harmed his reputation and interests, caused him to suffer economic damages, and deprived him of the benefit of the agreement.[6] The defendants thereafter filed separate special

[5] Specifically, the letter provided in relevant part: "To Whom It May Concern:

"On June 10, 2018 [the plaintiff] ([o]ffice, 525 Windsor [Avenue], Windsor, CT) was arrested in West Hartford . . . on charges of [a]ssault [in the third] [d]egree 'with intent to cause grave physical injury' and [r]isk of [i]njury to a [m]inor, a [c]lass C [f]elony. While driving a car in West Hartford with his young child in the back seat, [the plaintiff] got in an argument with his wife and he punched her in the face. When he stopped the car, she fled to an adjacent store and called [the] police. The police observed [that] she had a swollen eye from being punched.

"Under [rule 8.4 of the] Connecticut Rules of Professional Conduct . . . it is professional misconduct for a lawyer to commit a criminal act that reflects adversely on the fitness of a lawyer. Commentary: [l]awyers are subject to discipline when they violate these rules and 'offenses involving violence, dishonesty and breach of trust are in that category.'

"I bring this to your attention out of public concern and under your watchful eye of enforcing the rules and public mandates. The fact that [the plaintiff] is a lawyer going around assaulting people reflects badly on the legal community as a whole. As a lawyer in the Hartford [c]ourts he is held to a high standard of public trust. His [w]ife and [c]hild are real victims and he needs to be held accountable. Just because he is a lawyer the system will try to cover this up. You are our [v]ictims' [a]dvocates. Help us please."

[6] The plaintiff also filed an attorney grievance against Brignole, claiming that Brignole's actions violated several Rules of Professional Conduct. The Hartford Judicial District Grievance Panel for Geographic Area 13 and the

motions to dismiss the action as a SLAPP suit pursuant to § 52-196a, along with accompanying memoranda of law, in which they (1) denied the allegations in the complaint, and (2) contended that the plaintiff's breach of contract claims were based on the exercise of a right protected by the anti-SLAPP statute, namely, "the right of free speech in connection with a matter of public concern," and that the plaintiff was unable to "show probable cause that he [would] prevail on the merits of his claim." The plaintiff objected to the defendants' respective special motions to dismiss.

On August 24, 2020, the trial court issued a memorandum of decision denying the defendants' special motions to dismiss, rejecting their argument that "the letters constitute[d] an exercise of free speech on a matter of public concern and, thus, [were] protected under § 52-196a." The court observed that the "problem . . . [was] that [Brignole, as manager, owner, and principal of the law firm] denie[d] sending the letters at issue and, thus, denie[d] engaging in any speech at all, protected or not." Thus, the court determined that the defendants could not meet their "initial burden" under § 52-196a (e) (3) of showing, by a preponderance of the evidence, that they were being sued because Brignole exercised his right of free speech.[7] As such, the trial court denied the defendants' special motions to dismiss.

The defendants subsequently filed separate appeals from the denials of their special motions to dismiss

city of Hartford reviewed the complaint and the proffered defenses and determined that no probable cause existed that Brignole had committed professional misconduct by sending the letters.

[7] In so concluding, the trial court rejected the defendants' argument "that the court should simply assume [that] the allegations of the complaint are true for purposes of the motion, as may be done, in some circumstances, on a motion to dismiss pursuant to Practice Book § 10-30." The court determined that "[§] 52-196a (e) (3) plainly sets forth a requirement that the moving party must establish his right to the special protections of the statute by the presentation of actual facts, not assumptions valid only for purposes of the [special] motion [to dismiss]."

with the Appellate Court. The plaintiff moved to dismiss each appeal for lack of an appealable final judgment. The defendants then objected, arguing that the denial of a special motion to dismiss is immediately appealable both under the plain language of § 52-196a (d) and as a final judgment under this court's decision in *State* v. *Curcio*, supra, 191 Conn. 31. The Appellate Court ultimately granted the plaintiff's motions to dismiss and rendered judgments dismissing the appeals. These certified appeals followed.[8] See footnote 3 of this opinion.

The primary issue raised in these certified appeals—namely, whether a trial court's denial of a special

[8] On February 1, 2022, this court ordered supplemental briefing on the issue of "whether the Appellate Court's dismissal of [the law firm's] appeal . . . can be affirmed on the alternative ground that the Appellate Court lacked subject matter jurisdiction to consider the appeal because [the law firm] failed to amend its appeal under Practice Book § 61-9 to include the trial court's November 18, 2020 ruling denying its special motion to dismiss." (Internal quotation marks omitted.) Having reviewed the record in this case as a whole, we conclude that the trial court's November 18, 2020 ruling is most fairly characterized as an articulation clarifying that it had previously denied the law firm's special motion to dismiss—for the same reason as Brignole's—in its initial ruling dated August 24, 2020. The trial court's articulation, which was issued in response to a sua sponte order from the Appellate Court, does not appear to us to constitute a separate, substantive decision on the merits of the law firm's underlying motion to dismiss so as to require an amended appeal under Practice Book § 61-9. See, e.g., *In re Santiago G.*, 325 Conn. 221, 232–33, 157 A.3d 60 (2017) (noting that "the well established rule that every presumption is to be indulged in favor of jurisdiction" extends to appellate proceedings (internal quotation marks omitted)). But cf. *Gibson* v. *Jefferson Woods Community, Inc.*, 206 Conn. App. 303, 304–305 n.1, 260 A.3d 1244 (given plaintiff's failure to file amended appeal, Appellate Court lacked jurisdiction over appeal from trial court's subsequent granting of motion to dismiss filed by codefendant, when existing appeal was limited to granting of motion to dismiss filed by different defendant, despite fact that motions were granted on "same bases" (internal quotation marks omitted)), cert. denied, 339 Conn. 911, 261 A.3d 747 (2021); *Juliano* v. *Juliano*, 96 Conn. App. 381, 386, 900 A.2d 557 (Appellate Court lacked jurisdiction over appeal from denial of motion to open conversion and fraud judgment, filed subsequent to original appeal from that judgment, because, "[i]f [the party] desired appellate review of the court's denial of his motion to open, he should have filed an appeal form indicating such intention or amended the existing form"), cert. denied, 280 Conn. 921, 908 A.2d 544 (2006).

motion to dismiss under the anti-SLAPP statute can constitute an appealable final judgment—is identical to that considered in *Smith* v. *Supple*, supra, 346 Conn. 928. In that case, we examined relevant statutory text, legislative history, and analogous laws from our sister states, and concluded that our "anti-SLAPP statute affords a defendant a substantive right to avoid litigation on the merits . . . ." Id., 949; see id., 938–60. We then continued to conclude that, in cases in which a defendant can assert a colorable claim that a trial court's denial of a special motion to dismiss under that statute has placed that particular right at risk, an immediate appeal may be taken pursuant to the second prong of *Curcio*. See id., 949; see also *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 41, 213 A.3d 1110 (2019) ("[a defendant] must make at least *a colorable claim* that some recognized statutory or constitutional right is at risk" (emphasis added; internal quotation marks omitted)).

Turning to the record in these certified appeals, we now consider whether the defendants have asserted a colorable claim to the protections afforded by the anti-SLAPP statute. In particular, we must determine whether the defendants have asserted a colorable claim that Brignole's conduct, as alleged in the plaintiff's complaint, is based on the exercise of his "right of free speech," as that term has been defined by our legislature in § 52-196a (a) (2).

The statute defines the phrase "right of free speech" as "communicating, or conduct furthering communication, in a public forum on a matter of public concern . . . ." General Statutes § 52-196a (a) (2). Although the term "public forum" is not defined, the phrase "matter of public concern" is defined as "an issue related to (A) health or safety, (B) environmental, economic or community well-being, (C) the government, zoning and other regulatory matters, (D) a public official or public

figure, or (E) an audiovisual work . . . .” General Statutes § 52-196a (a) (1).

A review of relevant case law reveals several Superior Court decisions that have interpreted the term “public forum,” as used in the anti-SLAPP statute, to include communications to newspapers and other traditional media outlets. See, e.g., *Primrose Cos.* v. *McGee*, Superior Court, judicial district of Waterbury, Docket No. UWY-CV-21-6062747-S (August 26, 2022) (citing cases and finding that defendant’s letter to editors, which was published in newspaper, was action in public forum); *Lawrence* v. *Chambers*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FST-CV-20-5022942-S (September 21, 2020) (“[t]he newspaper and television station[s] are public for[a]” in exercise of free speech); *Pacheco Quevedo* v. *Hearst Corp.*, Superior Court, judicial district of Stamford-Norwalk, Docket No. FST-CV-19-5021689-S (December 19, 2019) (“[e]mbedded in anti-SLAPP laws like § 52-196a is the fundamental principle that ‘news reporting activity is free speech’ ”).

Courts of this state, in construing our anti-SLAPP statute, have further concluded that speech that involves a “matter of public concern” includes “issues of economic or community [well-being] . . . and other regulatory matters . . . . This would appear to include unethical behavior alleged against a regulated professional. As to an allegation of illegal behavior, [i]t is well established that [t]he commission of [a] crime, prosecutions resulting from it, and judicial proceedings arising from the prosecutions . . . are without question events of legitimate concern to the public . . . . Indeed, [p]ublic allegations that someone is involved in crime generally are speech on a matter of public concern.” (Citation omitted; internal quotation marks omitted.) *Rockoff* v. *Annulli*, Superior Court, judicial district of Hartford, Docket No. HHD-CV-20-6122116-S (July 10, 2020) (70 Conn. L. Rptr. 39, 40); see, e.g., *Noble* v. *Hennessey*,

Superior Court, judicial district of New London, Docket No. KNL-CV-20-6045166-S (January 12, 2021) (attorney grievance complaint was related to matter of public concern because legal profession is regulated and complaint alleged unethical behavior); *Rockoff* v. *Annulli*, supra, 70 Conn. L. Rptr. 40 (allegations of unethical and criminal behavior by regulated professional concerning private real estate transaction involved matters of public concern); see also *Graves* v. *Chronicle Printing Co.*, Superior Court, judicial district of Tolland, Docket No. CV-18-5010056-S (November 7, 2018) (67 Conn. L. Rptr. 442, 446) ("[p]ublishing articles concerning the arrest and prosecution of a person accused of harming children certainly satisfies the statutory definitions of 'free speech' and 'matter of public concern' "); cf. *Gleason* v. *Smolinski*, 319 Conn. 394, 412, 125 A.3d 920 (2015) (" '[s]peech deals with matters of public concern when it can be fairly considered as relating to any matter of political, social, or other concern to the community . . . or when it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public' ").

Although the pertinent case law is less developed, courts in other jurisdictions presented with similarly worded anti-SLAPP statutes have also considered the merits of special motions to dismiss, even in cases in which the defendant has denied making all or some of the underlying statements alleged. Those courts have reasoned, as the defendants in the present case initially argued, that an initial analysis under their states' respective anti-SLAPP statutes should turn on the nature of the statements alleged in the complaint. See *Spirtos* v. *Yemenidjian*, 137 Nev. 711, 714, 499 P.3d 611 (2021) (concluding, under similarly worded statute, that "[the defendant's] denial that he made the alleged statement [was] irrelevant to step one of the anti-SLAPP analysis" (emphasis omitted)); *Hersh* v. *Tatum*, 526 S.W.3d 462,

467 (Tex. 2017) (dismissal under Texas' anti-SLAPP statute was not precluded by fact that defendant denied making statements at issue because "[t]he basis of a legal action is not determined by the defendant's admissions or denials but by the plaintiff's allegations," and, "[w]hen it is clear from the plaintiff's pleadings that the action is covered by the [anti-SLAPP statute], the defendant need show no more").

Because the issue before us is limited to whether the defendants in the present case have asserted a *colorable* claim to the protections afforded by our state's anti-SLAPP statute, as required to obtain an immediate review of the trial court's denial of their special motions to dismiss under the second prong of *Curcio*, we need not determine whether any of the foregoing persuasive authority is either factually distinguishable or legally correct. A showing of colorability in this context, although meaningful, presents a lower bar. See, e.g., *In re Santiago G.*, 325 Conn. 221, 231, 157 A.3d 60 (2017) ("A colorable claim is one that is superficially well founded but that may ultimately be deemed invalid . . . . For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he *might* prevail." (Citation omitted; emphasis in original; internal quotation marks omitted.)). The existence of the previously cited case law affords the defendants with at least a superficially well founded claim that the conduct alleged in the plaintiff's complaint—namely, Brignole's sending letters to "various news outlets and persons" concerning the arrest and prosecution of an attorney—could be considered conduct furthering communication in a public forum on a matter of public concern. Cf. *Graves* v. *Chronicle Printing Co.*, supra, 67 Conn. L. Rptr. 446 (police officer's sending statements to newspaper concerning allegations of criminal behavior fell within scope of anti-SLAPP statute, as officer was "furthering

communication, in a public forum on a matter of public concern" (internal quotation marks omitted)).

Accordingly, we conclude that the trial court's denial of the defendants' colorable special motions to dismiss under § 52-196a constitutes an appealable final judgment under *Curcio*.[9] The Appellate Court, therefore, improperly dismissed the defendants' respective appeals for lack of a final judgment.[10]

The judgments of the Appellate Court are reversed and the cases are remanded to that court for further proceedings according to law.

In this opinion McDONALD, MULLINS and PRESCOTT, Js., concurred.

D'AURIA, J., with whom ECKER, J., joins, dissenting. Today, in *Smith* v. *Supple*, 346 Conn. 928, A.3d (2023), one of two companion cases to the present case that we also decide today, a majority of this court holds that an appeal from the denial of a special motion to dismiss filed pursuant General Statutes § 52-196a, our anti-SLAPP statute, constitutes an appealable final judgment under the second prong of *State* v. *Curcio*, 191

[9] We note that the trial court's decision in the present case focused exclusively on the first step of the burden shifting analysis set forth in § 52-196a (e) (3). As a result, we express no opinion on the various other aspects of this case, such as issues of contractual waiver and causation, which are more properly considered under the second step of § 52-196a (e) (3). See, e.g., *Thompson* v. *Inglewood Unified School District*, Docket No. B264151, 2016 WL 5462850, *5 n.4 (Cal. App. September 29, 2016) (finding that defendants had met their burden under step one of California's anti-SLAPP statute and noting that whether speech violated nondisparagement clause was issue addressed in probability of prevailing on claims analysis under step two).

[10] The dissent posits that we should "not saddle the Appellate Court with a remand" in this case because of the several novel issues that this case presents. Footnote 3 of the dissenting opinion. We disagree. We note that transfer remains available as an appropriate means for addressing—without additional delay—any novel constitutional or statutory issues that are presented with respect to the merits of this appeal. See Practice Book § 65-1.

Conn. 27, 31, 463 A.2d 566 (1983), if the special motion to dismiss is premised on a "colorable claim" that the underlying cause of action is based on the defendants' exercise of their rights to free speech, to free association, or freedom to petition the government. *Smith* v. *Supple*, supra, 930; see id., 960. I dissented in *Smith* because I do not interpret § 52-196a to grant either a right to an immediate appeal, a right to immunity from suit, or any analogous right not to proceed to trial before an appellate court has reviewed the trial court's gatekeeping determination. In that dissent, I detailed not just my disagreement with the majority's statutory construction analysis—especially its interpretation of the nature of the right § 52-196a creates—but also my belief that an appeal of that gatekeeping ruling, on a record assembled in an expedited fashion under the statute, does not permit the level of judicial scrutiny often required to adjudicate weighty constitutional issues at the appellate level, especially such intensely fact based issues as whether statements were made in a public forum or on a matter of public concern. See id., 966, 971–72, 1001–1002 (*D'Auria*, *J.*, dissenting). Therefore, in my view, the denial of these motions should not constitute appealable final judgments.[1] See id., 966, 1001–1002 (*D'Auria*, *J.*, dissenting).

My disagreement with the majority in *Smith* was also premised, in no small part, on my belief that the colorable claim standard the majority established in that case is such a low bar as to be essentially no bar at all, permitting appeals from the denial of virtually every special motion to dismiss. Any illusions that the color-

[1] Rather, I interpret § 52-196a as granting a new procedural right, entitling the defendants to raise as early as possible in the litigation their preexisting right to immunity from liability when the underlying defense is premised on their exercise of a first amendment right or a state constitutional analogue. The defendants had the right to file a special motion to dismiss early in the litigation process, with discovery and its associated costs and burdens stayed until the trial court resolved the special motion. See *Smith* v. *Supple*, supra, 346 Conn. 970–71, 976, 987–88 (*D'Auria*, *J.*, dissenting).

able claim standard will provide the Appellate Court—where, in the first instance, these interlocutory appeals will almost always be filed and any final judgment challenges resolved—with a tool to bat aside and short-circuit appeals that have little hope of prevailing are, in my view, dashed by the majority's determination in the present case that the Appellate Court improperly dismissed the defendants' appeal and that, therefore, even this appeal will have to be briefed, argued, and decided before the parties return to the trial court.

The plaintiff, J. Xavier Pryor, brought this action against the defendants, Timothy Brignole and Brignole Bush & Lewis, LLC, claiming that an anonymous letter Brignole sent to various news outlets about the plaintiff breached the nondisparagement provision of their settlement agreement and caused the plaintiff to sustain (1) harm to his reputation and interests, (2) economic damages, and (3) the loss of the benefit of the settlement agreement. Both defendants filed special motions to dismiss the action as a SLAPP suit pursuant to § 52-196a, contending that the plaintiff's breach of contract claims were based on Brignole's "right of free speech in connection with a matter of public concern . . . ." The trial court denied the defendants' motions, concluding that, because Brignole had denied sending the letters at issue, the defendants had failed to satisfy their "initial burden" under § 52-196a (e) (3) of showing, by a preponderance of the evidence, that they were being sued as a result of Brignole's exercise of his free speech rights. In other words, the trial court determined that the defendants, having denied that Brignole sent the letters, could not avail themselves of the statute's protections because they could not demonstrate that they were being sued for the exercise of their first amendment rights insofar as there was no such exercise according to them. They therefore had not invoked the special

motion procedure afforded under § 52-196a for its intended purpose: to protect those claiming they had been sued for exercising their first amendment rights.

The defendants filed separate appeals with the Appellate Court, and, without opinion, the Appellate Court dismissed the appeals for lack of a final judgment. As I indicated previously, I would hold that the Appellate Court properly dismissed the appeals because I do not believe that the legislature intended to provide either a statutory right to appeal the ruling or any kind of right that would satisfy the second prong of *Curcio*.[2]

The majority, however, holds that the defendants have asserted "a colorable claim that Brignole's conduct, as alleged in the plaintiff's complaint, is based on the exercise of his 'right of free speech,' as that term has been defined by our legislature in § 52-196a (a) (2)." The majority's holding means that the defendants can have their cake and eat it, too. That is, Brignole can deny that he disparaged the plaintiff but can still stop his lawsuit in its tracks and take advantage of a procedure by which the trial court must give priority to the defendants' motions. See General Statutes § 52-196a (e) (1) ("[t]he court shall conduct an expedited hearing on a special motion to dismiss"). And, having been unsuc-

[2] As I indicated in my dissent in *Smith*, under my interpretation of the statutory right at issue, the defendants have received the intended benefits of § 52-196a. See *Smith* v. *Supple*, supra, 346 Conn. 966 (*D'Auria*, *J.*, dissenting). The trial court, acting in its gatekeeping function, considered the merits of the underlying lawsuit, determining that the defendants had failed to " '[make] an initial showing, by a preponderance of the evidence,' " establishing that the plaintiff brought the underlying lawsuit abusively or frivolously to chill the defendants' right to free speech. More specifically, the trial court ruled that nothing in the record demonstrated that Brignole had actually exercised his right to free speech. Thus, the defendants, "early in the process," had the opportunity to "try to dismiss a frivolous or abusive claim that has no merit" and did not have to incur significant costs of litigation until they received a determination on their motion. (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 336 Conn. 332, 382 n.36, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021).

cessful, the defendants can perpetuate this special treatment by taking a rarely afforded interlocutory appeal of the denials of their special motions to dismiss, preventing the plaintiff from pursuing his case for as long as the appellate process takes. The plaintiff must hurry up and wait for someone who actually denies engaging in constitutionally protected speech at all.

The majority's only support for this proposition is that "courts in [two] other jurisdictions presented with similarly worded anti-SLAPP statutes have also considered the merits of special motions to dismiss, even in cases in which the defendant has denied making all or some of the underlying statements alleged." The majority goes on to state: "Because the issue before us is limited to whether the defendants in the present case have asserted a colorable claim to the protections afforded by our state's anti-SLAPP statute, as required to obtain an immediate review of the trial court's denial of their special motions to dismiss under the second prong of *Curcio*, we need not determine whether any of the foregoing persuasive authority is either factually distinguishable or legally correct." (Emphasis omitted.)

The difficulty I have with the majority's approach—which provides a procedural advantage to defendants for which there is no analogue for plaintiffs—is similar to the difficulty I had with the majority's interpretation of a different part of the statute in *Smith*. That is, in its zeal to examine precedents of other state courts and follow suit, the majority does not conduct any kind of analysis of Connecticut's anti-SLAPP statute, under Connecticut's own legal principles (including, specifically, General Statutes § 1-2z), to determine if § 52-196a even arguably supports the majority's contention that a defendant may deny making the alleged statements—a defense that does not involve any constitutional rights—while taking advantage of the benefits afforded under § 52-196a. Irrespective of what courts in other

states have held, once we have properly construed § 52-196a, we might conclude that its protections do not even colorably extend to a defendant who denies making a statement at all.

Under a proper § 1-2z analysis, for the defendants to succeed on their special motions to dismiss under § 52-196a, they must have raised in their motions a defense that their actions constituted protected speech. Specifically, § 52-196a (b) provides in relevant part that, "[i]n any civil action in which a party files a complaint . . . against an opposing party that is based on the opposing party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, such opposing party may file a special motion to dismiss . . . ." Also, subsection (e) (3) of § 52-196a directs that the court "shall" grant the motion if the moving party "makes an initial showing, by a preponderance of the evidence, that the opposing party's complaint . . . is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association . . . ."

At least arguably, the language of § 52-196a (b) indicates that a defendant has a right to file a special motion to dismiss only when the underlying action is based on the defendant's right of free speech, right to petition the government, or right of association. Similarly, the plain language of subsection (e) (3) suggests that a defendant must raise and establish by a preponderance of the evidence that the plaintiff's action violates his first amendment rights. Although the defendants in the present case did raise a first amendment defense in their special motions to dismiss, they also raised as their main defense that Brignole did not make the alleged statements. Although it is standard and acceptable procedure for parties to plead and argue in the alternative,

§ 52-196a creates a special proceeding that the statute makes very clear is reserved only for those invoking constitutional rights that are imperiled. It is thus at least arguable under the statutory language that § 52-196a does not apply to defendants who contest making the statements at issue. If true, then a plaintiff's own constitutional right—of access to courts—would be unnecessarily compromised in favor of those whom the statute does not protect. I see no impediment to deciding that issue in this certified appeal, even as a matter of whether the defendants have a colorable claim.

Accordingly, for the reasons detailed in my dissent in *Smith*, and for the reasons discussed in this opinion, I respectfully dissent.[3]

[3] I also disagree with the rescript in this case. I would not saddle the Appellate Court with a remand and ask it to decide, even in the first instance, the several novel issues that the majority's approach to our statute creates in a case such as this. For one reason, we are going to have to resolve these questions anyhow at some point. Moreover, if it turns out that the trial court properly denied the special motions to dismiss, the plaintiff's action has already been delayed almost three years.

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GREGORY B. SMITH ET AL. *v.* AARON SUPPLE ET AL.
(SC 20730)

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

This court, having requested briefing from the parties on the issue of whether there was a final judgment for purposes of appellate jurisdiction by order dated July 20, 2022, it is hereby ordered that the trial court's denial of the defendants' special motion to dismiss, filed pursu-

* This case was originally argued on October 12, 2022, before a panel consisting of Chief Justice Robinson, and Justices McDonald, D'Auria, Mullins, Ecker and Alexander. Thereafter, Judge Prescott was added to the panel. He has read the briefs and appendices, and listened to a recording of the oral argument prior to participating in this opinion.

ant to General Statutes § 52-196a, constitutes a final judgment under the second prong of *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983), and the defendants' appeal is transferred to the Appellate Court for further proceedings according to law.

May 2, 2023

ROBINSON, C. J. In this appeal, we must consider whether Connecticut's appellate courts have jurisdiction over an interlocutory appeal from a trial court's denial of a special motion to dismiss filed pursuant to our anti-SLAPP[1] statute, General Statutes § 52-196a.[2] The

[1] "SLAPP is an acronym for strategic lawsuit against public participation . . . ." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 336 Conn. 332, 337 n.4, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021).

[2] General Statutes § 52-196a provides in relevant part: "(b) In any civil action in which a party files a complaint, counterclaim or cross claim against an opposing party that is based on the opposing party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, such opposing party may file a special motion to dismiss the complaint, counterclaim or cross claim.

* * *

"(d) The court shall stay all discovery upon the filing of a special motion to dismiss. The stay of discovery shall remain in effect until the court grants or denies the special motion to dismiss and any interlocutory appeal thereof. Notwithstanding the entry of an order to stay discovery, the court, upon motion of a party and a showing of good cause, or upon its own motion, may order specified and limited discovery relevant to the special motion to dismiss.

* * *

"[e] (3) The court shall grant a special motion to dismiss if the moving party makes an initial showing, by a preponderance of the evidence, that the opposing party's complaint, counterclaim or cross claim is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, unless the party that brought the complaint, counterclaim or cross claim sets forth with particularity the circumstances giving rise to the com-

defendants, Aaron Supple, Karen Montejo, Hendrick Xiong-Calmes, and Gianna Moreno, who were students at Trinity College in Hartford (Trinity), appealed to the Appellate Court from the trial court's denial of their specialmotion to dismiss the action brought against them by the plaintiffs, Gregory B. Smith, Nicholas Engstrom, and The Churchill Institute, Inc. (Churchill Institute).[3] Thereafter, this court transferred the appeal to itself and ordered the parties, sua sponte, to brief the issue of whether the trial court's denial of the special motion to dismiss constitutes a final judgment for the purpose of an appeal. On that limited issue, the defendants argue that the trial court's denial is immediately appealable under the second prong of *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). For the reasons that follow, we agree with the defendants and conclude that the denial of a special motion to dismiss based on a colorable claim of a right to avoid litigation under § 52-196a is an appealable final judgment under the second prong of *Curcio*. Because the defendants' appeal presents such a colorable claim, we transfer the appeal back to the Appellate Court for further proceedings according to law.

The record reveals the following relevant facts and procedural history, which are undisputed for purposes of the present appeal. Smith is a professor of political science and philosophy at Trinity. Acting in his capacity as a professor at Trinity, Smith circulated a letter to his fellow faculty and colleagues entitled "Reflections on the 'Campus Climate.' " The letter criticized Trinity's

plaint, counterclaim or cross claim and demonstrates to the court that there is probable cause, considering all valid defenses, that the party will prevail on the merits of the complaint, counterclaim or cross claim. . . ."

[3] The plaintiffs also brought this action against a student newspaper at Trinity and certain individuals associated with the newspaper, but they later withdrew the complaint as to those defendants. For the sake of simplicity, all references herein to the defendants are to Supple, Montejo, Xiong-Calmes, and Moreno.

policies, which Smith believed constituted a "new segregation . . . ." Smith wrote in relevant part: "We are creating a new form of racism and classism at Trinity—with a new form of original sin being loaded on white, suburban students—and it is no accident that this occurs as the aftermath of transforming the center of the curriculum and hiring into a focus on the mantra of [r]ace, [c]lass and [g]ender as if there were nothing else of interest in the life of the mind." Smith went on to refer to Trinity's " 'cultural houses' " as "tribal enclaves," opining that "[h]ouses that integrate students by interest and academic subject matter would be far more promising than tribal enclaves that lead to division and hostility that need not exist. We are creating a climate of armed camps, not one of open, urbane and cosmopolitan civility. What happened to the premise in [*Brown* v. *Board of Education*, 347 U.S. 483, 74 S. Ct. 686, 98 L. Ed. 873 (1954)] that separate is never equal? What happened to Martin Luther [King, Jr.'s] 'dream' of getting past the surface to treating each person as an individual and an equal rather than as members of groups?"[4] Although Smith sent his letter to his fellow faculty members, the defendants and other students received access to it in March, 2019.

In the spring of 2019, several undergraduate students at Trinity, including Engstrom, created the Churchill Club (club) and applied for formal recognition and funding from Trinity's Student Government Association (SGA). Smith served as the faculty advisor to the club. The

[4] In 2017, Smith also published a post in the "Alumni for a Better Trinity College" group on Facebook, which lamented the racism being experienced by "Western" and "American" individuals. In that post, Smith wrote in relevant part: "The new racism is every bit as ugly as the old; and it is every bit as divisive. Until we get beyond this kind of hate, we have no real hope of living together as fellow citizens and friends. . . ." Smith continued: "Trinity needs a genuine, open discussion of where we have arrived and clarity about all the ways in which the new racism, with its anti-Western and anti-American sentiments, is descending on [Trinity]."

club was "inspired" in part by the Churchill Institute, which is a nonprofit corporation founded by Smith that "focuses on the study of Western civilization, philosophy, and tradition," and certain reading groups that Smith had organized. In connection with the club's application for formal recognition, the club's student representatives, led by Engstrom, appeared before the SGA on March 3, 2019, to answer questions. Student protestors also attended the hearing to protest against the club's formal recognition. The SGA continued the vote on whether to formally recognize the club and subsequently announced that a pair of " 'drop-in student town halls' " would take place on April 10 and 11, 2019.

On April 1, 2019, a Trinity student newspaper published its annual satirical issue. The issue featured an article entitled "SGA Considers Fascist Society Approval," referencing the campus controversy over the club's application for recognition. Around April 10, 2019, the defendants posted flyers around campus, featuring the Churchill Institute's logo, a photograph of Smith, and a quote from a Facebook post authored by Smith: "the new racism is every bit as ugly as the old."[5] The defendants also posted nearly identical flyers featuring a photograph of Engstrom.

Thereafter, the plaintiffs brought the present action against the defendants, alleging libel per se, libel per quod, and negligent infliction of emotional distress. The defendants filed a special motion to dismiss under the anti-SLAPP statute, § 52-196a, arguing that the plaintiffs' claims were based on the defendants' exercise of their right of free speech and their right of association in connection with a matter of public concern under the first amendment to the United States constitution. The

[5] Although this language was taken from a particular Facebook post authored by Smith; see footnote 4 of this opinion; the defendants' flyers neither contained quotation marks nor otherwise attributed a source.

plaintiffs objected to the defendants' special motion to dismiss.

The trial court denied the defendants' special motion to dismiss on November 16, 2021. The court noted that, in deciding a special motion to dismiss under § 52-196a (e) (3), Connecticut courts must undertake a two-pronged, burden shifting analysis. See footnote 2 of this opinion. The court found that the defendants had failed to meet their burden under § 52-196a (e) (3) with respect to their claim of free speech because their communications at Trinity were not made in a "public forum," as required by § 52-196a (a) (2).[6] The court further concluded that a private college, like Trinity, was not a state actor for purposes of triggering first amendment protections under the United States constitution.[7]

As to the defendant's right of association claim,[8] the trial court noted that the "United States Supreme Court has afforded constitutional protection to freedom of association in two distinct senses. First, the [c]ourt has held that the [c]onstitution protects against unjustified government interference with an individual's choice to enter into and maintain certain intimate or private rela-

[6] General Statutes § 52-196a (a) (2) defines "right of free speech" as "communicating, or conduct furthering communication, in a *public forum* on a matter of public concern . . . ." (Emphasis added.)

[7] In reaching this conclusion, the trial court looked to the New Jersey Supreme Court's decision in *State* v. *Schmid*, 84 N.J. 535, 423 A.2d 615 (1980), appeal dismissed sub nom. *Princeton University* v. *Schmid*, 455 U.S. 100, 102 S. Ct. 867, 70 L. Ed. 2d 855 (1982), which noted that another private college, Princeton University, was a "predominantly private, unregulated and autonomous" institution, lacking the "close nexus" to the state necessary for it to be subject to the first amendment; (internal quotation marks omitted) id., 548; and that "the attachment of [f]irst [a]mendment requirements to [Princeton] University by virtue of the general public's permitted access to its property would still be problematic." Id., 551.

[8] General Statutes § 52-196a (a) (4) broadly defines "right of association" as "communication among individuals who join together to collectively express, promote, pursue or defend common interests . . . ."

tionships. Second, the [c]ourt has upheld the freedom of individuals to associate for the purpose of engaging in protected speech or religious activities." (Internal quotation marks omitted.) The trial court determined that the defendants' conduct, and the lawsuit that ensued, did "not involve any governmental interference with the defendants' choice to enter into and maintain intimate or private relationships." The court further determined that the defendants' conduct did not constitute engagement in protected speech under the first amendment because Trinity was not a public forum. Accordingly, the court concluded that the defendants had also failed to meet their initial burden under § 52-196a (e) (3) on the ground that the plaintiffs' complaint was based on their right of association.[9]

The defendants appealed from the trial court's denial of their special motion to dismiss to the Appellate Court. Shortly after the parties filed their preliminary statement of the issues, the Appellate Court sua sponte stayed the appeal pending this court's decision in *Pryor* v. *Brignole*, 346 Conn. 534, A.3d (2023). Thereafter, we transferred this appeal to our docket pursuant to Practice Book § 65-1 and instructed the parties, sua sponte, to brief "only the threshold jurisdictional issue of whether the denial of a special motion to dismiss filed pursuant to . . . § 52-196a is an appealable final judgment . . . ."

Before this court, the defendants argue that an appealable final judgment exists under the general appellate jurisdiction statute, General Statutes § 52-263,[10] as expli-

[9] Because the trial court found that the defendants had failed to meet their burden under the first prong of § 52-196a (e) (3), it did not reach the issue of whether the plaintiffs met their burden under the statute's second prong.

[10] General Statutes § 52-263 provides: "Upon the trial of all matters of fact in any cause or action in the Superior Court, whether to the court or jury, or before any judge thereof when the jurisdiction of any action or proceeding is vested in him, if either party is aggrieved by the decision of the court or

cated by the second prong of *State* v. *Curcio*, supra, 191 Conn. 31, because an interlocutory appeal is necessary to protect the statutory right to the dismissal of a SLAPP suit. The defendants first look to the text of § 52-196a (d), which provides in relevant part that any stay of discovery imposed upon the filing of a special motion to dismiss "shall remain in effect until the court grants or denies the special motion to dismiss *and any interlocutory appeal thereof*. . . ." (Emphasis added.) Although the defendants concede that this language does not expressly create appellate jurisdiction, they argue that the reference to "interlocutory appeal[s]" suggests that the legislature understood that the right at issue in the statute would satisfy *Curcio*. In further support of this claim, the defendants also rely on the purpose of the statute as explained in the legislative history, namely, to provide a rapid mechanism by which defendants could avert SLAPP suits—which are by definition frivolous lawsuits intended to punish or deter the otherwise legitimate exercise of first amendment rights. In emphasizing that Connecticut's anti-SLAPP statute provides a right to avoid litigation, the defendants likewise rely on a variety of federal and sister state cases in arguing that the protections afforded by the anti-SLAPP statute would be irrevocably lost by virtue of having to litigate a putative SLAPP suit to conclusion following a trial court's erroneous denial of a special motion to dismiss.

The plaintiffs contend in response that the denial of a special motion to dismiss is not an appealable final judgment. The plaintiffs argue that, had the legislature intended such denials to be immediately appealable, it

judge upon any question or questions of law arising in the trial, including the denial of a motion to set aside a verdict, he may appeal to the court having jurisdiction from the final judgment of the court or of such judge, or from the decision of the court granting a motion to set aside a verdict, except in small claims cases, which shall not be appealable, and appeals as provided in sections 8-8 and 8-9."

would have used specific language in the statute to bestow that right. The plaintiffs also argue that the reference in § 52-196a (d) to an "interlocutory appeal" was not intended to make the denial of a special motion to dismiss immediately appealable in and of itself but, instead, merely contemplated other forms of interlocutory appeals not requiring a final judgment, such as public interest appeals by application to the Chief Justice under General Statutes § 52-265a. They further posit that the legislative history of the anti-SLAPP statute is devoid of any reference to the provision of an interlocutory appeal. The plaintiffs also argue that anti-SLAPP protection is not subject to vindication by interlocutory appeal under the second prong of *Curcio* because it is simply a procedure, akin to a motion for summary judgment, and not itself an independent substantive right. In particular, the plaintiffs contend that the anti-SLAPP statute was created to short-circuit litigation and that a statutory procedure to truncate litigation does not itself constitute an independent right. Finally, they argue that allowing an appeal would open the floodgates to interlocutory appeals, which would be at odds with our final judgment jurisprudence. We, however, agree with the defendants and conclude that the denial of a special motion to dismiss based on a colorable claim of a right to avoid litigation under § 52-196a is an immediately appealable final judgment under the second prong of *Curcio*.

