No. _____

In The
Supreme Court of the United States

LITCHFIELD HISTORIC DISTRICT COMMISSION; BOROUGH OF LITCHFIELD, CONNECTICUT; GLENN HILLMAN; and KATHLEEN CRAWFORD,

Petitioners,

v.

CHABAD LUBAVITCH OF LITCHFIELD COUNTY, INC. and JOSEPH EISENBACH,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRIT OF CERTIORARI

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I. QUESTIONS PRESENTED

The Second Circuit Court of Appeals held that, under the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc(a), a land use law which is neutral and general in its application, but applies "at least partly subjective [discretionary] criteria on a case-by-case basis," can substantially burden an applicant's exercise of religion only if it is narrowly drawn and there is a compelling state interest to do so. *Chabad Lubavitch of Litchfield County, Inc., et al. v. Litchfield Historic District Commission, et al.*, 768 F.3d 183, 193 (2d Cir. 2014).

The questions presented are:

Did the Second Circuit violate the Free Exercise Clause in holding that RLUIPA's substantial burden provisions may provide that a neutral and generally applicable land use law can substantially burden religious practices only if it is narrowly drawn and there is a compelling state interest for doing so?

Did the Second Circuit violate the Establishment Clause if its interpretation of RLUIPA's substantial burden provision does not permit a neutral and generally applicable land use law to substantially burden religious uses unless it is narrowly drawn and there is a compelling state interest, while secular applicants have no such favorable treatment?

I. QUESTIONS PRESENTED – Continued

Can a state land use law be neutral and generally applicable if it is applied on a case-by-case basis using standards that have a reasonable, subjective/ discretionary component or does it constitute an "individualized assessment" necessitating strict scrutiny under RLUIPA?

Does the Fourteenth Amendment, Sections 1 and 5, permit Congress to establish and substitute constitutional standards for those decided by this Court?

II. PARTIES TO THE PROCEEDINGS

Petitioners, Glenn Hillman, Kathleen Crawford, Litchfield Historic District Commission and the Borough of Litchfield were the appellees in the court below.

Respondents, Chabad Lubavitch of Litchfield County, Inc., and Joseph Eisenbach were the appellants in the court below. Additionally, the United States of America, appeared as amicus curiae in support of the respondents.

Originally the Town of Litchfield, CT and Wendy Kuhne were parties, but are no longer and have no interest in the outcome of the case. None of the "parties Doe" cited in the operative complaint were ever served and brought into the case.

III. CORPORATE DISCLOSURE STATEMENT

Chabad Lubavitch of Litchfield County, Inc. is a non-stock, membership corporation. It has no parent company and no publicly held company holds any membership interest.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

IV. PETITION FOR A WRIT OF CERTIORARI

Petitioners, Glenn Hillman, Kathleen Crawford, Litchfield Historic District Commission and the Borough of Litchfield, respectfully petition this Court for a writ of certiorari to review the above cited judgment of the United States Court of Appeals for the Second Circuit in this case.

V. OPINIONS BELOW

The opinion of the Second Circuit is reported at 768 F.3d 183 (2014) and reproduced in the appendix hereto at App. 1. The opinion of the District Court for the District of Connecticut is reported at 853 F. Supp. 2d 214 and reproduced at App. 43.

VI. JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Second Circuit was entered on September 19, 2014. This court granted an extension to file this petition until February 16, 2015.

VII. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment of the United States Constitution which provides in part: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ."

The Fourteenth Amendment which provides in part:

> "Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . .
>
> Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article."

Title 42 United States Code, Section 2000cc *et seq*. with particular reference to Section 2000cc(a) which provides in part:

> "§**2000cc. Protection of land use as religious exercise**
>
> (a) Substantial burdens.
>
> (1) General rule. No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –
>
> (A) is in furtherance of a compelling governmental interest; and

(B) is the least restrictive means of furthering that compelling governmental interest.

(2) Scope of application. This subsection applies in any case in which –

. . .

(C) the substantial burden is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, ***individualized assessments*** of the proposed uses for the property involved." [Emphasis added.]

