ZARELLA, J., with whom McLACHLAN, J., joins, concurring. I agree with the majority that General Statutes § 17a-593, which describes the procedure to be followed by the psychiatric security review board in extending an insanity acquittee's term of commitment, does not violate the right of the defendant, Anthony Dyous, to equal protection under the federal constitution by imposing a greater burden on individual liberty than the procedure for obtaining an order of civil commitment under General Statutes §§ 17a-498 and 17a-515, which apply to civilly committed inmates. I disagree, however, with the majority's approach. The majority initially assumes that insanity acquittees and civilly committed inmates are similarly situated with respect to the prospect of continued commitment. It then assumes, in contravention of our jurisprudence, that intermediate scrutiny applies and that § 17a-593 survives this heightened standard. I do not agree with this approach because, in my view, a simpler and more direct analysis, which would yield a determination that insanity acquittees and civilly committed inmates are clearly not similarly situated, would end the inquiry. Moreover, the majority's application of a series of presumptions not only fails to clarify the law but results in further confusion. Specifically, the majority, without expressly overruling *State* v. *Long*, 268 Conn. 508, 539–40, 847 A.2d 862, cert. denied, 543 U.S. 969, 125 S. Ct. 424, 160 L. Ed. 2d 340 (2004), casts significant doubt on its viability. Accordingly, I concur only in the majority's rejection of the defendant's equal protection claim.[1]

"[T]he concept of equal protection [under the federal constitution] has been traditionally viewed as requiring the uniform treatment of persons standing in the same relation to the governmental action questioned or challenged. . . . Conversely, the equal protection clause places no restrictions on the state's authority to treat dissimilar persons in a dissimilar manner. . . . Thus, [t]o implicate the equal protection [clause] . . . it is necessary that the state statute . . . in question, either on its face or in practice, treat persons standing in the same relation to it differently. . . . [Accordingly], the analytical predicate [of an equal protection claim] is a determination of who are the persons [purporting to be] similarly situated. . . . The similarly situated inquiry focuses on whether the [challenger is] similarly situated to another group for purposes of the challenged government action. . . . Thus, [t]his initial inquiry is not whether persons are similarly situated for all purposes, but whether they are similarly situated for purposes of the law challenged." (Citations omitted; internal quotation marks omitted.) *Kerrigan* v. *Commissioner of Public Health*, 289 Conn. 135, 157-58, 957 A.2d 407 (2008).

Although this court often assumes that two groups are similarly situated for the purpose of conducting a more comprehensive equal protection analysis; see, e.g., *Perez-Dickson* v. *Bridgeport*, 304 Conn. 483, 522, 43 A.3d 69 (2012) (assuming that African-American employees were similarly situated to Caucasian employees); *Keane* v. *Fischetti*, 300 Conn. 395, 403, 13 A.3d 1089 (2011) (assuming that firefighters were similarly situated to other municipal employees); see also *State* v. *Wright*, 246 Conn. 132, 143, 716 A.2d 870 (1998) (noting court's frequent assumption that categories of defendants are similarly situated with respect to challenged statute); I believe that insanity acquittees and those who are civilly committed are distinguishable on such a fundamental level that there is no reason to apply the presumption in the present case. As this court explained in *Long*, "[w]hat differentiates these two groups for the purposes of recommitment procedures is the acquittee's proven criminal offense, which has been adjudicated to be the product of mental illness. A verdict of not guilty by reason of mental disease or defect establishes two facts: (1) the person committed an act that constitutes a criminal offense; and (2) he committed the act because of mental illness. . . . Thus, unlike a civilly committed inmate, an acquittee has proven to the fact finder that his mental disease or defect caused him to commit a crime, thereby establishing a legal nexus between the acquittee's mental illness and the criminal act." (Citations omitted.) *State* v. *Long*, supra, 268 Conn. 539–40. The United States Supreme Court recognized a similar distinction in *Jones* v. *United States*, 463 U.S. 354, 103 S. Ct. 3043, 77 L. Ed. 2d 694 (1983), when it noted that there are "important differences between the class of potential civil-commitment candidates and the class of insanity acquittees that justify differing standards of proof." Id., 367. The court specifically observed that application of the clear and convincing standard to potential civil commitment candidates is justified because of a concern that "members of the public could be confined on the basis of some abnormal behavior which might be perceived by some as symptomatic of a mental or emotional disorder, but which is in fact within a range of conduct that is generally acceptable. . . . In view of this concern . . . it [is] inappropriate to ask the individual to share equally with society the risk of error. . . . But since automatic commitment . . . follows only if the acquittee himself advances insanity as a defense and proves that his criminal act was a product of his mental illness, there is good reason for diminished concern as to the risk of error. More important, the proof that he committed a criminal act as a result of mental illness eliminates the risk that he is being committed for mere idiosyncratic behavior . . . . A criminal act by definition is not within a range of conduct that is generally acceptable." (Citations omitted; internal quotation marks omitted.)