"The lack of a final judgment implicates the subject matter jurisdiction of an appellate court to hear an appeal. A determination regarding . . . subject matter jurisdiction is a question of law [over which we exercise plenary review]." (Internal quotation marks omitted.) *Brown & Brown, Inc.* v. *Blumenthal*, 288 Conn. 646, 651–52, 954 A.2d 816 (2008). "We commence the discussion of our appellate jurisdiction by recognizing that there is no constitutional right to an appeal. . . . Arti-

cle fifth, § 1, of the Connecticut constitution provides for a Supreme Court, a Superior Court and such lower courts as the [G]eneral [A]ssembly shall . . . ordain and establish, and that [t]he powers and jurisdiction of these courts *shall be defined by law*. . . . To consider the [defendants'] claims, we must apply the law governing our appellate jurisdiction, which is statutory. . . . The legislature has enacted . . . § 52-263, which limits the right of appeal to those appeals filed by aggrieved parties on issues of law from final judgments. Unless a specific right to appeal otherwise has been provided by statute, we must always determine the threshold question of whether the appeal is taken from a final judgment before considering the merits of the claim. . . . Further, we have recognized that limiting appeals to final judgments serves the important public policy of minimizing interference with and delay in the resolution of trial court proceedings." (Citations omitted; emphasis in original; footnote omitted; internal quotation marks omitted.) Id., 652–53.

Thus, "[a]s a general rule, an interlocutory ruling may not be appealed pending the final disposition of a case." (Internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 41, 213 A.3d 1110 (2019). In determining whether a judgment or a ruling is an immediately appealable final judgment, courts have routinely looked to a statute's text to see if the legislature has provided an express right to appeal. See General Statutes § 1-2z. In those instances that the legislature has not provided such an express right, our courts then continue to consider whether the right at issue implicates one of the two prongs set forth in *State* v. *Curcio*, supra, 191 Conn. 31. See *Blakely* v. *Danbury Hospital*, 323 Conn. 741, 745, 150 A.3d 1109 (2016) ("[T]he subject matter jurisdiction of our appellate courts is limited by statute to appeals from final judgments . . . . [However], the

courts may deem interlocutory orders or rulings to have the attributes of a final judgment if they fit within either of the two prongs of the test set forth in [*Curcio*]." (Internal quotation marks omitted.)).

We begin by observing that § 52-196a does not expressly authorize an interlocutory appeal from a trial court's denial of a special motion to dismiss. The single subsection of that statute referencing interlocutory appeals, as we noted previously in this opinion, provides in relevant part: "The court shall stay all discovery upon the filing of a special motion to dismiss. The stay of discovery shall remain in effect *until the court grants or denies the special motion to dismiss and any interlocutory appeal thereof*. . . ." (Emphasis added.) General Statutes § 52-196a (d). The defendants concede, and we agree, that this isolated reference to an interlocutory appeal does not rise to the level of specificity required for an independent grant of appellate jurisdiction. Cf. General Statutes § 31-118 ("[w]hen any court or a judge thereof issues or denies a temporary injunction in a case involving or growing out of a labor dispute and either party is aggrieved . . . he may appeal from the final judgment of the court or of such judge to the Appellate Court at any time within two weeks of . . . such judgment"); General Statutes § 42-110h (order granting or denying class certification for class actions brought under Connecticut Unfair Trade Practices Act "shall be immediately appealable by either party"); General Statutes § 52-278*l* (a) (1) ("[a]n order . . . granting or denying a prejudgment remedy . . . shall be deemed a final judgment for purposes of appeal"); General Statutes § 54-63g (aggrieved accused person or state "may petition the Appellate Court for review of [an] order [concerning release]").

The text and legislative history of § 52-196a, however, also do not in any way suggest that the legislature intended

to *preclude* interlocutory appeals from denials of special motions to dismiss. See, e.g., *In re Tyriq T.*, 313 Conn. 99, 112–14, 96 A.3d 494 (2014) (examining legislative history and genealogy of General Statutes § 46b-127, and concluding that "the intent of the legislature [was] to prohibit an immediate appeal of a discretionary transfer order" from juvenile matters docket to regular criminal docket). As the plaintiffs argue, on the one hand, the reference in § 52-196a (d) to an "interlocutory appeal" very well could be a reference to a public interest appeal by application to the Chief Justice pursuant to § 52-265a, which does not require a final judgment. See, e.g., *Halladay* v. *Commissioner of Correction*, 340 Conn. 52, 67, 262 A.3d 823 (2021). The defendants suggest, on the other hand, that this language may also be an indirect reference to the availability of interlocutory review under *State* v. *Curcio*, supra, 191 Conn. 31. Either way, the fact that the legislature expressly provided for a stay of discovery during the pendency of an interlocutory appeal provides us with good reason to believe that the legislature, at the very least, did not intend to foreclose such review.

The absence of language expressly providing the defendants with a right to an interlocutory appeal does not, however, answer the question of whether a trial court's denial of a special motion to dismiss can nonetheless constitute an appealable final judgment. Indeed, it is well established that, "[a]lthough the legislature is free to make it clear in the language of a statute that an immediate appeal may be taken from an order of the court, the absence of such language is not determinative of whether such a right exists. . . . Rather, we presume that the legislature is aware of our [long-standing] final judgment jurisprudence. . . . Consequently, unless the legislature has made its intent clear regarding the appealability of an interlocutory order under a particular statute, our determination of whether that order

is immediately appealable hinges on whether the order meets the test articulated in *Curcio*." (Citations omitted.) *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, 279 Conn. 220, 238, 901 A.2d 1164 (2006); cf. *In re Tyriq T.*, supra, 313 Conn. 103 n.4 (declining to consider whether discretionary transfer orders are appealable final judgments under *Curcio* given that "the legislature has manifested a clear intent to prohibit interlocutory appeals" from such orders).

"We previously have determined . . . that certain interlocutory orders have the attributes of a final judgment and consequently are appealable under . . . § 52-263. . . . In *State* v. *Curcio*, [supra, 191 Conn. 31], we explicated two situations in which a party can appeal an otherwise interlocutory order: (1) [when] the order or action terminates a separate and distinct proceeding, or (2) [when] the order or action so concludes the rights of the parties that further proceedings cannot affect them. . . .

"The second prong of the *Curcio* test focuses on the nature of the right involved. It requires the parties seeking to appeal to establish that the trial court's order threatens the preservation of a right already secured to them and that that right will be irretrievably lost and the [party] irreparably harmed unless they may immediately appeal. . . . Thus, a bald assertion that the defendant will be irreparably harmed if appellate review is delayed until final adjudication . . . is insufficient to make an otherwise interlocutory order a final judgment. One must make at least a colorable claim that some recognized statutory or constitutional right is at risk." (Footnote omitted; internal quotation marks omitted.) *Sena* v. *American Medical Response of Connecticut, Inc.*, supra, 333 Conn. 41.

Our case law establishes that "[t]he key to appellate jurisdiction under the second prong of *Curcio* is not

so much that the right is already secured to a party; indeed, what is at issue in an appeal is the effect of the challenged order on the scope of the claimed right at issue. Rather, the second prong of *Curcio* boils down to whether, as a practical and policy matter, not allowing an immediate appeal will create irreparable harm insofar as allowing the litigation to proceed before the trial court will—in and of itself—function to deprive a party of that right." *Halladay* v. *Commissioner of Correction*, supra, 340 Conn. 62–63; see *Blakely* v. *Danbury Hospital*, supra, 323 Conn. 746 ("[t]he rationale for immediate appellate review is that the essence of the protection of immunity from suit is an entitlement not to stand trial or face the other burdens of litigation" (internal quotation marks omitted)).

Our recent decision in *Halladay* surveyed our final judgment case law under the second prong of *Curcio*. "Paradigmatic examples of such rights that require immediate vindication via an interlocutory appeal are double jeopardy violations resulting in successive prosecutions; see, e.g., *State* v. *Crawford*, 257 Conn. 769, 777, 778 A.2d 947 (2001), cert. denied, 534 U.S. 1138, 122 S. Ct. 1086, 151 L. Ed. 2d 985 (2002); collateral estoppel and res judicata; see, e.g., *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 328 n.3, 15 A.3d 601 (2011); and various immunities from suit. See, e.g., *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 787, 865 A.2d 1163 (2005) (absolute immunity for statements made in judicial and quasi-judicial proceedings); *Shay* v. *Rossi*, 253 Conn. 134, 166, 749 A.2d 1147 (2000) (colorable claim to state's sovereign immunity is appealable final judgment because that 'doctrine protects against suit as well as liability—in effect, against having to litigate at all'), overruled in part on other grounds by *Miller* v. *Egan*, 265 Conn. 301, 828 A.2d 549 (2003); see also *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, supra,

[279 Conn.] 233–34 (denial of motion for prepleading security by unauthorized insurer pursuant to General Statutes § 38a-27 (a) is appealable under second prong of *Curcio* because, 'once the trial has concluded, the court will be unable to restore to the plaintiffs either their right to have the defendants post security or their right to obtain a default judgment against the defendants') . . . ." (Citation omitted.) *Halladay* v. *Commissioner of Correction*, supra, 340 Conn. 63–64; see *Sena* v. *American Medical Response of Connecticut, Inc.*, supra, 333 Conn. 52 (legislature intended protections under state of emergency statute, General Statutes § 28-13, to provide political subdivisions of state with "immunity from suit and not just immunity from liability," thereby rendering denial of motion for summary judgment appealable final judgment).

The defendants contend that § 52-196a confers a right independent of the first amendment itself, namely, a right to avoid the costly and onerous litigation process altogether as a consequence of the exercise of their first amendment rights.[11] In considering the nature of the right conferred by the anti-SLAPP statute for final judgment purposes, we find particularly instructive the legislative history of § 52-196a. See, e.g., *U.S. Bank National Assn.* v. *Crawford*, 333 Conn. 731, 733–34, 743, 219 A.3d 744 (2019) (considering whether issue was

[11] Our determination of whether there is an appealable final judgment in the present case turns in part on whether the anti-SLAPP statute confers a right *independent* of the first amendment itself. The first amendment provides immunity from liability, and we have previously held that immunity from liability is not appealable under *Curcio*. See *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, supra, 279 Conn. 232 ("There is a crucial distinction to be drawn between a right not to be tried and a right [the] remedy [of which] requires the dismissal of charges. . . . The former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial. The latter does not." (Internal quotation marks omitted.)).

matter of public importance in determining whether denial of foreclosure committee's motion for fees and expenses because of automatic bankruptcy stay was immediately appealable); see also *Lafferty* v. *Jones*, 336 Conn. 332, 382 n.36, 246 A.3d 429 (2020) (purpose of § 52-196a is "instructive" in determining scope of trial court's discretion to order limited discovery in connection with special motion to dismiss), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021).

Then Representative William Tong, the sponsor of the bill in the House of Representatives that became § 52-196a, explained that the anti-SLAPP[12] statute was intended to address "situations in which people have spoken out on matters of public concern including the press and we've seen situations [in which] people file litigation. *There appears to be no basis to that litigation but it's designed to chill free speech and the expression of constitutional rights and so this* [*legislation*] *provides for a special motion to dismiss so that early in the process somebody who's speaking and exercis*[*ing*] [*his or her*] *constitutional rights can try to dismiss a frivolous or abusive claim that has no merit and* [*short-circuit*] *a litigation* [*when*] *it might otherwise*

[12] Historically, the term "SLAPP," or "strategic lawsuit against public participation," appears to have been coined in 1988, when it "was used in two separate scholarly articles," in which the authors, Professors Penelope Canan and George W. Pring, "posited that there was a nationwide trend in which large commercial interests utilized litigation to intimidate citizens who otherwise would exercise their constitutionally protected right to speak in protest against those interests. The scholars asserted that the goal of such litigation was not to prevail, but to silence or intimidate the target, or to cause the target sufficient expense so that he or she would cease speaking out. . . . [S]een in this stark light, SLAPP suits are an improper use of our courts." *LoBiondo* v. *Schwartz*, 199 N.J. 62, 85–86, 970 A.2d 1007 (2009), citing P. Canan & G. Pring, "Strategic Lawsuits Against Public Participation," 35 Soc. Probs. 506 (1988), and P. Canan & G. Pring, "Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative and Qualitative Approaches," 22 Law & Society Rev. 385 (1988).

cost a great deal of money to continue to prosecute. We think it's an important measure . . . to promote free speech and reporting by our news organizations as well."[13] (Emphasis added.) 60 H.R. Proc., Pt. 16, 2017 Sess., pp. 6879–80; see id., p. 6884, remarks of Representative Tong (describing "a significant amount of resources" expended by local news organization to defend against frivolous defamation actions); id., pp. 6924–25, remarks of Representative Tong (describing anti-SLAPP statute as "focused on this phenomenon of fake news or alternative facts" and ensuring that "no person, no developer, no interest group, [and] no private party that has substantial resources [is] able to abuse the litigation process and leverage our court system to shut people down and to do so by accusing them of peddling fake news or . . . [alternative] facts"). In explaining the reach of the anti-SLAPP statute beyond just news organizations, Representative Tong stated that real estate developers often filed false defamation claims to "bully" private citizens speaking out against proposed projects, in order "to spend down" the objector and to "try to use the litigation process to pressure them into standing down."[14] Id., p. 6901; see id., pp. 6901–6902, remarks of

[13] The proceedings in the Senate on the anti-SLAPP statute were similar to those in the House of Representatives. Speaking in support of the bill, Senator Paul R. Doyle described the special motion to dismiss as intended "to assist people [who] are sued on [the basis of] their free speech rights to have a means to quickly get rid of frivolous lawsuits." 60 S. Proc., Pt. 6, 2017 Sess., p. 2235. He described it as "a mechanism that can save money for defendants that are wrongly targeted for simply exercising their rights . . . on the [first] [a]mendment and other matters of public concern." Id., pp. 2235–36, remarks of Senator Doyle; see id., pp. 2236–37, remarks of Senator John A. Kissel (describing high costs of litigation and anti-SLAPP statute as response to "someone with a lot of money [who] wants to develop property . . . [or] wants to shut down newspaper[s] or broadcasters or anything like that, or just people [who] . . . if you mention their name they file a lawsuit and just hope for the best").

[14] In the property development context, one court has aptly described SLAPP suits as a "figurative litigation 'asteroid,' " stating that "the [a]nti-SLAPP statute aims to remedy the [fallout] from the unwarranted maintenance of litigation launched to deter, punish or intimidate efforts at critical

Representative Richard A. Smith ("I . . . would hate to see somebody's right to free speech and their right to contest a hearing—whatever it might be on a zoning level or anywhere else—to have that right stymied just because somebody else has a bigger pocket book").

Most significant, in responding to a question from Representative Smith about how much time a trial court would have to rule on a special motion to dismiss under the anti-SLAPP statute, Representative Tong emphasized the nature of the statutory right. He observed that "[t]ime is of the essence" because the special motion to dismiss is "an extraordinary remedy and you want to make sure that it is dispatched as quickly as possible *to avoid . . . undue litigation and abuse of the process* as . . . the cost of litigation is ever more expensive and at an hourly rate when the meter's running, it can get pretty high pretty quickly, particularly on early motion practice and particularly in civil practice, so . . . we want to try to avoid that, particularly when you're dealing with an individual citizen who's just trying to speak on [a] matter of public concern. You don't want to run the bills up so that it becomes prohibitive for them to vindicate their rights."[15] (Emphasis added.)

public comment and participation in governmental proceedings involving the [suit bringer's] interests. Thus, metaphorically, the [wrongfully brought] litigation, within the scope of the statute, is akin to a 'killer asteroid' intended to make extinct the complaints and complainants opposing the plaintiff's initiatives that require governmental approval." *MCB Woodberry Developer, LLC* v. *Council of Owners of Millrace Condominium, Inc.*, 253 Md. App. 279, 287, 265 A.3d 1140 (2021).

[15] To this end, Representative Tong stated that the usual 120 day rule would continue to apply to the trial court's decision on the pending special motion to dismiss; see 60 H.R. Proc., supra, p. 6920; see also General Statutes § 51-183b; but also indicated his "hope" and "expect[ation] that the court would act before then . . . . I think the reason why it says as soon as practicable in [§ 52-196a (e) (4)] is because of the constitutional rights implicated . . . . They're important. It's important to vindicate those rights often because when you're speaking on a matter of public concern or you're

Id., pp. 6921–22. Representative Tong went on to describe the nature of the special motion to dismiss proceeding under § 52-196a as a "substantial hearing" or a "[mini-trial] at the outset," akin to that for a prejudgment remedy. Id., p. 6945.

The purpose of the "extraordinary remedy" provided by the anti-SLAPP statute persuades us that its substantive benefit—a right to avoid costly and burdensome litigation on the merits—would be lost if defendants were required to litigate putative SLAPP cases to conclusion following the erroneous denial of a special motion to dismiss.[16] Id., p. 6921, remarks of Representative Tong. The statute's extensive legislative history indicates that the legislature was particularly concerned about defendants laboring under the burden of having to defend against SLAPP suits, which are by definition frivolous and oppressive, as a consequence of having exercised their first amendment rights. This renders the benefit conferred by the anti-SLAPP statute analogous to other statutory and common-law rights to avoid litigation on the merits—such as double jeopardy, collateral estoppel, res judicata, and absolute or sovereign immunity—which this court has deemed to qualify as final judgments under § 52-263 and *Curcio* because they cannot be vindicated by an appeal following the conclusion of trial before the trial court. See, e.g., *Halladay* v. *Commissioner of Correction*, supra, 340 Conn. 63–64 (citing cases).

trying to exercise a right to associate or petition the government, it's time sensitive." 60 H.R. Proc., supra, p. 6921.

[16] The plaintiffs argue that the statute's legislative history makes it clear that its purpose is to provide only a procedural means for short-circuiting litigation. We acknowledge that the anti-SLAPP statute provides a procedural mechanism to stay discovery and to dismiss a lawsuit before discovery ensues. The statute, however, creates this procedural mechanism to achieve an important substantive goal, namely, protecting the parties from expensive

Indeed, the right to speak freely without reprisal from frivolous and burdensome lawsuits, protected by § 52-196a, is particularly analogous to a trial court's denial of a claim of collateral estoppel; see, e.g., *Convalescent Center of Bloomfield, Inc.* v. *Dept. of Income Maintenance*, 208 Conn. 187, 195, 544 A.2d 604 (1988); and denials of summary judgment on the basis of the common-law absolute immunity accorded to participants in judicial and quasi-judicial proceedings; see *Chadha* v. *Charlotte Hungerford Hospital*, supra, 272 Conn. 786–87; both of which this court has held to be appealable under the second prong of *Curcio*. In *Convalescent Center of Bloomfield, Inc.*, this court considered whether a trial court's order rejecting the defendant's claim of collateral estoppel and remanding the case for further administrative proceedings was ripe for appellate review. See *Convalescent Center of Bloomfield, Inc.* v. *Dept. of Income Maintenance*, supra, 192. In concluding that the trial court's denial of a claim of collateral estoppel was appealable under the second prong of *Curcio*, we held that, "[i]f the defendant is correct that the plaintiffs are precluded from relitigating their entitlement to reimbursement, it would be *unfair to require the defendant to expend its resources to defeat the plaintiffs' claims on the merits*. We have held an interlocutory order to be final for purposes of appeal if it involves a claimed right the legal and practical value of which would be destroyed if it were not vindicated before trial. . . . In this respect, the defense of collateral estoppel is a civil law analogue to the criminal law's defense of double jeopardy, *because both invoke the right not to have to go to trial on the merits*. Like the case of a denial of a criminal defendant's colorable double jeopardy claim, [when] immediate appealability is well established . . . the . . . judgment denying the

and time-consuming lawsuits on the merits. In that sense, the statute provides an "expedited off-ramp" for a party to avoid further litigation.

defendant's claim of collateral estoppel is a final judgment." (Citations omitted; emphasis added; internal quotation marks omitted.) Id., 194–95.

Likewise, our holding in *Chadha* that there was an appealable judgment under *Curcio*'s second prong was "dictated by the underlying purpose of the immunity afforded at common law to those who provide information in connection with judicial and quasi-judicial proceedings, namely, that in certain situations the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements. . . . Put simply, absolute immunity furthers the public policy of encouraging participation and candor in judicial and quasi-judicial proceedings. *This objective would be thwarted if those persons whom the common-law doctrine was intended to protect nevertheless faced the threat of suit.*" (Citation omitted; emphasis added; internal quotation marks omitted.) *Chadha* v. *Charlotte Hungerford Hospital*, supra, 272 Conn. 786–87; see, e.g., *Dayner* v. *Archdiocese of Hartford*, 301 Conn. 759, 770–72, 23 A.3d 1192 (2011) (concluding that denial of motion to dismiss employment discrimination action based on first amendment ministerial exception was appealable final judgment because "the very act of litigating a dispute that is subject to the ministerial exception would result in the entanglement of the civil justice system with matters of religious policy, making the discovery and trial process itself a first amendment violation"). But cf. *Harger* v. *Odlum*, 153 Conn. App. 764, 770–71, 107 A.3d 430 (2014) (denial of motion to dismiss medical malpractice action based on failure to file proper opinion letter required by General Statutes § 52-190a was not appealable final judgment under second prong of *Curcio* because "the defendant [did] not [allege] that health care professionals have any statu-

tory or constitutional right already secured to them that *shields them from litigation* akin to the right against double jeopardy or the other types of immunity from suit in the civil context" (emphasis added)).

Put differently, the purpose of the special motion to dismiss under § 52-196a puts it squarely within the category of second prong *Curcio* cases, such as *Convalescent Center of Bloomfield, Inc.*, and *Chadha*, pursuant to which "a colorable claim to a right to be free from an action is protected from the immediate and irrevocable loss that would be occasioned by having to defend an action through the availability of an immediate interlocutory appeal from the denial of a motion to dismiss. . . . The rationale for immediate appellate review is that the essence of the protection of immunity from suit is an *entitlement not to stand trial or face the other burdens of litigation*." (Citation omitted; emphasis added; internal quotation marks omitted.) *Blakely* v. *Danbury Hospital*, supra, 323 Conn. 746. The anti-SLAPP statute affords a defendant a substantive right to avoid litigation on the merits that can be costly and burdensome, and this is undoubtedly a right that would be abrogated if not vindicated by an immediate appeal.[17]

We are further persuaded that a denial of a special motion to dismiss under § 52-196a is an immediately

[17] The dissent places significant emphasis on the fact that the legislature has not expressly provided for a right to an immediate appeal in our anti-SLAPP statute. See part IV A of the dissenting opinion. We disagree. To reiterate, the fact that § 52-196a does not itself provide an express right of appellate jurisdiction does not thereby foreclose our inquiry under our final judgment jurisprudence set forth in *State* v. *Curcio*, supra, 191 Conn. 31. By definition, an analysis under the *Curcio* test is *only* ever required in cases in which the legislature has not expressly provided a right to interlocutory appeal within the statute at issue. See, e.g., *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, supra, 279 Conn. 238 ("Although the legislature is free to make it clear in the language of a statute that an immediate appeal may be taken from an order of the court, the absence of

appealable final judgment because of the statute's provision on attorney's fees. The legislature has provided in subsection (f) (1) of the statute that, "[i]f the court grants a special motion to dismiss under this section, the court shall award the moving party costs and reasonable attorney's fees, including such costs and fees incurred in connection with the filing of the special motion to dismiss." General Statutes § 52-196a (f) (1). If a trial court improperly denies a special motion to dismiss, but the moving party cannot challenge that improper denial in an immediate appeal, a moving party will not be able to vindicate its entitlement to such an award until after a resolution of the merits in its favor. It would be inefficient to require the defendant, after prevailing on the merits before the trial court, to then file an appeal, in which the sole claim would be that the trial court improperly denied a motion to dismiss at the very outset of the case.

We disagree with the plaintiffs' contention that permitting interlocutory appeals in this context will open the floodgates to endless appeals from denials of special motions to dismiss under § 52-196a.[18] First, a defendant who files a special motion to dismiss that is deemed "frivolous and solely intended to cause unnecessary

such language is not determinative of whether such a right exists. . . . Rather, we presume that the legislature is aware of our [long-standing] final judgment jurisprudence. . . . Consequently, unless the legislature has made its intent clear regarding the appealability of an interlocutory order under a particular statute, our determination of whether that order is immediately appealable hinges on whether the order meets the test articulated in *Curcio*." (Citations omitted.)). In deciding whether an order meets the test set forth in *Curcio*, we previously have considered—as we consider today—among other things, a statute's purpose and legislative history, our own and other courts' final judgment jurisprudence, and public policy. See, e.g., id., 232–38; see also, e.g., *U.S. Bank National Assn.* v. *Crawford*, supra, 333 Conn. 743; *Sena* v. *American Medical Response of Connecticut, Inc.*, supra, 333 Conn. 46–52.

[18] The plaintiffs correctly observe that this form of argument is best understood as a policy consideration to be weighed by courts in determining

delay" risks liability for an award of attorney's fees and costs pursuant to § 52-196a (f) (2). This potential sanction provides a significant disincentive to a defendant to file an immediate appeal from the denial of a motion to dismiss because he or she may incur additional responsibility for attorney's fees and costs incurred by a plaintiff in defending that appeal.[19] Second, defendants who have failed to prevail on a special motion to dismiss already have an inherent interest in pursuing the most efficient resolution of the suit brought against them. Unfounded interlocutory appeals would, in most cases, only serve to increase the duration of the proceeding and the cost of the defense. Third, the existing rules of practice permit a court to "impos[e] sanctions" for the "[p]resentation of a frivolous appeal or frivolous issues on appeal." Practice Book § 85-2 (5). Courts are permitted to impose "appropriate discipline" on offenders, including a prohibition against appearing in court "for a reasonable and definite period of time" and "costs and payment of expenses, together with attorney's fees to the opposing party." Practice Book § 85-2. Accordingly, a party who loses a special motion to dismiss under § 52-196a in the trial court will risk the imposition of sanctions by the court if the party thereafter brings a frivolous and meritless appeal from the trial court's denial of a special motion to dismiss.

whether a final judgment exists under the second prong of *Curcio*. See *U.S. Bank National Assn.* v. *Crawford*, supra, 333 Conn. 745–46.

[19] The legislative history of the anti-SLAPP statute bears out the importance of the attorney's fees provision in ensuring the appropriate use of the special motion to dismiss. Representative Tong described the attorney's fees provision as a measure against "the very frivolousness that the statute is designed to avoid or deter" because the special motion to dismiss is "an extraordinary remedy . . . to terminate a litigation early"; he emphasized that, "if a party avails [itself] of this process [it] should do so in good faith as well and have a good basis for doing so, so . . . the attorney's fees provision is a check on the parties because of the extraordinary nature of the relief sought to ensure that . . . the parties do so in good faith and don't waste the court's

Our *Curcio* jurisprudence also renders a flood of frivolous interlocutory appeals unlikely. The dispositive inquiry into whether the denial of a special motion to dismiss under § 52-196a is an appealable final judgment under the second prong of *Curcio* is whether the defendant can assert a *colorable claim* of a right to avoid litigation under the anti-SLAPP statute.[20] An appellate court will first have to address "the jurisdictional threshold inquiry of whether the [defendant] has a colorable claim" of a right to avoid litigation under the statute. *In re Santiago G.*, 325 Conn. 221, 231, 157 A.3d 60 (2017). If colorability exists, then the inquiry will focus on "whether the trial court's judgment . . . was proper, namely, the merits of the . . . claim . . . ." Id.; see id., 232 ("[O]n appeal, two separate inquiries must be made. First, the court must determine whether the trial court's decision . . . is a final judgment for jurisdictional purposes; if it is not, then the appeal must be dismissed. . . . If the court determines that the trial court's decision is a final judgment, then it properly has subject matter jurisdiction to analyze and render a decision as to the parties' claims . . . ." (Citation omitted.)). Noncolorable appeals from the denial of a special motion to dismiss, like other noncolorable appeals, will continue to be subject to dismissal for lack of a final judgment. See, e.g., *State* v. *Crawford*, supra, 257 Conn. 776–77, 781 (dismissing appeal because defendant did not present colorable claim of double jeopardy to support availability of interlocutory appeal); *Clark* v. *Clark*, 115 Conn. App. 500, 510, 974 A.2d 33 (2009) (dismissing appeal for lack of final judgment because would-be intervenor did not make colorable claim to intervention

time." 60 H.R. Proc., supra, pp. 6911–12; see id., pp. 6955–56, remarks of Representatives Tong and Craig Fishbein (discussing purpose of mandatory attorney's fees provision).

[20] As we discuss subsequently in this opinion, colorability requires only a superficially well founded claim of a right to avoid litigation under the

as matter of right). This colorability inquiry will serve to weed out frivolous appeals from being reviewed on the merits and to prevent the appellate floodgates from opening.[21]

Finally, our conclusion is consistent with a wealth of federal and sister state case law that applies a *Curcio*-esque analysis[22] in holding that an interlocutory appeal lies from the denial of a special motion to dismiss a SLAPP suit.[23] Most significant, our sister states have

anti-SLAPP statute. See, e.g., *In re Santiago G.*, 325 Conn. 221, 231, 157 A.3d 60 (2017).

[21] As our appellate courts start to address the substantive provisions of the anti-SLAPP statute, the reach and the applicability of the statute will become clearer. This will also allow the dividing line between colorable and noncolorable claims that a trial court improperly denied a motion to dismiss to become more discernable. Importantly, then, defendants considering an appeal from a denial of a special motion to dismiss will have guidance in making that determination as our jurisprudence develops.

[22] An examination of federal and sister state case law is particularly instructive with respect to the jurisdictional issue before us because the legislative history of our anti-SLAPP statute signifies that it was modeled after anti-SLAPP statutes that came before it in other states. Senator John A. Kissel noted that Connecticut's anti-SLAPP statute "is a compilation of some of the best laws . . . from throughout the United States" and that "[w]e are not the first state to move in this direction . . . ." 60 S. Proc., Pt. 6, 2017 Sess., p. 2236. Likewise, Representative Tong, advocating for the passage of Connecticut's anti-SLAPP statute, noted that "twenty-nine other states have adopted . . . legislation very similar to the construct we have here." 60 H.R. Proc., supra, p. 6884.

[23] In addition to the decisions discussed subsequently in this opinion, we note that numerous other states have enacted legislation specifically providing for interlocutory appeals of denials of anti-SLAPP special motions to dismiss. See, e.g., *Benton* v. *Benton*, 39 Cal. App. 5th 212, 216–18, 252 Cal. Rptr. 3d 118 (2019) (noting that legislature provided for interlocutory appeal from denial of special motion to strike under California's anti-SLAPP statute, Cal. Civ. Proc. Code § 425.16 (i), with commercial speech exception provided by Cal. Civ. Proc. Code § 425.17 (e)), review denied, California Supreme Court, Docket No. S258466 (November 26, 2019); *Geer* v. *Phoebe Putney Health System, Inc.*, 310 Ga. 279, 280, 282–85, 849 S.E.2d 660 (2020) (discussing interlocutory appeal procedure under Georgia's anti-SLAPP statute, Ga. Code Ann. § 9-11-11.1 (e)); *Stark* v. *Lackey*, 136 Nev. 38, 39 n.1, 458 P.3d 342 (2020) (discussing Nevada's anti-SLAPP statute, Nev. Rev. Stat. § 41.670 (4), which makes denial of special motion to dismiss "independently appealable" via interlocutory appeal to Nevada Supreme Court); *Cordova* v. *Cline*, 396 P.3d 159, 163–65 (N.M. 2017) (concluding that interlocutory

found denials of motions to dismiss under their respective anti-SLAPP statutes to be appealable under jurisprudence that mirrors the second prong of *Curcio*, even in the absence of express language in the statute providing a right to an interlocutory appeal. In *Fabre* v. *Walton*, 436 Mass. 517, 781 N.E.2d 780 (2002), the Massachusetts Supreme Judicial Court held that the denial of a special motion to dismiss under the commonwealth's anti-SLAPP statute was appealable under the "doctrine of present execution," which is an exception to the commonwealth's common-law final judgment rule that mirrors the second prong of *Curcio*.[24] Id., 521; see id. (under exception for "the doctrine of present execution . . . immediate appeal of an interlocutory order is allowed

appeal provided by New Mexico's anti-SLAPP statute, N.M. Stat. Ann. § 38-2-9.1, is available to parties regardless of whether they have pending counterclaims); *Steidley* v. *Community Newspaper Holdings, Inc.*, 383 P.3d 780, 782 (Okla. Civ. App. 2016) (discussing Okla. Stat. Ann. tit. 12, § 1437, "which provides a specific right to appeal the denial of a motion to dismiss brought pursuant to the Oklahoma Citizens Participation Act"); *Penllyn Greene Associates, L.P.* v. *Clouser*, 890 A.2d 424, 432 n.8 (Pa. Commw. 2005) (noting right to "an interlocutory appeal as of right" from denial of special motion to dismiss based on "immunity" under Pennsylvania's anti-SLAPP statute, 27 Pa. Stat. and Cons. Stat. Ann. § 8303), appeal denied, 591 Pa. 719, 919 A.2d 960 (2007); *Nandigam Neurology, PLC* v. *Beavers*, 639 S.W.3d 651, 663–64 (Tenn. App. 2021) (noting that Tennessee's anti-SLAPP statute, Tenn. Code Ann. § 20-17-106, provides express right to interlocutory appeal to intermediate appellate court from denial or grant of special motion to dismiss); *In re Lipsky*, 460 S.W.3d 579, 585–86 n.2 (Tex. 2015) (noting that Texas legislature amended interlocutory appeal statute, Tex. Civ. Prac. & Rem. Code Ann. § 51.014, to make denials of special motions to dismiss appealable in light of conflicting decisions on that point from that state's intermediate appellate courts); cf. *Ryan* v. *Fox Television Stations, Inc.*, 979 N.E.2d 954, 958–59 n.1 (Ill. App. 2012) (discussing Ill. Sup. Ct. R. 306 (a) (9), which invoked Illinois Supreme Court's authority under Illinois constitution to allow interlocutory appeals from denials of special motions to dismiss under anti-SLAPP statute).

[24] Massachusetts' anti-SLAPP statute is similar to ours. It provides "a procedural remedy that permits the defendant in a SLAPP suit to file a 'special' motion to dismiss early in the litigation, which a judge shall grant, 'unless the party against whom such special motion is made shows that: (1) the moving party's exercise of its right to petition was devoid of any reasonable factual support or any arguable basis in law and (2) the moving party's acts caused actual injury to the responding party.' [The statute] also

if the order will interfere with rights in a way that cannot be remedied on appeal from the final judgment"). The court observed that the anti-SLAPP "statute provides broad protections for individuals who exercise their right to petition from harassing litigation and the costs and burdens of defending against retaliatory lawsuits. . . . In this regard, they are similar in purpose to the protections afforded public officials by the doctrine of governmental immunity." (Citation omitted; footnote omitted.) Id., 520. Analogizing the anti-SLAPP statute's protections to the commonwealth's governmental immunity from suit, under which "[i]nterlocutory orders . . . are appealable pursuant to the doctrine of present execution"; id., 521; the court concluded that "the denial of a special motion to dismiss interferes with rights in a way that cannot be remedied on appeal from the final judgment. The protections afforded by the anti-SLAPP statute against the harassment and burdens of litigation are in large measure lost if the [defendant] is forced to litigate a case to its conclusion before obtaining a definitive judgment through the appellate process. Accordingly . . . there is a right to interlocutory appellate review from the denial of a special motion to dismiss filed pursuant to the anti-SLAPP statute." Id., 521–22; see *Blanchard* v. *Steward Carney Hospital, Inc.*, 483 Mass. 200, 212–13, 130 N.E.3d 1242 (2019) (reaffirming *Fabre* and observing that "[t]he doctrine of present execution . . . applies to anti-SLAPP cases in order to preserve a moving party's 'immunity' from being required to litigate a SLAPP suit"); see also *Morse Bros., Inc.* v. *Webster*, 772 A.2d 842, 848 (Me. 2001) (The court recognized the exception to the common-law final judgment rule in the case of a denial of a special motion to dismiss because "[p]recluding the moving party from appealing a decision on the motion would result in

include[s] the automatic stay of discovery [upon] the filing of a special motion to dismiss." *Fabre* v. *Walton*, supra, 436 Mass. 520.

continued litigation, which is the precise harm that the [anti-SLAPP] statute seeks to prevent. In these circumstances, the cost and delay of litigating the claim does constitute 'a loss of substantial rights or permanent foreclosure of relief.' ");[25] cf. *Gundel* v. *AV Homes, Inc.*, 264 So. 3d 304, 310–11 (Fla. App. 2019) (granting discretionary certiorari review to allow interlocutory appeal from denial of special motion to dismiss because harm of improper denial could not be remedied on appeal after final judgment, insofar as "the [a]nti-SLAPP statute bears some similarity to statutes providing for immunity from suit [when] the statutory protection cannot be adequately restored once it is lost through litigation and trial").[26] But see *Cedar Green Land Acquisition, LLC* v. *Baker*, 212 S.W.3d 225, 228 (Mo. App. 2007) (holding that denial of special motion to dismiss was not appealable because anti-SLAPP statute lacked "specific language" conferring right to interlocutory appeal).

[25] Maine's anti-SLAPP statute, which is also similar in its wording to our anti-SLAPP statute, provides in relevant part: "When a moving party asserts that the civil claims, counterclaims or cross claims against the moving party are based on the moving party's exercise of the moving party's right of petition under the Constitution of the United States or the Constitution of Maine, the moving party may bring a special motion to dismiss. . . . The court shall grant the special motion, unless the party against whom the special motion is made shows that the moving party's exercise of its right of petition was devoid of any reasonable factual support or any arguable basis in law and that the moving party's acts caused actual injury to the responding party. In making its determination, the court shall consider the pleading and supporting and opposing affidavits stating the facts upon which the liability or defense is based. . . ." Me. Rev. Stat. Ann. tit. 14, § 556 (2003). The statute then provides that "[a]ll discovery proceedings are stayed upon the filing of the special motion under this section, except that the court, on motion and after a hearing and for good cause shown, may order that specified discovery be conducted. The stay of discovery remains in effect until notice of entry of the order ruling on the special motion." Me. Rev. Stat. Ann. tit. 14, § 556 (2003).