VIII. INTRODUCTION

In this case Petitioners seek to have neutral, municipal historic district regulations applied to religiously used real estate in the same manner as property used for secular purposes. The Second Circuit has ruled that, under RLUIPA's substantial burden provisions, if a neutral law is applied with a discretionary standard, it cannot substantially burden a religious practice unless it is narrowly drawn and supported by a compelling state interest. In the Second Circuit, the law now grants religious land use applicants a massive advantage unobtainable by others.

The legal foundations of this petition are found in *Employment Div. v. Smith*, 494 U.S. 872, 110 S. Ct.

1595, 108 L. Ed. 2d 876, 58 USLW 4433 (1990) as followed in *City of Boerne v. Flores,* 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997). In *Boerne* this court held that the provisions of the earlier Religious Freedom Restoration Act of 1993 (RFRA) contradicted the constitutional standard set by this court in *Smith* and thereby violated the "vital [principle] necessary to maintain the separation of powers and the federal balance." *Id.* at 536. In so holding, the Court in *Boerne* followed *Smith*, not *Sherbert v. Verner,* 374 U.S. 398 (1963), stating, "*Smith* held that neutral, generally applicable laws may be applied to religious practices even when not supported by a compelling governmental interest." 521 U.S. at 514.

RLUIPA is an attempt, so far successful in the Second Circuit, to substitute a legislative mandate which follows *Sherbert v. Verner*, rather than the judicial standard set by this Court in *Smith*. Indeed, our Ninth Circuit Court of Appeals, referring to the substantial burden provision of RLUIPA, could not have stated it more bluntly or clearly:

> "Congress passed RLUIPA to reinstate the strict scrutiny standard that had been applied – **prior to *Smith*** – to certain laws, including generally applicable, facially neutral zoning laws pursuant to which governments may make 'individualized assessments' of the property at issue. *See Guru Nanak,* 456 F.3d 978, 985-86; 42 U.S.C. § 2000cc(a)(2)(C)." [Emphasis added.]

International Church of Foursquare Gospel v. City of San Leandro, 673 F.3d 1059, 1066 (9th Cir. 2011).

As the Ninth Circuit so boldly proclaimed, RLUIPA is a second attempt to reinstate what was limited or overturned in *Sherbert*. And this attempt has now been successful in the Second Circuit.

The Defendant Chabad, a religious organization, owns a residential building located in the Litchfield Historic District which they hope to use as a synagogue. The organization and its Rabbi applied to the Historic District Commission for a certificate of appropriateness to add an addition which was four times larger than the residence. Their application was denied without prejudice, and the HDC invited them to file a new application stating that it would approve an addition no greater than the original structure. The Defendants did not file a new application nor seek administrative relief.

Instead they filed a twelve count complaint in Federal Court including claims that the decision violated RLUIPA.

The Petitioner Defendants filed a motion for summary judgment with the district court as to all twelve counts of the complaint; and the motion was granted in total. On appeal, the Second Circuit upheld the trial court on all counts except the Sixth and Seventh which concerned actions under RLUIPA. The Second Circuit held that the trial court had used the wrong standard to decide the motion with respect to the "substantial burdens" and "nondiscrimination"

claims based on RLUIPA. These were set forth in the Sixth and Seventh Counts respectively. The matter was remanded to the trial court to reconsider the motion using the Second Circuit's stated standards.

The Petitioners do not challenge the Second Circuit's ruling with respect to the Seventh Count concerning nondiscrimination under RLUIPA.

This petition solely addresses the Second Circuit's decision with respect to the Sixth Count grounded in 42 U.S.C. § 2000cc-(2)(a) (RLUIPA) which provides that a land use law which is applied as an "individualized assessment" cannot substantially burden a religious practice only if it is narrowly drawn and is supported by a compelling state interest. In so holding, the Second Circuit argued that a land use law is not neutral and generally applicable if it is applied on a case by case basis using a standard that is partially subjective.[1] 768 F.3d at 193-195. The law must be narrowly drawn and supported by a compelling state interest if it substantially burdens a person's practice of religion.

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[1] "Discretionary" and "subjective" are used interchangeably when discussing the impact of the exercise of discretion on civil rights. See, *Watson v. Fort Worth Bank and Trust*, 487 U.S. 977, 108 S. Ct. 2777, 101 L. Ed. 2d 827, 57 USLW 4922 (1988) when this court stated: "We conclude, accordingly, that subjective or discretionary employment practices may be analyzed under the disparate impact approach in appropriate cases." 487 U.S. at 991. The petitioner prefers "discretionary"; the Second Circuit preferred "subjective."

