ZARELLA, J., with whom McLACHLAN, J., joins, concurring in the judgment. I concur in the judgment and the majority's conclusion that, in certain circumstances, a landlord may be held liable under a common-law theory of premises liability for dog bite injuries to a tenant. I am compelled to write separately, however, because I disagree with much of the majority's reasoning. In my view, this court did not acknowledge in *Auster* v. *Norwalk United Methodist Church*, 286 Conn. 152, 943 A.2d 391 (2008), that principles of common-law liability are applicable to dog bite injuries, and, consequently, *Auster* provides no guidance in deciding whether a negligence action can be brought in the present circumstances. Furthermore, the majority ignores the historic separation between dog bite claims brought pursuant to statutory authority and common-law negligence claims alleging dangerous conditions, and thus fails to apply the well established test traditionally employed in resolving novel questions, like the one in the present case, as to whether a legal duty exists. Finally, the majority's thinly supported analysis relies on two factually dissimilar cases addressing a landlord's duty to maintain the *physical* premises of a business establishment;[1] see *Williams* v. *Milner Hotels Co.*, 130 Conn. 507, 508–10, 36 A.2d 20 (1944); and an apartment complex. See *Reardon* v. *Shimelman*, 102 Conn. 383, 386–89, 128 A. 705 (1925). Accordingly, I respectfully concur only in the judgment and the majority's ultimate conclusion that a landlord may be held liable under a common-law theory of premises liability for dog bite injuries in the particular circumstances of this case.

I

The majority and the Appellate Court conclude that this court recognized in *Auster* that ordinary principles of common-law liability could be brought to bear on the question of whether a landlord could be held liable in negligence for failing to protect against a dog attack. See *Giacalone* v. *Housing Authority*, 122 Conn. App. 120, 125–26, 998 A.2d 222 (2010). I disagree.

In *Auster*, this court stated that "the plaintiff [had] failed to establish that the defendant [landlord, a church] was a keeper of the dog [under General Statutes § 22-357]. This is not to say, of course, that the defendant may not have been negligent in failing to take reasonable precautions to protect against the attack that occurred . . . particularly in view of the fact that [the] dog previously had bitten a church employee. We conclude *only* that the evidence was insufficient to hold the defendant strictly liable to the plaintiff as a keeper of the dog under § 22-357. On retrial, the plaintiff will have the opportunity to establish her common-law negligence claim against the defendant." (Emphasis

added.) *Auster* v. *Norwalk United Methodist Church*, supra, 286 Conn. 164–65.

On the basis of this language, I would conclude that the majority and the Appellate Court in the present case improperly construed *Auster*. In relying on *Auster*, the Appellate Court observed: "If such an action would not lie as a matter of law, we can discern no reason why the court [in *Auster*] would have remanded for a new trial on that claim." *Giacalone* v. *Housing Authority*, supra, 122 Conn. App. 126. The Appellate Court conducted no further analysis other than to note that a number of other jurisdictions permit an injured party to bring an action against the landlord of property on which a dog bite injury occurred under a common-law negligence theory even when the landlord is not the owner or keeper of the dog. Id., 125. The Appellate Court's ultimate conclusion, however, rested on this court's comments in *Auster*. The Appellate Court simply stated that, "in light of our Supreme Court's decision in *Auster*, we conclude that such a cause of action also may be viable in Connecticut." Id.

I believe that, to the extent the majority and the Appellate Court relied on the comments in *Auster* as a basis for their decisions, that reliance is misplaced because the comments were nonbinding dicta. "Dicta are [o]pinions of a [court] which do not embody the resolution or determination of the specific case before the court [and] [e]xpressions in [the] court's opinion which go beyond the facts before [the] court and therefore are individual views of [the] author[s] of [the] opinion and [are] not binding in subsequent cases as legal precedent." (Internal quotation marks omitted.) *Honulik* v. *Greenwich*, 293 Conn. 641, 645 n.5, 980 A.2d 845 (2009). Thus, the court's extraneous comments in *Auster* that the defendant might have been negligent and that the plaintiff would "have the opportunity to establish her common-law negligence claim against the defendant"; *Auster* v. *Norwalk United Methodist Church*, supra, 286 Conn. 165; did not constitute recognition of a theory of common-law liability for dog bite injuries and can provide no guidance to this court in deciding whether to extend a landlord's duty under premises liability law in the present circumstances.[2]