[26] We note that the Florida Supreme Court has not conclusively determined whether, under Florida law, the denial of a special motion to dismiss creates irreparable harm for purposes of certiorari jurisdiction over interlocutory appeals. See *Geddes* v. *Jupiter Island Compound, LLC*, 341 So. 3d 353, 353 (Fla. App. 2022) (disagreeing with *Gundel* and certifying conflict to Florida

Similarly, the majority of the United States courts of appeals have deemed denials of special motions to dismiss under state anti-SLAPP statutes to be appealable under the collateral order doctrine identified by the United States Supreme Court in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949), which permits—pursuant to the federal appellate statutes, 28 U.S.C. §§ 1291 and 1292—the appeal of a "small class" of nonfinal orders that implicate a "substantial public interest" and are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated."[27] (Internal quotation marks omitted.) *Will* v. *Hallock*, 546 U.S. 345, 349, 353, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006). In so concluding, these courts have determined that the anti-SLAPP statutes at issue effectively created a substantive right to avoid litigation on the merits. See *Franchini* v. *Investor's Business Daily, Inc.*, 981 F.3d 1, 7, 8 n.6 (1st Cir. 2020) (surveying federal courts of appeals in holding that collateral order doctrine conferred jurisdiction over interlocutory appeal from "a

Supreme Court); *WPB Residents for Integrity in Government, Inc.* v. *Materio*, 284 So. 3d 555, 556 (Fla. App. 2019) (same); see also H. Blum, Note, "SLAPPing Back in Federal Court: Florida's Anti-SLAPP Statute," 76 U. Miami L. Rev. 345, 368 and n.160 (2021).

[27] Subsequent United States Supreme Court case law has established that, for an order to fall within the "small" and "narrow" class that qualifies for interlocutory review under the collateral order doctrine, it must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." (Internal quotation marks omitted.) *Will* v. *Hallock*, 546 U.S. 345, 349, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006). This court previously has deemed collateral order doctrine case law under *Cohen* instructive in our application of *Curcio*'s second prong. See *Melia* v. *Hartford Fire Ins. Co.*, 202 Conn. 252, 255–57, 520 A.2d 605 (1987) (relying on *Cohen* and concluding that discovery orders, including those implicating attorney-client privilege, are not appealable final judgments); see also *U.S. Bank National Assn.* v. *Crawford*, supra, 333 Conn. 744 ("we consider federal court decisions to be persuasive when we are considering

substantive decision" under Maine's anti-SLAPP law because (1) decision presented question "distinct from the merits of the action" given unique statutory procedure, (2) decision "implicate[d] important societal interests in both [f]irst [a]mendment protections for media outlets, and the substantive statutory rights created under Maine law," and (3) denial of special motion to dismiss was "also effectively unreviewable on appeal from a final order" insofar as defendant would be "denied meaningful relief if it must go through the time and expense of fully litigating [the] matter before it [could] address the anti-SLAPP issue"); *Los Lobos Renewable Power, LLC* v. *AmeriCulture, Inc.*, 885 F.3d 659, 666–67 (10th Cir.) (rejecting argument under *Cohen* that "the rights enshrined in New Mexico's anti-SLAPP statute could be protected after final judgment because they [did] not shield defendants from the burden of standing trial" because "the New Mexico anti-SLAPP statute aims to nip harassing litigation in the bud, thus protecting potential victims from the effort and expense of carrying on a frivolous lawsuit"), cert. denied, U.S. , 139 S. Ct. 591, 202 L. Ed. 2d 427 (2018); *NCDR, LLC* v. *Mauze & Bagby, PLLC*, 745 F.3d 742, 752 (5th Cir. 2014) (concluding that denial of special motion to dismiss filed pursuant to Texas anti-SLAPP statute was interlocutory appeal under collateral order doctrine because "[a] legislatively approved immunity from trial, as opposed to a mere claim of a right not to be tried, is imbued with a significant public interest," and "[i]t would be difficult to find a value of a high[er] order than the [constitutionally protected] rights to free speech and petition that are at the heart of [an] anti-SLAPP statute" (internal quotation marks omitted)); *Henry* v. *Lake Charles American Press, LLC*, 566 F.3d

the scope of [our] authority" to "treat appeals that are otherwise interlocutory in character as appeals from final judgments if they satisfy *Curcio*,"

164, 178, 180–81 (5th Cir. 2009) (holding that denial of special motion to dismiss filed pursuant to Louisiana's anti-SLAPP statute was appealable under collateral order doctrine because it "provide[s] defendants the right not to bear the costs of fighting a meritless defamation claim," statute's "importance weigh[ed] profoundly in favor appealability" because such statutes "aim to curb the chilling effect of meritless tort suits [challenging] the exercise of [f]irst [a]mendment rights," and interlocutory appeals "are more freely allowed" in free speech cases (internal quotation marks omitted)); C. Barylak, Note, "Reducing Uncertainty in Anti-SLAPP Protection," 71 Ohio St. L.J. 845, 880–81 (2010) (supporting interlocutory appeals from denials of special motions to dismiss insofar as "SLAPPs differ from other types of litigation because victory and defeat lie not in final judgment, but in the ability of one party to entangle the other in burdensome, frivolous litigation," and "[the] [p]rovision for immediate appeal is consistent with both the objectives of the collateral order doctrine and anti-SLAPP laws"). But see *Ernst* v. *Carrigan*, 814 F.3d 116, 119–22 (2d Cir. 2016) (order passing on merits of special motion to strike filed pursuant to Vermont's anti-SLAPP statute was not appealable under collateral order doctrine because it did not "resolve an important issue *completely separate from the merits* of the action" given that analysis of motion was "entangled in the facts" and elements of claims, and rejecting analogy to qualified immunity as not requiring fact based analysis (emphasis in original; internal quotation marks omitted)); *Metabolic Research, Inc.* v. *Ferrell*, 693 F.3d 795, 801–802 (9th Cir. 2012) (concluding that then effective version of Nevada's anti-SLAPP statute was not immediately appealable under collateral order doctrine given statutory language suggesting that it provided " 'immu-

despite lack of statutory discretionary jurisdiction such as that conferred by 28 U.S.C. § 1292 (b)).

nity from civil liability,' " in comparison to California statute that provided interlocutory state court appeal and immunity from suit).[28]

We deem these collateral order cases and scholarship particularly persuasive, insofar as § 52-196a renders the court's determination on a special motion to dismiss entirely independent of the merits of the case by providing that the "findings or determinations made" in connection with the hearing on that motion or the attorney's fee determination "shall not be admitted into evidence at any later stage of the proceeding or in any subsequent action." General Statutes § 52-196a (g). We conclude, therefore, that the denial of a special motion to dismiss based on a *colorable claim* of a right to avoid litigation under § 52-196a is an immediately appealable final judgment under the second prong of *Curcio*.

We next consider whether the defendants in the present case have asserted a colorable claim that they are entitled to protection under our anti-SLAPP statute, which is required to warrant a conclusion that the trial court's denial of their special motion to dismiss is appealable under *Curcio*. See *State* v. *Curcio*, supra, 191 Conn. 34. The defendants argue that they have

[28] We note that the Ninth Circuit also previously held that the then effective version of Oregon's anti-SLAPP statute did not create a right to an immediate appeal. See *Englert* v. *MacDonell*, 551 F.3d 1099, 1107 (9th Cir. 2009). In that case, the court found it particularly instructive that the Oregon legislature had not made any special provision in the statute, similar to that providing for an appeal in California's anti-SLAPP statute, for appellate relief from the denial of a motion to strike. See id., 1105–1106. The court held that "[t]his provide[d] compelling evidence that [Oregon's anti-SLAPP statute] was intended to do nothing more than provide the defendants with a procedural device to obtain prompt review by a nisi prius judge of the likelihood that the plaintiff would be able to come forward with sufficient evidence to get to a jury." Id., 1107. In contrast, our anti-SLAPP statute is not devoid of any reference to an appeal. In fact, although § 52-196a does not provide an express grant of an immediate appeal from denials of special motions to dismiss, the language in subsection (d) very well may indicate that the legislature intended for the availability of an immediate appeal

asserted a colorable claim under both the statute's "right of free speech" and "right of association" categories.

It is well established that "[a] colorable claim is one that is superficially well founded but that may ultimately be deemed invalid . . . . For a claim to be colorable, the defendant need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he *might* prevail." (Citation omitted; emphasis in original; internal quotation marks omitted.) *In re Santiago G.*, supra, 325 Conn. 231; see id., 233 ("our examination of whether a colorable claim exists focuses on the plausibility of the appellant's challenge to the denial of the motion to intervene when the pleadings and motion are viewed in light of the relevant legal principles"); *State* v. *Komisarjevsky*, 302 Conn. 162, 192–93, 25 A.3d 613 (2011) (*Zarella, J.*, concurring in part and dissenting in part) (trial court's granting of motion to vacate order sealing defendant's witness list was appealable final judgment because "[t]he facts in the record, all relied on by the majority in its analysis of the merits of the [claim]," established "a colorable claim that delay of appellate review threaten[ed] to abrogate his due process right to a fair trial"); *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, supra, 279 Conn. 236–37 n.16 ("[a]lthough we express no view regarding the ultimate merits of the plaintiffs' claim that they are entitled to prepleading security under § 38a-27 (a) . . . the plaintiffs have made a colorable claim that, contrary to the conclusion of the trial court, that statutory provision applies to their action against the defendants" (citations omitted)); *State* v. *Curcio*, supra, 191 Conn. 36 ("[u]ndoubtedly, [when] defendants make a colorable claim that a trial court proceeding subjects

under the auspices of *Curcio*. See *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, supra, 279 Conn. 237–38 (legislature is presumed to be aware of Connecticut's final judgment jurisprudence).

them to double jeopardy, they are entitled to have this challenge heard on appeal before trial").

On the basis of our review of the record, we conclude that the defendants have asserted a colorable claim that the conduct alleged in the complaint falls within the meaning of the phrase "right of association," as it is used in our anti-SLAPP statute. That statute defines the phrase "right of association" broadly to include any "communication among individuals who join together to collectively express, promote, pursue or defend common interests . . . ."[29] General Statutes § 52-196a (a) (4). Subsection (b) further requires that an exercise of the right of association be in connection with a "matter of public concern"; General Statutes § 52-196a (b); which, in turn, is defined in relevant part as "an issue related to (A) health or safety, (B) environmental, economic or community well-being . . . [or] (D) a public official or public figure . . . ."[30] General Statutes § 52-196a (a) (1). These categories are not further defined in the statute, but courts have generally held that speech on the topic of race relations or racial discrimination is "a matter inherently of public concern" under the first amendment. *Connick* v. *Myers*, 461 U.S. 138, 148 n.8, 103 S. Ct. 1684, 75 L. Ed. 2d 708 (1983); see, e.g., *Calvit* v. *Minneapolis Public Schools*, 122 F.3d 1112, 1117 (8th Cir. 1997) (criticism by employee of public

[29] "Although not expressly enumerated in the first amendment, the right of association has been recognized as a fundamental right under the first amendment as well. It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty [en]sured by the [d]ue [p]rocess [c]lause of the [f]ourteenth [a]mendment, which embraces freedom of speech." (Internal quotation marks omitted.) *State* v. *Bonilla*, 131 Conn. App. 388, 394, 28 A.3d 1005 (2011).

[30] Before the trial court, the defendants specifically argued that their rights under the anti-SLAPP statute were implicated because their conduct in posting the flyers around campus was related to a "matter of public concern" under (1) the "health or safety" category, (2) the "environmental, economic or community well-being" category, and (3) the "public official or public figure" category. General Statutes § 52-196a (1) (A), (B) and (D).

school's policy based on racial classification was matter of public concern under first amendment).

Before the trial court, the defendants argued that their conduct falls under the "community well-being" category because the statute's language warrants a broad reading of the term "community." In particular, they argued that the controversy concerning the club's recognition, on which the flyers commented, is a concern to, at the very least, both the Trinity community and the community surrounding it.[31]

Before this court, the defendants likewise argue that their claim under the right of association is colorable, and that the trial court erred with respect to the merits, because that category, as defined in § 52-196a (a) (4), does not require that the conduct take place in a public forum or impose a state action requirement. In support of this assertion, the defendants note that there is no express language in that definition imposing those requirements, in contrast to the "public forum" language in § 52-196a (a) (2).

We conclude that the defendants have asserted a colorable claim that their conduct in posting the flyers around campus, after the protests against the club's recognition began, constituted a "communication among" and with other students on campus who were joining together to pursue a "common interest," namely, preventing the club from being recognized and funded by the SGA, on a "matter of public concern." Indeed, the defendants in the present case have asserted a colorable claim that their conduct relates to topics of race relations and racial discrimination, as the flyers contain references to Smith's previous remarks on race and protest the club's recognition because of its affiliation

[31] The record indicates that, some time after the posting of the flyers, local news organizations, such as The Hartford Courant and WFSB-TV,

with Smith's remarks and sentiments. In other words, the defendants have a superficially well founded claim that their conduct relates to "community well-being."[32] Although we recognize that the defendants' claim under the right of association may ultimately be deemed to lack merit, we conclude that the defendants have "demonstrate[d] simply that [they] *might* prevail" under § 52-196a. (Emphasis in original; internal quotation marks omitted.) *State* v. *Crawford*, supra, 257 Conn. 776. Accordingly, we conclude that the defendants have asserted a colorable claim that they are entitled to a right to avoid litigation under the anti-SLAPP statute and, therefore, that the trial court's denial of their special motion to dismiss under § 52-196a constitutes an appealable final judgment under *Curcio*.[33]

The appeal is transferred to the Appellate Court for further proceedings according to law.

reported on the controversy surrounding the club and the response on campus. The record further indicates that, some time after the posting of the flyers, a petition seeking to prevent the club's formal recognition was circulated on the Internet for signatures.

[32] Regardless of whether "community" means the community at large or the campus community at Trinity, an issue we need not conclusively address for purposes of this appeal, the defendants have at a minimum asserted a colorable claim by describing the general newsworthiness of the controversy on and off of campus; see footnote 31 of this opinion; and that the controversy impacts both the campus and surrounding community. In addition, the defendants have at least a superficially well founded claim that, because the definition of "right of free speech" requires use of a "public forum," when the statutory definition of the "right of association" does not, the fact that Trinity is a private institution has no bearing on the analysis of the latter right under the first step of § 52-196a (e) (3). Similarly, the defendants also have asserted a colorable claim that the trial court erred in imposing a state action requirement under their right of association claim. The anti-SLAPP statute was created to target actions when, often times, the underlying dispute is between two private parties. See footnote 15 of this opinion and accompanying text. Indeed, the tort of defamation itself typically involves disputes between private parties, with the subject matter of the particular dispute dictating the scope of the first amendment protections warranted. See, e.g., *Gleason* v. *Smolinski*, 319 Conn. 394, 430–32, 125 A.3d 920 (2015).

[33] Because we conclude that the defendants have asserted a colorable claim under the "right of association" category on a matter relating to

In this opinion McDONALD, MULLINS and PRESCOTT, Js., concurred.

D'AURIA, J., with whom ECKER and ALEXANDER, Js., join, dissenting. Many states have passed what have come to be known as anti-SLAPP[1] statutes. Connecticut's legislature passed a version of this kind of statute in 2017. See General Statutes § 52-196a. A hallmark of these statutes is the availability of early court intervention to protect those who claim that a lawsuit has been filed against them in retaliation for their exercise of protected constitutional rights.[2] On an expedited basis and on a quickly assembled record, a trial judge serves as a gatekeeper, promptly weeding out and dismissing lawsuits that plainly have been filed for this illegitimate purpose.

When the legislature passed the legislation that became § 52-196a, it was not writing on a blank slate. Many state legislatures had already passed these kinds of statutes, and the legislative history of § 52-196a notes that we borrowed generously from these models. Some

"community well-being," we need not consider whether the conduct at issue may also constitute an exercise of the "right to free speech" or a "matter of public concern" relating to either "health or safety" or "public official[s] or public figure[s]," as defined in § 52-196a (a). Because the trial court's decision in the present case focused exclusively on the first step of the burden shifting analysis set forth in § 52-196a (e) (3), we likewise express no opinion as to whether the plaintiffs may ultimately succeed in showing that there is probable cause, considering all valid defenses, that they will prevail. See footnote 9 of this opinion.

[1] SLAPP stands for "strategic lawsuit against public participation . . . ." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 336 Conn. 332, 337 n.4, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021).

[2] A paradigmatic example of a SLAPP case is a "[lawsuit] directed at individual citizens of modest means for speaking publicly against [wealthy] development projects." (Internal quotation marks omitted.) *Demoulas Super Markets, Inc.* v. *Ryan*, 70 Mass. App. 259, 262, 873 N.E.2d 1168 (2007); see also, e.g., *Sipple* v. *Foundation for National Progress*, 71 Cal. App. 4th 226, 238, 83 Cal. Rptr. 2d 677 (1999), review denied, California Supreme Court, Docket No. S078979 (July 28, 1999).

of these other states' statutes, including those the legislature most conspicuously borrowed from, explicitly provided for an interlocutory appeal from the denial of an early motion, in Connecticut called a "special motion to dismiss." Some do not provide explicitly for an appeal. Still other legislatures amended their states' statutes to provide for an interlocutory appeal after a court had ruled that no such appeal was authorized.

Connecticut's statute does not explicitly provide for an interlocutory appeal. The majority today, however, finds authority for such an appeal in what should be a narrow avenue, doing so based on the second prong of the test adopted in *State* v. *Curcio*, 191 Conn. 27, 463 A.2d 566 (1983), which allows for an immediate appeal "[when] the order or action so concludes the rights of the parties that further proceedings cannot affect them." Id., 31. Even under the second prong of *Curcio*, though, we are obliged pursuant to General Statutes § 1-2z to take our cues from what the legislature has said about the "nature of the statutory right" at issue, as the majority phrases it. In my view, based on the statutory language and the available evidence of legislative intent, the majority's analysis does not abide by § 1-2z. Rather, I conclude that the defendants, Aaron Supple, Karen Montejo, Hendrick Xiong-Calmes and Giana Moreno, who were students at Trinity College in Hartford, have failed to establish that a right already secured to them will be irretrievably lost absent an immediate appeal.

We traditionally have "strictly construe[d]" the right to appeal; E. Prescott, Connecticut Appellate Practice & Procedure (5th Ed. 2016) § 2-1:1.2, p. 44; including the right to appellate review of interlocutory rulings. In my view, the legislature expects us to do exactly that. The legislature knows we will look for explicit statutory language authorizing an interlocutory appeal and for

"distinctive and unmistakable" language in defining a statutory right that might meet the strictures of the second prong of *Curcio*. *Trinity Christian School* v. *Commission on Human Rights & Opportunities*, 329 Conn. 684, 696, 189 A.3d 79 (2018). I do not believe that the defendants have established that, under § 1-2z and our case law, the legislature authorized us to hear appeals from these gatekeeper rulings. And I do not believe that, having opened the door to these appeals, they will be as easy to rule on and dispose of as the majority might expect. For all of the reasons that follow, I respectfully dissent.

I

I will assume familiarity with the details of the incidents that gave rise to this action, as aptly described in the majority opinion, and focus first on the trial court proceedings. Review of those proceedings provides an appropriate appreciation of the beneficial measures enacted in Connecticut's anti-SLAPP statute, § 52-196a, by which the legislature balanced the rights of plaintiffs who claim damages to pursue legal action in our courts; see Conn. Const., art. I, § 10;[3] and the rights of defendants who claim that the action is nothing more than retaliation for exercising their protected constitutional rights.

The plaintiffs, Gregory B. Smith, Nicholas Engstrom and The Churchill Institute, Inc., brought this action against the defendants on April 5, 2021, alleging libel per se, libel per quod, and negligent infliction of emotional distress. The defendants filed a "special motion to dismiss," arguing that, in the language of § 52-196a, the plaintiffs' claims were based on the defendants' exer-

[3] The constitution of Connecticut, article first, § 10, known as the "open courts provision" of the state constitution, provides in relevant part: "All courts shall be open, and every person, for an injury done to him in his person, property or reputation, shall have remedy by due course of law . . . ."

cise of their rights of free speech or association in connection with a matter of public concern under the first amendment to the United States constitution. As required by § 52-196a (c), the defendants filed their motion within thirty days of the return date.

The defendants' special motion to dismiss gave rise to an expedited trial court procedure. Specifically, pursuant to § 52-196a (d), the filing of the motion prompted a stay of discovery, which applies unless the court finds "specified and limited discovery relevant to the special motion to dismiss" necessary.[4] On July 21, 2021, after a condensed briefing period, the trial court conducted an expedited hearing on the motion.[5] The court issued a decision denying the motion on November 16, 2021, within the time our rules of practice afford for rulings on short calendar matters. See Practice Book § 11-19 (a) (court "shall issue a decision on such matter not later than 120 days from the date of such submission"); see also General Statutes § 52-196a (e) (4) (directing court to rule on special motion "as soon as practicable").

The trial court held that the defendants had failed to meet their burden under § 52-196a (e) (3) of demonstrating that the plaintiffs' complaint is based on the defen-

[4] It is not clear whether the parties undertook any discovery, but no order of the court permitting discovery appears in the record.

[5] Section 52-196a (e) (1) requires the court to hold a hearing no later than sixty days after the date of the filing of the special motion to dismiss, unless, among other things, the court, "for good cause shown, is unable to schedule the hearing during the sixty-day period."

July 19, 2021, would have been the sixtieth day after the defendants filed their special motion. At a time when the courts were still hampered by COVID-19 restrictions and hearing most matters remotely, the trial court in this matter recognized that the legislature directed that the court make these motions a priority and heard the parties with admirable dispatch on the sixty-second day after the defendants filed their motion. As contemplated by § 52-196a (e) (2), both parties attached affidavits to their submissions. It does not appear that the trial court took any evidence, but the defendants asked the court to take judicial notice of the Trinity College student handbook.

dants' right to free speech because their communications at Trinity College were not made in a "public forum," as required under § 52-196a (a) (2).[6] The trial court further held that a private college, like Trinity College, was not a state actor for purposes of triggering first amendment protections under the federal constitution.

The defendants filed an appeal, which the Appellate Court promptly stayed, awaiting a decision in *Pryor* v. *Brignole*, 336 Conn. 933, 248 A.3d 3 (2021), in which we had certified the issue of whether a denial of a special motion to dismiss is immediately appealable. We transferred the defendants' appeal to this court for consideration along with *Pryor* and *Robinson* v. *V. D.*, Docket No. SC 20731, an appeal that the Appellate Court had also stayed and that we had also transferred because it implicated the same threshold jurisdictional issue.

II

It is well established that, ordinarily, the denial of a motion to dismiss—even on jurisdictional grounds, which was not the basis of the defendants' special motion—is an interlocutory ruling, not a final judgment for purposes of appeal. See, e.g., *In re Teagan K.-O.*, 335 Conn. 745, 754, 242 A.3d 59 (2020). Nor is the denial of a motion for summary judgment or a motion to strike ordinarily an appealable final judgment. See, e.g., *Lighthouse Landings, Inc.* v. *Connecticut Light & Power Co.*, 300 Conn. 325, 328 n.3, 15 A.3d 601 (2011) (motion for summary judgment); *White* v. *White*, 42 Conn. App. 747, 749, 680 A.2d 1368 (1996) (motion to strike).

The constitutional nature of the defense the defendants have posed in the present case compels no differ-

[6] Section 52-196a (a) (2) defines " '[r]ight of free speech' " as "communicating, or conduct furthering communication, in a *public forum* on a matter of public concern . . . ." (Emphasis added.)

ent result. This is because it is also well established that the right to free speech protected by the first amendment confers an immunity from liability, which may be raised as a defense; see, e.g., *Gleason* v. *Smolinski*, 319 Conn. 394, 406–407, 125 A.3d 920 (2015); see also *Snyder* v. *Phelps*, 562 U.S. 443, 451–52, 131 S. Ct. 1207, 179 L. Ed. 2d 172 (2011); and, if unsuccessful, may be appealed upon the entry of an adverse final judgment. See, e.g., *Segni* v. *Commercial Office of Spain*, 816 F.2d 344, 345 (7th Cir. 1987) ("[i]t's quite a leap . . . to say that anytime a motion to dismiss on [f]irst [a]mendment grounds is denied, the defendant can appeal the denial, on the theory that the failure to dismiss the suit at the earliest opportunity is itself an infringement of the defendant's [f]irst [a]mendment rights").

Therefore, the defendants do not dispute, and the majority concedes, that, prior to January 1, 2018, the effective date of No. 17-71, § 1, of the 2017 Public Acts (P.A. 17-71), codified at § 52-196a, the defendants' constitutional rights to free speech provided them not with immunity from suit but only with immunity from liability for claims premised on the exercise of those rights. It follows that, before the passage of § 52-196a and today's majority decision, a defendant's unsuccessful motion (to dismiss, to strike, or for summary judgment) based on a first amendment defense would not have been immediately appealable.

III

In 2017, the legislature passed P.A. 17-71, § 1, which became effective on January 1, 2018, and permits those against whom lawsuits have been filed to pursue a special motion to dismiss early in the litigation, raising as a defense that the underlying action arose out of the exercise of their constitutional rights to free speech, to free association, or to petition the government. As described previously, the statute permits any defendant

filing a motion posing such a defense to require plaintiffs in short order to demonstrate that their case has merit, factually and legally. In particular, the statute directs the trial court to grant the special motion to dismiss if the defendants make "an initial showing, by a preponderance of the evidence, that the opposing party's complaint, counterclaim or cross claim is based on the moving party's exercise of" his constitutional rights "in connection with a matter of public concern . . . ." General Statutes § 52-196a (e) (3). The plaintiffs can defeat the special motion to dismiss if they "[set] forth with particularity the circumstances giving rise to the complaint . . . and [demonstrate] to the court that there is probable cause, considering all [of the defendants'] valid [constitutional] defenses, that the [plaintiffs] will prevail on the merits of the complaint . . . ." General Statutes § 52-196a (e) (3).

Whether and how to manage and accelerate proceedings at the trial court level is one policy determination that the legislature clearly and unambiguously provided for in § 52-196a, directing in significant detail how a special motion to dismiss should be filed and resolved. In the present case, for example, following these directives closely, the trial court ruled on the motion in just over seven months from the filing of the complaint.[7]

Whether to permit one party to halt the trial court proceedings and to launch the parties on an appellate track in the event the motion is denied is an altogether different policy determination, however, about which the legislature said almost nothing. An interlocutory appeal takes an action that the plaintiffs have a constitu-

[7] In the companion cases also released today—*Pryor* v. *Brignole*, 346 Conn. 534, A.3d (2023), and *Robinson* v. *V. D.*, 346 Conn. 1002, A.3d (2023)—the trial court in those cases also took up and ruled on the motions promptly: in *Pryor*, within about ten and one-half months from the filing of the complaint, and, in *Robinson*, within four and one-half months from the filing of the complaint.

tional right to file and pursue and deposits it in an entirely different court system not known for its dispatch. If permitted, this appeal comes after the plaintiffs have made a preliminary showing, in short order and "with particularity," that there is probable cause that they will prevail on their complaint, despite the defendants' constitutional challenges. General Statutes § 52-196a (e) (3). Moreover, appellate review of these rulings—often requiring findings of fact by which to measure the plaintiffs' claims and the defendants' arguments of intrusion on protected rights—will have to be undertaken on a record constructed hastily, and intentionally so. This is not a recipe for the solemn and meticulous scrutiny often required to adjudicate weighty constitutional issues, and I would not presume that the legislature intended our appellate courts to take up these cases on an interlocutory basis without more specific legislative direction.

Nevertheless, the defendants claim, and the majority today agrees, that § 52-196a not only changed the procedure by which defendants may speedily contest the merits of a lawsuit at the trial level but also permits defendants to take an appeal when that procedure is unsuccessful. I disagree.

IV

In Connecticut, "an appeal is purely a statutory privilege accorded only if the conditions fixed by statute and the rules of court for taking and prosecuting the appeal are met." (Internal quotation marks omitted.) *State* v. *Coleman*, 202 Conn. 86, 88–89, 519 A.2d 1201 (1987). That is, we do not determine as a policy matter whether to afford litigants an appeal from a particular ruling, let alone an interlocutory ruling: only the legislature does so. There are two ways that the legislature may signal to our courts its policy choice to permit interlocutory appeals. Both ways require a close exami-

nation of the statutory language, pursuant to § 1-2z, which I do not agree that the majority has undertaken.

A

The first is the clear and unambiguous way, namely, the legislature could have made explicit in § 52-196a that the denial of a special motion to dismiss is immediately appealable. Anti-SLAPP statutes in numerous other states contain precisely this kind of specific language permitting interlocutory appeals from the denial of similar motions. Among the states with specific language authorizing an interlocutory appeal are those whose legislation served as a model for Connecticut's anti-SLAPP statute, according to the very legislative history the majority cites. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 8, 2017 Sess., p. 4602, testimony of Klarn DePalma, vice president and general manager, WFSB-TV (noting that language of Connecticut's anti-SLAPP statute is most similar to statutes from California, Oregon, Texas and Washington); see also Cal. Civ. Proc. Code § 425.16 (i) (Deering Supp. 2021); Or. Rev. Stat. § 31.150 et seq. (2017); Tex. Civ. Prac. & Rem. Code Ann. § 27.008 (West 2020); Wn. Rev. Code Ann. § 4.105.080 (West 2021). Also, among the states with explicit statutory appeal language are those that made the right to an interlocutory appeal explicit only after a court had ruled that it would not infer such a right. See *Wynn* v. *Bloom*, 852 Fed. Appx. 262, 262 n.1 (9th Cir. 2021) (Nevada); *Schwern* v. *Plunkett*, 845 F.3d 1241, 1244 (9th Cir. 2017) (Oregon). Although the absence of explicit language authorizing an immediate appeal from the denial of a special motion to dismiss is not determinative of whether such a right exists; see, e.g., *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, 279 Conn. 220, 238, 901 A.2d 1164 (2006); Connecticut's legislature has demonstrated in several contexts that, when it intends to per-

mit an interlocutory ruling to be immediately appealable, it knows how to authorize it expressly.[8] Two of these enabling statutes in particular warrant closer examination in comparison to § 52-196a.

The first is the prejudgment remedy statute, General Statutes § 52-278*l* (a),[9] which the majority itself cites because it is mentioned in the legislative history of § 52-196a. As the majority points out, then Representative William Tong described the nature of the special motion to dismiss proceeding under § 52-196a as a "substantial hearing" or "[mini-trial] at the outset," akin to a prejudgment remedy hearing. 60 H.R. Proc., Pt. 16, 2017 Sess., p. 6945. It is true that both statutes provide for a trial court's early examination of whether the statutory requirements have been satisfied. The difference, of

[8] See General Statutes § 9-325 (providing for review of questions of law by Supreme Court in election cases); General Statutes § 31-118 (aggrieved party "may appeal" from grant or denial of temporary injunction in cases involving labor disputes); General Statutes § 42-110h (order granting or denying class certification in action under Connecticut Unfair Trade Practices Act, General Statutes § 42-110a et seq., "shall be immediately appealable by either party"); General Statutes § 51-164x (a) (review by Appellate Court of orders closing courtroom); General Statutes § 52-235 (a) (allowing for reservation of questions of law to Supreme Court or Appellate Court); General Statutes § 52-265a (a) (aggrieved party "may appeal" to Supreme Court from order or decision that involves matter of substantial public interest); General Statutes § 52-278*l* (a) (order granting or denying prejudgment remedy "shall be deemed a final judgment for purposes of appeal"); General Statutes § 52-405 ("[w]hen, in any action demanding an accounting, a judgment is rendered ordering such accounting, appeal may be had from such judgment to the Appellate Court, as if it were a final judgment"); General Statutes § 54-56e (f) ("[a]n order of the court denying a motion to dismiss the charges against a defendant who has completed such defendant's period of probation or supervision or terminating the participation of a defendant in such program shall be a final judgment for purposes of appeal").

[9] General Statutes § 52-278*l* (a) provides: "An order (1) granting or denying a prejudgment remedy following a hearing under section 52-278d or (2) granting or denying a motion to dissolve or modify a prejudgment remedy under section 52-278e or (3) granting or denying a motion to preserve an existing prejudgment remedy under section 52-278g shall be deemed a final judgment for purposes of appeal."

course, is that § 52-278*l* expressly authorizes an appeal from an order "granting or denying a prejudgment remedy" and includes among its provisions a shortened appeal period (seven days) and authority for the trial court to order a stay in the event of an appeal if the party taking the appeal posts a bond, thus protecting the adverse party from any damages that may result from the stay. Had Representative Tong been asked to comment further on the analogy between a ruling on a prejudgment remedy and the denial of a special motion to dismiss, he would have had to observe that our anti-SLAPP statute contains no appeal provision, unlike § 52-278*l* and numerous anti-SLAPP statutes in other states.[10]

Also worth examining is General Statutes § 31-118, concerning labor injunctions. That statute not only explicitly authorizes an appeal when a court "issues or denies" a temporary injunction arising out of a labor dispute but also provides its own distinct appeal period (two weeks) and directs the parties and the reviewing court on the appellate procedure to undertake. General Statutes § 31-118. In particular, the statute requires that "the record shall be . . . made available to counsel within two weeks"; "[t]he appellant shall file his brief within two weeks . . . and the appellee within one week thereafter"; no extensions of time are allowed except for "illness or other acts of God"; the appeal

[10] Although we are not obliged to defer even to a formal opinion of the attorney general; see, e.g., *Crandle* v. *Connecticut State Employees Retirement Commission*, 342 Conn. 67, 82, 269 A.3d 72 (2022) (" '[a]lthough an opinion of the attorney general is not binding on a court, it is entitled to careful consideration and is generally regarded as highly persuasive' "); this obvious difference between § 52-278*l* and § 52-196a likely explains why now Attorney General Tong argues, as an amicus in *Pryor* v. *Brignole*, 346 Conn. 534, A.3d (2023), one of two companion cases also released today; see footnote 7 of this opinion; that § 52-196a does not create an independent interlocutory right to appeal or any right that satisfies the second prong of *Curcio*. See *Pryor* v. *Brignole*, Conn. Supreme Court Briefs & Appendices, October Term, 2022, Brief of Amicus Curiae State of Connecticut pp. 4–7.

must be heard no "later than two weeks from the date the appeal is perfected"; and the appeal "shall take precedence over all matters except older matters of the same character." General Statutes § 31-118. Section 52-196a contains none of these details.

Both § 31-118 and § 52-278*l*, with their explicit appeal provisions, provide particularly apt comparisons to our anti-SLAPP statute because they involve similar preliminary determinations *at the trial level*. See General Statutes § 31-115 (temporary injunctive relief requires "finding of facts by the court" that (a) unlawful acts have been threatened and are forthcoming; (b) substantial and irreparable injury; (c) harm to complainant; (d) no adequate remedy at law; and (e) inadequate protection of complainant's property); General Statutes § 52-278d (a) (1) ("there is probable cause that a judgment in the amount of the prejudgment remedy sought . . . will be rendered in the matter in favor of the plaintiff"). Whereas the legislature has decided as a policy matter that rulings on temporary labor injunctions and prejudgment remedies are worthy of interlocutory appellate review by the nonprevailing party, as the majority concedes, the legislature has made no such explicit policy decision regarding our anti-SLAPP statute.

The only portion of the statute that arguably hints at a right to appeal the denial of a special motion to dismiss is subsection (d) of § 52-196a, which provides in relevant part: "The court shall stay all discovery upon the filing of a special motion to dismiss. The stay of discovery shall remain in effect until the court grants or denies the special motion to dismiss and any interlocutory appeal thereof. . . ." This language is a far cry from authorizing an interlocutory appeal, however, and the majority does not contend otherwise. Staying discovery until the trial court rules on a special motion to dismiss and an appellate court rules on a possible interlocutory

appeal does little to imply that the legislature intended statutorily to grant defendants the right to an immediate appeal. At most, this language shows that the legislature was aware that, in unique circumstances, such as when a party files a public interest appeal pursuant to General Statutes § 52-265a, a denial of a special motion to dismiss may be immediately appealable.[11] See *Lafferty* v. *Jones*, 336 Conn. 332, 336–38 and n.3, 246 A.3d 429 (2020) (granting petition to file expedited public interest appeal, pursuant to § 52-265a, from trial court's sanction revoking defendants' opportunity to pursue special motion to dismiss under § 52-196a), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021). The present appeal could have been a viable candidate for certification under that statute. But acknowledging in a statute that appellate courts could have the authority to hear interlocutory appeals through another jurisdictional avenue is not the same as providing a right to appeal in the statute itself.