Petitioners urge this Court to reassert, as it has in the past, that the touchstone for determining the often inherent tension between the mandates of the Establishment and Free Exercise Clauses is strict governmental neutrality between the religious and secular. *City of Boerne v. Flores,* 521 U.S. 507, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997); *McCreary County, Kentucky v. American Civil Liberties Union of Kentucky,* 545 U.S. 844, 125 S. Ct. 2722, 162 L. Ed. 2d 729 (2005); and, further, that this neutrality applies to generally applied land use laws so long as any discretion exercised by a commission is neither arbitrary nor otherwise illegal.

Under the Second Circuit's interpretation of RLUIPA fraternal organizations, schools, clubs and private associations of every secular nature can be denied applications that would otherwise be granted to the religious. Paraphrasing Justice Stevens at page 537 in his concurring opinion in *Boerne*: the "individualized assessment" provision of RLUIPA provides the religious a weapon that no secular applicant can obtain.

Also, it should not be ignored that the standard for granting a certificate of appropriateness in an historic district is certainly no less subjective than determining what activities and uses are religious and, then, at what point an administrative burden on religion practice crosses the line and becomes "substantial."

Further, such determinations necessarily entangle land use boards in religious matters. It requires municipal land use boards and commissions to hold hearings and investigate the extent to which proposed uses are religious. This is exactly the type of entanglement that the First Amendment seeks to avoid.

And if the religious applicant does not agree with their judgments, the municipal board or commission becomes further entangled with the religious applicant as it becomes a target for damages under RLUIPA in federal court.

Below, this Court will be urged to grant this petition and ultimately rule that under our First Amendment, religious organizations must follow neutral and generally applicable land use regulations in the same manner as do secular applicants; that a law can be neutral and generally applicable if it is applied with standards giving the commission or board reasonable discretion; that an "individualized assessment" arises only when a law, on its face, gives exemption for secular uses not provided to religious uses; and, to the extent that RLUIPA conflicts with these principles, it is unconstitutional and void.

IX. STATEMENT OF THE CASE

A. The Parties

The individual plaintiff is Rabbi Joseph Eisenbach, an ordained Hasidic Rabbi who is the

President of the respondent Chabad Lubavitch of Litchfield County (Chabad), a Connecticut membership corporation. *Chabad Lubavitch of Litchfield County, Inc., et al. v. Litchfield Historic District Commission, et al.*, 768 F.3d 183, 188 (2d Cir. 2014).

Chabad owns a two story, stick-style Victorian residence constructed in the 1870's which encompasses 2,600 square feet and a basement. *Id.* It is located in the Litchfield Historic District and is the subject of their lawsuit.

The petitioner Borough of Litchfield is a Connecticut municipal corporation whose boundaries are wholly within the Town of Litchfield. The National Park Service has described Litchfield as "[p]robably the finest surviving example of a typical late 18th century New England town." *Chabad Lubavitch of Litchfield County, Inc., et al. v. Borough of Litchfield, et al.*, 853 F. Supp. 2d 214, 219 (D. Conn. 2012).

The petitioner, Litchfield Historic District Commission (HDC) is established pursuant to and governed by the provisions of Chapter 97a of the Connecticut General Statutes (CGS) §§ 7-147a *et seq*. *Id.* at 219. Section 7-147d(a) provides that no structure in the district can be altered unless the HDC grants it a certificate of appropriateness. 768 F.3d at 188-189.

Under the provisions of CGS, Chapter 97a, all properties located in the Historic District are subject to obtaining a certificate of appropriateness before altering a structure. There are no exemptions based

on use or ownership. (In fact, in Connecticut, historic districts have no jurisdiction over use. CGS, § 7-147f(b).)

The individual Defendants are Glenn Hillman who is a member of the HDC who acted upon the Plaintiff's application and Kathleen Crawford who was an alternate member, but who did not act on the application. 768 F.3d at 202.