Furthermore, insofar as the Appellate Court in this case could discern no reason why the court in *Auster* would have remanded for a new trial on the common-law negligence claim "[i]f such an action would not lie as a matter of law"; *Giacalone* v. *Housing Authority*, supra, 122 Conn. App. 126; it failed to consider that the trial court had instructed the jury not to decide the common-law negligence claim if it returned a verdict for the plaintiff on the statutory negligence claim. The defendant in *Auster* also did not file a motion to strike or otherwise challenge the plaintiff's common-law negligence claim when it sought review of the trial court's

judgment on the statutory negligence claim, as the plaintiff did in the present case, nor did the Appellate Court in *Auster* discuss the viability of the common-law negligence claim in reversing the judgment and remanding the case for a new trial on that claim. See generally *Auster* v. *Norwalk United Methodist Church*, 94 Conn. App. 617, 620–24, 894 A.2d 329 (2006), aff'd, 286 Conn. 152, 943 A.2d 391 (2008). In addition, this court took pains in *Auster* to emphasize that its holding was limited to the plaintiff's statutory negligence claim. *Auster* v. *Norwalk United Methodist Church*, supra, 286 Conn. 165. Accordingly, the common-law negligence claim remained for consideration by the jury following this court's decision to overturn the verdict for the plaintiff on the statutory negligence claim. See id. In *Auster*, therefore, this court had no choice but to agree with the Appellate Court that the case should be remanded for a new trial on the remaining common-law negligence claim. I therefore disagree with the majority and would conclude that the certified question of whether the Appellate Court properly relied on *Auster* must be answered in the negative.

II

I nonetheless believe that this court may reframe the certified question to address whether premises liability law should be extended to cover dog bite injuries, regardless of what might or might not have been said in *Auster*, because the plaintiff specifically raised the issue in her complaint without tying it to *Auster*.[3] See, e.g., *State* v. *Ouellette*, 295 Conn. 173, 184, 989 A.2d 1048 (2010) (court may reformulate certified question to conform to issue actually presented); *Rosado* v. *Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 191, 884 A.2d 981 (2005) (court may "reformulate . . . the certified question to reflect more accurately the issues presented"); *Ankerman* v. *Mancuso*, 271 Conn. 772, 777, 860 A.2d 244 (2004) (court may rephrase certified questions in order to render them more accurate in framing issues that case presents); *State* v. *Brown*, 242 Conn. 389, 400, 699 A.2d 943 (1997) (court may reframe certified question to eliminate focus on improper issue); *Stamford Hospital* v. *Vega*, 236 Conn. 646, 648 n.1, 674 A.2d 821 (1996) (court may reframe certified question to render it more accurate in framing issues presented). Thus, if the certified question is rephrased to eliminate the reference to *Auster*, I agree with the majority that the plaintiff may bring a common-law negligence claim against the defendant. I strongly disagree with the majority, however, insofar as it ignores more than 200 years of statutory authority on dog bite injuries, relies principally on two inapposite Connecticut cases in a futile attempt to show that the rule it establishes is firmly anchored in existing principles of common-law negligence, and fails to apply this court's traditional test for determining whether a legal duty exists when there is no guiding precedent.

I begin by noting that Connecticut premises liability law, which is directed to keeping premises safe from dangers caused by defects in the physical condition of the property, has never been applied to dog bite claims, which involve dangers created or brought onto the property by occupants or visitors with dogs and have nothing to do with the physical condition of the property. Dog bite claims have been governed since 1798 by statutory authority; see *Grannis* v. *Weber*, 107 Conn. 622, 624–25, 141 A. 877 (1928); and, therefore, occupy a special niche in Connecticut law, separate and apart from cases brought under common-law principles of negligence. Consequently, to the extent the majority relies on negligence cases involving injuries caused by a landlord's failure to maintain the physical condition of the premises; see *Williams* v. *Milner Hotels Co*., supra, 130 Conn. 508–10; *Reardon* v. *Shimelman*, supra, 102 Conn. 386–89; it disregards the historic separation of these two entirely separate legal spheres.