B

The majority is correct that we have said that the absence of specific language conferring the right to appeal "is not determinative of whether such a right exists. . . . Rather, we presume that the legislature is aware of our [long-standing] final judgment jurisprudence." (Citation omitted.) *Hartford Accident & Indem-*

[11] I do not rule out the possibility that, in rare circumstances involving a first amendment claim, the denial of a special motion to dismiss under § 52-196a may be immediately appealable pursuant to *Curcio*. See *Dayner* v. *Archdiocese of Hartford*, 301 Conn. 759, 769–72, 23 A.3d 1192 (2011) (pretrial denial of ministerial exception defense under first amendment was immediately appealable, not because of any right granted under any statute but because defense itself provided right to immunity from suit), overruled in part by *Hosanna-Tabor Evangelical Lutheran Church & School* v. *Equal Employment Opportunity Commission*, 565 U.S. 171, 132 S. Ct. 694, 181 L. Ed. 2d 650 (2012). I simply am not convinced that the legislature intended for all denials of special motions to dismiss under § 52-196a to be immediately appealable.

nity Co. v. *Ace American Reinsurance Co.*, supra, 279 Conn. 238. This leads to the second way in which the legislature can signal to appellate courts its policy choice to permit interlocutory appeals. Specifically, the legislature can include language in the statute that satisfies the test articulated in *Curcio*. See id. That is, we presume that the legislature has taken note of the "circumstances in which an interlocutory ruling is deemed [by this court] to have the attributes of a final judgment" under our appeal statutes "so as to permit an immediate appeal." *Saunders* v. *KDFBS, LLC*, 335 Conn. 586, 591, 239 A.3d 1162 (2020); see *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, supra, 238.

Specifically, we have held that an "otherwise interlocutory order is appealable in two circumstances: (1) [when] the order or action terminates a separate and distinct proceeding, [and] (2) [when] the order or action so concludes the rights of the parties that further proceedings cannot affect them." *State* v. *Curcio*, supra, 191 Conn. 31. No one contends that the first prong of *Curcio* is implicated in the present case or by § 52-196a. Rather, the only question is whether the denial of a special motion to dismiss satisfies the second prong of the *Curcio* test, which "focuses on the nature of the right involved. It requires the parties seeking to appeal to establish that the trial court's order threatens the preservation of a right already secured to them and that that right will be irretrievably lost and the [parties] irreparably harmed unless they may immediately appeal." (Internal quotation marks omitted.) *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, supra, 279 Conn. 226.

1

In undertaking a second prong *Curcio* analysis, the " 'essential predicate' " is to identify properly the nature of the right implicated. Id., 231. "The right of the party

must be of a statutory or constitutional nature."[12] E. Prescott, supra, § 3-1:2.3, p. 92. With the lack of interlocutory review not implicating any constitutional right, the majority describes the statutory right at stake in the present case several ways. For example, quoting our decision in *Convalescent Center of Bloomfield, Inc.* v. *Dept. of Income Maintenance*, 208 Conn. 187, 195, 544 A.2d 604 (1988), the majority suggests that, as in that case, § 52-196a protects "the right not to have to go to trial on the merits" or the right "to avoid litigation on the merits that can be costly and burdensome . . . ."[13] (Emphasis omitted; internal quotation marks omitted.) It also refers to a "right to avoid litigation," a "right to avoid the costly and onerous litigation process altogether," a "right to avoid costly and burdensome litigation on the merits," and a right that "shields [the

[12] Common-law rights that already are secured and would be lost without the right to an immediate appeal may also come within *Curcio*'s second prong. See, e.g., *Chadha* v. *Charlotte Hungerford Hospital*, 272 Conn. 776, 785–87, 865 A.2d 1163 (2005) (explaining why purpose of absolute immunity under common law, protecting against threat of suit, compels conclusion that denial of motion for summary judgment on ground of such immunity gives rise to immediately appealable final judgment due to irreparable harm). No common-law right is at issue in the present case.

[13] *Convalescent Center of Bloomfield, Inc.* v. *Dept. of Income Maintenance*, supra, 208 Conn. 196–202, involved the common-law defenses of collateral estoppel and res judicata. The majority's analogy to this court's case law holding that the pretrial denial of those common-law defenses, as well as immunity for statements made in judicial and quasi-judicial proceedings, are immediately appealable is, in my view, not fitting. See *Blakely* v. *Danbury Hospital*, 323 Conn. 741, 746–47, 150 A.3d 1109 (2016); *Convalescent Center of Bloomfield, Inc.* v. *Dept. of Income Maintenance*, supra, 194–95. The pretrial denials of these common-law defenses were based on common-law rights, which required this court to determine whether these rights were akin to immunity from suit by providing a right to avoid litigation, whereas the present case involves a statutory defense, which we must examine under the dictates of § 1-2z. See, e.g., *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 40, 45, 213 A.3d 1110 (2019). Additionally, it is unclear if this court's holdings in those cases involving res judicata and/or collateral estoppel were correct in light of analogous federal case law. See *Strazza Building & Construction, Inc.* v. *Harris*, 346 Conn. 205, 210–11 n.2, 288 A.3d 1017 (2023).

defendants] from litigation akin to the right against double jeopardy or the other types of immunity from suit in the civil context . . . .'' (Emphasis omitted; internal quotation marks omitted.) None of these phrases appears in the statute's text.

The majority does not explain why it eschews characterizing the nature of the right implicated by § 52-196a as ''immunity from suit . . . .'' Instead, the majority forgoes the required § 1-2z analysis and characterizes this right as merely being akin to immunity from suit, despite the fact that this kind of analysis applies only to common-law defenses. See footnote 13 of this opinion. If asked to define the phrase ''immunity from suit'' for a legal dictionary, however, a lexicographer would be hard-pressed to craft a better definition than any of the phrases the majority uses to describe the right it claims the statute protects and that I compiled in the preceding paragraph. In fact, our case law defines immunity from suit precisely using these very phrases. For example, we have often said that ''the essence of the protection of immunity from suit is an entitlement not to stand trial or face the other burdens of litigation.'' (Internal quotation marks omitted.) *Blakely* v. *Danbury Hospital*, 323 Conn. 741, 746, 150 A.3d 1109 (2016). We have also described state sovereign immunity, which is an immunity from suit, as a ''doctrine [that] protects against suit as well as liability—in effect, against having to litigate at all.'' *Shay* v. *Rossi*, 253 Conn. 134, 166, 749 A.2d 1147 (2000), overruled in part on other grounds by *Miller* v. *Egan*, 265 Conn. 301, 828 A.2d 549 (2003).

Using the proper legal parlance is important because, when we seek to define statutory rights with such significant consequences, we should speak precisely so that we may expect the legislature also to speak precisely when granting these rights. Words matter. And, as with all statutory interpretation exercises this court under-

takes, it is elementary that § 1-2z governs our exercise of divining the precise nature of the statutory right at issue, as we have recognized very recently.

For example, in *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 213 A.3d 1110 (2019), we looked "to [General Statutes] § 28-13 to determine the nature of the immunity afforded to political subdivisions" when they are sued for actions taken by their police and fire departments in response to declared state emergencies. Id., 45. We described this issue as "a question of statutory construction"; id.; and, therefore, pursuant to § 1-2z, we first examined the plain language of § 28-13, which we determined to be ambiguous. See id., 47–48. Only then did § 1-2z permit us to consider the relevant legislative history, which led us to ultimately conclude that § 28-13 provided immunity from suit. See id., 48–52. Based on this conclusion, we held that the denial of a motion for summary judgment premised on the immunity conferred by § 28-13 was immediately appealable under the second prong of *Curcio*. See id., 52; see also *Trinity Christian School* v. *Commission on Human Rights & Opportunities*, supra, 329 Conn. 694 (under § 1-2z, we must first look to statute's language to determine whether legislature provided any indication that it intended to grant immunity from suit); *Harger* v. *Odlum*, 153 Conn. App. 764, 769–73, 107 A.3d 430 (2014) (determining pursuant to § 1-2z that General Statutes § 52-190a does not grant immunity from suit, and thus pretrial denials of this statutory right are not immediately appealable under second prong of *Curcio*).

Unlike in *Sena*, the majority in the present case, in its search for the nature of the right conferred on defendants by § 52-196a, only briefly examines any of the statute's plain language and, when it does, does not consider the language of subsection (b), in which the so-called "right" is described. Neither does the majority

consider whether any language is ambiguous, which could arguably justify the majority's reference to particular legislators' statements about the statute's purpose that nevertheless do not refer to immunity from suit or a right to appeal. Instead, the majority resorts to characterizing the nature of the right found in § 52-196a, ultimately concluding that the right conferred by the statute may be vindicated only if the defendant has a right to an interlocutory appeal. Since 2003 and the passage of § 1-2z, however, to guard against possibly inaccurate portrayals of legislative intent, the legislature has directed us to examine a statute's text first, along with "its relationship to other statutes." General Statutes § 1-2z. We do not consider extratextual evidence, such as legislative history, unless the text is ambiguous or unless it yields absurd or unworkable results. See General Statutes § 1-2z.

Because I believe that the majority's description of the right is merely another way of describing an immunity from suit, I first undertake what I consider to be a proper § 1-2z analysis of § 52-196a to determine whether the legislature, not having explicitly created a right to an interlocutory appeal in the statute; see part IV A of this opinion; nonetheless manifested an intent to confer on defendants a right to immunity from suit, the denial of which, under our case law, creates a right to an immediate interlocutory appeal. I conclude that the legislature did not do so.[14] Nor do I agree with the majority that the legislative history it recounts supports a conclusion that the legislature intended to provide immunity

[14] Of course, I recognize that the second prong of *Curcio* may be satisfied in a case that involves a right other than immunity from suit. See, e.g., *In re Teagan K.-O.*, supra, 335 Conn. 755–59 (allowing immediate appeal from interlocutory order in family matters due to importance of right of family to remain together without interference of state). But neither the defendants nor the majority asserts any other kind of right, and thus my analysis will be limited to immunity from suit, which, in my view, is synonymous with the nature of the right the majority describes.

from suit by granting defendants a right not to litigate akin to immunity from suit.

2

A corollary to the "presum[ption] that the legislature is aware of our [long-standing] final judgment jurisprudence"; *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, supra, 279 Conn. 238; is that the legislature is also aware of how to signal under *Curcio* that the denial of a right is immediately appealable. As I discussed previously, and as guided by § 1-2z, this is particularly true when determining whether a statute grants immunity from suit. Specifically, we have stated that, "when the legislature intends to confer immunity from liability or from suit, it does so in *distinctive and unmistakable terms* . . . ." (Emphasis added; footnotes omitted.) *Trinity Christian School* v. *Commission on Human Rights & Opportunities*, supra, 329 Conn. 696. For example, we previously have noted specific examples of statutory language conferring immunity from suit, including the phrases, "no action may be brought" and "shall not be liable . . . ." (Footnotes omitted; internal quotation marks omitted.) Id.; see General Statutes § 52-557e ("[n]o action may be brought to recover damages against any licensed physician for any decision or action taken by him as a member of a hospital utilization review committee"); General Statutes § 52-557o ("[n]o action for trespass shall lie"); see also *Sena* v. *American Medical Response of Connecticut, Inc.*, supra, 333 Conn. 47–52 (holding that denial of motion for summary judgment premised on § 28-13 was immediately appealable under second prong of *Curcio* because statute provided immunity from suit based on language that attorney general must " 'appear for and defend' " political subdivisions, as well as legislative history emphasizing state's taking on cost and burdens of litigation). Applying these principles to

the text of § 52-196a, I cannot locate in my review of the statute's plain language any "distinctive and unmistakable terms" even suggesting an immunity from suit or an immunity of any kind. *Trinity Christian School* v. *Commission on Human Rights & Opportunities*, supra, 696.

My review begins with subsection (b) of § 52-196a, which actually confers the right to file the special motion. In relevant part, § 52-196a (b) provides: "In any civil action in which a party files a complaint . . . against an opposing party that is based on the opposing party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, *such opposing party may file* a special motion to dismiss the complaint . . . ." (Emphasis added.) The subsections that follow subsection (b) detail the procedure a defendant must follow to go about exercising this right. For example, subsection (c) sets the deadline for when a defendant must file a special motion to dismiss at thirty days from the return date, absent good cause found by the trial court. Subsection (d) provides for a stay of discovery during the pendency of the motion, which, for the same reasons explained in part IV A of this opinion as to why this language does not support a statutory right to appeal, also does not provide any kind of immunity. Subsection (e) governs when and how the trial court must conduct a hearing on the motion. Specifically, the trial court is required to conduct "an expedited hearing" and must "rule on a special motion to dismiss as soon as practicable." General Statutes § 52-196a (e) (1) and (4). Finally, subsection (f) not only does not show any legislative intent to create an immunity from suit but supports my analysis that this statute provides only a procedural benefit to defendants. Subsection (f), the fee shifting provision, pro-

vides defendants with a significant financial benefit in the event that a special motion to dismiss is improperly denied. In particular, if unsuccessful at trial, a defendant may raise a first amendment defense on appeal, and, if successful, this court may hold that the special motion to dismiss was improperly denied, may vacate the judgment, and then may remand the case to the trial court with direction to dismiss the plaintiff's action and to determine the appropriate award of costs and attorney's fees under subsection (f). See *Gurliacci* v. *Mayer*, 218 Conn. 531, 576, 590 A.2d 914 (1991) (requiring trial court to determine attorney's fees on remand); *Medical Device Solutions, LLC* v. *Aferzon*, 207 Conn. App. 707, 782, 264 A.3d 130 (remanding case to "[trial] court with instructions to determine, if possible, what portion of the fees and costs it awarded under [Connecticut Unfair Trade Practices Act (CUTPA), General Statutes § 42-110a et seq. was] reasonably incurred to litigate that portion of the CUTPA claim that was not barred by the statute of limitations"), cert. denied, 340 Conn. 911, 264 A.3d 94 (2021). Additionally, if successful at trial, the defendant may then file a motion for attorney's fees with the trial court. See Practice Book § 11-21 ("[m]otions for attorney's fees shall be filed with the trial court within thirty days following the date on which the final judgment of the trial court was rendered").

Section 52-196a does not contain the kind of "unmistakable terms" that have led us to conclude that a statute creates a right to "immunity from suit," whether described as such by our case law in this usual way, or described synonymously as a "right to avoid litigation," or a "right not to have to go to trial on the merits," or a right "akin" to immunity from suit. Rather, the plain language of § 52-196a clearly and unambiguously creates only a new *procedure* for defendants to raise as early as possible in the litigation their *preexisting* right to immunity from liability when the underlying

defense is premised on their exercise of a first amendment constitutional right or state constitutional analogue. The legislature plainly wanted to confer on defendants the procedural right to raise this defense in the trial court before being burdened by the costs and inconvenience of discovery. But, as this court has previously recognized, "[t]here is a crucial distinction to be drawn between a right not to be tried and a right whose remedy requires the dismissal of charges. . . . The former necessarily falls into the category of rights that can be enjoyed only if vindicated prior to trial. The latter does not."[15] (Internal quotation marks omitted.) *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, supra, 279 Conn. 232. In striking a balance between the rights of plaintiffs and defendants, the legislature's decision not to include distinctive and unmistakable language providing a right to immunity from suit should lead us to conclude that the legislature did not view the right to an immediate appeal as within that bundle of rights critical to the policy it was implementing—i.e., a right that "can be enjoyed only if vindicated prior to trial." (Internal quotation marks omitted.) Id.; see *Englert* v. *MacDonell*, 551 F.3d 1099, 1105 (9th Cir. 2009) (collateral order doctrine was not satisfied by Oregon's anti-SLAPP statute "because it was not intended to provide a right not to be tried, as distinguished from a right to have the legal sufficiency of the evidence underlying the complaint reviewed by a nisi

[15] More specifically, we have explained that, if a statute confers only immunity from liability, "a right whose remedy requires [only] the dismissal of charges," pretrial rulings denying a motion based on that more limited immunity are not immediately appealable under the second prong of *Curcio* because an immunity from liability defense can be vindicated after trial. (Internal quotation marks omitted.) *Hartford Accident & Indemnity Co.* v. *Ace American Reinsurance Co.*, supra, 279 Conn. 232. Denials of a claimed right of immunity from suit, i.e., the right not to be tried and to be free of having to litigate, on the other hand, are immediately appealable because such a right cannot be vindicated after trial. See id.; *Shay* v. *Rossi*, supra, 253 Conn. 163–64.

prius [i.e., trial] judge before a defendant is required to undergo the burden and expense of a trial").

In the context of *Curcio*'s second prong, "[w]e have [also] said that the claimed right cannot be 'a contingent right created by statute and subject to the discretion of the trial court'; *State* v. *Garcia*, 233 Conn. 44, 66, 658 A.2d 947 (1995) [overruled in part on other grounds sub silentio by *Sell* v. *United States*, 539 U.S. 166, 123 S. Ct. 2174, 156 L. Ed. 2d 197 (2003)]; rather, the right must exist independently of the order from which the appeal is taken." *Hartford Accident & Indemnity Co*. v. *Ace American Reinsurance Co*., supra, 279 Conn. 231. In the present case, the rights created by § 52-196a (e) (3) are contingent on "an initial showing, by a preponderance of the evidence," by the defendant, and a "probable cause" showing by the plaintiff. The legislature's use of the phrases "initial showing" and "probable cause," by their nature, strongly suggests that the legislature contemplated the trial court's exercising some degree of discretion. See *TES Franchising, LLC* v. *Feldman*, 286 Conn. 132, 137, 943 A.2d 406 (2008) (in ruling on application for prejudgment remedy, "[i]n its determination of probable cause, the trial court is vested with broad discretion" (internal quotation marks omitted)). Moreover, this relatively low probable cause burden necessary for the plaintiff to defeat the special motion to dismiss demonstrates that the legislature recognized that many special motions to dismiss may be denied, and yet it decided not to expressly create a right to immunity from suit, undermining any argument that an immediate appeal is necessary to vindicate the statutory right at issue.

I draw from the statutory language that the legislature intended for the trial court, if called on by a defendant, to act as a gatekeeper, early in the litigation and in an expedited fashion, to consider and rule on the viability

of the alleged constitutional violations before a defendant is burdened by the costs and inconvenience of discovery. In the words of the United States Court of Appeals for the Ninth Circuit construing a similarly worded statute, the Oregon legislature provided the defendant with the right to have the "legal sufficiency of the evidence underlying the complaint reviewed by a nisi prius [i.e., trial] judge . . . ." *Englert* v. *MacDonell*, supra, 551 F.3d 1105.[16] This is eminently sensible because, when the trial court is tasked with acting as a gatekeeper, which is most often a trial court function; see, e.g., *State* v. *Schiappa*, 248 Conn. 132, 163 n.39, 728 A.2d 466, cert. denied, 528 U.S. 862, 120 S. Ct. 152, 145 L. Ed. 2d 129 (1999); all that is required is a preliminary showing that the party may prevail on the facts and law, which may lead to an incomplete or inadequate record for appellate review of constitutional questions. See part V of this opinion.

Thus, I disagree with the majority that the plain language of § 52-196a creates a right—"akin" or otherwise—to immunity from suit. Rather, under our well established rules of statutory construction, the statute's plain language clearly and unambiguously creates a new and valuable *procedure* for a defendant to raise, as early as possible in the litigation, his or her preexisting right to immunity from liability when the underlying defense is premised on his or her exercise of a first amendment right or state constitutional analogue.

[16] I recognize that, after the Ninth Circuit decided *Englert*, Oregon's legislature amended its anti-SLAPP statute to expressly permit an interlocutory appeal. See 2009 Or. Laws c. 449, §§ 1 and 3. That is a legislative prerogative, consistent with what I believe Connecticut's legislature expects of our courts under § 1-2z—to interpret the plain language of legislation consistently, without conjecture. The fact that other state legislatures have amended their anti-SLAPP statutes after a court had ruled that the statutory language did not allow for an immediate appeal should not alter our § 1-2z analysis but, rather, shows that the legislature is responsible for clearly stating its intention to authorize an appeal.

3

Even if I were to agree that the language of § 52-196a is ambiguous with respect to the nature of the statutory right created (which not even the majority contends), I disagree that the legislative history supports a conclusion that the legislature intended to create a right akin to immunity from suit.

First, I make an observation about reliance on legislative history in this context generally. Given the primacy of legislative text under § 1-2z and the traditional approach of strictly construing statutory appellate rights; see E. Prescott, supra, § 2-1:1.2, p. 44; it is at least arguable that we should not be looking to extraneous sources, like legislative history, for something that the legislature can say explicitly and relies on us not to infer. Cf. *Envirotest Systems Corp.* v. *Commissioner of Motor Vehicles*, 293 Conn. 382, 390, 978 A.2d 49 (2009) ("the existence of uncertainty in a statute with regard to [a sovereign immunity] waiver is not an ambiguity but, rather, an answer").

Putting that aside, in my view, the majority reads far more into statements made by particular legislators than can reasonably be inferred. Of course, not a single legislator mentioned the idea of an interlocutory appeal. I do not believe that the legislature would have us review the statements of individual legislators just to get a sense of the policy the legislature was trying to effect and then extrapolate from there whether going one step further (in this case, an interlocutory appeal) would, in our view, be consistent with that policy and therefore conclude that the legislature must have so intended.

The majority essentially reads the legislative history, sub silentio, to confer on defendants a right to an error-free gatekeeper. As an example, the majority writes

that "[t]he extensive legislative history of the statute indicates that the legislature was particularly concerned about defendants laboring under the burden of having to defend against SLAPP suits, which are by definition frivolous and oppressive, as a consequence of having exercised their first amendment rights." The majority's characterization of the statutory purpose is inarguable: to deter and weed out abusive and frivolous claims "designed to chill free speech and the expression of constitutional rights . . . ." (Emphasis omitted; internal quotation marks omitted.) But the majority holds that the legislative history makes clear that this weeding out function extends beyond the trial court, the usual gatekeeper. In its view, the weeding out process is not complete until an appellate court has reviewed a trial judge's very preliminary determinations of the defendant's "initial showing" and the plaintiff's showing of "probable cause" that he will prevail on the merits. See part V of this opinion. The majority *has* to read this into the legislative history because not once does a legislator mention extending the gatekeeping function beyond the trial court, to an appellate court's interlocutory review, if a defendant, after availing himself of the significant benefits of the trial court's speedy determination, is unsuccessful in convincing the trial court of the merits of its special motion to dismiss. In my view, the available legislative history is far too thin a reed on which to upset the usual rule that all preserved issues are reviewable when an aggrieved party appeals at the end of the case, and not until then.

I read the scant legislative history to lean the other way: against permitting an interlocutory appeal. Specifically, Representative Tong explicitly clarified that "it's a bill to protect people against *liabilities* . . . ." (Emphasis added.) 60 H.R. Proc., supra, p. 6879. Nowhere in the legislative history is there any reference to or suggestion of the statute's providing immunity from suit. Rather,

as Representative Tong explicitly stated, the statute's intended purpose is to "[provide] for a special motion to dismiss so that early in the process somebody who's speaking and [has] exercised [his] constitutional rights can *try* to dismiss a frivolous or abusive claim that has no merit and [short-circuit] a litigation where it might otherwise cost a great deal of money to continue to prosecute." (Emphasis added.) Id.; see id., p. 6884, remarks of Representative Tong. Like the language contained in the statute, Representative Tong's statement indicates only that the legislature intended to create a process to weed out frivolous and abusive lawsuits early in the litigation so as to prevent the needless expense and burdens of litigation. In other words, the legislature wanted to ensure that defendants did not have to incur the cost of litigation until a gatekeeper—the trial court—determined that there is "probable cause" that the lawsuit has merit. Id., pp. 6905, 6909, remarks of Representative Tong. The lack of an immediate appeal from a denial of a motion to dismiss does not undermine the legislature's goal of ensuring that this gatekeeping function occurs "as quickly as possible to avoid . . . undue litigation and abuse of the process . . . ." Id., p. 6921, remarks of Representative Tong.

Importantly, the legislative history shows that § 52-196a was the result of balancing the two interests at stake here: (1) the defendant's right to free speech, and (2) the plaintiff's right to have a claim heard. See id., pp. 6881–82, remarks of Representative Rosa C. Rebimbas ("this legislation does provide for an expedited hearing and the purpose in that, again, is as the good [c]hairman had indicated it is a gentle balance between free speech by being able to resolve any issues once it's brought before the court's attention"); id., p. 6909, remarks of Representative Tong ("the claimant who has generally a right to have his or her claims heard"). By providing a procedural remedy, not a right to immunity from suit,

the legislature strikes this balance. See Conn. Joint Standing Committee Hearings, Judiciary, Pt. 9, 2017 Sess., pp., 4779–80, testimony of Eric Parker, on air anchor and chief investigative reporter, WFSB-TV ("It sets up a clear test. If the complaint shows a bare minimum of validity, it moves forward. If it does not, the defendant can end the litigation quickly and without the months of delays and expenses that come with it. It doesn't mean valid lawsuits won't get prosecuted. Those claims do exist and they should be allowed to move forward. The plaintiffs deserve every ounce of the rights the courts give them."). Thus, I do not read the legislative history to do any more than the text of the statute explicitly says, i.e., speak to the creation of a procedure that permits a defendant to obtain prompt review of an alleged SLAPP lawsuit.

4

The majority cites to a handful of cases from other jurisdictions that it claims apply "a *Curcio*-esque analysis" and support its conclusion that an interlocutory appeal lies from the "denial of a special motion to dismiss . . . ."[17] The majority tells us that this case law is "particularly instructive" because of Senator John A. Kissel's description of Connecticut's anti-SLAPP statute as "a compilation of some of the best [anti-SLAPP] laws out there from throughout the United States." 60 S.

[17] Although the majority is concerned about "the protections afforded by the anti-SLAPP statute [that] would be irrevocably lost by virtue of having to litigate a putative SLAPP suit to conclusion following a trial court's erroneous denial of a special motion to dismiss," the majority's holding allows an interlocutory appeal from *all* denials of special motions to dismiss, not just erroneous denials. An appellate court can never know if the trial court committed error until it has heard the appeal. Indeed, because, in my view, the majority's "colorable claim" standard ensures that virtually every defendant's interlocutory appeal will survive a motion to dismiss; see part V of this opinion; it is inevitable that many appeals the majority's opinion sanctions will go to judgment and that it will be determined on appeal that the trial court did *not* commit error.

Proc., Pt. 6, 2017 Sess., p. 2236; see also 60 H.R. Proc., supra, p. 6884, remarks of Representative Tong ("twenty-nine other states have adopted . . . legislation very similar to the construct we have here"). The majority would apparently have us infer from such a general legislative statement that permitting an interlocutory appeal from a trial judge's considered denial of a special motion to dismiss would place Connecticut's anti-SLAPP statute among "the best laws out there . . . ." This is the majority's own value judgment. Whether I agree with that judgment is not important. There are states that provide for interlocutory appeals and some that do not.

What is important is that, having compiled examples of "the best laws out there," the legislature chose not to include what at least as many jurisdictions as the majority cites specifically did include: a statute explicitly permitting an interlocutory appeal.[18] See Cal. Civ. Proc. Code § 904.1 (a) (13) (Deering Supp. 2021); Ga. Code Ann. § 9-11-11.1 (e) (Supp. 2019); Nev. Rev. Stat. § 41.670 (4) (2019); N.M. Stat. § 38-2-9.1 (C) (Cum. Supp. 2015); Okla. Stat. Ann. tit. 12, § 1437 (West Cum. Supp. 2021); 27 Pa. Stat. and Cons. Stat. Ann. § 8303 (West 2009); Tenn. Code Ann. § 20-17-106 (West Supp. 2019); Tex. Civ. Prac. & Rem. Code Ann. § 27.008 (West 2020); Wn. Rev. Code Ann. § 4.105.080 (West 2021); see also Ill. Sup. Ct. R. 306 (a) (9) (West 2020). In fact, although the legislative history of § 52-196a recites that our anti-SLAPP statute is most similar in language to the statutes from California, Oregon, Texas and Washington; see Conn. Joint Standing Committee Hearings, Judiciary,

[18] I agree with the majority that the lack of explicit statutory language providing a right to appeal is not relevant to this court's analysis under the second prong of *Curcio*. I nevertheless rely on the fact that other state legislatures have explicitly included a right to appeal in their anti-SLAPP statutes to emphasize the irrelevance of the case law from these jurisdictions, on which the majority relies.

Pt. 8, 2017 Sess., p. 4602; in 2017, when the legislature enacted § 52-196a, the anti-SLAPP statutes in California, Texas, and Washington included language explicitly authorizing an immediate appeal from a denial of a motion under those statutes. See 2014 Cal. Stat. c. 71, § 17; see also Tex. Civ. Prac. & Rem. Code Ann. § 27.008 (West 2015); Wn. Rev. Code Ann. § 4.24.525 (5) (d) (West 2017).

The legislature's reliance on Oregon's anti-SLAPP statute is also important to note because the Oregon legislature had amended its statute in 2009—before Connecticut's legislature enacted § 52-196a—to add language permitting an immediate appeal. 2009 Or. Laws c. 449, §§ 1 and 3 (effective January 1, 2010); see House Committee on Judiciary, Staff Measure Summary on Senate Bill No. 543 (amending Oregon law to authorize "an immediate appeal [from] the denial of an anti-SLAPP . . . motion"). The original version of Oregon's statute was explicitly premised on California's anti-SLAPP statute, except that it did not include language providing for an immediate right to appeal from the denial of a special motion to strike, as California's did. See *Englert* v. *MacDonell*, supra, 551 F.3d 1105–1107; see also Or. Rev. Stat. §§ 30.142 and 30.144 (2001). The statutory language also did not include a right not to go to trial and thus did not provide immunity from suit. See *Englert* v. *MacDonell*, supra, 1105–1107. Because of this, courts had held that the denial of a motion under Oregon's anti-SLAPP statute was not immediately appealable. See, e.g., id. In response, the Oregon legislature then amended the statute to specifically provide the right to appeal. See *Schwern* v. *Plunkett*, supra, 845 F.3d 1244. My conclusion that Connecticut's legislature did not intend to provide either an immediate right to appeal or immunity from suit is supported by its decision not to include specific language authorizing an interlocutory appeal, as other state legislatures had, or a right to

immunity from suit, despite presumably knowing that the absence of such language, as in the original version of Oregon's anti-SLAPP statute, would likely lead a court to conclude that there is no right to an immediate appeal.

Cases that have held that the denial of a motion under an anti-SLAPP statute is immediately appealable, notwithstanding the lack of explicit language granting the right to appeal, are distinguishable from the present case in one of three ways: (1) the anti-SLAPP statute at issue contained language significantly different from that found in § 52-196a;[19] (2) the legislative history of the particular anti-SLAPP statute demonstrated compellingly that the legislature in fact intended to create immunity from suit, which the history of § 52-196a does not demonstrate;[20] or, most often, (3) the particular court's statutory construction analysis was not governed by principles consistent with § 1-2z or our case law regarding statutory immunity from suit.[21]

More consistent with the analysis the legislature has directed Connecticut courts to undertake under § 1-

[19] *NCDR, LLC* v. *Mauze & Bagby, PLLC*, 745 F.3d 742, 750–52 (5th Cir. 2014), decided under the federal collateral order doctrine, involved Texas' anti-SLAPP statute, which contains language much more explicit and definite than § 52-196a: "An appellate court shall expedite an appeal or other writ, whether interlocutory or not, from a trial court order on a motion to dismiss a legal action . . . or from a trial court's failure to rule on that motion in the time prescribed . . . ." Tex. Civ. Prac. & Rem. Code Ann. § 27.008 (b) (West 2020).

[20] See *Gundel* v. *AV Homes, Inc.*, 264 So. 3d 304, 310 (Fla. App. 2019) (legislative history showed that statute created right not to be subject to litigation).

[21] See *Morse Bros., Inc.* v. *Webster*, 772 A.2d 842, 848–49 (Me. 2001); *Duracraft Corp.* v. *Holmes Products Corp.*, 427 Mass. 156, 159–67, 691 N.E.2d 935 (1998); see also *Franchini* v. *Investor's Business Daily, Inc.*, 981 F.3d 1, 7 and n.6 (1st Cir. 2020) (applying Maine case law); *Los Lobos Renewable Power, LLC* v. *AmeriCulture, Inc.*, 885 F.3d 659, 666–67 (10th Cir.), cert. denied, U.S. , 139 S. Ct. 591, 202 L. Ed. 2d 427 (2018); *Henry* v. *Lake Charles American Press, LLC*, 566 F.3d 164, 178, 180–81 (5th Cir. 2009).

2z are cases from other courts that have reached the opposite conclusion from that of the majority based solely on scrutiny of the particular state statute at issue under established state law principles more consistent with § 1-2z. For example, as explained, courts have interpreted Oregon's original version of its anti-SLAPP statute, which has language similar to our statute, as not creating either a right to an immediate appeal or immunity from suit and, thus, holding that the denial of a motion under its statute was not appealable. See *Englert* v. *MacDonell*, supra, 551 F.3d 1105–1107 (interpreting what is now Or. Rev. Stat. §§ 31.150 and 31.152, and holding that defendants could not immediately appeal from trial court's order denying special motion to strike under collateral order doctrine). Similarly, courts have held that denials of motions filed under Nevada's original version of its anti-SLAPP statute, which, like Oregon's original version, did not include an explicit right to appeal or immunity from suit, were not immediately appealable because "the values underlying th[is] particular anti-SLAPP statute can be satisfied through the normal appellate process."[22] *Metabolic Research, Inc.* v. *Ferrell*, 693 F.3d 795, 800 (9th Cir. 2012); see id., 801–802 (citing Nevada case law in determining that denial of special motion to dismiss under Nevada's anti-SLAPP statute was not immediately appealable under collateral order doctrine because statute did not expressly provide for immediate right to appeal or establish immunity from suit).

Thus, it is only fair to say about the case law from other jurisdictions that courts in those states review the particular language of their anti-SLAPP legislation under their own rules of construction. This court must do the same.

[22] In 2013, Nevada amended its anti-SLAPP statute to provide for an immediate right to appeal. See 2013 Nev. Stat. c. 176, § 4; see also *Wynn* v. *Bloom*, 852 Fed. Appx. 262, 262 n.1 (9th Cir. 2021).

V

The majority responds to the plaintiffs' floodgates argument (i.e., that permitting interlocutory appeals from denials of special motions to dismiss will result in "endless appeals") by saying that the influx of appeals will not likely be significant. The majority is probably right. That is not *my* floodgates concern though. Rather, my concern stems from what I view as an unwarranted weakening of our final judgment jurisprudence.

Only very recently, and with some justification, members of this court have lamented the "murky state of our final judgment jurisprudence" under *Curcio*'s second prong and the expansion of the supposedly " 'narrow' " exception to our final judgment rule under that prong. *U.S. Bank National Assn.* v. *Crawford*, 333 Conn. 731, 760, 219 A.3d 744 (2019) (*McDonald*, *J.*, dissenting). With today's decision, I fear the murkiness has become more pronounced and the narrow exception widened further. These are the floodgates that concern me.

This uncertainty, I believe, is avoidable if we follow the traditional approach of construing strictly the right to appeal derived from statute. In employing § 1-2z principles and following our statutory construction jurisprudence in this context, we should look for and locate *explicit* language in statutes before concluding that a statute confers a right to appeal. We also should look for "distinctive and unmistakable" statutory language before concluding that a statute confers a right (any right, however characterized) that, under *Curcio*'s second prong, can be vindicated only by resort to an interlocutory appeal. *Trinity Christian School* v. *Commission on Human Rights & Opportunities*, supra, 329 Conn. 696. When it comes to appeal rights derived from Connecticut statutes, the legislature and this court have a well-developed language by which we speak to one

another clearly. In the present case, the majority concedes that there is no explicit language establishing the right to appeal. Nor does the majority rely on any specific statutory language as providing immunity from suit. In my view, absent any mention whatsoever in the legislative history of an appeal from a denial of a special motion to dismiss or immunity from suit, the majority is left to postulate that the legislature intended to protect defendants from alleged SLAPP suits *so much* that, even after a considered decision by a gatekeeping trial judge, the legislature must have intended this protection to extend to what is supposed to be a rare interlocutory appeal process. My floodgates concern is that, with respect to future second prong *Curcio* claims based on a statutory right, this court has now indicated that it will consider legislative history—specifically, whether there is any evidence regarding how strongly proponents of particular legislation felt about the rights they were conferring—to determine whether a party has the right to an immediate appeal. I would instead look for something much more explicit, and for the most obvious of reasons: because that is what I believe the legislature has directed us to do when scrutinizing statutes, and particularly statutes relied on as giving rise to the right to an interlocutory appeal.

The majority seeks to cabin its holding today by insisting that the "colorable claim" standard will limit appeals from denials of special motions to dismiss under § 52-196a. In the first instance, of course, after today's decision, *any* denial of a motion to dismiss is appealable, not just erroneous ones. A plaintiff will have to challenge the appeal as not raising a colorable claim of error for an appellate court even to consider dismissing the appeal. It is worthwhile examining what will be reviewed in these interlocutory appeals and how challenges to their colorability will necessarily be handled under the majority's announced standard.