B. Procedural History

The Chabad submitted an application to the HDC to grant it a certificate of appropriateness to build a three story, 17,000 square foot addition to its residence. The addition included a sanctuary, kosher kitchens, a ritual bath, classrooms, administrative offices, an indoor swimming pool, guest accommodations, and a nearly 5,000 square foot residence for Rabbi Eisenbach and his family. *Id.* at page 189; 853 F. Supp. 2d at page 220 and footnote 7.

There is nothing in the record indicating the size of the Chabad's congregation because it has never disclosed the size of its assembly nor the number of students likely to attend religious classes. 768 F.3d at pages 189-190.

The application was first considered at two prehearings and then at three formal hearings where the HDC bifurcated the proceedings: first, it would consider the proposed architectural modifications; and then it would decide whether the denial would place a

"substantial burden" on the plaintiffs' religious exercises. *Id.*

The Second Circuit's decision summarizes the HDC's decision:

> "The HDC denied the Chabad's application on December 20, 2007. In its written opinion, the HDC catalogued the history and importance of the Deming House to the historic character of the Borough of Litchfield. Per the HDC, the altered but nonetheless distinctively residential structure serves as one of the "last vestiges" of the Borough's residential district, "significant alteration" of which would destroy the "residential character" of the property's environs. As such, the HDC "commended" the Chabad's proposals to rehabilitate the existing structure, but nevertheless denied three of the Chabad's proposed modifications: hanging a double door on the front of the house, incorporating a clock tower, and building an addition on the property. The HDC concluded that the double door would conflict with the house's original design and would require removal of a single door that was " probably the original door of the house." J.A. 330. The HDC deemed the clock tower "incongruous with the immediate neighborhood and the district as a whole," and found that it would "in one stroke transform[ ] the house from a residential structure in appearance to an institutional structure." *Id*. Finally, the HDC objected to the size of the proposed addition, which it characterized as "massive" and "nearly 20,000 square

> f[ee]t," a size "over five times as large as" the Deming House that would "dwarf[ ] and overwhelm[ ]" not only the house but also the neighborhood as a whole. J.A. 328, 331.
>
> However, in light of the Chabad's proposed religious use of the property, the HDC also granted accommodations to substitute for the rejected modifications. Specifically, the HDC stated that it would accept a proposal replacing the clear glass currently in the house's front door with stained glass, incorporating a finial with a Star of David atop the house, and including an addition that was no larger than the original structure. The HDC granted the Chabad leave to file an amended application consistent with these conditions." *Id.* at 190.

The standards the HDC used to determine the permitted size of an addition were neither arbitrarily chosen nor applied. First, the HDC was required to follow the standards set forth in Section 7-147f of the Connecticut General Statutes. For further clarification and guidance the HDC adopted the Department of Interior's Standards for Rehabilitating Historic Buildings. 853 F. Supp. 2d at page 234 and footnote 19.

Finally, the standard for governing the size of an appropriated addition was first presented to the HDC by the Plaintiffs' own attorney who, at the hearing, presented a comparable building in the neighborhood. The attorney argued that that building was permitted to have an addition of approximately the same size as

the original structure. The HDC agreed with the Plaintiffs' attorney that the addition to the comparator was appropriate in terms of size and scale and stated in its decision that it would permit a similarly scaled addition to the Plaintiffs' building.[2] 853 F. Supp. 2d at 228-229 and footnotes 11 and 12.

The Plaintiffs did not administratively appeal the decision. Nor did they file an amended application. 768 F.3d at 190.

Instead, the respondents then filed in federal district court a complaint of twelve counts against the Applicants. The complaint alleged violations of both state and federal statutes and constitutions including violations of RLUIPA.

C. The District Court's Decision

In district court, both sides filed motions for summary judgment on all counts. The respondents motion was denied and the Applicants' motion was granted as to all counts.