Because premises liability cases typically raise issues concerning a landlord's duty to keep premises safe from dangerous conditions caused by physical defects, such cases are necessarily factually distinguishable from the present case. The majority relies predominantly on *Williams* and *Reardon*. In *Williams*, the plaintiff allegedly was bitten by a rat while staying overnight at the defendant's hotel, and the alleged breach of duty was the defendant's failure to make repairs to the property that would have prevented the rat from entering. See *Williams* v. *Milner Hotels Co*., supra, 130 Conn. 509–10. In *Reardon*, the plaintiff slipped and fell on a common walkway connecting two apartment buildings, and the alleged breach of duty was the defendant's failure to keep the walkway clear of ice and frozen snow. See *Reardon* v. *Shimelman*, supra, 102 Conn. 385, 388–89. Accordingly, the duty of the property owners in *Williams* and *Reardon* was to guard against dangerous conditions by making certain physical improvements to the premises, such as repairing holes in the baseboards of the hotel room or keeping the common walkway free of ice and frozen snow. In contrast, the harm in the present case was caused by a domesticated animal that was intentionally brought onto the premises by the tenant. In such circumstances, the property owner's duty does not require physical repairs or other improvements to render the premises safe. Rather, the duty requires the removal or control of an animal that otherwise might have been permitted under the rules applicable to pets if the animal had been more docile. This basic dissimilarity between the source and type of harm and the action required to prevent the harm from occurring renders *Williams* and *Reardon* unpersuasive with respect to whether to extend the duty of landlords to protect persons lawfully on the premises from dog bite injuries.

I also take issue with the majority's reliance on the conclusion in *Reardon* that a vicious dog may qualify as a dangerous condition because this court long has recognized that a landlord's common-law duty to alleviate known dangers exists independently of the specific source of the danger. The court in *Reardon* was referring to the source of a dangerous *physical* condition, not to the type of danger presented by a vicious dog brought onto the premises by a tenant. See *Reardon* v. *Shimelman*, supra, 102 Conn. 388. This is clear from the context of the court's discussion, in which it considered whether a dangerous physical condition caused by ice and snow falling onto a common walkway differed from a dangerous physical condition caused by decaying wood or rusty nails, and from its citation to a treatise in which the author discussed a landlord's obligation to a tenant to make *repairs and physical improvements*, in reaching its conclusion regarding the source of danger. Id., citing 1 H. Tiffany, Landlord and Tenant (1910) § 89, p. 633. Accordingly, Connecticut's premises liability law provides no basis for today's ruling, not only because it occupies a completely different legal sphere from the law on dog bite injuries, but because the issues in premises liability cases involving landlords and tenants, which typically relate to the physical condition of the property, are factually distinguishable from those in dog bite cases.

III

When an issue of first impression, like the novel issue in this case, is raised and involves a common-law duty, this court's usual approach is to consider the governing common-law principles and to apply the traditional test for determining whether a legal duty exists. See, e.g., *Monk* v. *Temple George Associates, LLC*, 273 Conn. 108, 118–22, 869 A.2d 179 (2005). Applying that test, I agree with the majority's ultimate conclusion that the defendant may be held liable for the plaintiff's injuries in the present circumstances.

"The essential elements of a cause of action in negligence are well established: duty; breach of that duty; causation; and actual injury. . . . Contained within the first element, duty, there are two distinct considerations. . . . First, it is necessary to determine the existence of a duty, and then, if one is found, it is necessary to evaluate the scope of that duty. . . . The existence of a duty is a question of law and only if such a duty is found to exist does the trier of fact then determine whether the defendant violated that duty in the particular situation at hand. . . . If a court determines, as a matter of law, that a defendant owes no duty to a plaintiff, the plaintiff cannot recover in negligence from the defendant. . . .