Recall that many (or perhaps most) rulings denying special motions to dismiss will be made on the basis of probable cause determinations about the strength of the plaintiff's "initial showing," considering the defendant's valid defenses. General Statutes § 52-196a (e) (3). Those rulings are made based on a factual record the statute requires to be assembled quickly and at the most preliminary stage of the proceedings. General Statutes § 52-196a (g) ("[t]he findings or determinations made pursuant to subsections (e) and (f) of this section shall not be admitted into evidence at any later stage of the proceeding"). Therefore, many appeals from denied motions—like the present case—will be heard based on the record the parties could muster to that point.[23] Because they are preliminary rulings based on probable cause, other than in the clearest of cases—factually and legally—these rulings will likely be reviewed only for clear error. See, e.g., *TES Franchising, LLC* v. *Feldman*, supra, 286 Conn. 137 ("[i]n its determination of probable cause, the trial court is vested with broad discretion which is not to be overruled in the absence of clear error" (internal quotation marks omitted)); id., 138 n.6 ("we conclude that the clear error standard in this context is a heightened standard of deference that exceeds the level of deference afforded under the abuse of discretion standard"); *Augeri* v. *C. F. Wooding Co.*,

[23] See, e.g., *Burton* v. *Mason*, Docket No. X06-UWY-CV-21-5028294-S, 2021 WL 6101177, *5 (Conn. Super. December 10, 2021) ("[b]ased on this record, the court cannot conclude that it is more likely than not that this matter was brought 'based on' the defendants' exercise of their rights to free speech, association or to petition the government"); *Robinson* v. *DeGray*, Docket No. KNL-CV-20-6049156-S, 2021 WL 1914162, *5 (Conn. Super. April 14, 2021) (based on record at time of hearing on special motion to dismiss, defendant failed to establish that statements made during work related grievance proceedings involved matters of public concern); *Littlefield* v. *Aurora*, Docket No. FST-CV-20-6045400-S, 2020 WL 5624108, *3 (Conn. Super. August 31, 2020) (based on record before trial court, defendants failed to show plaintiffs' complaint was based on defendants' exercise of first amendment rights).

173 Conn. 426, 429, 378 A.2d 538 (1977) ("[A]t the hearing on an application for a prejudgment remedy . . . [t]he hearing . . . is not intended to be a full-scale trial on the merits. . . . In reaching its determination of probable success on the merits [the court] is essentially weighing probabilities, and in this it must have a broad discretion."). Nonetheless, defendants are advised by today's ruling that they have a right to avoid trial that they can vindicate only by appealing. A plaintiff might challenge a defendant's appeal as "not colorable." But, as the majority today admits, a "colorable claim is one that is superficially well founded but that may ultimately be deemed invalid . . . ." (Internal quotation marks omitted.) "[T]he defendant need not convince the trial court that he necessarily will prevail; he must demonstrate simply that he *might* prevail." (Emphasis in original; internal quotation marks omitted.) This is quite a low bar. The Appellate Court, the workhorse court of our appellate system, will therefore be charged in most cases with determining whether there is superficially a well-founded basis on which the defendant *might* prevail in his appeal.[24] If the defendant overcomes this minor obstacle, the Appellate Court will move on to review the trial court's denial of the defendant's motion based on the standards of an "initial showing" and "probable cause . . . ." General Statutes § 52-196a (e) (3). Because these determinations are so fact specific and, in many instances, perhaps discretionary, it is remarkably optimistic to predict that the "line between colorable and noncolorable claims" will "become more discernable" as "our jurisprudence develops."

I know it is not lost on the majority that permitting these interlocutory appeals comes at a cost, and not only to the appellate system. If the legislature intended

[24] Most of these motions will be decided by the Appellate Court after the parties each file a ten page memorandum of law. Most rulings—granting or denying motions to dismiss—are issued without written opinions.

for these rulings to be appealed, it is within its control to authorize an immediate appeal. But in this context, plaintiffs' cases are interrupted by the special motion to dismiss procedure and ultimately delayed by an appeal from the denial in the first instance. A potentially yearslong process follows if the appeal overcomes the colorable claim standard. Plaintiffs have little recourse for their cases being stalled.[25]

Time will tell whether most appeals will survive, although today's evidence is that most will: the court today dismisses none of the three appeals before us. See, e.g., *Pryor* v. *Brignole*, 346 Conn. 534, 546, A.3d (2023). Time will tell also whether permitting interlocutory appeals will yield many reversals, that is, clear error in a trial court's gatekeeping, probable cause determination.

Implicit in the majority opinion is that all of this is worth it—and more important, it believes, the legislature considers it worth it—if even one defendant had a meritorious special motion to dismiss that should have been granted and he should not have been exposed to trial. No statutory scheme is error free, of course. But "[w]e do not presume error . . . ." (Internal quotation marks omitted.) *State* v. *Milner*, 325 Conn. 1, 13, 155 A.3d 730 (2017). I am not suggesting that the majority does presume error. I am suggesting that, without further explicit instruction from the legislature, I am

[25] Plaintiffs can seek attorney's fees under § 52-196a (f) (2). But that subsection provides that fees are to be awarded only if the court "finds that such special motion to dismiss is frivolous and solely intended to cause unnecessary delay . . . ." General Statutes § 52-196a (f) (2). By its terms, the statute appears to permit fees only for frivolous motions. Even if, presumably, this subsection would extend to frivolous *appeals* of motions that have been correctly denied, this is not a prevailing party standard. The standard for frivolousness does not guarantee a plaintiff compensation for fees and certainly not for the costs of delay. Cf. General Statutes § 52-196a (f) (1) (awarding "the moving party costs and reasonable attorney's fees" if trial court grants special motion to dismiss, without caveat).

unwilling to conclude that the legislature intended for us to expend appellate resources in a search for error in the preliminary, discretionary gatekeeping determinations of trial judges.

Accordingly, because I do not interpret § 52-196a as granting a right to an immediate appeal or to immunity from suit, the denial of the defendants' special motion to dismiss pursuant to § 52-196a was not immediately appealable. Therefore, the Appellate Court should dismiss the defendants' appeal.

Accordingly, I respectfully dissent.

MICHAEL ROBINSON ET AL. *v.* V. D.*
(SC 20731)

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

The plaintiffs' motion to dismiss the defendant's appeal from the trial court's denial of his special motion to dismiss, filed pursuant to General Statutes § 52-196a, having been presented to this court, it is hereby ordered that the plaintiffs' motion is denied, and the case is transferred to the Appellate Court for further proceedings according to law.

May 2, 2023

ROBINSON, C. J. The defendant, V. D., appealed from the order of the trial court denying his special motion to dismiss, pursuant to the anti-SLAPP[1] statute, General

* In accordance with federal law; see 18 U.S.C. § 2265 (d) (3) (2018), as amended by the Violence Against Women Act Reauthorization Act of 2022, Pub. L. No. 117-103, § 106, 136 Stat. 49, 851; we decline to identify any person protected or sought to be protected under a protection order, protective order, or a restraining order that was issued or applied for, or others through whom that person's identity may be ascertained.

[1] "SLAPP is an acronym for strategic lawsuit against public participation . . . ." (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 336 Conn. 332, 337 n.4, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021).

Statutes § 52-196a,[2] the action brought by the plaintiffs, Michael Robinson and Mary Robinson. The plaintiffs now move to dismiss this appeal for lack of subject matter jurisdiction and, specifically, for lack of an appealable final judgment.[3] In response to the plaintiffs' motion, the defendant contends that the legislature's inclusion of "interlocutory appeal" language in subsection (d) of § 52-196a, the statute's legislative history, and public policy all favor an implicit right to an immediate appeal,

[2] General Statutes § 52-196a provides in relevant part: "(b) In any civil action in which a party files a complaint, counterclaim or cross claim against an opposing party that is based on the opposing party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, such opposing party may file a special motion to dismiss the complaint, counterclaim or cross claim.

* * *

"(d) The court shall stay all discovery upon the filing of a special motion to dismiss. The stay of discovery shall remain in effect until the court grants or denies the special motion to dismiss and any interlocutory appeal thereof. Notwithstanding the entry of an order to stay discovery, the court, upon motion of a party and a showing of good cause, or upon its own motion, may order specified and limited discovery relevant to the special motion to dismiss.

* * *

"[e] (3) The court shall grant a special motion to dismiss if the moving party makes an initial showing, by a preponderance of the evidence, that the opposing party's complaint, counterclaim or cross claim is based on the moving party's exercise of its right of free speech, right to petition the government, or right of association under the Constitution of the United States or the Constitution of the state in connection with a matter of public concern, unless the party that brought the complaint, counterclaim or cross claim sets forth with particularity the circumstances giving rise to the complaint, counterclaim or cross claim and demonstrates to the court that there is probable cause, considering all valid defenses, that the party will prevail on the merits of the complaint, counterclaim or cross claim. . . ."

[3] The defendant appealed from the decision of the trial court to the Appellate Court, and we subsequently transferred the appeal and the pending motion to dismiss to this court pursuant to General Statutes § 51-199 (c) and Practice Book § 65-1.

and the defendant further asserts that the denial of a special motion to dismiss is an appealable final judgment under the standard set forth in *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). For the reasons set forth in the companion case that we also decide today, *Smith* v. *Supple*, 346 Conn. 928, A.3d (2023), we conclude that a trial court's denial of a colorable special motion to dismiss under § 52-196a is an immediately appealable final judgment under the second prong of *Curcio*. We further conclude that the record demonstrates that the defendant has presented a colorable claim that he is entitled to a right to avoid litigation under our anti-SLAPP statute. Accordingly, we deny the plaintiffs' pending motion to dismiss this appeal for lack of a final judgment and transfer the case to the Appellate Court for further proceedings according to law.

The record reveals the following relevant facts and procedural history, which are undisputed for purposes of the present appeal. The parties are civilian employees of the United States Coast Guard (Coast Guard). Michael Robinson works as a locksmith at the United States Coast Guard Academy in New London (academy) and previously served as an assistant coach for the academy's skeet shooting team. Mary Robinson works as a human resources specialist at the Coast Guard headquarters. The defendant is employed as a carpenter/mason at the academy and, in 2019, was temporarily promoted to the new position of construction control inspector.

In late 2019 or early 2020, after applying for the full-time, permanent construction control inspector position, the defendant was informed that he had not been selected for the position. The defendant then resumed his job as a carpenter/mason. Thereafter, the defendant filed a formal, written grievance through his union rep-

resentative and alleged that the plaintiffs were involved in "a 'quid pro quo' arrangement" with the candidate selected for the position and the official who had selected the candidate. The defendant also alleged that he was denied the position, in part, "because of his known affiliation with the union . . . ."[4] A hearing took place, at which, the plaintiffs contend, the defendant made certain statements consistent with the allegations in the written grievance. Administrative officials with the Coast Guard subsequently investigated both of the plaintiffs and cleared them of any wrongdoing.

Thereafter, in June, 2020, the parties attended a competitive shooting event at a gun club in Burrillville, Rhode Island. After the event was over, Michael Robinson and the defendant had a verbal altercation in the parking lot, during which they exchanged certain insults. Thereafter, the defendant served an application for a protective order on Michael Robinson. A hearing took place in the Superior Court, which dismissed the application.

In December, 2020, the plaintiffs filed the present action against the defendant, alleging in their complaint that the defendant made false accusations against them on numerous occasions, namely, in the union grievance, during the proceedings which resulted from it, in the application for the protective order, and during the hearing that took place in the Superior Court on the protective order application. The plaintiffs alleged defamation, invasion of privacy by false light, common-law vexatious litigation, vexatious litigation under General Statutes § 52-568, and intentional and negligent infliction of emotional distress.

[4] In their complaint in this action, the plaintiffs specifically contended that the defendant falsely alleged in the grievance that he was "unfairly treated because of his known affiliation with the union" and that "[m]anagement favors persons who do not affiliate with the union . . . ."

In January, 2021, the defendant filed a special motion to dismiss, pursuant to § 52-196a, arguing that the plaintiffs' allegations in this action arose from the exercise of his rights of free speech, to petition the government, and to associate as a member of a labor union under the Connecticut constitution and the first amendment to the United States constitution. The defendant also alleged, among other defenses, that the plaintiffs' action violated public policy and that his statements were immune from the defamation claims, as they arose during judicial or quasi-judicial proceedings.

The plaintiffs opposed the motion, and, following a hearing, the trial court denied the special motion to dismiss. The court found that the defendant's conduct as alleged in the complaint was not protected under § 52-196a because it addressed private concerns, rather than a "matter of public concern," as defined in subsection (a) (1) of the statute.[5] The court further concluded that the defendant's conduct during the work related grievance process was personal in nature because it related to his employer's denial of the defendant's promotion and did not address the general practices of the employer. As such, the court determined that the defendant's conduct during that process was not related to a matter of public concern under "the government, zoning and other regulatory matters" category of the definition. General Statutes § 52-196a (a) (1) (C). In addition, the trial court found that the defendant's actions did not relate to a matter of public concern under the "public official or public figure" category; General Statutes § 52-196a (a) (1) (D); because the defendant had failed to establish that the plaintiffs' posi-

[5] "Matter of public concern" is defined as "an issue related to (A) health or safety, (B) environmental, economic or community well-being, (C) the government, zoning and other regulatory matters, (D) a public official or public figure, or (E) an audiovisual work . . . ." General Statutes § 52-196a (a) (1).

tions gave them "substantial control or responsibility over governmental affairs or that there was a significant public interest in either position that went beyond the general interest in all public sector employees."[6] Accordingly, the court concluded that the defendant had failed to meet his burden of showing, by a preponderance of evidence, that the complaint was based on the exercise of his right of free speech, to petition the government, or of association.

The defendant appealed from the trial court's decision to the Appellate Court in April, 2021, where the plaintiffs filed a motion to dismiss the appeal for lack of a final judgment. Thereafter, the defendant filed a motion to stay the proceedings until this court decided *Pryor* v. *Brignole*, 346 Conn. 534, A.3d (2023). The Appellate Court granted the motion for a stay on September 29, 2021, without ruling on the plaintiffs' motion to dismiss. In July, 2022, this court transferred this appeal to itself pursuant to Practice Book § 65-1 and ordered the parties to address in their appellate briefs "only the threshold jurisdictional issue of whether the denial of a special motion to dismiss filed pursuant to . . . § 52-196a is an appealable final judgment . . . ."[7]

The primary issue raised by the plaintiffs' motion to dismiss this appeal—namely, whether a trial court's denial of a special motion to dismiss under the anti-SLAPP statute can constitute an appealable final judgment—is controlled by *Smith* v. *Supple*, supra, 346

[6] As to the defendant's statements in the application for a protective order and his conduct during the proceedings that resulted therefrom, the trial court concluded that the application and the proceedings were inherently personal in nature.

[7] We subsequently granted the application of the American Civil Liberties Union Foundation of Connecticut (ACLU) to file an amicus curiae brief in support of the defendant's contention that a denial of a special motion to dismiss under the anti-SLAPP statute is an appealable final judgment.

Conn. 928. In that case, we examined relevant statutory text, legislative history, and analogous laws from our sister states and concluded that our "anti-SLAPP statute affords a defendant a substantive right to avoid litigation on the merits . . . ." Id., 949; see id., 938–60. We then continued to conclude that, in cases in which a defendant can assert a colorable claim that a trial court's denial of a special motion to dismiss under that statute has placed that particular right at risk, an immediate appeal may be taken pursuant to the second prong of *State* v. *Curcio*, supra, 191 Conn. 31. See *Smith* v. *Supple*, supra, 949; see also *Sena* v. *American Medical Response of Connecticut, Inc.*, 333 Conn. 30, 41, 213 A.3d 1110 (2019) ("[a defendant] must make at least *a colorable claim* that some recognized statutory or constitutional right is at risk" (emphasis added; internal quotation marks omitted)).

Application of that standard to the present case requires us to consider whether the defendant has asserted a colorable claim to the protections afforded by the anti-SLAPP statute. In particular, we must determine whether the defendant has asserted a colorable claim that his actions, as alleged in the plaintiffs' complaint, are based on his right of free speech, to petition the government, or of association.

We conclude that the defendant has asserted a colorable claim that at least some of the statements forming the basis of the plaintiffs' complaint were based on the defendant's exercise of his right to petition the government, as contemplated by the anti-SLAPP statute. "Right to petition the government" is defined in relevant part as "communication in connection with an issue under consideration or review by a legislative, executive, administrative, judicial or other governmental body . . . ." General Statutes § 52-196a (a) (3) (A). A party seeking protection under the statute must show,

by a preponderance of the evidence, that the exercise of that right is in connection with a "matter of public concern," as defined in § 52-196a (a) (1). See footnote 5 of this opinion. Courts have found that "mixed questions of private and public concerns" may be protected under the first amendment and that "the fact that a statement evolves from a personal dispute does not preclude some aspect of it from touching [on] matters of public concern." *Morgan* v. *Milford*, 914 F. Supp. 21, 23 (D. Conn. 1996).

The defendant presented evidence before the trial court that his actions related to a matter of public concern because they (1) arose from a collective bargaining agreement between the Coast Guard and the American Federation of Government Employees, Council 120, to which the defendant belongs, and (2) related to improprieties in the hiring process at the academy that went beyond his own personal position, specifically, that Coast Guard hiring officials disfavor persons with a union affiliation when hiring.

On the basis of our review of the record and the plain meaning of the definition of "right to petition the government," we conclude that the defendant has at least a superficially well founded claim that some of his statements, particularly those relating to the grievance process, qualify as communications relating to an issue under consideration by a governmental body, namely, the Coast Guard. See *Stellmaker* v. *DePetrillo*, 710 F. Supp. 891, 893 (D. Conn. 1989) (public school teacher's grievance was protected under first amendment from retaliation by public officials because "[the] grievance was filed pursuant to a procedure established through collective bargaining" and thereby invoked his "right to . . . petition a government[al] body, the [b]oard of [e]ducation"); see also *Noble* v. *Hennessey*, Superior Court, judicial district of New London, Docket No. KNL-

CV-20-6045166-S (January 12, 2021) (allegedly defamatory grievance filed with quasi-judicial body, Statewide Grievance Committee, fell under purview of petitioning government for purposes of anti-SLAPP statute).

In addition, the defendant has asserted a colorable claim that his statements during the grievance process relate to a "matter of public concern." Although these statements evolved from a personal dispute between the parties, the statements could conceivably be of concern to the general public because the allegations related to hiring practices within a governmental entity. In particular, the defendant's speech touches on the possible existence of anti-union sentiment within the academy and quid pro quo arrangements between management officials as it relates to hiring. Therefore, the defendant has at least a superficially well founded claim that his conduct concerns not only him, but others at the academy and the general community at large.[8]

Accordingly, we conclude that the defendant has asserted a colorable claim to a right to avoid litigation under our anti-SLAPP statute. On the basis of the record before us, we conclude that the trial court's denial of the defendant's special motion to dismiss filed pursuant to § 52-196a constitutes an appealable final judgment under *Curcio*.

The plaintiffs' motion to dismiss this appeal for lack of a final judgment is denied, and, pursuant to Practice

[8] Because we conclude that the defendant has asserted a colorable claim under the right to petition the government for his statements during the grievance proceedings, we need not decide whether the statements alleged in the plaintiffs' complaint also fall within the statutory definitions of "right of free speech" and "right of association." See General Statutes § 52-196a (a) (2) and (4). Ultimately, we leave it to the appellate court reviewing the merits of the defendant's appeal to determine whether the trial court, in fact, incorrectly concluded that the defendant had not met his initial burden under § 52-196a (e) (3).

Book § 65-1, the case is transferred to the Appellate Court for further proceedings according to law.

In this opinion McDONALD, MULLINS and PRESCOTT, Js., concurred.

D'AURIA, J., with whom ECKER and ALEXANDER, Js., join, dissenting. For the reasons stated in my dissenting opinion in one of the two companion cases we also decide today; see *Smith* v. *Supple*, 346 Conn. 928, 965, A.3d (2023) (*D'Auria*, *J.*, dissenting); I do not agree with the majority's conclusion that the denial of a special motion to dismiss asserting a colorable claim that the underlying cause of action is based on a defendant's exercise of his or her rights to free speech, to free association, or to petition the government constitutes an appealable final judgment. Specifically, as I explained in detail in my dissent in *Smith*, I do not interpret General Statutes § 52-196a, our anti-SLAPP statute, as granting a right to an immediate appeal. Nor do I interpret § 52-196a as granting a right to immunity from suit, and thus I do not agree with the majority that the denial of a colorable claim to the protections afforded by § 52-196a constitutes an appealable final judgment under the second prong of *State* v. *Curcio*, 191 Conn. 27, 31, 463 A.2d 566 (1983). Accordingly, I respectfully dissent.

Rather, I interpret § 52-196a as granting a new procedural right, entitling the defendant to raise as early as possible in the litigation his or her preexisting right to immunity from liability when the underlying defense is premised on his or her exercise of a first amendment right or a right under a state constitutional analogue. The right to this procedure, and its corresponding benefits, has been satisfied in the present case. The defendant, V. D., had the right to file a special motion to dismiss early in the litigation process, with discovery and its associated costs and burdens stayed until resolu-

tion of the motion. The trial court, acting in its gatekeeping function, considered the merits of the underlying lawsuit, determining that the defendant had failed to establish, by a preponderance of the evidence, that the plaintiffs, Michael Robinson and Mary Robinson, brought the underlying lawsuit abusively or frivolously in an attempt to chill the defendant's rights to free speech, to free association, or to petition the government. Specifically, the trial court found nothing in the record from which it could find that the defendant's conduct was a matter of public concern. Thus, the defendant, "early in the process," had the opportunity to "try to dismiss a frivolous or abusive claim that has no merit" and did not have to incur the costs of litigation until he received a determination on his motion. (Internal quotation marks omitted.) *Lafferty* v. *Jones*, 336 Conn. 332, 382 n.36, 246 A.3d 429 (2020), cert. denied, U.S. , 141 S. Ct. 2467, 209 L. Ed. 2d 529 (2021). Therefore, I would dismiss the defendant's appeal for lack of a final judgment.

Accordingly, I respectfully dissent.

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CONNECTICUT APPELLATE REPORTS

Vol. 219

CASES ARGUED AND DETERMINED

IN THE

APPELLATE COURT

OF THE

STATE OF CONNECTICUT

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IN RE CAMERON H. ET AL.*
(AC 45534)

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

Syllabus

The respondent mother appealed to this court from the judgments of the trial court terminating her parental rights with respect to her minor children. She claimed that the trial court erroneously concluded, inter alia, that she was unable or unwilling to benefit from the reunification services offered to her by the Department of Children and Families pursuant to statute (§ 17a-112 (j) (1)) and that she failed to achieve a sufficient degree of personal rehabilitation. The minor children, who had previously been adjudicated neglected and committed to the care of the petitioner, the Commissioner of Children and Families, had complex

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

needs, having been diagnosed with, inter alia, attention deficit hyperactivity disorder and post-traumatic stress disorder, which the department provided services to address and support. *Held*:

1. The respondent mother could not prevail on her claim that the trial court improperly concluded that the department made reasonable efforts to reunify her with her children and that she was unable or unwilling to benefit from such reunification efforts: because the petitioner did not allege in the petitions to terminate parental rights that the department had made reasonable efforts to reunify the mother with her children, this court did not address this portion of her claim; moreover, contrary to the mother's claim that the department's services were inadequate to assist her to meet the complex needs of her children, and that without adequate services, she was unwilling or unable to benefit from such services, the trial court's uncontested subordinate findings established that the department took various steps to facilitate the mother's reunification with her children before the petitioner sought to terminate the mother's parental rights, including referring her to several parenting education and supervision programs, and the department's social worker testified as to the mother's struggles with accountability for her actions and her difficulties accepting her children's special needs; furthermore, the record reflected the report of the court-appointed psychological evaluator, who noted that the mother did not incorporate the information learned from the parenting education programs into her behavior when interacting with the children, did not reach out to her children's service providers to further understand their special needs, and was resistant to making changes, particularly as to her parenting style.
2. The trial court properly concluded that the respondent mother had failed to achieve the requisite degree of personal rehabilitation, as required by § 17a-112 (j) (3) (B) (ii), to reasonably encourage the belief that, within a reasonable time, considering the ages and needs of the children, she could assume a responsible position in the children's lives: contrary to the mother's claim that she failed to acquire the knowledge necessary to care for the children because the department's services, as provided to her, were not adequate given the children's special needs, the record contained sufficient evidence to support the trial court's findings that the petitioner had proven by clear and convincing evidence that the mother failed to rehabilitate given the ages and needs of the children; moreover, although the mother participated in numerous parenting programs aimed to improve her skills as a parent given the special needs of the children, she failed to benefit from such services, as the department's social worker testified that the mother was not receptive to the children's special needs and had not contacted her children's service providers to better understand those needs, and the court-appointed psychological evaluator testified that the mother had difficulty addressing her own mental health needs, mistrusted service providers, which prevented her from making significant progress in learning from the services provided

to her, did not believe in her children's diagnoses and was not familiar with the diagnoses or the services her children received.

Argued November 7, 2022—officially released May 4, 2023**

Procedural History

Petitions by the Commissioner of Children and Families to terminate the respondents' parental rights with respect to their minor children, brought to the Superior Court in the judicial district of New Britain, Juvenile Matters, and tried to the court, *Taylor*, *J.*, judgments terminating the respondents' parental rights, from which the respondent mother appealed to this court. *Affirmed.*

Matthew C. Eagan, assigned counsel, for the appellant (respondent mother).

Evan O'Roark, assistant attorney general, with whom was *Ciarra J. Minacci-Morrey*, assistant attorney general, and, on the brief, *William Tong*, attorney general, for the appellee (petitioner).

Opinion

SUAREZ, J. The respondent mother, Joyce F., appeals from the judgments of the trial court terminating her parental rights as to her minor children, Cameron H. and Noah H. (children),[1] pursuant to General Statutes § 17a-112 (j) (3) (B) (ii). On appeal, the respondent claims that the court improperly concluded that (1) the Department of Children and Families (department) made reasonable efforts to reunify her with her children, and that she was unable or unwilling to benefit from the reunification services; and (2) she failed to

** May 4, 2023, the date that this decision was released as a slip opinion, is the operative date for all substantive and procedural purposes.

[1] The father of Cameron and Noah, Milecom H., also was named as a respondent in the petitions for termination of parental rights. Milecom consented to the termination of his parental rights as to both children and is not participating in this appeal. We hereinafter refer to the respondent mother as the respondent.

achieve such a degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the age and needs of the children, she could assume a responsible position in their lives. We affirm the judgments of the court.

The following facts, which the court found by clear and convincing evidence or are otherwise undisputed, and procedural history are relevant to this appeal. The respondent has three adult children from previous relationships and three minor children.[2] She has an extensive history with the department dating back to 1994, which includes thirty-nine referrals, related to issues of physical abuse, medical neglect, physical neglect, inadequate supervision, domestic violence, parenting issues and inappropriate sexual contact between the older siblings.

On March 2, 2018, the petitioner, the Commissioner of Children and Families, filed neglect petitions and motions for orders of temporary custody (OTCs) on behalf of the children. The court granted the OTCs, finding that the children were in immediate physical danger from their surroundings and that the department had made reasonable efforts to prevent their removal. The court vested temporary custody of the children in the care and custody of the petitioner. On March 16, 2018, following a contested hearing, the OTCs were sustained and specific steps to facilitate reunification of the respondent with the children were ordered.

On July 16, 2018, the children were adjudicated neglected and committed to the care and custody of the petitioner. At that time, the court issued new specific steps.

On September 22, 2020, the petitioner filed motions to review and approve permanency plans, which

[2] In addition to Cameron and Noah, the respondent has another minor child who resides with his biological father and is not a subject of this appeal.

included the termination of parental rights and adoption of the children. On November 5, 2020, following a hearing, the court approved the permanency plans.

On February 8, 2021, the petitioner filed petitions to terminate the parental rights of the respondent with respect to the children (petitions). As to each child, the petitioner alleged, as the grounds for termination, that the children had been found in a prior proceeding to have been neglected, abused, or uncared for and that the respondent had "failed to achieve [such a] degree of personal rehabilitation [as] would encourage the belief that within a reasonable time, considering the age[s] and needs of the [children], [she] could assume a responsible position in [their lives] . . . ." The petitioner further alleged that the department had made reasonable efforts to locate the respondent, that she was unable or unwilling to benefit from reunification efforts, and that reasonable efforts to reunify were not required because the court had previously approved a permanency plan other than reunification.

A trial on the petitions was held over the course of four nonconsecutive days beginning on August 30, 2021. The respondent was represented by counsel. Numerous witnesses testified, and several exhibits were admitted into the record. On March 28, 2022, the court issued a memorandum of decision in which it granted the petition as to each child. The court found by clear and convincing evidence that the children had previously been adjudicated neglected and that the respondent had failed to rehabilitate sufficiently to satisfy the requirements of § 17a-112 (j) (3) (B) (ii). The court also found by clear and convincing evidence that the department had made reasonable efforts to reunify the respondent with the children, and that she was unable or unwilling to benefit from the reunification services.

In its memorandum of decision, the court made the following relevant findings concerning Cameron. "Cameron was born [in] 2014 in Hartford. [He] has a child protection history relating to physical neglect. This resulted in his hospitalization on January 26, 2018, and again on February 14, 2018, after he ingested Risperdal and on the subsequent occasion, presented as lethargic. There were also concerns regarding [the respondent's] delay in securing medical treatment. . . .

"Cameron has been engaged in individual therapy . . . to address his emotional and behavioral needs . . . . [He] displayed impulsive and aggressive behaviors as well as hyperactivity. His inability to self-regulate was disruptive to his foster home, and his impulsive behaviors had frequently presented a risk for his own safety. The treatment goals for Cameron were to reduce risky behaviors, have periods of focus, and increase his ability to express himself verbally. Cameron has been focusing on simple tasks and reducing impulsive and risky behaviors. Cameron also received play therapy to allow him the experience of calm, focused, and reduced hyperactivity by increasing his self-awareness through mindfulness and finding alternate and healthy methods of self soothing.

"Cameron's diagnoses include attention deficit/hyperactivity disorder (ADHD), other specified trauma-related disorder, pica, sensory sensitivity and integration disorder, and [post-traumatic stress disorder (PTSD)] by history." The court further noted that a clinician who worked with Cameron while he attended the YWCA LEAP program believed that his "behaviors were a result of trauma, voids, rejection, and a need to fulfill his social and emotional needs. . . . His behaviors usually included self-harming behaviors (biting and hitting his head against things), flipping his body, and eating nonfood items (rock salt, paper, paper clips, or playdough)."

The court made the following relevant findings concerning Noah. "Noah was born [in] 2015 in Hartford. [He] has been in [the department's] care since 2018, due to concerns of physical neglect related to inadequate supervision by [the respondent]. Noah's sibling, Cameron, was hospitalized on January 26, 2018, and again on February 14, 2018, after he ingested Risperdal and, on the subsequent occasion, presented as lethargic. There were concerns regarding [the respondent's] delay in securing medical treatment. Noah was two years old at the time. . . .

"Noah participated . . . and engaged in weekly [therapeutic] sessions . . . ." The goals of his treatment plans were to "identify his triggers for aggression, increase coping skills, reduce dysregulation, reduce [the] amount of emotional dysregulation, reduce encopresis, and reduce sibling fighting." The court further found that, according to his treatment provider, Noah "displayed hyperactive behavior, and his insight and judgment appear[ed] to be poor." Noah "was diagnosed with ADHD, other specified trauma-related disorder, enuresis-diurnal, and sensory sensitivity and integration disorder." The court noted that "Cameron and Noah were very emotional about being separated."

In addition, the court made the following relevant findings concerning the respondent. "[The respondent] participated in individual therapy on a weekly basis with Nadia Rivera, [a certified addiction counselor], until approximately November, 2020. [Rivera] reported that [the respondent] was diagnosed with anxiety and [PTSD] from childhood maltreatment. [Rivera] reported that [the respondent] exhibit[ed] symptoms of bipolar disorder but [was] not diagnosed with this condition at [that] time. [Rivera] suggested that [the respondent] meet with the [advanced practice registered nurse] for medication management, but [the respondent] declined medication.

"[Rivera] reported that [the respondent's] treatment goals were to work on coping and organizational skills, maintaining stability in the community, maintaining housing, and maintaining employment. Her main goal was to control her impulsivity. [Rivera] reported that [the respondent] appeared to be doing better emotionally. However, maintaining and developing social relationships continued to be a barrier for [the respondent]. [Rivera] reported that [the respondent] did not display mindfulness as she was unaware of her body language and had a difficult time adjusting in certain situations. She also reported that [the respondent] was not happy about her children not being in her care and she had a difficult time processing it."

With respect to reunification efforts, the court found by clear and convincing evidence that the department "offered [the respondent] administrative case reviews (ACRs), casework services, considered removal meeting, supervised visitation, and transportation assistance. All Pointe Care, [LLC (All Pointe Care)] offered parenting education and supervised visitation. Klingberg Family Center provided individual therapy and parenting education. St. Francis' Parenting Support Service offered parenting education. Unlimited Family Services, LLC (Unlimited Family Services), offered individual therapy, parenting education, and supervised visitation. Western Connecticut Behavioral Health, LLC, (Jessica Biren-Caverly, Ph.D. [a psychologist]) offered psychological evaluations. Wheeler Clinic offered [a] reunification and therapeutic family time . . . program."

Additionally, the court found by clear and convincing evidence that the respondent was "encouraged to engage with the children's service providers to gain insight into [the children's] trauma symptoms, presenting behaviors, and child specific strategies that may be more effective in managing [their] behaviors." She,

however, "failed to follow through with contacting [the children's] service providers in order to be able to understand their situation and issues better."

The court noted that the respondent "has been unable to correct the factors that led to the initial commitment of her children, insofar as she is concerned. The clear and convincing evidence reveals that, from the date of commitment through the date of the filing of the . . . petition[s], and continuing through the time of trial, [the respondent] has not been available to take part in her sons' lives in a safe, nurturing, and positive manner, and, based on her issues of mental health, parenting deficits, and a failure to engage, complete, and benefit from counseling and services, [the respondent] will never be consistently available to [the children].

"Unlike many [termination of parental rights] cases, the issue is not the respondent's . . . attendance with service providers and with visitation. There is no question that [her] attendance with service providers has been generally satisfactory. [The respondent's] issues have been related to her inability to gain benefit from her services. [She] has consistently refused to acknowledge her responsibility in Cameron's poisoning. This factor was noted by several witnesses and service providers. [The respondent's] understanding of [the children's] issues remains poor. As a result, she has difficulty in regulating their behavior or controlling them without resorting to violence.

"The clear and convincing evidence indicates that [the respondent] failed to follow through with contacting [the children's] service providers in order to be able to understand their situation and issues better. . . . [The respondent] has failed to master minimally acceptable parenting skills to meet the children's emotional and behavioral needs, as she was unable to appreciate the extent of their mental health diagnoses

and trauma. While [the respondent] has engaged in parenting services, she continues to need increased knowledge of the children's specific care needs, supervision needs, and age appropriate discipline in light of the children's trauma history. She has failed to acquire such knowledge."

In reaching its conclusion that the respondent had failed to rehabilitate and was not reasonably likely to do so in the future, the court discussed, in part, the court-ordered psychological evaluation of the respondent and the children. A report thereof was admitted into evidence along with the testimony of the court-appointed evaluator, Biren-Caverly. The court noted that Biren-Caverly "testified that [the respondent] did not have much insight into her own mental health needs. She indicated that [the respondent's] therapist related that [the respondent] was reluctant to discuss her mental health issues during therapy. . . .

"[Biren-Caverly] concluded that [the respondent's] individual therapy was of limited effectiveness. She testified that [the respondent] mistrusts everyone and cannot incorporate the recommendations of the service providers into her parenting. Furthermore, [the respondent] does not believe that her parenting is wrong.

"[Biren-Caverly] recommended against reunification. She noted that, without [the respondent] incorporating the service providers' recommendation[s] into her parenting, it was unlikely that [the respondent] would be successful in raising her sons."

In light of the foregoing findings, the court concluded that there was clear and convincing evidence that (1) the department had made reasonable efforts to reunify the respondent with her children, (2) she was unable or unwilling to benefit from the reunification efforts, and (3) the respondent had failed to rehabilitate. The court then found that terminating the respondent's

parental rights was in the best interests of the children.[3] Accordingly, the court rendered judgments terminating the parental rights of the respondent and appointed the petitioner as the children's statutory parent. This appeal followed.[4] Additional facts and procedural history will be set forth as necessary.

Before turning to the respondent's claims, we first set forth the following legal principles. Section 17a-112 (j) provides in relevant part: "The Superior Court, upon notice and hearing as provided in [General Statutes §§] 45a-716 and 45a-717, may grant a petition filed pursuant to this section if it finds by clear and convincing evidence that (1) the [department] has made reasonable efforts to locate the parent and to reunify the child with the parent in accordance with subsection (a) of [General Statutes §] 17a-111b, unless the court finds in this proceeding that the parent is unable or unwilling to benefit from reunification efforts, except that such finding is not required if the court has determined at a hearing pursuant to [§] 17a-111b, or determines at trial on the petition, that such efforts are not required, (2) termination is in the best interest of the child, and (3) . . . (B) the child (i) has been found by the Superior Court or the Probate Court to have been neglected, abused or uncared for in a prior proceeding, or (ii) is found to be neglected, abused or uncared for and has been in the custody of the [petitioner] for at least fifteen months and the parent of such child has been provided specific steps to take to facilitate the return of the child to the parent pursuant to [General Statutes §] 46b-129 and has failed to achieve such degree of personal rehabilitation as would encourage the belief that within a

[3] We note that the respondent in this appeal does not challenge the court's finding that the termination of her parental rights was in the best interests of the children.

[4] In this appeal, the attorney for the children filed a statement in accordance with Practice Book § 67-13 adopting the brief filed by the petitioner and asking the court to affirm the judgments of the trial court.

reasonable time, considering the age and needs of the child, such parent could assume a responsible position in the life of the child . . . .''