The district court noted that the Plaintiffs were relying on *Sherbert v. Verner* 374 U.S. 398, 83 S. Ct. 1790, 10 L. Ed. 2d 965 (1963) for the proposition that because the statutory scheme governing historic

[2] The District Court at footnote 9 points out that the HDC's decision states only that it will permit an addition of this scale. It does not state whether or to what extent a larger addition would be permitted.

commissions involves the application of discretionary standards, the court must apply strict scrutiny to the scheme. 853 F. Supp. at 223. But the trial court noted at footnote 8 that the Court in *Smith* was severely limiting the application of *Sherbert* to the unemployment compensation field and that "most courts that have considered this issue have found that the mere existence of discretionary standards. . . . does not 'amount to a system of individualized exemptions triggering strict scrutiny.'" After reviewing the state statutory scheme and the record before it the trial court concluded:

> "Consequently, as a matter of law, Chabad cannot establish a substantial burden on the free exercise of its religion, because the statutory scheme Chabad challenges is neutral and of general applicability, and not imposed arbitrarily, capriciously, or unlawfully." *Id.* at 225.

D. The Second Circuit Court's Decision.

On appeal to the Second Circuit the appellate court upheld the trial court except for its rulings on the Sixth and Seventh counts which were based on the "substantial burden" and "non-discrimination" provisions of RLUIPA respectively.

The Second Circuit reversed the trial court, holding that there is a subjective (discretionary) element in the application of the state and municipal regulations, and, accordingly, under RLUIPA these

regulations can substantially burden religious practices only if narrowly drawn and there is a compelling state interest for doing so. It held:

> "Because Connecticut's statutory scheme therefore permits – indeed, demands – application of subjective standards to individual land use applications, and because the HDC applied such subjective standards to the Chabad's application, we conclude that the HDC's denial of the Chabad's application resulted from an "individual assessment," triggering RLUIPA's substantial burden provision. The district court consequently erred in determining that the Chabad could not establish a claim under RLUIPA's substantial burden provision "as a matter of law," and we vacate the district court's judgment insofar as it concerns that claim." 768 F.3d at 194-195.

The Second Circuit Court reached this provision by agreeing with the Ninth Circuit, as quoted above, that the substantial burden provision in RLUIPA "codifies the principles announced in *Sherbert v. Verner"* without so much as even discussing the severe limitations put on *Sherbert's* holding by *Smith*. *Id.* at 193.

In fact, and curiously, the Second Circuit Court ignored *Smith* entirely as well as *City of Boerne*. If it had considered *Smith* it would have found that the primary reason that the Court restricted *Sherbert* to the unemployment field is because that statutory scheme required the Court to

look at the particular religious circumstances behind the applicant's claim for an exemption. 494 U.S. at 884.

In this case the opposite is true. Under the neutral and generally applicable regulations of the historic district there are no exemptions of any kind. All properties are subject to the regulations and the regulations are applied without regard to religious considerations.

Perversely, under the Second Circuit's interpretation of RLUIPA the commission is forced to consider those very religious circumstances that the Court in *Smith* sought to avoid.

In *City of Boerne* this Court ruled that the Constitution requires Congress to follow the Supreme Court's precedent as to constitutional standards rather than substituting its own. In the Second Circuit, Congress has triumphed: With RLUIPA, Religious applicants now have a weapon to use in land use applications that no secular applicant can wield.

X. Why the Supreme Court should grant this Petition

A. Because the Second Circuit's Decision requires municipal planning bodies to determine what constitutes religious practice and whether municipal land use regulations "substantially" burden such practice, it subverts the neutrality imposed on government by the Establishment and Free Exercise Clauses, it plunges municipalities into troubling entanglements with religion, and it puts municipalities at severe risk of excessive litigation.

1. The Second Circuit Court's decision subverts the governmental neutrality mandated by both the Establishment and Free Exercise Clauses.

> "First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion." *Epperson v. Arkansas,* 393 U.S. 97, 104, 89 S. Ct. 266, 21 L. Ed. 2d 228 (1968).

This court has recognized that governmental neutrality with respect to religious matters is central to understanding and applying both the Establishment Clause and the Free Exercise Clause. In *McCreary County,* this court called neutrality the "touchstone" of its analysis of the Establishment

Clause. 545 U.S. at 860. It further discussed how the principal of neutrality does not allow the government to "favor one religion over another, or religion over irreligion, religious choice being the prerogative of individuals under the Free Exercise Clause." *Id.* at 875-876.