"Duty is a legal conclusion about relationships between individuals, made after the fact, and imperative

to a negligence cause of action. The nature of the duty, and the specific persons to whom it is owed, are determined by the circumstances surrounding the conduct of the individual. . . . Although it has been said that no universal test for [duty] ever has been formulated . . . our threshold inquiry has always been whether the specific harm alleged by the plaintiff was foreseeable to the defendant. The ultimate test of the existence of the duty to use care is found in the foreseeability that harm may result if it is not exercised. . . . By that is not meant that one charged with negligence must be found actually to have foreseen the probability of harm or that the particular injury which resulted was foreseeable, but the test is, would the ordinary [person] in the defendant's position, knowing what he knew or should have known, anticipate that harm of the general nature of that suffered was likely to result . . . .

"A simple conclusion that the harm to the plaintiff was foreseeable, however, cannot by itself mandate a determination that a legal duty exists. Many harms are quite literally foreseeable, yet for pragmatic reasons, no recovery is allowed. . . . A further inquiry must be made, for we recognize that duty is not sacrosanct in itself, but is only an expression of the sum total of those considerations of policy which lead the law to say that the plaintiff is entitled to protection. . . . The final step in the duty inquiry, then, is to make a determination of the fundamental policy of the law, as to whether the defendant's responsibility should extend to such results." (Citations omitted; internal quotation marks omitted.) *Pelletier* v. *Sordoni/Skanska Construction Co.*, 286 Conn. 563, 593–94, 945 A.2d 388 (2008).

The common-law rule under premises liability law is that a landlord is liable to his tenant and others lawfully on the land "for physical harm caused by a dangerous condition upon land retained in the [landlord's] control if the [landlord], by the exercise of reasonable care, could have discovered the condition and the unreasonable risk involved therein and could have made the condition safe." 2 Restatement (Second), Torts § 360, p. 250 (1965); see also *Gore* v. *People's Savings Bank*, 235 Conn. 360, 375, 665 A.2d 1341 (1995) ("the common law imposes on landlords . . . a duty to maintain in reasonably safe condition those areas of their premises over which they exercise control"). Accordingly, "[a]s a matter of common law, although landlords owe a duty of reasonable care as to those parts of the property over which they have retained control, landlords generally [do] not have a duty to keep in repair any portion of the premises leased to and in the exclusive possession and control of the tenant." (Internal quotation marks omitted.) *LaFlamme* v. *Dallessio*, 65 Conn. App. 1, 14, 781 A.2d 482 (2001), rev'd on other grounds, 261 Conn. 247, 802 A.2d 63 (2002).

Additionally, "[t]here [can] be no breach of the duty

resting upon the [landlords] unless they [know] of the defective condition or were chargeable with notice of it because, had they exercised a reasonable inspection of their premises, they would have discovered it . . . . Thus, liability of a landlord for damages resulting from a defective condition in an area over which the landlord exercises control generally depends upon proof that the landlord received either actual or constructive notice of the condition prior to the time of the plaintiff's injuries. . . . Liability also usually depends upon proof that the landlord failed to remedy the defective situation in a reasonable period of time after receipt of notice." (Citations omitted; internal quotation marks omitted.) *Gore* v. *People's Savings Bank*, supra, 235 Conn. 373.

With respect to dog bite injuries, Connecticut's dog bite statute, § 22-357, was enacted to make owners or keepers strictly liable to third parties for injuries caused by their dogs. Subsequently, this court determined in *Auster* that "a landlord is not the keeper of a dog [under the dog bite statute] merely because the landlord acquiesces in the presence of the dog on leased premises, or because the landlord has the authority to require that the dog be removed from the premises in the event that it becomes a nuisance, or even because the landlord has the authority to require that certain conditions be placed on the use of the dog by its owner." *Auster* v. *Norwalk United Methodist Church*, supra, 286 Conn. 162. Extending the duty of a landlord to protect against dog bite injuries thus requires consideration of whether such injuries are foreseeable, and, if so, whether there are good public policy reasons for imposing liability on the landlord.

On the basis of the foregoing considerations, I would first conclude that it is foreseeable that dogs brought onto the premises by tenants will be required to go outside regularly and traverse common areas controlled by the landlord, such as hallways, lobbies and surrounding yards, when entering and leaving the tenant's unit. It is also foreseeable that dogs traversing the common areas will be likely to encounter third persons who are lawfully on the premises. Accordingly, it is foreseeable that an aggressive dog that an owner fails to restrain might attack persons encountered in the common areas when the dog is traveling to and from the tenant's unit or occupying common areas of the property.