''Proceedings to terminate parental rights are governed by § 17a-112. . . . Under [that provision], a hearing on a petition to terminate parental rights consists of two phases: the adjudicatory phase and the dispositional phase. During the adjudicatory phase, the trial court must determine whether one or more of the . . . grounds for termination of parental rights set forth in § 17a-112 [(j) (3)] exists by clear and convincing evidence. The [petitioner] . . . in petitioning to terminate those rights, must allege and prove one or more of the statutory grounds. . . . Subdivision (3) of § 17a-112 (j) carefully sets out . . . [the] situations that, in the judgment of the legislature, constitute countervailing interests sufficiently powerful to justify the termination of parental rights in the absence of consent. . . . Because a respondent's fundamental right to parent his or her child is at stake, [t]he statutory criteria must be strictly complied with before termination can be accomplished and adoption proceedings begun.'' (Internal quotation marks omitted.) *In re Ryder M.*, 211 Conn. App. 793, 806–807, 274 A.3d 218, cert. denied, 343 Conn. 931, 276 A.3d 433 (2022).

I

The respondent first claims that the court improperly concluded that the department had made reasonable efforts to reunify her with her children and that she was unable or unwilling to benefit from the reunification efforts. Because the petitioner did not allege in the petitions that the department had made reasonable efforts to reunify the respondent with the children, we limit our analysis to the question of whether the court erred in concluding that the respondent was unwilling or unable to benefit from reunification services, which

the petitioner did allege. The respondent argues that the evidence was insufficient for the court to conclude that she was unwilling or unable to benefit from services because, although the department provided the respondent with services, all of which were aimed at improving her skills as a parent, these services were "grossly inadequate to meet the needs of these complex children." We are not persuaded.

In order to evaluate the respondent's claim, we first review the services the department provided.[5] The respondent does not contest the court's subordinate findings made in support of its reasonable efforts determination. She acknowledges that "[t]here is no dispute that the [d]epartment offered the respondent . . . casework and other administrative services, parenting education, supervised visitation, transportation to the visits, individual therapy and therapeutic family time program" and that these services were aimed at improving her skills as a parent. Rather, the respondent maintains that the services provided by the department were

[5] "[A]lthough it is true that a finding that the department made reasonable reunification efforts is not a necessary predicate to a finding that a parent is unable to benefit from such efforts, this does not mean that a trial court could never view those two issues as interrelated." *In re Elijah C.*, 326 Conn. 480, 497–98, 165 A.3d 1149 (2017). "[T]he question of whether the petitioner made reasonable efforts to reunify the respondent with her child is inextricably linked to the question of whether the respondent can benefit from such efforts." *In re Gabriella A.*, 319 Conn. 775, 814, 127 A.3d 948 (2015). "Depending on the case, a trial court might well conclude that the department's reunification efforts were so lacking as to preclude both a finding that the department made reasonable reunification efforts *and* that a parent is unable to benefit from such efforts." (Emphasis in original.) *In re Elijah C.*, supra, 498. However, the department is only required to "prove *either* that it has made reasonable efforts to reunify *or*, *alternatively*, that the parent is unwilling or unable to benefit from reunification efforts. Section 17a-112 (j) clearly provides that the department is not required to prove both circumstances. Rather, either showing is sufficient to satisfy this statutory element." (Emphasis in original.) *In re Jorden R.*, 293 Conn. 539, 552–53, 979 A.2d 469 (2009). Because the petitioner did not allege in the petitions at issue in the present case that reasonable reunification efforts had been made, we review the court's reasonable reunification efforts finding only

inadequate to assist her in adjusting her circumstances so that she could realistically care for the complex needs of the children, and that, without such services being offered to the respondent, there was insufficient evidence that she was unwilling or unable to benefit from them.

The petitioner argues that the department made numerous service referrals directed at "addressing . . . [the respondent's] impediments to reunification with [the children], specifically her untreated mental health concerns and parenting incapacities." The petitioner further argues that, despite these efforts, the respondent was unable or unwilling: "to fully appreciate her role in Cameron['s] and Noah's trauma, behaviors, and mental health needs"; recognize the emotional and behavioral needs of the children; and adequately engage and address her own mental health issues.

We first set forth the standard of review that governs the resolution of this claim. On appeal, "we review the trial court's ultimate determination that a respondent parent was unwilling or unable to benefit from reunification services for evidentiary sufficiency and review the subordinate factual findings for clear error. . . . [We do] not examine the record to determine whether the trier of fact could have reached a conclusion other than the one reached. . . .

"In our review of the record for evidentiary sufficiency, we are mindful that, as a reviewing court, [w]e cannot retry the facts or pass upon the credibility of the witnesses. . . . Rather, [i]t is within the province of the trial court, when sitting as the fact finder, to weigh the evidence presented and determine the credibility and effect to be given the evidence." (Citations

as it relates to its conclusion that the respondent is unable or unwilling to benefit from such reasonable reunification efforts.

omitted; internal quotation marks omitted.) *In re Gabriella A.*, 319 Conn. 775, 790, 127 A.3d 948 (2015). "Under this standard, the inquiry is whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . . When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court." (Internal quotation marks omitted.) *In re Ryder M.*, supra, 211 Conn. App. 809.

The court's uncontested subordinate findings establish that the department took various steps to facilitate the respondent's reunification with her children before the petitioner sought to terminate the respondent's parental rights. The record reveals that the department referred the respondent to Unlimited Families Services, a parenting education and supervision program, which offered the respondent supervised visitation with the children and helped her develop strategies to better regulate the children's behaviors. Although the respondent was successfully discharged from that program, it was recommended that she continue to engage in parenting services due to her inability to accept responsibility for her actions that led to the department's removal of the children. In addition, Unlimited Family Services recommended mental health treatment for the respondent. Thereafter, the department referred the respondent to All Pointe Care, another supervised visitation service with a parenting education component. The respondent was discharged from this program shortly after an incident in which she was physically aggressive with one of the children. After she was discharged from All Pointe Care, the respondent was resistant to other services, as she believed she did not need

any supervised visits and briefly moved to North Carolina where she did not engage in any services.[6] Upon her return from North Carolina, the department referred the respondent to another parenting support service through Saint Francis Hospital, which was a curriculum based program during which the respondent received parenting education aimed at helping her gain insight into the children's emotional and behavioral needs.

The record further reveals that, despite the services that were offered to the respondent to facilitate reunification with the children, she was unable or unwilling to benefit from them. At trial, the court heard testimony from the department's social worker, Tenika Campbell. Campbell testified that the respondent still struggles with accountability for her actions. Campbell further testified that the respondent did not seem to be receptive when they spoke about the children's emotional and behavioral needs. According to Campbell, the respondent believes that the children are just regular hyperactive children. Campbell further testified that the department had provided the respondent and the respondent's therapists and parenting educators, on various occasions, with the contact information of the children's providers in order for the respondent to better understand the children's needs. To Campbell's knowledge, the respondent never contacted the children's providers to discuss their needs.

At trial, the petitioner also introduced into evidence the written report of the court-ordered psychological evaluation, which supports the court's conclusion that the respondent was unable or unwilling to benefit from reunification efforts. In the report, Biren-Caverly indicated that she asked the respondent about Cameron's

[6] The record reflects that the respondent moved to North Carolina in June, 2020, without the knowledge of the department. She returned to Connecticut in November, 2020.

needs. The respondent replied that Cameron had been diagnosed with ADHD and pica, however, she indicated that all of her children that have been in foster care have been diagnosed with ADHD. When asked about Noah's special needs, the respondent indicated to Biren-Caverly that Noah did not have any special needs and that he was just an active normal child. In Biren-Caverly's opinion, the respondent would require significant education to learn about the children's individual mental health needs. In her report, Biren-Caverly noted that the respondent had a history of attending services, however, it appeared that the respondent did not incorporate the information learned into her interactions with the children. Biren-Caverly further noted that the respondent had a limited understanding and acceptance of the children's mental health needs and that she had a minimal appreciation of her role in their current functioning. Biren-Caverly opined that, in order for the respondent to reunify with the children, she would need to engage in the children's therapy, gain understanding of their needs, and acknowledge that the children experienced trauma in her care. Biren-Caverly, however, believed that the respondent is resistant to making changes and that the respondent does not believe that she needs to make changes to her parenting style.

In the present case, the court's uncontested cumulative findings amply support its determination that, despite the department's reasonable efforts to reunify the respondent with the children, given their special needs, the respondent was unable or unwilling to benefit from such efforts.

II

Next, the respondent claims that the court improperly concluded that she had failed to achieve such a degree of personal rehabilitation as would encourage the belief that, within a reasonable time, considering the ages and

needs of the children, she could assume a responsible position in their lives. We are not persuaded.

We begin by setting forth the established principles of law and the applicable standard of review that govern the resolution of this claim. "The trial court is required, pursuant to § 17a-112, to analyze the [parent's] rehabilitative status as it relates to the needs of the particular child, and further . . . such rehabilitation must be foreseeable within a reasonable time. . . . The statute does not require [a parent] to prove precisely when [she] will be able to assume a responsible position in [her] child's life. Nor does it require [her] to prove that [she] will be able to assume full responsibility for [her] child, unaided by available support systems. It requires the court to find, by clear and convincing evidence, that the level of rehabilitation [she] has achieved, if any, falls short of that which would reasonably encourage a belief that at some future date [she] can assume a responsible position in [her] child's life. . . . Personal rehabilitation as used in [§ 17a-112 (j) (3) (B)] refers to the restoration of a parent to [her] former constructive and useful role as a parent. . . . [I]n assessing rehabilitation, the critical issue is not whether the parent has improved [her] ability to manage [her] own life, but rather whether [she] has gained the ability to care for the particular needs of the [children] at issue. . . .

"[The] completion or noncompletion [of the specific steps], however, does not guarantee any outcome. . . . Accordingly, successful completion of expressly articulated expectations is not sufficient to defeat a department claim that the parent has not achieved sufficient rehabilitation. . . . Whereas, during the adjudicatory phase of a termination proceeding, the court is generally limited to considering events that precede the date of the filing of the petition or the latest amendment to the petition, also known as the adjudicatory date, it may rely on events occurring after the [adjudicatory] date

. . . when considering the issue of whether the degree of rehabilitation is sufficient to foresee that the parent may resume a useful role in the child's life within a reasonable time. . . .

"A conclusion of failure to rehabilitate is drawn from *both* the trial court's factual findings and from its weighing of the facts in assessing whether those findings satisfy the failure to rehabilitate ground set forth in § 17a-112 (j) (3) (B). Accordingly . . . the appropriate standard of review is one of evidentiary sufficiency, that is, whether the trial court could have reasonably concluded, upon the facts established and the reasonable inferences drawn therefrom, that the cumulative effect of the evidence was sufficient to justify its [ultimate conclusion]. . . .[7] When applying this standard, we construe the evidence in a manner most favorable to sustaining the judgment of the trial court. . . . We will not disturb the court's subordinate factual findings unless they are clearly erroneous. . . . A factual finding is clearly erroneous when it is not supported by any evidence in the record or when there is evidence to support it, but the reviewing court is left with the definite and firm conviction that a mistake has been made." (Citations omitted; emphasis in original; footnote added; internal quotation marks omitted.) *In re G. H.*, 216 Conn. App. 671, 683–85, 286 A.3d. 671 (2022).

In its memorandum of decision, the court found by clear and convincing evidence that the respondent had failed to rehabilitate given the ages and needs of the children. It found that the respondent "ha[d] failed to master minimally acceptable parenting skills to meet

[7] The respondent claims in her brief to this court that evidentiary sufficiency is an improper standard of review in child protection cases. However, she concedes that, as an intermediary court of appeals, this court is bound by our Supreme Court's decision in *In re Shane M.*, 318 Conn. 569, 588, 122 A.3d 1247 (2015), in which the court held that the appropriate standard of review is one of evidentiary sufficiency.

the children's emotional and behavioral needs as she was unable to appreciate the extent of their mental health diagnoses and trauma." It further found that, "[w]hile [the respondent] has engaged in parenting services, she continues to need increased knowledge of the children's specific care needs, supervision needs, and age appropriate discipline in light of the children's trauma history. She has failed to acquire such knowledge." Significantly, the court also found that the respondent has "consistently refused to acknowledge her responsibility in Cameron's poisoning."

The court concluded that, when considering the "high level of care, patience, and discipline that [the children's] needs will require from their caregivers, it is patently clear that [the respondent] is not in a better position to parent her children than she was at the time of [the children's] commitment" and that the respondent "is no better able to resume the responsibilities of parenting at the time of filing the termination petition[s] than [she] had been at the time of the children's commitment." (Internal quotations marks omitted.) The court noted that the children "cannot wait for the remote possibility that their biological mother might overcome her mental health issues, her parenting issues, and her failure to appropriately benefit from referrals, recommendations, and services and acquire sufficient parenting ability to care for them one day in the future." Accordingly, the court found that the petitioner had proven, by clear and convincing evidence, that the respondent had failed to rehabilitate pursuant to § 17a-112 (j) (3) (B) (ii).

The respondent maintains that the court could not properly find that she had failed to rehabilitate because the reunification services that were provided to her were not adequate given the children's needs. She

argues that she failed to acquire the knowledge necessary to care for the children because the services provided to her by the department were not tailored to address the high level of care, patience and discipline that the children's special needs require from their caretakers.[8]

The record contains abundant evidence from which the court reasonably could have found that the respondent had failed to rehabilitate, considering the age and needs of the children. The undisputed evidence is that the children have special needs and that they have participated in services designed to address their needs. There also is undisputed evidence in the record establishing that the respondent participated in numerous services aimed to help her improve her skills as a parent given the special needs of the children but failed to benefit from such services. In support thereof, at trial, the petitioner presented testimony from the department's social worker, Tenika Campbell, who testified that she discussed with the respondent the behaviors and emotional needs of the children. According to Campbell, the respondent was not receptive to the children's needs. Additionally, Campbell testified that the

[8] In support of her claim that the department did not provide her with adequate reunification services, the respondent compares the services provided to the foster mother with the services provided to her. Specifically, she asserts that the foster mother received accurate diagnoses of the children's behavioral and psychological conditions, appropriate medication for the children's needs, weekly in-home services, coaching, counseling, and additional funding to facilitate any further enrichment that might help the children and the family to function. This argument assumes that the foster mother and the respondent are similarly situated in terms of their respective skill sets, circumstances and willingness and ability to benefit from the same services. The services offered to the respondent, because they must also be specifically tailored to the respondent's specific impairments before a return of the children to her custody can be considered, are not comparable to the services accepted by the foster mother under the circumstances of this case. We are, therefore, not persuaded by this argument because our review of the evidence reflects that the services provided to the foster mother were necessary to address the children's needs while in the physical care of the foster mother.

respondent was provided with the contact information for the children's service providers and was encouraged to contact them directly in an effort to help her understand and accept their needs. According to Campbell, however, the respondent never contacted the children's service providers.

In addition to the department's social worker, the court heard testimony from Biren-Caverly. Biren-Caverly testified that the respondent told her that she did not have a mental health diagnosis. On the basis of that statement, Biren-Caverly opined that the respondent did not have much insight into her own mental health needs and that she was reluctant to discuss her mental health needs with her therapists. According to Biren-Caverly, because of the respondent's unwillingness to discuss her mental health, any mental health treatment would be of limited effectiveness. Biren-Caverly further testified that the respondent's mistrust of service providers prevented her from making significant progress in learning from the resources provided to her. Regarding the respondent's understanding of the children's needs, Biren-Caverly testified that the respondent did not believe the children had ADHD and that the respondent was not familiar with the diagnoses of the children nor the services they had received. In light of the children's extensive mental health diagnoses, Biren-Caverly opined that the children would need a highly structured environment and, based on her evaluation, the respondent would not be able to meet the needs of the children. Biren-Caverly, therefore, recommended against reunification.

Construing the record in the manner most favorable to sustaining the judgments of the trial court, as we are obligated to do, we conclude that the record contains sufficient evidence to support the court's finding that the petitioner had proven by clear and convincing evidence that the respondent failed to rehabilitate such

that, considering the ages and needs of the children, she could assume a responsible position in their lives. Accordingly, the court properly concluded that the respondent had failed to rehabilitate.

The judgments are affirmed.

In this opinion the other judges concurred.

PATRICK YOUNG *v.* COMMISSIONER OF CORRECTION (AC 44723)

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

Syllabus

The petitioner, who had been convicted of the crimes of assault in the first degree and carrying a pistol without a permit, appealed to this court from the judgment of the habeas court denying his petition for a writ of habeas corpus. The petitioner had enlisted the help of T and M to cash a check that his girlfriend, Z, had stolen. When M was able to obtain only a portion of the funds after depositing the check into an automated teller machine, the petitioner believed that M and T had cashed the check and kept its full amount. After the bank informed M that the check had been stolen and that she would be arrested if she did not repay the funds she had received, the petitioner and Z, under the guise of retrieving money to repay the bank, drove with T and M to a dark road where the petitioner shot T. Prior to trial, Z, who was charged as a coconspirator of the petitioner, entered into an agreement with the state under which, in exchange for her cooperation and truthful testimony against the petitioner at his criminal trial, the state agreed to inform the court at her sentencing proceeding of that cooperation. The habeas court rejected the petitioner's claims that the state had violated his right to due process under *Brady* v. *Maryland* (373 U.S. 83) by failing to disclose to him its agreement with Z and by failing to correct her false or substantially misleading testimony at his criminal trial regarding the agreement. *Held*:

1. The petitioner could not prevail on his claim that the habeas court improperly concluded that the state had disclosed to his defense counsel its agreement with Z for her testimony at his criminal trial: the court's finding that the agreement was disclosed to the petitioner's defense counsel prior to Z's testimony was not clearly erroneous and thus supported the habeas court's determination that the petitioner had failed to establish a violation of his right to due process pursuant to *Brady*, as

the court credited the testimony of the prosecutor that, at the petitioner's criminal trial, he had disclosed the agreement to defense counsel; moreover, disclosure of the agreement was evident from Z's testimony at the criminal trial that she had asked her attorney to approach the prosecutor about a cooperation agreement, that no promises had been made to her about her own criminal case in exchange for her testimony, and that she was motivated to cooperate by her desire to get out of jail sooner and return to her children, from whom she had been separated.

2. This court's careful review of the record led it to conclude that the habeas court had properly determined that the petitioner failed to establish that Z's testimony was false or substantially misleading: the petitioner's contention that the prosecutor had knowingly presented such testimony from Z and then failed to correct it in violation of his due process rights was unavailing, as Z had accurately testified that she was charged as a conconspirator, the state made no promises to her in exchange for her testimony, and she had asked her attorney to approach the prosecutor just before the start of the petitioner's criminal trial to provide assistance with the hope that it would be brought to the attention of the sentencing judge because she wanted to do the right thing, get out of jail and get home to her children; moreover, there was no reasonable likelihood that any false or substantially misleading testimony by Z could have materially affected the jury's verdict, as the petitioner's defense counsel had presented that issue to the jury and impeached Z's credibility by showing inconsistencies between her testimony and her prior statements to the police, the prosecutor, in his closing argument, also noted that her credibility was questionable when he stated to the jury that it should take Z's testimony for what it was worth, and the state's case was so overwhelming that there was no reasonable likelihood that Z's testimony could have affected the judgment of the jury, as it was T and M who had testified about the shooting, during which Z was not present, and the petitioner's own testimony placed him at the crime scene with the firearm and a motive to injure T.

Argued September 15, 2022—officially released May 9, 2023

Procedural History

Amended petition for a writ of habeas corpus, brought to the Superior Court in the judicial district of Tolland, where the petition was withdrawn in part; thereafter, the case was tried to the court, *Chaplin*, *J.*; judgment denying the petition, from which the petitioner, on the granting of certification, appealed to this court. *Affirmed.*

Daniel Fernandes Lage, assigned counsel, for the appellant (petitioner).

Kathryn W. Bare, senior assistant state's attorney, with whom, on the brief, were *Patrick J. Griffin*, state's attorney, and *Craig P. Nowak*, senior assistant state's attorney, for the appellee (respondent).

Opinion

SEELEY, J. The petitioner, Patrick Young, 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 improperly concluded that his due process rights were not violated as a result of (1) the state's failure to disclose to the defense its agreement with a witness, Maria Zambrano, for her testimony in the petitioner's criminal trial, and (2) the state's knowing presentation of false and misleading testimony regarding this agreement. We disagree with the petitioner's claims, and, accordingly, affirm the judgment of the habeas court.

The following facts and procedural history are relevant to our resolution of this appeal. After a jury trial, the petitioner was convicted of assault in the first degree in violation of General Statutes § 53a-59 (a) (1) and carrying a pistol without a permit in violation of General Statutes § 29-35. Additionally, the court found the petitioner to be in violation of his probation. The court imposed a total effective sentence of thirty-one years of incarceration, execution suspended after twenty-four years, and five years of probation. In affirming the petitioner's conviction, we set forth the following facts that the jury reasonably could have found: "[Zambrano, the petitioner's] girlfriend . . . worked as a home health care aide and stole a $6500 check from one of her patients. After Zambrano told the [petitioner] about the stolen check, the [petitioner], who did not have a bank account, approached Diane Turner, his cousin, and Jessica McFadden, Turner's

roommate, for assistance in cashing the check. Zambrano, Turner, McFadden, and the [petitioner] rode together in Zambrano's car in order to cash the check. McFadden was unable to cash the check at the first bank that she tried because the check was postdated; the [petitioner] then had Zambrano alter the date on the check. At a second bank, McFadden was able to obtain $200 by depositing the check into an automatic teller machine. The bank later informed McFadden that the check was stolen and that she would be arrested if she did not repay the bank $200. The [petitioner] became angry when he was told that the check would not be cashed for its entire amount. He thought that Turner and McFadden had lied to him, cashed the check, and kept for themselves the full amount of $6500.

"On the night of the following day, June 24, 2013, Zambrano and the [petitioner] picked up Turner and McFadden at their New Haven residence under the guise of driving to Hamden to retrieve $200 so that McFadden could repay the bank. While Zambrano drove, the [petitioner] repeatedly questioned Turner and McFadden about what they did with the $6500 and why they had not given it to him. Zambrano stopped the vehicle on a dark road near a wooded area. The [petitioner] again asked Turner and McFadden about the location of the money. The [petitioner] reached into the car's glove compartment, retrieved a silver revolver, waved the revolver in the direction of the backseat where Turner and McFadden were seated, and again asked where the money was.

"The [petitioner] forced Turner to exit the car. The [petitioner] pointed the revolver at Turner's head, and she pleaded for her life. At some point, Turner ran into the woods and yelled for McFadden to follow. The [petitioner] then returned to the car, pointed the revolver at McFadden, told her to exit the car, and he and Zambrano drove away. McFadden found Turner in

the woods, and they hid. They then left the wooded area and walked down the road to search for help. The [petitioner] jumped out from behind bushes and pointed the gun at Turner's head; Turner raised her hands. The [petitioner] said that Turner was throwing him under the bus. He then shot Turner in her left palm, and the bullet exited by her wrist. The [petitioner] fired more shots, and one bullet hit Turner under her right arm near her rib cage. The [petitioner] then ran away, and McFadden and Turner hid in the woods before flagging down a work crew for assistance.

"Turner was taken to Yale-New Haven Hospital and treated for her injuries. Doctors were unable to remove a .38 caliber bullet at that time, but it was surgically removed months later when it migrated near her spine. Zambrano informed the police that she had accompanied the [petitioner] to a marina where he threw the revolver off the dock. A police dive team recovered the revolver, which was a .38 caliber stainless steel Smith & Wesson revolver." *State* v. *Young*, 174 Conn. App. 760, 762–64, 166 A.3d 704, cert. denied, 327 Conn. 976, 174 A.3d 195 (2017).

During her testimony at the petitioner's criminal trial, Zambrano acknowledged that she had made an agreement with the state but had not received any promise from the state, a prosecutor, or the police. She replied in the negative to the following inquiry from the prosecutor, John P. Doyle, Jr.: "Have you been made any promises in regards to your pending [criminal] matters as to how they will be disposed of or what will happen with your charges?"[1] During cross-examination by the

[1] Specifically, the following colloquy occurred between Doyle and Zambrano:

"Q. Okay. Prior—I want to ask you about your current status right now. Is it correct that you are currently held in custody awaiting charges in a state prison facility?

"A. Yes.

"Q. And is it correct that you are currently charged with offenses related to the events of June 24th, 2013?

petitioner's attorney, Thomas Farver, Zambrano admitted that she had been charged as a coconspirator with the petitioner and had been incarcerated for approximately eighteen months during which time she was

"A. Yes.

"Q. And is it true that you've been charged as a coconspirator with [the petitioner]?

"A. Yes. . . .

"Q. Okay. Now, I want to talk about your current situation just for a moment then. Like I said, you're charged as a coconspirator in this matter.

"A. Yes.

"Q. Okay. And you recognize that you've been called to the [witness] stand here to testify by the state of Connecticut.

"A. Yes.

"Q. Okay. And you recognize that you have the right not to have to testify here; is that correct?

"A. Yes.

"Q. And, however, you have made an agreement with the state of Connecticut with your attorney to testify here in regards to the events of June—in June, pardon me, of June 24th of 2013; is that correct?

"A. Yes.

"Q. All right. Have any promises been made to you by the state of Connecticut, by myself or any prosecutor or representative—

"A. No.

"Q. —or police officer?

"A. No.

"Q. In regards to your testimony here today?

"A. No.

"Q. Have you been made any promises in regards to your pending matters as to how they will be disposed of or what will happen with your charges?

"A. No. . . .

"Q. Okay. And you have actually been incarcerated and held on bond since June 27th of 2013 up until today [October 29, 2014]?

"A. Yes. . . .

"Q. Now, I just want to step back in regards to your—your understanding with the state of Connecticut and your attorney here. No promises have been made to you in regards to what your case is; correct?

"A. No.

"Q. But you are at some point hoping that it'll be brought to the attention of the judge that has handled your matter that you have cooperated with the state of Connecticut; is that correct?

"A. Yes.

"Q. All right. And your lawyer will obviously bring that to the attention of the court; is that correct?

"A. Yes."

separated from her two young children. She further admitted that she hoped, as a result of having reached out to the prosecution through her lawyer, that she would receive some consideration and be released from prison sooner. Zambrano also stated that she had not received any guarantees regarding the length of her incarceration and that "[n]o dates" had been promised to her. In conclusion, Zambrano noted that her motivation for testifying was to "do what was right," to get out of jail, and "to see her children again . . . ."[2]

[2] During Farver's cross-examination of Zambrano at the petitioner's criminal trial, the following colloquy occurred:

"Q. All right. Ma'am, you are charged as a coconspirator in this case, correct?

"A. Yes.

"Q. And you've been in jail for approximately a year and a half?

"A. Yes.

"Q. And at no time during—well, let me ask you, you have two young children?

"A. Yes.

"Q. You've been separated from them?

"A. Yes.

"Q. You want to get home to them?

"A. Yes.

"Q. And you had your attorney approach the state to volunteer last week, interview?

"A. Yes.

"Q. Now, was this with the hope that there'd be some consideration for you?

"A. Yes. . . .

"Q. Do you have any anticipation that this is going to help you get out of jail sooner?

"A. *I would hope so*, but I don't have any—they didn't guarantee me anything.

"Q. There's no—[n]o dates promised to you?

"A. No.

"Q. Right. But that certainly—that's your motivation, to come in here and testify, is to try to get over this quicker.

"A. Not to get over it, but just to do what was right.

"Q. To get out of—[t]o get out of jail?

"A. Yes.

"Q. And to see your children again?

"A. Yes." (Emphasis added.)

Subsequent to the petitioner's conviction, Zambrano pleaded guilty, pursuant to the *Alford* doctrine,[3] to conspiracy to commit assault in the first degree and conspiracy to commit larceny in the third degree for her actions in the matter involving the petitioner.[4] At that proceeding, Doyle informed the court, *Clifford*, *J.*, that Zambrano had agreed to cooperate with the state in the petitioner's trial a few days before the evidence had commenced and that no agreement or promises had been made to her in exchange for her testimony. At Zambrano's sentencing hearing on February 4, 2015, Doyle informed Judge Clifford of the following: "Prior to her testimony, [Zambrano] was not made any promises. It was made clear during both direct and cross-examination at the [petitioner's] trial that she had larceny cases pending. It was very clear that she had her part of the assault case pending there. And it came out, the fact that what she was facing was, she was exposed to, but that she had been made no promises by the state or any court for that matter. And that is correct, and it wasn't until we entered and worked a plea agreement out in front of Your Honor with [Zambrano's counsel] in this court that we came up with the plea arrangement." (Internal quotation marks omitted.) Judge Clifford ultimately sentenced Zambrano to ten years of incarceration, execution suspended after thirty months, and five years of probation.

[3] "See *North Carolina* v. *Alford*, 400 U.S. 25, 37, 91 S. Ct. 160, 27 L. Ed. 2d 162 (1970). 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 [her] is so strong that [she] is prepared to accept the entry of a guilty plea nevertheless. . . . A defendant often pleads guilty under the *Alford* doctrine to avoid the imposition of a possibly more serious punishment after trial." (Internal quotation marks omitted.) *Smorodska* v. *Commissioner of Correction*, 217 Conn. App. 171, 173 n.1, 287 A.3d 1117 (2022), cert. denied, 346 Conn. 907, 288 A.3d 628 (2023).

[4] Zambrano also pleaded guilty to a charge of larceny in the fifth degree, which arose from a separate matter.

The petitioner subsequently commenced the present action and, on May 18, 2018, filed an amended petition for a writ of habeas corpus. In count one, the petitioner alleged that his incarceration was illegal because the state had failed to disclose exculpatory material pursuant to *Brady* v. *Maryland*, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). In count two, the petitioner claimed that he received ineffective assistance of counsel during his criminal trial from Farver. Prior to the habeas trial, the petitioner withdrew his ineffective assistance of counsel claim. The habeas court, *Chaplin*, *J.*, conducted a one day trial on December 6, 2019.

At the habeas trial, Doyle testified that he had not planned on calling Zambrano as a witness in the petitioner's criminal case because she previously had refused to cooperate. Doyle indicated that Zambrano had made an initial statement to the police shortly after her arrest, and, at that time, she did not divulge the location of the gun used in the shooting or act in a cooperative manner. Doyle subsequently was provided with information obtained from a recorded telephone conversation from the Department of Correction in which Zambrano stated, "they ain't gonna find [the revolver], it's in the ocean, that's where he threw it."

Doyle further testified that, at or about the start of evidence in the petitioner's criminal trial, he was contacted by Zambrano's attorney, who indicated that she wanted to cooperate with the prosecution. Doyle met with Zambrano, who disclosed the location of the gun the petitioner used. In response to the question of whether he had made any promises to Zambrano in exchange for her testimony, Doyle stated: "I don't think I made any particular promises in exchange for her testimony . . . ." He further testified that he would not have told Zambrano that he would "assist her at sentencing if she had provided helpful testimony" but, rather, would have stated that he "would meet with her

attorney and discuss some kind of plea arrangement in regard to her case and that we would let the court know that she had cooperated."

During cross-examination by counsel for the respondent, the Commissioner of Correction, Doyle recalled that he had emphasized to Zambrano the importance of testifying truthfully. Doyle next explained what information he had provided to Farver regarding Zambrano's testimony. First, Doyle stated: "I mean, I did tell [Farver] at some point prior to the trial that [Zambrano] had now agreed to cooperate and she is going to testify, and that [her attorney] had approached us and that she had now given a statement, and I would have turned that statement over to . . . Farver . . . ." Doyle confirmed that he would have informed Farver that, if Zambrano testified truthfully, Doyle would apprise the court of that fact at Zambrano's sentencing. In response to further questioning, Doyle repeated that he had told Farver that Zambrano had agreed to cooperate and testify against the petitioner in his criminal trial and that, if she testified truthfully, Doyle would inform Judge Clifford of these facts.

On May 5, 2020, the petitioner filed his posttrial brief. Therein, he identified the two issues presented: "Did the prosecution's failure to inform defense counsel of exculpatory impeachment evidence against . . . Zambrano constitute a violation of *Brady* v. *Maryland*, [supra, 373 U.S. 83, and did] the failure to correct Zambrano's testimony during trial about not expecting consideration from the prosecution constitute a violation of due process?" With respect to the former, the petitioner argued that the informal understanding between the state and Zambrano regarding her testimony against the petitioner at his criminal trial in exchange for her own favorable treatment constituted *Brady* material and that the failure to disclose it violated the petitioner's due process rights. As to the latter, the petitioner

claimed that a conviction based on false or misleading evidence knowingly presented by the prosecution also amounts to a due process violation. See *Giglio* v. *United States*, 405 U.S. 150, 153, 92 S. Ct. 763, 31 L. Ed. 2d 104 (1972); *Napue* v. *Illinois*, 360 U.S. 264, 269, 79 S. Ct. 1173, 3 L. Ed. 2d 1217 (1959).

On March 9, 2021, the habeas court issued its memorandum of decision denying the petition for a writ of habeas corpus. Specifically, the court concluded that the petitioner had failed to prove his claims that, at his criminal trial, (1) the state had failed to disclose the incentive it had provided to Zambrano in exchange for her testimony (*Brady* claim), and (2) the state had failed to correct Zambrano's false and misleading testimony regarding her motivation to testify (*Giglio/Napue* claim).[5]

At the outset of its analysis, the court set forth the following facts: "Zambrano was charged as a coconspirator of the petitioner in the underlying incident for which the petitioner was charged. On June 27, 2013, she provided her first statement to the police, in which she indicated that it was Turner who stole the check and was in possession of a firearm that evening. Zambrano remained incarcerated while awaiting trial. After jury selection was completed in the petitioner's criminal trial, Zambrano's attorney approached . . . Doyle and indicated that she would like to cooperate with the state. Zambrano then gave a second statement in which

[5] In his appellate brief, the respondent notes that the petitioner specifically did not plead a *Giglio/Napue* claim in his amended habeas petition. During the habeas trial, the court permitted the petitioner's counsel, over the respondent's objections, to present evidence regarding the *Giglio/Napue* claim. In his posttrial brief, the petitioner addressed the *Giglio/Napue* claim. The habeas court considered the merits of the petitioner's *Giglio/Napue* claim in its memorandum of decision, and the respondent did not move to correct or to rectify that aspect of the decision. Under these facts and circumstances, the respondent does not contest review by this court of the petitioner's *Giglio/Napue* claim.

she indicated that the petitioner threatened Turner and McFadden. Zambrano also revealed the location of the firearm used in the assault, and assisted law enforcement with finding it. The state [forensics] lab conducted a ballistics test and determined that the recovered firearm was the weapon used in the shooting."

In its analysis of the petitioner's *Brady* claim, the habeas court, citing *Turner* v. *Commissioner of Correction*, 181 Conn. App. 743, 758–59, 187 A.3d 1163 (2018), determined that, although the state had not made Zambrano a specific promise regarding a particular sentence in exchange for her testimony, its agreement to inform the sentencing court of her cooperation fell within the scope of *Brady* material, and, therefore, the state was required to disclose it to the defense.[6] The habeas court further concluded: "The evidence before this court, however, fails to demonstrate that evidence of this agreement or consideration was inadvertently or wilfully suppressed by the state. . . . *Doyle credibly testified that he informed . . . Farver that the state would make Zambrano's cooperation known to the sentencing judge in her case.* The record also reveals that the testimony provided at the petitioner's criminal trial indicated that Zambrano was charged as a coconspirator with the petitioner. The record also reveals that, while the state had offered no specific guarantees or promised dates regarding her own sentencing, Zambrano testified on behalf of the state for purposes of getting out of jail sooner to see her children again. As a result of the foregoing, the court finds that the petitioner failed to demonstrate that the state suppressed evidence of an

[6] "Our case law is clear . . . that the petitioner need not establish the existence of a formal plea agreement in order to prove a *Brady* violation. [E]vidence that merely suggests an informal understanding between the state and a state's witness may constitute impeachment evidence for the purposes of *Brady*. . . . Such evidence is by no means limited to the existence of plea agreements." (Emphasis omitted; internal quotation marks omitted.) *Turner* v. *Commissioner of Correction*, supra, 181 Conn. App. 758.

agreement as required for a due process violation under *Brady*." (Emphasis added.)

With regard to the *Giglio/Napue* claim that the petitioner's right to due process was violated based on Doyle's failure to correct Zambrano's false or substantially misleading testimony regarding her motivation to testify, the court explained: "[T]he evidence before the court indicates that there were no promises or guarantees made by the state to Zambrano regarding the disposal of her pending criminal charges, and she testified to that effect at the petitioner's trial. Zambrano was never asked whether she expected that her cooperation would be made known to the sentencing judge, and she did not testify on that issue. In the context of the entire record, the court finds that Zambrano's testimony at the petitioner's criminal trial was not substantially misleading."

The court, therefore, denied the petition for a writ of habeas corpus. On March 18, 2021, it granted the petition for certification to appeal. This appeal followed.

I

We first address the petitioner's claim that the habeas court improperly concluded that the state did not violate his right to due process by failing to disclose to the defense its agreement with Zambrano to inform the sentencing judge in her criminal case of her testimony and cooperation against the petitioner, contrary to the principles set forth in *Brady* v. *Maryland*, supra, 372 U.S. 87, and its progeny.[7] We disagree.