Id. The court thus concluded that there was no reason to apply the same standard of proof to potential civil commitment candidates and the class of insanity acquittees. Id.

The practical effect of this distinction with respect to recommitment decisions is clear. The discharge of an insanity acquittee, whose status indicates that he or she has been declared dangerous to society due to the commission of a criminal act, raises the specter that the danger to society will recur if the mental disease recurs, which is not the case with a civilly committed inmate whose mental disease or defect was not accompanied by a criminal act. Accordingly, although insanity acquittees and civilly committed inmates share certain other characteristics,[2] I would conclude that they cannot be considered similarly situated for the purpose of an equal protection challenge to § 17a-593. See *Glatz* v. *Kort*, 807 F.2d 1514, 1522 (10th Cir. 1986) ("Insanity acquittees and involuntary civil committees are not similarly situated groups for equal protection purposes. . . . [T]he insanity acquittee has confessed to committing a criminal act earlier and the grand jury or the court has found probable cause to believe that he did in fact commit the act. . . . It is not unreasonable to conclude that an insanity acquittal supports an inference of continuing mental illness." [Citation omitted.]); *Green* v. *Commissioner of Mental Health & Mental Retardation*, 750 A.2d 1265, 1273 (Me. 2000) (observing that "insanity acquittees and individuals civilly committed are not similarly situated . . . because of the difference in circumstances giving rise to their commitment"); *Reiter* v. *State*, 36 P.3d 586, 595 (Wyo. 2001) (concluding that, because criminal acquittee "has placed his mental illness at issue, proved it by a preponderance of the evidence, and is therefore deemed to have committed a criminal act," acquittee is dissimilar to civil committee for equal protection purposes).

In *Long*, in which an equal protection claim was also raised with respect to § 17a-593; see *State* v. *Long*, supra, 268 Conn. 533; this court did not decide whether insanity acquittees and civilly committed inmates were similarly situated, preferring to defer the question by presuming that they were. Id., 535. In the present case, however, the majority invokes the same initial presumption, but, unlike in *Long*, in which the court determined that the rational basis test applies; id.; the majority in the present case presumes that intermediate scrutiny applies, thus implicitly overruling *Long*. I believe this is the wrong approach because the purpose of presuming that the classes are similarly situated and deciding the matter on the basis of the second prong is to avoid what is generally the thornier, first part of the two-pronged test. Here, in contrast, the more difficult question involves the second prong because, although this court approved the use of the rational basis test in *Long*, a handful of decisions by the United States Courts of

Appeals for the Second and Ninth Circuits have applied intermediate scrutiny. See, e.g., *Ernst J.* v. *Stone*, 452 F.3d 186, 200 (2d Cir. 2006); *Hickey* v. *Morris*, 722 F.2d 543, 546 (9th Cir. 1983). Nevertheless, instead of following *Long*, the majority indicates that it is "inclined to agree" with the defendant that "the balance of persuasive authority favors applying intermediate scrutiny to § 17a-593 . . . ." It thus assumes, without deciding, that intermediate scrutiny applies, even though such an assumption contradicts our precedent and leads to even more confusion. For this reason, I believe it is far better to resolve the defendant's claim on the ground that insanity acquittees and civilly committed inmates are not similarly situated. Accordingly, I respectfully concur.

[1] I agree with the majority's analysis and conclusion with respect to the defendant's secondary constitutional claim that he was deprived of his federal constitutional right to due process of law on the ground that his original plea of not guilty by reason of mental disease or defect was not knowing, intelligent or voluntary.

[2] The majority has described these characteristics, namely, that both groups have engaged in criminal conduct, are currently mentally ill, require treatment and present a danger to society.