The fact that the danger is foreseeable, however, does not end the inquiry. There also must be convincing public policy reasons to impose a duty on landlords to make reasonable efforts to protect persons in the common areas of the property from dog bite injuries. See, e.g., *Pelletier* v. *Sordoni/Skanska Construction Co.*, supra, 286 Conn. 594. This court has articulated four specific factors "to be considered in determining the extent of a legal duty as a matter of public policy:

(1) the normal expectations of the participants in the activity under review; (2) the public policy of encouraging participation in the activity, while weighing the safety of the participants; (3) the avoidance of increased litigation; and (4) the decisions of other jurisdictions." *Murillo* v. *Seymour Ambulance Assn., Inc.*, 264 Conn. 474, 480, 823 A.2d 1202 (2003); accord *Perodeau* v. *Hartford*, 259 Conn. 729, 756–57, 792 A.2d 752 (2002); *Jaworski* v. *Kiernan*, 241 Conn. 399, 407, 696 A.2d 332 (1997).

With respect to the first factor, the court must consider the normal expectations of persons inhabiting the common areas regarding their general safety, as well as the normal expectations of landlords concerning liability for the acts of their tenants' dogs. The normal expectations of persons inhabiting any part of the common areas would be that, to the extent a resident owns or keeps a dog on the premises, the owner or keeper would maintain control over the dog, especially when it is generally known that tenants have pets only with the landlord's consent. Similarly, although a landlord would not expect to be viewed as the owner or keeper of a tenant's dog, a landlord who knows that a tenant owns a dangerous dog very likely would not be surprised if the dog escaped from its owner's control in the common areas, as dogs often do, and injured another person who happened to be in the vicinity. Consequently, the normal expectations of the parties weigh in favor of extending the duty of landlords to the victims of dog bite injuries.

With respect to the second factor, the court must consider the benefits, if any, of encouraging tenants to keep dogs in their apartments, while also considering the safety of other persons in the common areas. As the Appellate Court observed in *Stokes* v. *Lyddy*, 75 Conn. App. 252, 815 A.2d 263 (2003), "[d]ogs are used for companionship and to protect property and person. . . . [T]here may be tenants whose interests in keeping a guard dog for protection of person or property are based on the character of the neighborhood in which the leased premises are located or by virtue of the peculiar circumstances of the individual tenant. Those are legitimate reasons for keeping dogs." Id., 271–72. When a tenant keeps a dog that is known to be dangerous or aggressive without the landlord's permission, however, the tenant assumes a high degree of risk, and there is no apparent benefit to the potential victim or to the landlord, who may suffer physical injury or financial liability, respectively, if the owner is unable to restrain the dog while in the common areas of the property. Similarly, if word spreads that a leased residential property does not enforce rules as to the keeping and restraint of pets, the landlord may suffer the financial consequences of having fewer tenants. Thus, the only person who potentially benefits from having a dog known to be dangerous and aggressive on leased residential property is the tenant who owns or keeps the

dog.

The third factor requires consideration of whether the proposed duty would result in increased litigation. Making landlords subject to liability for injuries caused by their tenants' dogs undoubtedly would provide new grounds for litigation. On the other hand, the potential for litigation would cause landlords to be more vigilant and diligent in enforcing rules requiring permission to keep dogs on the premises, which would have the effect of removing dangerous and aggressive dogs. Accordingly, imposing liability on landlords might result in reduced litigation under the strict liability statute. These countervailing considerations suggest that the overall increase in litigation very likely would be small.