[7] The petitioner mentions in his brief that his right to due process is protected by the fifth and fourteenth amendments to the United States constitution and under article first, §§ 8 and 9, of the Connecticut constitution. We note that the petitioner did not brief a separate state constitutional claim in accordance with *State* v. *Geisler*, 222 Conn. 672, 684–86, 610 A.2d 1225 (1992), or argue that the state constitution provides him greater protection than does the federal constitution. See, e.g., *State* v. *Taupier*, 197 Conn. App. 784, 787 n.1, 234 A.3d 29, cert. denied, 335 Conn. 928, 235 A.3d 525

We first set forth the relevant legal principles. "The fourteenth amendment to the United States constitution demands that [n]o [s]tate shall . . . deprive any person of life, liberty, or property, without due process of law . . . . Due process principles require the prosecution to disclose to the defense evidence that is favorable to the defendant and material to his guilt or punishment. . . . In order to obtain a new trial for improper suppression of evidence, the petitioner must establish three essential components: (1) that the evidence was favorable to the accused; (2) that the evidence was suppressed by the state—either inadvertently or wilfully; and (3) that the evidence was material to the case, i.e., that the accused was prejudiced by the lack of disclosure. . . .

"The state's failure to disclose an agreement with a cooperating witness may be deemed to be the withholding of exculpatory evidence. Impeachment evidence falls within *Brady*'s definition of evidence favorable to an accused. . . . Impeachment evidence is broadly defined in this context as evidence that could potentially alter the jury's assessment of a witness' credibility. . . . Specifically, we have noted that [a] plea agreement between the state and a key witness is impeachment evidence falling within the . . . *Brady* doctrine. . . . An undisclosed agreement for benefits between [a witness] and the state falls within the broad definition of impeachment evidence." (Citations omitted; internal quotation marks omitted.) *Marquez* v. *Commissioner of Correction*, 330 Conn. 575, 591–92, 198 A.3d 562 (2019); see also *Ayuso* v. *Commissioner of Correction*, 215 Conn. App. 322, 341–42, 282 A.3d 983, cert. denied, 345 Conn. 967, 285 A.3d 736 (2022). Stated differently,

(2020), cert. denied, U.S. , 141 S. Ct. 1383, 209 L. Ed. 2d 126 (2021). We therefore limit our review of the petitioner's claim to the federal constitution. See *Ham* v. *Commissioner of Correction*, 187 Conn. App. 160, 192 n.10, 201 A.3d 1074, cert. denied, 331 Conn. 904, 202 A.3d 373 (2019).

"[b]ecause a plea agreement is likely to bear on the motivation of a witness who has agreed to testify for the state, such agreements are potential impeachment evidence that the state must disclose." *Adams* v. *Commissioner of Correction*, 309 Conn. 359, 370, 71 A.3d 512 (2013).

Next, we identify the applicable standard of review. "The habeas judge, as the trier of facts, is the sole arbiter of the credibility of witnesses and the weight to be given to their testimony. . . . [T]his court cannot disturb the underlying facts found by the habeas court unless they are clearly erroneous . . . . The application of the habeas court's factual findings to the pertinent legal standard, however, presents a mixed question of law and fact, which is subject to plenary review. . . . Moreover, [w]hether the petitioner was deprived of his due process rights due to a *Brady* violation is a question of law, to which we grant plenary review." (Citation omitted; internal quotation marks omitted.) *Robinson* v. *Commissioner of Correction*, 204 Conn. App. 560, 566, 253 A.3d 1040, cert. denied, 337 Conn. 903, 252 A.3d 363 (2021); see also *Holbrook* v. *Commissioner of Correction*, 189 Conn. App. 108, 117, 206 A.3d 246, cert. denied, 331 Conn. 928, 207 A.3d 519 (2019); *Hines* v. *Commissioner of Correction*, 164 Conn. App. 712, 724, 138 A.3d 430 (2016).

In the present case, the habeas court concluded that the petitioner had failed to establish that the state inadvertently or wilfully suppressed its agreement with Zambrano to inform the sentencing judge in her criminal case of her testimony and cooperation against the petitioner. This conclusion was supported by its finding that Doyle disclosed the agreement[8] with Zambrano to Farver prior to her testimony at the petitioner's criminal

[8] Doyle testified at the habeas trial that Zambrano assisted the prosecution, inter alia, by revealing the location of the weapon and guiding law enforcement to its location. In exchange for her testimony and assistance, Doyle agreed to discuss a plea agreement with her attorney and to inform the sentencing judge in her criminal case of her cooperation.

trial. Specifically, the court stated: "Doyle testified credibly that he informed . . . Farver that Zambrano was now willing to cooperate with the state, and the state would make her cooperation known to the sentencing judge in her case, and gave him a copy of Zambrano's second statement."[9] It is well established that "it is not

[9] At the habeas trial, the following colloquy occurred between the respondent's counsel and Doyle during cross-examination:

"A. . . . I mean, I did tell [Farver] at some point prior to the trial that [Zambrano] had now agreed to cooperate, and she was going to testify . . . that she had now given a statement, and I would have turned that statement over to Attorney Farver and, you know . . . I probably would have informed Attorney Farver generally what, what she indicated or what she was going to [testify] to now. . . .

"Q. Okay. And do you recall telling Attorney Farver that you may, in the future, if she's, if she's truthful, go to her sentencing and just tell the judge what she had done?

"A. I, I would have told that. Any, any time there is a codefendant or even a witness with something else pending, I would have indicated, as part of their plea arrangement and probably in their plea canvass, too, that there's a certain range or a certain recommendation and that the state will let their sentencing court . . . know about their cooperation.

"Q. Right. Well, that's what I'm, I'm getting at.

"A. Yes.

"Q. I want to know what you told Attorney Farver.

"A. That I'm—yes. That I would tell Attorney Farver that, like I said, I can't remember off the top of my head; I'm assuming that she had entered pleas by the time that we—she testified. Okay? And that I would have, as part of her plea canvass . . . would have indicated that, when she is coming back for sentencing, I will let the court know about her cooperation and her truthfulness or lack thereof at sentencing.

"Q. So, did you tell Attorney Farver before she testified in the [petitioner's criminal] case, hey, Attorney Farver, she's going to cooperate now? When she goes to sentencing, I'm going to, if she's truthful, I'm going to go to [her sentencing judge] and tell her—

"A. Yes.

"Q. —what she did? So, you would, you—

"A. Yes.

"Q. —remember telling Attorney Farver that?

"A. Yes.

"Q. Okay.

"A. And I believe Attorney Farver would have cross-examined her about that as well.

"Q. Okay. Well, and that—the transcript will reflect that.

"A. Yes.

the role of this court to second-guess the credibility determinations made by the trial court." *Smith* v. *Commissioner of Correction*, 215 Conn. App. 167, 188, 282 A.3d 1036, cert. denied, 345 Conn. 921, 284 A.3d 983 (2022); see also *Kaddah* v. *Commissioner of Correction*, 211 Conn. App. 823, 829, 274 A.3d 115 (reviewing court ordinarily affords deference to credibility determination of habeas court based on its firsthand observations of conduct, demeanor and attitude of witness), cert. denied, 343 Conn. 928, 281 A.3d 1188 (2022).[10]

Additionally, Zambrano's direct testimony and the questions posed to Zambrano by Farver during cross-examination at the petitioner's criminal trial made it evident that Farver had been informed of her agreement with the state.[11] During Doyle's direct examination of

"Q. But I just want to know, specifically, if you recall what you told Attorney Farver with regards to her cooperation.

"A. Yes. I did tell him that.

"Q. You did tell him that. Okay. And this was all transpiring either right when evidence was starting or the day or two before?

"A. Yes. . . .

"Q. All right. And again, I want to be clear, at that point, you would agree with me, you would have to tell Attorney Farver she's going to now cooperate and, if she does cooperate, we're going to, I don't know, want to assist her, go through her sentencing or we're going to make this known to the sentencing judge in her case?

"A. Yes.

"Q. And you did that?

"A. Yes."

[10] We note that the habeas court specifically discredited "Zambrano's testimony that she did not initiate the meeting with the state to discuss cooperation, given the evidence to the contrary, including her own testimony at the petitioner's criminal trial . . . Doyle's representations to the court at Zambrano's sentencing and . . . Doyle's credible testimony at the habeas trial. In light of the foregoing, the court also does not credit Zambrano's testimony that the state used the phone recordings to pressure or threaten her into cooperating and testifying on behalf of the state."

[11] Doyle testified that he learned of Zambrano's intention to cooperate either on the eve of the petitioner's criminal trial or on the first day of evidence. He further testified that he informed Farver of the state's agreement with Zambrano before she testified in the criminal trial. The habeas court found Doyle to be a credible witness. Additionally, we note that "[e]vidence known to the defendant or his counsel, or that is disclosed,

her,[12] Zambrano acknowledged that she was charged as a coconspirator, that she had made an agreement with the prosecution to testify in the petitioner's criminal trial, and that she had not received any promises in regard to this testimony. Later, however, in her testimony on direct examination, Zambrano explicitly acknowledged that she was "hoping" that her attorney would inform the judge presiding over her sentencing hearing of her cooperation with the state.

During cross-examination,[13] Zambrano confirmed that she had been charged as a coconspirator in this case, and stated that she had been incarcerated for approximately eighteen months. She also testified that, during this time, she had been separated from her two young children and wanted to get home to them. Zambrano acknowledged that she had her attorney approach the prosecution about a cooperation agreement with the hope that she would receive some consideration. Farver inquired whether she had anticipated that her agreement to testify would "help [her] get out of jail sooner," and she responded: "I would hope so, but . . . they didn't guarantee me anything." He also asked her if the state had promised any "dates" regarding the period of incarceration and about her motivation for agreeing to cooperate with the state. On the basis of

even if during trial, is not considered suppressed as that term is used in *Brady*. . . . Even if evidence is not deemed suppressed under *Brady* because it is disclosed during trial, however, the defendant nevertheless may be prejudiced if he is unable to use the evidence because of the late disclosure. . . . Under these circumstances, the defendant bears the burden of proving that he was prejudiced by the state's failure to make the information available to him at an earlier time." (Internal quotation marks omitted.) *State* v. *Gray*, 212 Conn. App. 193, 225–26, 274 A.3d 870, cert. denied, 343 Conn. 929, 281 A.3d 1188 (2022); see also *State* v. *Washington*, 155 Conn. App. 582, 597, 110 A.3d 493 (2015). In the present case, the petitioner has not raised any argument that he was prejudiced as a result of a purported late disclosure.

[12] See footnote 1 of this opinion.

[13] See footnote 2 of this opinion.

Zambrano's testimony and the questions asked during cross-examination, it is apparent that Farver was aware of Zambrano's agreement with the state, including her hope of receiving consideration in exchange for her testimony.

Thus, the record supports the court's finding that Doyle informed Farver of the agreement with Zambrano.[14] It is axiomatic that "[e]vidence known to the defendant or his counsel, or that is disclosed, even if during trial, is not considered suppressed as that term is used in *Brady*." (Internal quotation marks omitted.) *State* v. *Gray*, 212 Conn. App. 193, 225–26, 274 A.3d 870, cert. denied, 343 Conn. 929, 281 A.3d 1188 (2022). Simply stated, "[t]he prerequisite of any claim under the *Brady*, *Napue* and *Giglio* line of cases . . . is the existence of an *undisclosed* agreement or understanding between the cooperating witness and the state." (Emphasis in original; internal quotation marks omitted.) *Gomez* v. *Commissioner of Correction*, 336 Conn. 168, 180, 243 A.3d 1163 (2020). We conclude, therefore, that the court's finding that Doyle had disclosed the agreement between the state and Zambrano in exchange for her testimony at the petitioner's criminal trial was not clearly erroneous and supports the court's ultimate determination that the petitioner did not establish a *Brady* violation.[15] Accordingly, the petitioner's *Brady* claim must fail.

[14] "[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." (Internal quotation marks omitted.) *Jaynes* v. *Commissioner of Correction*, 216 Conn. App. 412, 423, 285 A.3d 412 (2022), cert. denied, 345 Conn. 972, 286 A.3d 906 (2023).

[15] The petitioner argues in his principal appellate brief that the state's agreement with Zambrano was disclosed partially. Specifically, he contends that Doyle did not inform Farver that Zambrano had approached him at the start of the petitioner's criminal trial and that she sought to receive some consideration. The petitioner also appears to claim that Doyle failed to tell Farver that Zambrano had agreed to testify in the criminal trial only after Doyle told her that he would alert her sentencing judge of her cooperation.

II

We next address the petitioner's claim that the habeas court improperly concluded that his due process rights were not violated by Doyle's knowing presentation of false and substantially misleading testimony from Zambrano at the criminal trial. In particular, the petitioner asserts that Zambrano testified inaccurately that no promises had been made to her in exchange for her cooperation and that she had agreed to testify because she wanted "to do the right thing." The petitioner further argues that Doyle had an obligation to correct Zambrano's false or substantially misleading testimony and failed to do so in violation of his due process rights. The respondent counters, inter alia, that Zambrano's testimony was accurate and, therefore, not false or substantially misleading. Additionally, as an alternative basis for affirming the judgment of the habeas court, the respondent contends that there is no reasonable likelihood that any false or substantially misleading testimony affected the verdict. We agree with the respondent as to both of his arguments.

In his reply brief, the petitioner specifically claims that Doyle was required to inform Farver of Zambrano's specific motivation to cooperate with the prosecution in the petitioner's criminal case.

The record does not support the petitioner's contentions. As previously noted, during Farver's cross-examination of Zambrano at the petitioner's criminal trial, she admitted that she had her attorney reach out to the prosecution with the hope or anticipation of obtaining some consideration with respect to the disposition of her pending criminal charges in exchange for her testimony. Additionally, we are not persuaded that Doyle's obligation to inform the petitioner or Farver of his agreement with Zambrano applies to her specific motivations to assist the prosecution. In this case, given the information provided to Farver, he certainly could have deduced or inferred that Zambrano's decision to testify was the result of Doyle's offer to inform her sentencing judge of her cooperation. In other words, it was implicit that Zambrano's decision to testify was based on hearing that Doyle would alert her sentencing judge of her cooperation in the criminal case against the petitioner. Finally, the petitioner could have raised these matters in the direct examinations of Doyle or Zambrano during the habeas trial, but he failed to do so. We conclude, therefore, that this argument is unavailing.

We start by setting forth the applicable standard of review. "Whether a prosecutor knowingly presented false or misleading testimony presents a mixed question of law and fact, with the habeas court's factual findings subject to review for clear error and the legal conclusions that the court drew from those facts subject to de novo review." *Greene* v. *Commissioner of Correction*, supra, 330 Conn. 14; see also *State* v. *Johnson*, 345 Conn. 174, 204, 283 A.3d 477 (2022).

Next, we identify the relevant legal principles. Our Supreme Court has recognized that "[t]he teaching of [*Brady*, *Napue* and *Giglio*] . . . is that the state's knowing presentation of false testimony regarding the benefits that have been afforded to a cooperating witness may implicate two related but distinct rights protected by the due process clause of the fourteenth amendment. First, under *Brady* and its progeny, the state may not suppress material, exculpatory evidence, including evidence that tends to undermine the credibility of the state's witnesses. Second, under *Napue* and its progeny, *the state may not knowingly rely on the presentation of false or substantially misleading evidence to the jury, including evidence regarding the benefits that have been afforded to cooperating witnesses, to obtain a criminal conviction.* . . . [S]ee also, e.g., *Long* v. *Pfister*, 874 F.3d 544, 549 (7th Cir. 2017) (*Napue* and *Brady* are *cousin*[*s*] *representing distinct manifestations of principle that prosecutors must expose material weakness in their cases*), cert. denied, U.S. , 138 S. Ct. 1593, 200 L. Ed. 2d 777 (2018) . . . ." (Citation omitted; emphasis added; footnote omitted; internal quotation marks omitted.) *Gomez* v. *Commissioner of Correction*, supra, 336 Conn. 182–83; see also *Marquez* v. *Commissioner of Correction*, supra, 330 Conn. 592–93. Thus, a *Brady* claim is concerned primarily with disclosure of exculpatory material *to the defendant*, whereas the "essence

of [a] *Napue/Giglio* violation is [the] lack of disclosure of [the] truth *to* [*the*] *jury* . . . .'' (Emphasis added.) *Gomez* v. *Commissioner of Correction*, supra, 182; see id., 181, citing *Gaskin* v. *Commissioner of Correction*, 183 Conn. App. 496, 543–44 and n.30, 193 A.3d 625 (2018).

As our Supreme Court has recognized, ''[d]ue process is . . . offended if the state, although not soliciting false evidence, allows it to go uncorrected when it appears. . . . If a government witness falsely denies having struck a bargain with the state, or substantially mischaracterizes the nature of the inducement, the state is obliged to correct the misconception. . . . Regardless of the lack of intent to lie on the part of the witness, *Giglio* [v. *United States*, supra, 405 U.S. 153] and *Napue* [v. *Illinois*, supra, 360 U.S. 269–70] require the prosecutor to apprise the court when he or she knows that the witness is giving testimony that is substantially misleading.'' (Internal quotation marks omitted.) *Gomez* v. *Commissioner of Correction*, supra, 336 Conn. 175;[16]

[16] Approximately five years after the petitioner's criminal trial, our Supreme Court noted: ''To its credit . . . the Division of Criminal Justice voluntarily adopted a new policy, entitled '515 Cooperating Witnesses,' that is intended to ensure the vindication of defendants' rights under *Napue* and *Brady*. Of particular relevance to the present appeal, the policy provides: 'The prosecutorial official trying the case shall ensure that any testimony that is given by the cooperating witness concerning the cooperation agreement is true, accurate and not misleading. False, inaccurate or misleading testimony may be corrected with the use of leading questions, as permitted by the trial court.' '' *Gomez* v. *Commissioner of Correction*, supra, 336 Conn. 189–90 n.10.

In a letter sent to our Supreme Court following oral argument in *Gomez*, the prosecutor represented that Policy 515 had been adopted on October 1, 2019, and transmitted to all prosecutors on October 25, 2019. This policy required, inter alia, that cooperation agreements be reduced to a writing either in the form of an agreement signed by all parties, including the prosecutor, the cooperating witness, and counsel for the cooperating witness, or a memorandum prepared by the prosecutor. The policy also defined a cooperating witness as a person who ''1. Provides information to a law enforcement agency regarding the commission of a crime, or concerning a person suspected of, or charged with, committing a crime; and 2. Agrees to testify for the State in the trial of a criminal matter; and 3. Might reasonably

see also *State* v. *Johnson*, supra, 345 Conn. 204–205. As this court has stated, "[t]he state has a duty to correct the record if it knows that a witness has testified falsely." *Turner* v. *Commissioner of Correction*, supra, 181 Conn. App. 754; see also *Gomez* v. *Commissioner of Correction*, supra, 186 (more fundamental insult to due process occurs when state knowingly attempts to secure conviction based on falsehoods and fabrications). Our appellate courts have identified the rationale underlying this duty. "When a witness gives false testimony . . . the prosecutor and witness himself are the keepers of the truth. Without evidence of the falsity of the statement through admission by the witness, disclosure to the defendant or his counsel of any consideration the state offers to a cooperating witness is useless unless the jury gets to hear it." *Gaskin* v. *Commissioner of Correction*, supra, 183 Conn. App. 544 n.30; see also *Gomez* v. *Commissioner of Correction*, supra, 183 (harm associated with *Napue* violation is not limited to specific defendant but also undermines credibility of entire criminal justice system).

In order to prevail on this type of claim, the petitioner must demonstrate that (1) the state's witness provided *false or substantially misleading testimony* that was *material* and (2) the prosecutor failed to correct such testimony. *Gomez* v. *Commissioner of Correction*, supra, 336 Conn. 176. After a careful review of the record, we agree with the habeas court that the petitioner failed to establish that Zambrano's testimony was false or substantially misleading, and, therefore, his *Napue* claim fails. We further conclude that, even if Zambrano had provided false or substantially misleading testimony regarding her agreement with Doyle, there is no reasonable likelihood that it could have affected the jury's verdict.

expect to obtain, or has sought, been offered or obtained, a benefit from the State in exchange for his or her testimony."

As we previously noted in this opinion, during direct examination by Doyle at the petitioner's criminal trial, Zambrano stated that, although she had an agreement with the state, she had not been made any promises by the police or the prosecution in regard to her testimony.[17] Further, Zambrano agreed with the prosecutor that she had not "been made any promises in regards to [her] pending matters as to how they will be disposed of or what will happen with [her] charges . . . ." Zambrano later acknowledged that she was hoping that her cooperation would be brought to the attention of her sentencing judge. During cross-examination, Zambrano admitted that she had been incarcerated for approximately eighteen months and had been separated from her children.[18] She further acknowledged that she wanted "to get home to them . . . ." Zambrano's testimony informed the jury that she had her attorney reach out to Doyle about testifying in the petitioner's criminal trial with the possibility of some consideration for her by doing so. She agreed with Farver that she "hoped" to be released from jail sooner as a result of her testimony, but explained that the state had not guaranteed her anything and that no "dates" had been promised to her. Finally, she stated that her motivation was "to do what was right," to get out of jail, and to see her children again. The context of her agreement with the state was presented to the jury in its entirety. See *Greene* v. *Commissioner of Correction*, supra, 330 Conn. 12, 17, 22.

At the habeas trial, Doyle testified that he had informed Zambrano that he would not make any specific promises or guarantees in exchange for her testimony, only that he would inform her sentencing judge of her cooperation and assistance. Doyle also informed Farver of Zambrano's willingness to cooperate and his intention to present this cooperation at her sentencing

[17] See footnote 1 of this opinion.

[18] See footnote 2 of this opinion.

hearing. As the habeas court stated in its memorandum of decision: "Doyle further testified that he would not have felt obligated to correct Zambrano's testimony at the petitioner's trial because her statement that she was not guaranteed anything by the state in exchange for her testimony was accurate." The habeas court credited Doyle's testimony and specifically found that no specific promise was made to Zambrano.

The habeas court, therefore, properly concluded that Zambrano's testimony at the petitioner's criminal trial was not substantially misleading. Zambrano's testimony, viewed in its entirety, made clear to the jury that she (1) was charged as a coconspirator, (2) had made an agreement with the state to testify against the petitioner, and (3) had her attorney approach the state just before the start of the petitioner's trial to provide assistance with the hope that it would be brought to the attention of her sentencing judge and help her get out of jail sooner so that she could be with her children.[19] The jury in the petitioner's criminal trial was made aware that Zambrano had testified with the aspiration, but not the guarantee or specific promise, of receiving consideration in the form of a reduced period of incarceration.[20] See, e.g., *Greene* v. *Commissioner of Correction*, supra, 330 Conn. 12, 17, 22; id., 12 (statements

[19] We emphasize that Zambrano testified that she had agreed to cooperate with the prosecutor "to do what was right . . . [t]o get out of jail . . . [a]nd to see her children again . . . ." We therefore disagree with the petitioner's contention that her testimony was false or substantially misleading in that she had agreed to testify only because "she just wanted to do the right thing."

[20] The facts of the present case distinguish it from *Smith* v. *Commissioner of Correction*, Superior Court, judicial district of Tolland, Docket No. CV-16-4008338-S (September 20, 2021), a case cited by the petitioner in his principal appellate brief. In that case, the prosecutor at the criminal trial argued to the jury that certain witnesses had nothing to gain from their testimony and that they did not come willingly to testify but had been subpoenaed. Furthermore, defense counsel in *Smith* did not cross-examine the witness about his agreement with the state. "Finally, and most importantly, the jury never got to hear that [the witness] had an agreement with the prosecution that his cooperation with them would be made known to the sentencing judge and potentially [be] taken into consideration by the

regarding cooperation agreement described by habeas court as " 'not a model of clarity' " may sufficiently and accurately describe agreement when considered in entire context, and denial of knowledge of specific benefit or promise do not relate to broader question of whether witness received any benefit in exchange for testimony); cf. *State* v. *Jordan*, 314 Conn. 354, 366–67, 102 A.3d 1 (2014) (witness' testimony was "potentially misleading" where prosecutor informed court he would bring cooperation to attention of sentencing court and witness subsequently testified he did not expect "any kind" of benefit or consideration (internal quotation marks omitted)). Accordingly, we reject the petitioner's claim that his due process rights were violated.

Additionally, we agree with the respondent that, even if Zambrano had provided false or substantially misleading testimony regarding her agreement with Doyle, there is no reasonable likelihood that it could have affected the jury's verdict.[21] See, e.g., *Marquez* v. *Commissioner of Correction*, supra, 330 Conn. 593 (court assumed, without deciding, that state had improperly failed to disclose impeachment evidence concerning alleged agreement reached with witness and considered whether lack of disclosure to defense and failure to correct testimony were material). Compared to a traditional *Brady* claim, "the standard for materiality [in a *Napue/Giglio* claim] is significantly more favorable to

prosecutor when fashioning an appropriate offer. It was entitled to have that information." In light of these distinguishing facts, we conclude that the petitioner's reliance on *Smith* is misplaced.

[21] The issue of whether Zambrano's testimony, even if determined to be false or substantially misleading, would have materially affected the jury's verdict presents a question of law that was addressed by both parties in their appellate briefs. See, e.g., *Marquez* v. *Commissioner of Correction*, supra, 330 Conn. 591 n.3; *Kaddah* v. *Commissioner of Correction*, 299 Conn. 129, 136 n.10, 7 A.3d 911 (2010). Both parties had the opportunity to discuss this issue, and, therefore, the petitioner is not prejudiced by our discussion of materiality.

the defendant than it is with other forms of exculpatory evidence. . . . A conviction obtained through uncorrected false testimony must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. . . . In other words, reversal is virtually automatic . . . *unless the state's case is so overwhelming that there is no reasonable likelihood that the false testimony could have affected the judgment of the jury*." (Citations omitted; emphasis in original; internal quotation marks omitted.) Id., 594; *Turner* v. *Commissioner of Correction*, supra, 181 Conn. App. 754–55; see also *Adams* v. *Commissioner of Correction*, supra, 309 Conn. 372 (this standard "is not substantively different from the test that permits the state to avoid having a conviction set aside, notwithstanding a violation of constitutional magnitude, upon a showing that the violation was harmless beyond a reasonable doubt").

"This calls for a careful review of that testimony and its probable effect on the jury, weighed against the strength of the state's case and the extent to which [the defendant was] otherwise able to impeach [the witness]. . . . [E]vidence that may first appear to be quite compelling when considered alone can lose its potency when weighed and measured with all the other evidence, both inculpatory and exculpatory. Implicit in the standard of materiality is the notion that the significance of any particular bit of evidence can only be determined by comparison to the rest." (Citation omitted; internal quotation marks omitted.) *Marquez* v. *Commissioner of Correction*, supra, 330 Conn. 594; see also *State* v. *Jordan*, supra, 314 Conn. 371.

As we have noted in this opinion, Farver challenged the credibility of Zambrano during cross-examination and presented this issue to the jury. Her credibility was impeached further as a result of her testimony that was inconsistent with her initial statements to the police

regarding the assault.[22] See, e.g., *Marquez* v. *Commissioner of Correction*, supra, 330 Conn. 599–600 (impeachment of witness constitutes factor in determining whether elevated standard for materiality has been met). Farver highlighted these inconsistencies in his closing argument to the jury: "Why suddenly last week does [Zambrano] flip her story? She told you she gave a different—an inconsistent story and then lied when she was interviewed by the [police] because she's charged, she said. That's when she changes her story. Because she hopes to have something for the cooperation, that she get some consideration, that she's been in jail for a year and a half, hasn't seen her kids, wants to go back and see them. But yet, there's nothing in her story that gives her any responsibility. Everyone else who testified with knowledge of those events said [Zambrano] stole the check. She denied it." Further, Doyle recognized that Zambrano's credibility was questionable when, in his closing argument, he stated that the jury should "[t]ake her testimony for what it's worth . . . ."[23]

[22] The habeas court set forth the following in its memorandum of decision: "On June 27, 2013, [Zambrano] provided her first statement to the police, in which she indicated that it was Turner who stole the check and was in possession of a firearm that evening. . . . Zambrano [subsequently] gave a second statement in which she indicated that the petitioner threatened Turner and McFadden. Zambrano also revealed the location of the firearm used in the assault . . . ." Farver cross-examined her regarding this inconsistency, and she admitted that "portions" of her first statement were untruthful.

[23] Specifically, Doyle argued: "There's no doubt that . . . Zambrano's testimony is what it is. She made a request to testify on behalf of the state. She led the police to the gun. You could see it here in evidence. I agree with Mr. Farver on this fact. She's minimized her culpability in this. Perhaps in some idea that one day she'll be able to go back out there and be a visiting nurse. I agree with him. Minimize her responsibility in regards to that stolen check. Minimize her responsibility in regards to knowing what [the petitioner] was going to do when he pulled out there. . . . Take her testimony for what it's worth . . . ."

Additionally, the court provided the jury with the following instruction regarding Zambrano's testimony: "In weighing the testimony of an accomplice in this case, [Zambrano], who has not yet been sentenced or whose

We next consider the strength of the state's case. The key issue was whether the petitioner had pointed the revolver at Turner and pulled the trigger, as Turner and McFadden testified at the criminal trial, or whether the revolver accidentally discharged when Turner grabbed the barrel of the revolver as the petitioner waved it around with his finger on the trigger, as the petitioner testified. Zambrano was not present at the specific time and location of the shooting, and, therefore, her testimony did not address the petitioner's actions and intention at that particular moment.[24] See *Marquez* v. *Commissioner of Correction*, supra, 330 Conn. 600 (even if jury believed allegedly false testimony from witness regarding lack of deal with state, that impression was harmful only to extent witness' testimony provided unique value to state's case).

The petitioner's own testimony at the criminal trial placed him at the crime scene with the firearm and a motive for injuring Turner, namely, that she had absconded with proceeds from the stolen check. The petitioner admitted that he was "pissed off that . . .

case has not yet been disposed of, you should keep in mind that she may in her own mind be looking for some favorable treatment in the sentence or disposition of her own case. Therefore, she may have such an interest in the outcome of this case that her testimony may have been colored by that fact. Therefore, you must look with particular care at the testimony of an accomplice and scrutinize it very carefully before you accept it. . . . There are many offenses that are of such a character that only the person capable of giving useful testimony are those who are themselves implicated in the crime. It is for you to decide what credibility you will give to a witness who has admitted her involvement and criminal wrongdoing and whether you will believe or disbelieve the testimony of a person who, by her own admission, has committed or contributed to the crime charged by the state here. Like all other questions of credibility, this is a question you must decide based on all the evidence presented to you."

[24] As the respondent correctly noted in his appellate brief: "Thus, while Zambrano was both a witness to and participant in the events surrounding the shooting, the jury's determination of guilt on the sole contested issue at trial—namely, the petitioner's intent—rested primarily on its evaluation of the testimony offered by Turner, McFadden and the petitioner himself."

Turner had screwed [him] out of [his] half of that $6500 . . . .” The petitioner testified that, after stopping on a dark road near a wooded area, he removed the revolver from the glove compartment to “scare” Turner. He admitted that he was not permitted to possess the revolver due to his prior felony convictions. The petitioner further testified that he told Turner to get out of the vehicle and then questioned her about the money from the stolen check. He acknowledged having his finger on the trigger of the revolver in the moments before Turner was shot. The petitioner admitted to transporting the revolver to Milford and dropping it in the water with the intention of discarding it in the hope that it would never be found. Finally, the petitioner admitted that he had initially lied to the police when he told them that Turner had brought the revolver and held him at gunpoint before a struggle ensued.[25]

Furthermore, both Turner and McFadden testified that the petitioner accused Turner of withholding money from him, removed the revolver from the glove

[25] The petitioner testified that Turner reached for the revolver and, during their struggle, it discharged twice. He denied intentionally pulling the trigger and intentionally shooting Turner.

The court instructed the jury as follows: “In deciding what the facts are you must consider all the evidence. In doing this you must decide which testimony to believe and which testimony not to believe. You may believe or disbelieve all, none, or part of a witness’ testimony. In making that decision you may take into account a number of factors, including the following: number one, was the witness able to see or hear or know things about what the witness testified to; number two, how well was the witness able to recall and describe those events; three, what was the witness’ manner or demeanor while testifying; four, *did the witness have any interest in the outcome of this case* or any bias or prejudice concerning any party or any matter involved in this case; five, how reasonable was the witness’ testimony considered in the light of all the evidence in this case; six, *was the witness’ testimony contradicted by what the witness had said or done at another time or by the testimony of other witnesses or by other evidence.* If you conclude that a witness has deliberately testified falsely in some respect you should carefully consider whether you should rely on any of that person’s testimony.” (Emphasis added.)

box, ordered Turner to exit the vehicle, and then forced her to her hands and knees. Both McFadden and the petitioner testified that he drove off with Zambrano and then returned.[26] Turner and McFadden testified that he pointed the revolver at Turner and shot her twice. See, e.g., *Marquez* v. *Commissioner of Correction*, supra, 330 Conn. 595–98 (little question petitioner was present at scene of criminal activity and had held weapon used in murder; primary issue, if petitioner's statement was credited, was whether he participated in robbery that led to victim's murder; ample evidence presented that petitioner not only participated in robbery but fired fatal gunshots, *including testimony from two eyewitnesses who presented persuasive and consistent testimony*, selected petitioner's photograph from photographic array and identified him in court, consciousness of guilt evidence, and petitioner's confession to fellow inmate). The state's case as to the petitioner's intent, therefore, did not depend on the testimony of Zambrano, who was not present when Turner was shot, but, instead, was based on the testimony of Turner and McFadden, who were present when the shooting occurred.[27]

[26] Turner testified that she ran into the woods, where McFadden found her. She further testified that, after staying there for a few minutes, they left the woods because she thought the petitioner and Zambrano were gone. According to Turner, she and McFadden were walking on a road when the petitioner jumped out of some bushes and pointed the revolver at her head.

[27] We disagree with the petitioner's argument that "Zambrano's testimony was the only witness testimony that was in direct conflict with the [defense] case, which was a lack of intent on the assault charge. . . . Zambrano's damaging testimony regarding the [petitioner's] preshooting anger and postshooting actions to conceal evidence undoubtedly conflicted with the defense." (Citation omitted.) As discussed previously in this opinion, the petitioner himself testified regarding his efforts to conceal evidence by throwing the revolver in a body of water. Additionally, although Zambrano testified that the petitioner was "in a rage" about Turner a day or two before the shooting, there was other evidence regarding his anger toward his cousin. As noted, the petitioner stated he was "pissed off" at Turner, and McFadden recounted that he spoke to Turner with an assertive, raised and accusatory voice during the car ride to the remote location.

In light of the evidence the state presented, particularly the testimony of Turner and McFadden regarding the petitioner's actions at the time of the shooting, coupled with the petitioner's own testimony, we are not persuaded that Zambrano's testimony materially affected the jury's verdict. The state's case was so overwhelming that there is no reasonable likelihood that Zambrano's testimony could have affected the judgment of the jury, even if we were to conclude that her testimony as to her agreement with the state was false or substantially misleading. After weighing Zambrano's testimony, its probable effect on the jury, the strength of the state's case, and the extent to which defense counsel impeached Zambrano, we conclude that Zambrano's allegedly misleading testimony and Doyle's purported failure to correct it were immaterial under *Napue* and *Giglio*.

The judgment is affirmed.

In this opinion the other judges concurred.

COMMISSIONER OF TRANSPORTATION *v.* TERESA CHUDY ET AL.
(AC 44764)

Prescott, Suarez and DiPentima, Js.

Syllabus

The defendants property owners filed an application in the trial court, pursuant to statute (§ 13a-76), challenging the assessment of damages filed by the plaintiff Commissioner of Transportation in connection with the partial taking by condemnation of certain of the defendants' real property. The defendants claimed that the damages assessed by the commissioner were inadequate because the taking included all access to the only public street serving their property, thereby rendering the property landlocked. The court rendered judgment reassessing the damages due to the defendants for the taking, and the defendants appealed to this court. *Held* that the trial court did not improperly decline to award severance damages to the defendants as of the date of the taking, as the court's determination that the defendants failed to prove that

their property was landlocked on the date of the taking was not clearly erroneous: the court considered all of the evidence before it and credited the expert testimony of the commissioner's appraiser that access to the road from the defendants' property had not been restricted by the taking, and it did not credit the contrary expert testimony of the defendants' appraiser, which it determined to be inaccurate primarily as a result of the appraiser's failure to undertake a detailed review of the pertinent statute (§ 13a-73) and relevant documents relating to the construction project that prompted the partial taking.

Argued February 27—officially released May 9, 2023

Procedural History

Notice of condemnation of certain real property of the named defendant et al., brought to the Superior Court in the judicial district of Middlesex, where the named defendant et al. filed an application for the reassessment of damages; thereafter, the matter was tried to the court, *Hon. Barbara M. Quinn*, judge trial referee; judgment awarding certain damages to the named defendant et al., from which the named defendant et al. appealed to this court. *Affirmed.*

C. Scott Schwefel, with whom, on the brief, was *Mark S. Shipman*, for the appellants (named defendant et al.).

Cara C. Tonucci, assistant attorney general, with whom were *John Russo*, assistant attorney general, and, on the brief, *William Tong*, attorney general, for the appellee (plaintiff).

Opinion

PER CURIAM. The defendants Teresa Chudy and Michal Chudy appeal from the judgment of the trial court awarding them damages in the amount of $2000 for the taking by eminent domain of a portion of their real property (partial taking) by the plaintiff, the Commissioner of Transportation (commissioner).[1] On

[1] A notice of condemnation and assessment of damages filed by the commissioner also named AT&T, doing business as Frontier Communications, and the town of Cromwell as having an interest in the subject property by way of easements. No appearance has been filed on behalf of either of those additional parties. In this opinion, our references to the defendants are to Teresa Chudy and Michal Chudy.

appeal, the defendants claim that the court erred by not awarding severance damages as of the date of the partial taking. We affirm the judgment of the trial court.