In *McCreary County* the court recognized that this neutrality goes beyond guaranteeing freedom of conscience. It also guards against the "civic divisiveness" that arises when governments side with religion. *Id.* This is a very real concern for those who administer the law at the local level. Any town meeting or hearing where religion is a factor almost guarantees fervent attendance by those on all sides of the issue at hand. Basic fairness strikes deeply and it is basically unfair to allow the religious advantages not allowed the secular. Imagine the civic discord if tax benefits were allowed only for religious institutions. Emotions are no less heated for the unequal administration of land use laws.

The Second Circuit cloaked its decision in a misplaced attempt to protect religious institutions from covert hostility to religion. It reasoned that administrative agencies could hide discriminatory intent behind discretionary standards. 768 F.3d at 195. The Second Circuit likened substantial burden to disparate impact: it provided a backstop to the prohibition of intentional discrimination. *Id.* However the court failed to see that while a statistical analysis of multiple decisions might reveal some form of hidden bias in disparate treatment, there is no correlation

whatsoever between a burden on religious practice and discriminatory intent. While discriminatory intent may lead to a decision that burdens religious practice, so can completely neutral intent.

There is no logical reason to presume discrimination from the fact that a regulation is burdensome; it's a complete non-sequitor.

And that is exactly what the Second Circuit's decision does: It establishes a non-rebuttable presumption that a commission has acted with bias simply because its decision may burden an applicant's religious practice.

2. The Second Circuit Court's decision requires land use boards to become entangled in determining what constitutes religious practice and then apply subjective and inherently uncertain standards of what and what is not a substantial burden.

Ever since *Lemon v. Kurtzman,* 403 U.S. 602, 624, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) this Court has considered "entanglement" to be one of the two prongs by which to measure under the Establishment Clause whether religious parties may enjoy public rights and benefits to the same extent as secular parties.

For instance, in *Widmar v. Vincent,* 454 U.S. 263, 102 S. Ct. 269, 70 L. Ed. 2d 440 (1981), the Court

allowed religious organizations to use university facilities in part because it was concerned that the University of Missouri and courts would become entangled in determining what words and activities would fall within the "impossible task" of determining what was religious worship and teaching. 454 U.S. at 272, footnote 11.

While this case also concerns the Free Exercise clause, the Second Circuit's decision entangles land use boards in the difficult task of determining what use of land constitutes religious practice. Then, the boards are faced with the impossible task of determining exactly where the administration of land use regulations "substantially" burdens those practices.

These inherently subjective determinations must be made by boards and commissions largely composed of lay persons who are volunteers. Requiring such boards to make such determinations borders on judicial recklessness.

3. The uncertainty imposed upon land use decisions by the Second Circuit's decision invites unjustified litigation under RLUIPA.

RLUIPA provides "appropriate relief" for the violations of its provisions. 42 U.S.C. § 2000cc-2(a). While this will generally preclude monetary damages against a government (See *Sossamon v. Texas*, ___ U.S. ___, 131 S. Ct. 1651 (2011)), it leaves costly and intimidating law suits against individuals.

Whenever a party believes that a board or commission is mistaken as to whether a land use regulation burdens a religious practice, and if so, whether such burden is "substantial," the party may seek "appropriate relief" including compensatory damages and attorneys' fees. With the blatant uncertainty in outcome of many such cases, RLUIPA becomes an easy tool for intimidation and undeserved settlement, all without the plaintiff's slightest evidence that the land use commission acted with discrimination or improper intent.

B. Because several circuit courts have disregarded this Court's decisions in *Smith* and *City of Boerne*, this Court should re-establish throughout all circuits the principle of neutrality embodied in our First Amendment as it applies to the administration of land use regulations under RLUIPA.

In this case the Second Circuit held that because the historic district regulations gave the Historic District Commission a measure of discretion, the implementation of the regulations constituted "an individualized assessment" under RLUIPA; and thereby required that the regulations could substantially burden any practice of religion only if the regulations were narrowly drawn and required by a compelling state interest. *Chabad Lubavitch of Litchfield County, Inc., et al. v. Litchfield Historic District Commission, et al.*, 768 F.3d at 193.