The fourth factor requires consideration of the decisions of other jurisdictions. Most jurisdictions that have addressed this issue in recent years have concluded that a landlord may be subject to a cause of action in negligence for an attack on a third person by a tenant's dog when the attack occurs on property controlled by the landlord and the landlord has actual or imputed knowledge that the dog is dangerous or aggressive. See, e.g., *Gentle* v. *Pine Valley Apartments*, 631 So. 2d 928, 934–35 (Ala. 1994) (presence of vicious dog in common areas is dangerous condition for which landlord must exercise reasonable care to prevent injuries, provided landlord has direct or imputed knowledge of dog's dangerous propensities); *Fouts ex rel. Jensen* v. *Mason*, 592 N.W.2d 33, 39 (Iowa 1999) (landlord has duty to keep common areas reasonably safe by excluding dog when injury occurs in common areas over which landlord, alone or jointly with tenant, has control and landlord has actual or imputed knowledge of dog's vicious propensities); *Nutt* v. *Florio*, 75 Mass. App. 482, 486, 914 N.E.2d 963 (landlord potentially liable for dog bite injury when injury occurred in common area if landlord knew, or had reason to know, of dog's dangerous propensities), review denied sub nom. *Nutt* v. *Keane*, 455 Mass. 1106, 918 N.E.2d 91 (2009); *Linebaugh ex rel. Linebaugh* v. *Hyndman*, 213 N.J. Super. 117, 120–21, 516 A.2d 638 (App. Div. 1986) (landlord's responsibility to exercise reasonable care in maintenance of common areas under his control encompasses duty owed to prevent injuries caused by vicious dog kept on such premises with his knowledge), aff'd, 106 N.J. 556, 524 A.2d 1255 (1987); *Siegel* v. *1536–46 St. John's Place Corp.*, 184 Misc. 1053, 1054–55, 57 N.Y.S.2d 473 (1945) (landlord has duty to keep common areas reasonably safe by excluding "known vicious animals" from those areas); *Baker* v. *Pennoak Properties, Ltd.*, 874 S.W.2d 274, 277 (Tex. App. 1994) (landlord has common-law duty "to keep common areas of his property reasonably safe, including protecting tenants from known vicious dogs" when "the injury . . . occurred in a common area under the control of the landlord" and "the landlord . . . had actual or imputed knowledge of the particular

dog's vicious propensities"). See generally annot., "Landlord's Liability to Third Person for Injury Resulting From Attack on Leased Premises by Dangerous or Vicious Animal Kept by Tenant," 87 A.L.R.4th 1004 (1991) (summarizing cases).

Having considered all four factors, I would conclude that, because dog bite injuries on leased, residential properties are foreseeable and there are good public policy reasons in support of the proposed duty, a landlord may be held liable under a common-law theory of premises liability for injuries sustained by a tenant after being bitten by a dog owned by another tenant and kept on premises owned by the landlord. The duty should be imposed, however, in accordance with the well established legal principles that liability attaches only when the landlord had notice of the dog's dangerous propensities but did not own or have direct control over the dog, and when the injury occurred in a common area over which the landlord retained control. I therefore respectfully concur in the judgment.

[1] The majority also cites *Pettway* v. *Turbana Corp.*, Superior Court, judicial district of Fairfield, Docket No. FBT-CV-10-6008870-S (September 14, 2011), an action against a warehouse owner for negligence in failing to take measures such as fumigation to reduce the presence of spiders and other insects and to prevent them from entering the premises and biting warehouse workers. I do not discuss this case in the text, however, because it was decided on the same basis as *Williams* v. *Milner Hotels Co.*, 130 Conn. 507, 508–10, 36 A.2d 20 (1944), and is a Superior Court decision with no precedential value.

[2] This court granted the defendant's petition for certification to appeal limited to the following question: "Did the Appellate Court properly determine that, pursuant to *Auster* v. *Norwalk United Methodist Church*, [supra, 286 Conn. 152], the defendant could be held liable as a result of a dog bite from a dog that was owned and kept by a tenant of the landlord?" *Giacalone* v. *Housing Authority*, 298 Conn. 906, 907, 3 A.3d 69 (2010).

[3] As the majority explains, "the complaint alleges that the defendant was negligent in failing, inter alia: to remove the dog from the property or otherwise enforce a lease provision prohibiting tenants from keeping dogs without permission; to ensure that the dog was removed from the premises following the defendant's issuance of an order, two years prior to the attack, instructing the dog's owners to remove the dog; to keep the plaintiff safe from dog attacks on the premises; and to warn the plaintiff of the presence of a dangerous dog."