The following facts and procedural history are relevant to this appeal. The defendants own property located at 170 Coles Road in the town of Cromwell. The property consists of a vacant, wooded lot, 1.046 acres in size in a residential zone. On September 7, 2018, the commissioner filed a notice of condemnation and assessment of damages (notice of condemnation), pursuant to General Statutes § 13a-73 (b),[2] for the partial taking of a narrow strip of land along the entire frontage of the defendants' parcel, together with certain easements, in connection with a road widening and drainage improvement project in Cromwell, which involved the takings of narrow strips of roadside land from property owners abutting Coles Road. The partial taking of the defendants' property was for an area of land in fee of 620 square feet, a slope easement of 192 square feet for the purpose of sloping the property for the safety of the highway, and an easement to excavate a ditch within a 94 square feet area. In the notice of condemnation, the commissioner assessed damages in the amount of $3500.

The defendants filed an application in the Superior Court pursuant to General Statutes § 13a-76 for a reassessment of damages, claiming that the damages were inadequate because the commissioner took "access to the only public street serving their property," thereby rendering their property landlocked. The defendants argued that they were entitled to damages in the amount of $91,000, which allegedly represented the diminution in value of their property following the partial taking.

[2] Although § 13a-73 (b) was the subject of a technical amendment in 2018; see Public Acts 2018, No. 18-62, § 1; that amendment has no bearing on the merits of this appeal. In the interest of simplicity, we refer to the current revision of the statute.

Hearings were held on the matter over the course of several days in September, 2020, and January and March, 2021,[3] at which the court heard testimony from various witnesses, including the commissioner's appraiser, Michael Aletta, and the defendants' appraiser, Marc Gottesdiener. In a memorandum of decision dated May 19, 2021, the court rendered judgment awarding the defendants damages in the amount of $2000. In making that determination, the court specifically credited the analysis and appraisal presented by Aletta, who provided expert testimony that the defendants' access to Coles Road from their property had not been restricted. Specifically, Aletta demonstrated, by use of a map showing the area of the taking and photographs, that the defendants, either before or after the taking, could have applied to the town for a curb cut, which would have enabled them to secure access to the road. He also explained that, if the town had restricted access, the condemnation notice would have referenced subsection (f) of § 13a-73, rather than subsection (b). Aletta also testified concerning the appraised value of the defendants' property both before and after the condemnation, which resulted in his assessment of damages of $2000, and he specifically stated that the value of the remaining land was not affected by the condemnation.

Gottesdiener also provided expert testimony regarding the value of the property prior to and after the partial taking. He testified that, prior to the taking, the property had a value of $101,000.[4] He also testified that,

[3] Specifically, the court held a hearing on September 22, 2020, at the conclusion of which the parties rested. Thereafter, on January 7, 2021, the court issued an order requesting the parties to present argument regarding whether the matter should be opened for the purpose of taking evidence on the issue of a time limited taking of the subject property. Following argument on January 28, 2021, the court opened the evidence, and on March 29, 2021, the plaintiff presented testimony from two more witnesses.

[4] Although Gottesdiener valued the property prior to the taking at $101,000, during the hearing on September 22, 2020, the defendants' counsel stipulated to the $125,000 pretaking value of the property determined by Aletta.

after the taking, the defendants' property was landlocked with no right of access to a public road, as the commissioner's taking "took away all the frontage and access to Coles Road" from the defendants' parcel. That determination was based, in part, on his belief that guardrails along Coles Road ran across the entire length of the defendants' parcel and the fact that no easements or rights-of-way had been reserved to the defendants. As a result, he opined that the diminution in value to the defendants' property after the taking was $91,000, leaving the property with a value of $10,000 after the taking. The court, however, found that Gottesdiener's underlying assumption regarding the guardrails was inaccurate, as the guardrails, in fact, "intruded only a little distance, if at all, on the property frontage [of the defendants' parcel] on Coles Road . . . ."[5] Moreover, the court found that Gottesdiener never reviewed the taking statute referenced in the notice of condemnation. The court stated: "Had [Gottesdiener] reviewed the statute referenced in the condemnation notice and inquired further, the relevant details as well as the detailed construction maps, [a] memorandum of agreement [between the commissioner and] the town . . . and other documents would have been made available to him for his review. This detailed inquiry . . . the [defendants'] appraiser did not undertake. Those additional publicly available documents and facts would have led him to a different conclusion than the one he reached, and the court finds it cannot accept his ultimate conclusions as accurate."

The court also heard testimony from the engineer for the town of Cromwell, who testified about the defendants' access to Coles Road. That testimony was consistent with Aletta's testimony and was not contradicted

[5] At oral argument before this court, counsel for the defendants conceded that there was evidence in the record supporting the court's finding regarding the guardrails and, thus, withdrew any claim that the court's finding was clearly erroneous.

by the defendants. The court, which expressly rejected the "drastic conclusions" of Gottesdiener, concluded that the defendants "had the right to obtain a curb cut for access to Coles Road both before and after the taking, dependent only upon the presentation of appropriate plans." Accordingly, the court found that the defendants had failed to meet their burden of proving that their parcel was landlocked after the taking. Moreover, the court concluded that the defendants, who had planned to build a home on their property, "could still put their property to its highest and best use as a buildable residential lot with access to Coles Road." This appeal followed.

On appeal, the defendants claim that the court erred by not awarding severance damages as of the date of the taking. According to the defendants, on the date of the taking, the remaining portion of the premises was landlocked, which rendered their property essentially valueless. Thus, the defendants' challenge to the court's measure of damages is premised on their assertion that the court improperly rejected their claim that their parcel was landlocked at the time of the taking. Before addressing the defendants' claim, we set forth our standard of review and general principles that govern condemnation cases.

"In a condemnation matter, it is the condemnee's burden to show loss or damages in excess of the condemnor's figures." (Internal quotation marks omitted.) *Commissioner of Transportation* v. *Larobina*, 92 Conn. App. 15, 27, 882 A.2d 1265, cert. denied, 276 Conn. 931, 889 A.2d 816 (2005). "Damages recoverable for a partial taking are ordinarily measured by determining the difference between the market value of the whole tract as it lay before the taking and the market value of what remained of it thereafter, taking into consideration the changes contemplated in the improvement and those which are so possible of occurrence in the future

that they may reasonably be held to affect market value." (Internal quotation marks omitted.) *Cappiello* v. *Commissioner of Transportation*, 203 Conn. 675, 679, 525 A.2d 1348 (1987). "When only a portion of a party's property is taken, the landowner is entitled not only to compensation for the value of the property taken, but also to severance damages for the diminution in the value of the landowner's remaining property that the severance of a portion of the property causes." (Internal quotation marks omitted.) *Commissioner of Transportation* v. *Larobina*, supra, 23.

"Valuation is a matter of fact to be determined by the trier's independent judgment. . . . In determining fair market value, the trier may select the method of valuation most appropriate to the case before it; *Laurel, Inc.* v. *Commissioner of Transportation*, 180 Conn. 11, 37–38, 428 A.2d 789 (1980); and has the right to accept so much of the testimony of the experts and the recognized appraisal methods which they employed as [the court] finds applicable; [the court's] determination is reviewable only if [it] misapplies, overlooks, or gives a wrong or improper effect to any test or consideration which it was [its] duty to regard." (Citation omitted; internal quotation marks omitted.) *Cappiello* v. *Commissioner of Transportation*, supra, 203 Conn. 679–80. On appeal, this court must "determine whether the decision of the trial court is clearly erroneous." Id., 680. "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." (Internal quotation marks omitted.) *New London* v. *Picinich*, 76 Conn. App. 678, 685, 821 A.2d 782, cert. denied, 266 Conn. 901, 832 A.2d 64 (2003).

In the present case, the court's determination that the defendants failed to meet their burden of proving

that their parcel was landlocked for purposes of establishing their claimed entitlement to compensation in the amount of $91,000 was premised on the court's credibility assessment of the expert testimony provided. Specifically, the court did not accept the testimony of the defendants' appraiser and, instead, found "credible the analysis and appraisal presented by the commissioner's appraiser . . . ."

"[I]t is well settled that [t]he weight to be given the evidence and the credibility of the witnesses are within the sole province of the trial court. . . . The credibility and the weight of expert testimony is judged by the same standard, and the trial court is privileged to adopt whatever testimony [it] reasonably believes to be credible. . . . *United Technologies Corp.* v. *East Windsor*, 262 Conn. 11, 26, 807 A.2d 955 (2002). [T]he trial judge . . . is free to accept or reject, in whole or in part, the testimony offered by either party. . . . Because it is the trial court's function to weigh the evidence and determine credibility, we give great deference to its findings. . . . 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. . . . Where the trial court rejects the testimony of a [party's] expert, there must be some basis in the record to support the conclusion that the evidence of the [expert witness] is unworthy of belief." (Citations omitted; internal quotation marks omitted.) *Cavanagh* v. *Richichi*, 212 Conn. App. 402, 424–25, 275 A.3d 701 (2022); see also *Gaughan* v. *Higgins*, 186 Conn. App. 618, 623, 200 A.3d 1161 (2018) (although "credibility determinations are beyond the reach of an appellate court . . . the trial court cannot arbitrarily disregard, disbelieve or reject an expert's testimony in the first instance" (citation omitted; internal quotation marks omitted)),

cert. denied, 330 Conn. 968, 200 A.3d 188 (2019), and cert. denied, 330 Conn. 968, 200 A.3d 699 (2019).

On the basis of the record before us, we conclude that the court did not arbitrarily disregard the expert testimony of Gottesdiener. It is clear from the record that the court considered all of the evidence before it but chose to credit the appraisal and analysis provided by Aletta, who testified that access to the road from the defendants' property had not been restricted, nor had there been any impact on the remaining land, as a result of the partial taking; it did not accept the conclusions to the contrary of Gottesdiener, which it found were inaccurate primarily as a result of his failure to undertake a detailed review of the condemnation statute and relevant documents relating to the construction project that prompted the partial taking. See *Arroyo* v. *University of Connecticut Health Center*, 175 Conn. App. 493, 518, 167 A.3d 1112 ("[w]here expert testimony conflicts, it becomes the function of the trier of fact to determine credibility and, in doing so, it could believe all, some or none of the testimony of either expert" (internal quotation marks omitted)), cert. denied, 327 Conn. 973, 174 A.3d 192 (2017). The court also specifically found, "from all of the credible evidence, that the [defendants] had the right to obtain a curb cut for access to Coles Road both *before and after* the taking . . . ." (Emphasis added.) It was within the exclusive province of the court, as the trier of fact, to make those credibility determinations, which we may not second-guess.[6] See

[6] Although, on appeal, the defendants argue that the portion of their premises not taken was landlocked, in doing so they fail to address the credibility determinations made by the court. Instead, they focus their argument on their claim that this case is governed by *Laurel, Inc.* v. *Commissioner of Transportation*, supra, 180 Conn. 11, which the trial court found was factually distinguishable from the present case. We agree with the court's conclusion that *Laurel, Inc.*, does not apply to the present case, as the subject property in *Laurel, Inc.*, was taken for the improvement of a limited access highway, which "may be broadly described as a highway [that] motorists can enter and leave only at designated interchanges," and for which the right of direct access by abutting landowners is restricted; *State* v. *Lane*, 4

Abrams v. *PH Architects, LLC*, 183 Conn. App. 777, 804, 193 A.3d 1230 ("it is outside the role of this court to second-guess the credibility determinations of the trier of fact"), cert. denied, 330 Conn. 925, 194 A.3d 290 (2018). Therefore, the trial court's determination that the defendants failed to prove that their property was landlocked on the date of the partial taking is not clearly erroneous, and the court did not improperly decline to award severance damages.

The judgment is affirmed.

Conn. Cir. 368, 374, 232 A.2d 518 (1967); see also *Laurel, Inc.* v. *Commissioner of Transportation*, supra, 28 ("[t]here are no abutter's rights to a limited access highway"); whereas, in the present case, Coles Road is a public roadway, for which abutting landowners have a common-law right of access or egress over the roadway. See *State* v. *Lane*, supra, 374; see also *Cohen* v. *Hartford*, 244 Conn. 206, 209 n.8, 710 A.2d 746 (1998). Therefore, the defendants' reliance on *Laurel, Inc.*, is unavailing.

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State *v.* Santiago 44

Motion to correct illegal sentence; mootness; motion to dismiss; postappeal motion for sentence modification; whether consideration of claims on appeal would result in practical relief to defendant in light of sentence modification granted by trial court during pendency of appeal; whether trial court's ruling on appeal dismissing motion to correct had been superseded during pendency of appeal by sentence modification.

Young *v.* Commissioner of Correction 171

Habeas corpus; whether habeas court properly concluded that state had not violated petitioner's right to due process under Brady *v.* Maryland *(373 U.S. 83) by failing to disclose agreement under which witness agreed to testify truthfully against him at his criminal trial in exchange for state's agreement to inform sentencing court in witness' criminal case of her testimony and cooperation; whether habeas court properly concluded that petitioner had failed to establish that witness' testimony at petitioner's criminal trial was false or substantially misleading and that prosecutor failed to correct it in violation of his due process rights.*

NOTICE

Public Hearing on Practice Book Revisions to the Rules of Appellate Procedure Being Considered by the Justices of the Supreme Court and Judges of the Appellate Court

On May 16, 2023, at 2 p.m., a public hearing will be conducted pursuant to General Statutes § 51-14 (c) in the Supreme Court courtroom, 231 Capitol Avenue, Hartford, for the purpose of receiving comments concerning revisions to the Rules of Appellate Procedure which are being considered by the Justices and Judges, as well as any proposed new rule or any change to an existing rule that any member of the public deems desirable. The revisions proposed by the Advisory Committee on Appellate Rules were printed in the April 25, 2023 issue of the Connecticut Law Journal and are posted on the Judicial Branch website at http://www.jud.ct.gov/pb.htm.

Each speaker will be allowed a maximum of five minutes to offer their remarks. Anyone who believes that they may need to exceed the five minute limit or who does not wish to speak at the public hearing but wishes to offer comments on the proposed revisions may submit their comments to the co-chairs of the Advisory Committee on Appellate Rules by e-mail to Attorney Jill Begemann at Jill.Begemann@connapp.jud.ct.gov or by forwarding their comments to the co-chairs at the following address:

Co-Chairs of the Advisory Committee on Appellate Rules

Attn: Attorney Jill Begemann

Connecticut Appellate Court

75 Elm Street

Hartford, CT 06106

All comments should be received by May 10, 2023.

Wheelchair access is located in the rear of the Supreme Court building, and may be reached from the staff parking lot between Lafayette and Oak Streets. There are a limited number of handicap accessible parking spaces in the gated staff lot, which may be entered from Oak Street. Use the intercom at the gate to speak to security about the availability of parking. Once at the accessible door, use the intercom to request entry from security. If you would like to attend the meeting and need an accommodation under the Americans with Disabilities Act, please e-mail ADA.Contact@connapp.jud.ct.gov or call (860) 757-2200, ext. 3141 before May 10, 2023.

Hon. Gregory T. D'Auria

Hon. Eliot D. Prescott

Co-Chairs, Advisory Committee on Appellate Rules

NOTICE OF CONNECTICUT STATE AGENCIES

DEPARTMENT OF SOCIAL SERVICES

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 23-U: Coverage and Payment Modifications for the Transition from the Coronavirus Disease 2019 (COVID-19) Federal Public Health Emergency (PHE)

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS). Public comment information is at the bottom of this document.

Proposed Changes to Medicaid State Plan

Effective on or after May 12, 2023, which is the first day after the scheduled end of the federal Coronavirus Disease 2019 (COVID-19) public health emergency (PHE), this SPA will Attachments 3.1-A, 3.1-B, 3.1-K, and 4.19-B of the Medicaid State Plan to make the updates detailed below. Fee schedules are published at this link: https://www.ctdssmap.com, then select ''Provider'', then select ''Provider Fee Schedule Download,'' then select the applicable fee schedule. Whenever fee schedules are referenced, they incorporate the fee schedule rates for the applicable dates as posted on the fee schedule accessible from that webpage.

As explained in more detail below in the context of each proposed change included in this SPA, the overall purpose of this SPA is to continue certain flexibility under various approved disaster relief SPAs and submitted proposed disaster relief SPA 23-0005, which are governed by the flexibility in standard federal requirements implemented by CMS and pursuant to the state's approved waiver from CMS pursuant to section 1135 of the Social Security Act during the federally declared national emergency and PHE to help assist with the state's response to the COVID-19 pandemic and its effects. In accordance with federal requirements, all COVID-19 disaster relief SPAs will sunset no later than the last day of the federal PHE, which, as communicated by the federal government, will be May 11, 2023.

Home Health Services Reimbursement. There will be payments made in July 2023, November 2023, and March 2024 for qualifying home health agency providers, who will be eligible for receive payments calculated based on 2% of expenditures for the prior four months, so long as the provider meets the benchmarks set forth in the SPA pages, which include, as applicable, standards related to training, surveys, and health information exchange participation. For six-month periods after March 2024, the value-based payment will change from the progressive benchmark payments to outcome-based payments with outcome measures set forth in the SPA pages related to decreasing avoidable hospitalization, increasing percent of people who need ongoing services discharged from hospital to community in lieu of nursing home, and increase in probability of return to community within 90 days of nursing home admission. Payments are based on up to 2% of expenditures for the 6 months that immediately precede each payment other than the first outcome payment which will be based on the 4 months that immediately precede the first payment.

The purpose of this portion of the SPA is to continue implementing, with respect to home health services, relevant provisions of the state's Spending Plan for Implementation of the American Rescue Plan Act (ARPA) of 2021, Section 9817, as updated, which relates to Home and Community-Based Services (HCBS) (ARPA HCBS Spending Plan). The purpose of the ARPA HCBS Spending Plan, in turn, is to improve the quality, access, and infrastructure for HCBS, as defined in that federal law and associated CMS guidance.

Community First Choice (CFC) Coverage and Reimbursement.

CFC Provisions Related to ARPA HCBS Spending Plan

Also consistent with implementing relevant provisions of the ARPA HCBS Spending Plan in improving access, quality and infrastructure for HCBS, this SPA makes the following coverage and reimbursement expansions. This SPA adds remote supports, which is defined in more detail in the SPA pages and includes the provision of supports by staff at a remote location who are engaged with the individual through technology/devices with the capability for live two-way communication. Individual interaction with the staff person may be scheduled, on-demand, or in response to an alert from a device in the remote support equipment system. Note that the equipment is already covered under the assistive technology service portion of this benefit. In order to provide remote live supports, the provider entity must be certified by DSS as a community hub. This SPA also expands the coverage definition of assistive technology to specifically reference remote equipment.

Note that other SPA provisions related to CFC for implementation of the ARPA HCBS Spending Plan are included in proposed SPA 23-0005-A (as are similar provisions related to the section 1915(i) Connecticut Home Care Program for Elders (CHCPE) and the section 1915(i) Connecticut Housing Engagement and Support Services (CHESS)).

CFC Provisions Continuing Certain Disaster Relief SPA Flexibilities

This SPA continues the following flexibilities for the Community First Choice (CFC) benefit pursuant to section 1915(k) of the Social Security Act included in one or more approved disaster relief SPAs:

- First, although beneficial for care planning and service delivery for the attendant care category of service to be provided in person whenever feasible, to the extent clinically appropriate for each individual based on that person's circumstances, care planning and service delivery for attending care services may be continued to be provided virtually, subject to the state's approval on a case-by-case basis.
- Second, the provider qualifications for providers of agency-based support and planning coach services are broadened to enable, as a substitute for five years of experience in a professional capacity in a disability or health organization, to also allow five years of personal experience managing supports and services in the community either as a person with a disability or as a parent of a child with a disability, except that parents cannot provide this service for their own children. All other relevant qualifications remain in effect.
- Third, although beneficial for the assessment to be conducted in person, to the extent clinically appropriate for each individual based on that person's circumstances, all or part of the assessment may be provided virtually, subject to the state's approval on a case-by-case basis.

The purpose of the proposed change described above is to maintain virtual options for access to those relevant services when clinically appropriate to help improve choice and access for CFC participants.

Moving Clinic Mental Health Services to the Rehabilitation Services Benefit Category. In guidance issued by CMS earlier in the PHE, CMS detailed that it interprets the federal clinic regulation (42 C.F.R. § 440.90) to require that for telehealth to be billed by a clinic within the clinic Medicaid State Plan benefit category, either the clinic's practitioner or the member must be located in a licensed location of the clinic. During the PHE, the state requested, and CMS approved, a disaster relief waiver under section 1135 of the Social Security Act allowing the state to cover telehealth services provided by a clinic even if neither the practitioner nor the member was located in a licensed location of that clinic. That section 1135 waiver will expire automatically at the end of the federal PHE. The purpose of this portion of the SPA is to enable the state to have the flexibility to cover mental health services provided by a clinic via telehealth when neither the clinic practitioner nor the member is in a licensed location of the clinic. Note that this flexibility is still subject to the broader DSS telehealth policy regarding requirements and procedures for telehealth, which this SPA is not changing.

In order to enable continuation of this flexibility, this portion of the SPA will move mental health services provided by behavioral health clinics, medical clinics, and rehabilitation clinics from the federal Medicaid State Plan clinic benefit category defined by federal regulation at 42 C.F.R. § 440.90 to the federal Medicaid State Plan rehabilitative services benefit category defined by federal regulation at 42 C.F.R. § 440.130(d). This change will apply both to privately operated clinics and to public clinics operated by the State of Connecticut Department of Mental Health and Addiction Services (DMHAS). This change applies only to mental health services and only to freestanding behavioral health clinics, medical clinics, and rehabilitation clinics currently enrolled with DSS as clinic provider types. This change does not apply to federally qualified health centers (FQHCs) or outpatient hospitals because those federal regulations are more flexible in this context and do not include the restrictions on telehealth that CMS has interpreted to the clinic regulation, as referenced above. This change also does not apply to substance use disorder (SUD) services, because those services were previously moved to the federal Medicaid State Plan rehabilitation services benefit category through approved SPA 22-0020, which was coordinated with the state's approved SUD demonstration waiver pursuant to section 1115 of the Social Security Act.

This SPA does not make any substantive changes to coverage or reimbursement in this context, simply moving existing covered services and reimbursement methodology from the federal clinic benefit category to the federal rehabilitation services benefit category. Rates, reimbursement methodology, and coverage all remain the same. The purpose of this change is set forth above to maintain the state's ability to cover telehealth in the context as described above.

Removing Restrictive Language for Audio-Only Services and Reimbursement for Specified Covered Audio-Only Services. In order to enable the state to continue covering telehealth services, including where applicable and covered in accordance with DSS policy, audio-only services, this SPA removes language in the coverage pages for the physician services benefit category that currently indicates that services provided over the telephone are not covered. Related, this SPA also reflects the addition of audio-only billing codes to the physician office and outpatient fee schedule, which were previously added by one or more approved COVID disaster

relief SPAs, which expire automatically at the end of the PHE. Specifically, the following codes are added:

Procedure Code	Description	Rate
99442	Physician telephone patient service, 11-20 minutes of medical discussion	$42.93
99443	Physician telephone patient service, 21-30 minutes of medical discussion	$64.99

Laboratory Coverage Flexibility. In order to maintain access to COVID-19 laboratory settings, this SPA continues the state's election of the laboratory flexibilities authorized in federal regulation under 42 C.F.R. § 440.30(d), which were made in one or more approved disaster relief SPAs, which are expiring at the end of the PHE. Specifically, in accordance with that regulation through the end of the PHE and period of active surveillance as defined in that regulation, the state chooses to cover COVID-19 laboratory testing or other testing for such other infectious disease named in a future federal PHE (1) without a physician's order and (2) in places of service (POS) other than an office or laboratory location, which can allow pop-up testing sites and other non-traditional locations for testing.

The purpose of this change is to maintain access to COVID-19 tests and to promote public health.

COVID-19 Vaccine Reimbursement. Consistent with approved SPA 22-0013 and continuing the reimbursement that was in effect through one or more approved disaster relief SPAs, this SPA continues the current reimbursement methodology for COVID-19 vaccine administration and vaccines for pharmacy providers and for the applicable fee schedules (physician (when provided by physicians, nurse practitioners, physician assistants, and certified nurse-midwives and for this service, all of those practitioners will be paid at 100% of the fee on the physician fee schedule), home health agency (regardless of whether the beneficiary is otherwise receiving home health services), hospice agency (regardless of whether the beneficiary is otherwise receiving hospice services), medical clinic, dialysis clinic, and family planning clinic) to be 100% of Medicare from dates of service May 12, 2023 through September 30, 2024.

Additionally, for dates of service May 12, 2023 through September 30, 2024, this SPA will reimburse the COVID-19 vaccine product, when commercially purchased, at 100% of the Medicare rate, or in the absence of a Medicare rate, in accordance with the federally approved Medicaid State Plan provisions regarding physician-administered drugs, the lowest of:

- the usual and customary charge to the public or the actual submitted ingredient cost;
- the National Average Drug Acquisition Cost (NADAC) established by the Centers for Medicare and Medicaid Services;
- the Affordable Care Act Federal Upper Limit (FUL); or
- wholesale Acquisition Cost (WAC) plus zero (0) percent when no NADAC is available for the specific drug.

COVID-19 vaccine administration and vaccine product will be reimbursed to the following providers: Physicians, Physician Assistants, Advanced Practice Registered Nurses, Certified Nurse Midwives, Medical Clinics, Family Planning Clinics, Dialysis Clinics, Federally Qualified Health Centers, Outpatient Hospitals, Hospice Agencies, Home Health Agencies, Dentists, and Pharmacies.

The state will review the reimbursement level for dates of service October 1, 2024 forward at a future time and in a future SPA.

The purpose of this change is to maintain access to COVID-19 vaccine administration and vaccines.

COVID-19 Testing Reimbursement. Finally, consistent with approved SPA 22-0013 and continuing the reimbursement that was in effect through one or more approved disaster relief SPAs this SPA will update COVID-19 testing reimbursement rates for dates of service May 12, 2023-September 30, 2024. This update is to continue to allow payment of COVID lab tests to be reimbursed at 100% of current Medicare rates during that time frame, which applies to the independent laboratory, physician, dialysis clinic, family planning clinic, and medical clinic fee schedules. The state will review the reimbursement level for dates of service October 1, 2024 forward at a future time and in a future SPA, reflecting in part the consideration that the laboratory fee schedule is generally set at 70% of Medicare rates.

Estimated Fiscal Impact

Home Health. DSS estimates that the home health reimbursement increases will increase annual aggregate expenditures by approximately $3,334,942 in SFY 2023, $7,665,854 in SFY 2024, and $2,816,476 in SFY 2025.

Removing Restrictive Language for Physician Services Performed via Audio-Only. DSS estimates that removing the restrictions on coverage for audio-only services and maintaining the reimbursement for the audio-only procedure codes set forth above will increase annual aggregate expenditures by approximately $943,528 in SFY 2023, $971,834 in SFY 2024 and $1,000,989 in SFY 2025.

CFC. DSS does not anticipate any significant fiscal impact from the portions of this SPA that extend specified provisions from the approved disaster relief SPAs because those pieces simply provide more flexibility in terms of the mode of accessing the service or in the qualifications of providers, as applicable, but they do not change actual coverage or reimbursement. DSS estimates that the ARPA HCBS CFC coverage and reimbursement expansions will increase annual aggregate expenditures by approximately $30,000 in SFY 2023, $218,822 in SFY 2024 and $693,346 in SFY 2025.

Mental Health Services in Clinics. DSS does not anticipate any significant fiscal impact from the portion of this SPA that moves mental health services provided by freestanding clinics from the federal clinic benefit category to the federal rehabilitation services benefit category because the substantive coverage and reimbursement are not changing.

Laboratory Coverage Flexibility. At this time, DSS does not anticipate any significant fiscal impact from the portion of this SPA that continues the flexibility to cover COVID-19 laboratory tests without a physician order and/or in a setting other than laboratory or office. However, if it were ever to become necessary to expand COVID-19 testing in those contexts back to peak pandemic levels, then continuing this flexibility would be associated with approximately $1,000,000 in monthly gross expenditures (or annualized to approximately $12,000,000 in annual aggregate expenditures).

COVID-19 Testing Reimbursement. DSS estimates that the portion of this SPA maintaining reimbursement at 100% of Medicare for COVID-19 testing for the May 12, 2023 through September 30, 2024 period is likely to result in increasing annual aggregate expenditures by approximately $2,315,110 in SFY 2023, $20,666,213 in SFY 2024 and $5,321,550 in SFY 2025.

COVID-19 Vaccines and Vaccine Administration Reimbursement. DSS estimates that the portion of this SPA maintaining reimbursement at 100% of Medicare for COVID-19 vaccines and vaccine administration for the May 12, 2023 through September 30, 2024 period is likely to result in increasing annual aggregate expenditures by approximately $13,640 in SFY 2023, $121,764 in SFY 2024 and $31,354 in SFY 2025.

Obtaining SPA Language and Submitting Comments

The proposed SPA is posted on the DSS website at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below). When feasible and relevant, the versions of the SPA pages posted to that webpage include track changes indicating this SPA's proposed changes to the current version of the Medicaid State Plan.

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 23-U: Coverage and Payment Modifications for the Transition from the Coronavirus Disease 2019 (COVID-19) Federal Public Health Emergency (PHE)''.

Anyone may send DSS written comments about this SPA. **Written comments must be received by DSS at the above contact information no later than May 24, 2023**.

Department of Social Services

Notice of Proposed Medicaid State Plan Amendment (SPA)

SPA 23-W: Chronic Disease Hospitals – Continuing Ventilation Bed Rate Add-On

The State of Connecticut Department of Social Services (DSS) proposes to submit the following Medicaid State Plan Amendment (SPA) to the Centers for Medicare & Medicaid Services (CMS) within the U.S. Department of Health and Human Services (HHS). Public comment information is at the bottom of this document.

Proposed Changes to Medicaid State Plan

Effective July 1, 2023, this SPA will amend Attachment 4.19-A of the Medicaid State Plan to maintain the $500.00 per day add-on to the per diem rate for beds provided to patients on ventilators in free-standing licensed chronic disease hospitals, as defined in section 19a-550 of the Connecticut General Statutes. Under the current approved Medicaid State Plan and in accordance with 238 of Public Act No. 22-118, An Act Adjusting the State Budget for the Biennium Ending June 30, 2023, this add-on previously applied only during State Fiscal Year (SFY) 2023. DSS

anticipates that the funding to support this rate add-on will be maintained, so the purpose of this SPA is to remove the end-date for the add-on in the Medicaid State Plan and support continued access and quality for these services.

Estimated Fiscal Impact

DSS estimates that maintaining the add-on for chronic disease hospital ventilation beds will increase annual aggregate expenditures by approximately $11,000,000 in State Fiscal Year (SFY) 2024 and $11,000,000 in SFY 2025.

Obtaining SPA Language and Submitting Comments

This proposed SPA is posted on the DSS web site at this link: https://portal.ct.gov/DSS/Health-And-Home-Care/Medicaid-State-Plan-Amendments. The proposed SPA may also be obtained at any DSS field office, at the Town of Vernon Social Services Department, or upon request from DSS (see below). When feasible and relevant, the versions of the SPA pages posted to that webpage include track changes indicating this SPA's proposed changes to the current version of the Medicaid State Plan.

To request a copy of the SPA from DSS or to send comments about the SPA, please email: Public.Comment.DSS@ct.gov or write to: Department of Social Services, Medical Policy Unit, 55 Farmington Avenue, 9th Floor, Hartford, CT 06105. Please reference ''SPA 23-W: Chronic Disease Hospitals – Continuing Ventilation Bed Rate Add-On''.

Anyone may send DSS written comments about the SPA. **Written comments must be received by DSS at the above contact information no later than June 8, 2023.**

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. 2023-2 April 20, 2023

Question Presented: **Is a Statement of Financial Interests (''SFI'') filer required to report student loans, refinanced with the Connecticut Higher Education Supplemental Loan Authority (''CHESLA'') and executed via promissory note, as a contract with a quasi-public agency on her SFI filing?**

Brief Answer: **We conclude that, under General Statutes § 1-83 (b) (1) (G), which requires SFI filers to disclose ''any . . . contracts with . . . a quasi-public agency held or entered into by the individual,'' an SFI filer must report student loans refinanced with CHESLA via a promissory note as a contract with a quasi-public agency.**

At its March 16, 2023 regular meeting, the Citizen's Ethics Advisory Board granted the petition for an advisory opinion submitted by Emily Burnett, a Connecticut Career Trainee Planning Analyst at the Office of Policy and Management (''OPM''), and it now issues this advisory opinion under General Statutes § 1-81 (a) (3) of the Code of Ethics for Public Officials.

Background

There are no factual disputes here, and Ms. Burnett asks the following purely legal question:

> Statement of Financial Interest (''SFI'') requirements for reporting a student loan refinanced with the Connecticut Higher Education Supplemental Loan Authority (''CHESLA''), which is defined as a ''quasi-public agency'' under the Code of Ethics for Public Officials. General Statutes § 1-79 (12). Should student loans through CHESLA be reported on the Leases & Contracts tab of the Office of State Ethics Statement of Financial Interest form?

Analysis

Concerning jurisdiction, persons generally subject to the Code are described as either ''Public officials'' or ''State employees.'' The Code defines the latter 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). It follows that, as an OPM employee, Ms. Burnett is a ''state employee'' and thus subject to the Code.

Under General Statutes § 1-83, certain public officials and state employees must file SFIs for the preceding calendar year with the Office of State Ethics. Among

other items that must be disclosed on the SFI are ''*any* leases or *contracts with* the state or *a quasi-public agency held or entered into by the individual* or a business with which he or she was associated . . . .'' (Emphasis added.) General Statutes § 1-83 (b) (1) (G). Subdivision (G) contains no exceptions.

CHESLA, as noted above, is a quasi-public agency for purposes of the Code, and under the Connecticut Higher Education Supplemental Loan Authority Act, specifically, General Statutes § 10a-225 (d) (1), CHESLA

> may develop and require the use of a master promissory note for education loans. Each master promissory note shall allow borrowers to receive, in addition to initial education loans, additional education loans for the same or subsequent periods of enrollment. Each master promissory note shall include a provision stating that the note shall be governed by and construed pursuant to the laws of the state of Connecticut.

According to CHESLA's General Counsel, ''[w]hen an individual refinances a student loan with CHESLA, they sign a promissory note for the loan agreeing to pay the loan pursuant to the terms of the note.'' And a promissory note, under Connecticut law, ''is nothing more than a written *contract* for the payment of money.'' (Emphasis added.) *Appliances, Inc.* v. *Yost*, 181 Conn. 207, 210–11 (1980).

Applying this to the question here, because an individual who signs a promissory note with CHESLA to refinance a student loan enters or holds a contract with a quasi-public agency, an SFI filer must disclose such a contract under the ''Leases and Contracts'' section of the SFI, pursuant to subdivision (G) of subsection 1-83 (b) (1). As noted earlier, subdivision (G) contains no exceptions, and we cannot conjure an exception where none exists. See *Doe* v. *Manson*, 183 Conn. 183, 188 (1981) (''[i]t . . . is not our function to attempt to improve upon the actions of the legislature by reading into a statute what is clearly not there'' [internal quotation marks omitted]); *Evans* v. *Admin., Unemployment Comp.*, 135 Conn. 120, 124 (1948) (''[w]e are not at liberty to . . . indulge in the license of striking out and inserting, and remodeling, with the view of making the letter express an intent which the statute in its native form does not evidence'' [internal quotation marks omitted]). The appropriate avenue for seeking amendments to the statute is through the General Assembly, not the Board.

Finally, we note that, if the amount of a student loan—with CHESLA or with any other entity—exceeds $10,000, an SFI filer is also required to report the student loan under the SFI form's ''Creditor'' section. See General Statutes § 1-83 (b) (1) (F) (''[t]he statement of financial interests . . . shall include the following information for the preceding calendar year in regard to the individual required to file the statement . . . (F) the names and addresses of creditors to whom the individual, the individual's spouse or dependent children, individually, owed debts of more than ten thousand dollars'').

Conclusion

Based on the facts presented, we conclude that, under § 1-83 (b) (1) (G), which requires SFI filers to disclose ''any . . . contracts with . . . a quasi-public agency held or entered into by the individual,'' an SFI filer must report student loans

refinanced via promissory notes with CHESLA under the ‘‘Leases and Contracts’’ section of the form.

By order of the Board,

Dated **April 21, 2023**

/s/ Dena Castricone
Chairperson

NOTICE

Notice of Certification as Authorized House Counsel

Upon recommendation of the Bar Examining Committee, in accordance with § 2-15A of the Connecticut Practice Book, notice is hereby given that the following individuals have been certified by the Superior Court as Authorized House Counsel for the organization named:

Certified as of March 15, 2023:	
Kimberly R. Dolan	Bridgewater Associates, LP
Certified as of March 17, 2023:	
Jessica Studness	SpringWorks Therapeutics
Certified as of March 21, 2023:	
Taylor P. Calhoun	Insurity, LLC
Certified as of March 22, 2023:	
Kenneth J. Kalafus	Boehringer Ingelheim USA Corp.
Certified as of March 24, 2023:	
Kimberly A. Evans	Charter Oak Health Center, Inc.
Certified as of March 29, 2023:	
Bradley A. Fishman	Athene
Certified as of March 31, 2023:	
Jill Arnold	Massar Capital Management, LP
Alex E. Breger	The Hartford Steam Boiler Inspection and Insurance Company

Hon. Elizabeth A. Bozzuto
Chief Court Administrator