The Ninth Circuit Court gives an even wider berth as to what constitutes an "individualized assessment." In *Guru Nanak Sikh Society of Yuba City v. County of Sutter,* 456 F.3d 978, 987 (9th Cir. 2006), the Ninth Circuit court stated that RLUIPA's substantial burden provisions apply whenever "the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use." *Id.* at 986. See also *International Church of the Foursquare Gospel v. City of San Leandro, et al*., 673 F.3d 1059 (9th Cir. 2011). Seemingly, this would make the substantial burden provisions of RLUIPA apply to any land use application, not just those involving the use of discretion.

The Eleventh Circuit Court interpreted the individualized assessment provision to pertain to any procedure that results in a case-by-case evaluation of the proposed activity, because, according to that court, under such a procedure a land use commission may use their authority "in potentially discriminatory ways." *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1225 (11th Cir. 2004).

None of the above Circuit Courts discussed *Smith* or *Boerne* in determining what application of land use laws would be determined to be "individualized assessments."

The Tenth Circuit Court, after an in depth discussion of *Smith* and *Sherbert*, has held that land use laws under RLUIPA land use laws will not trigger strict scrutiny if they were not passed with religious

animus; they are not enforced with religious animus; and they do not judge religious reasons for use to be lesser than secular ones. *Grace United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 650-653 (10th Cir. 2006).

The Third Circuit Court has adopted the Tenth Circuit's approach to "individualized assessments" holding that the general applicability of the regulations turns on the three factors enumerated above. *The Lighthouse Institute for Evangelism, Inc. v. City of Long Branch,* 510 F.3d 253, 276-277 (3d Cir. 2007).

Both the Tenth and Third Circuits discussed Smith and the meaning it gives to individualized assessments. Neither the Tenth nor Third Circuits employed a subjectivity test as did the Second Circuit.

This Court should provide direction to resolve these conflicts among the courts of appeals.

XI. CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term 2013

(Argued: September 16, 2013
Decided: September 19, 2014)

Nos. 12-1057-cv (Lead), 12-1495-cv (Con)

CHABAD LUBAVITCH OF LITCHFIELD COUNTY, INC.,
JOSEPH EISENBACH,

Plaintiffs-Appellants-Cross-Appellees,

UNITED STATES OF AMERICA,

Plaintiff,

- v. -

LITCHFIELD HISTORIC DISTRICT COMMISSION,
BOROUGH OF LITCHFIELD, CONNECTICUT,
GLENN HILLMAN, KATHLEEN CRAWFORD,

Defendants-Appellees-Cross-Appellants,

TOWN OF LITCHFIELD, CONNECTICUT,
DOE, POLICE DOG, WENDY KUHNE,

Defendants.*

Before: WALKER, LIVINGSTON, and CHIN, *Circuit Judges*.

Chabad Lubavitch of Litchfield County, Inc. ("Chabad") appeals from the February 21, 2012

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* The Clerk of Court is directed to amend the caption as set forth above.

judgment of the United States District Court for the District of Connecticut (Hall, *C.J.*) denying its motion for partial summary judgment and granting the defendants' motion for summary judgment on each of the Chabad's claims, brought pursuant to 42 U.S.C. §§ 1983, 1985, and 1986; the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*; and Connecticut state law, and stemming from the denial of the Chabad's application to alter its property, located in the Borough of Litchfield's historic district. Because we conclude that the district court applied erroneous legal standards to the Chabad's claims under RLUIPA's substantial burden and nondiscrimination provisions, we **VACATE** the grant of summary judgment in the defendants' favor on these claims and **REMAND** them for further consideration consistent with this opinion. By contrast, we **AFFIRM** the grant of summary judgment in the defendants' favor on the remainder of the Chabad's claims, largely due to the Chabad's failure adequately to brief these claims.

Rabbi Joseph Eisenbach ("Rabbi Eisenbach") appeals from the June 20, 2011 order of the district court dismissing his claims, coextensive with the Chabad's, for lack of standing. Because we conclude that the district court erred in finding that Rabbi Eisenbach lacked standing under RLUIPA, we **VACATE** the dismissal of his claims on that ground and **REMAND** for consideration whether he nonetheless failed to state a claim. However, we **AFFIRM** the

dismissal of Rabbi Eisenbach's remaining claims for failure adequately to brief these claims.

Accordingly, the February 21, 2012 judgment is **VACATED AND REMANDED IN PART** and **AFFIRMED IN PART**, and the June 20, 2011 order is **VACATED AND REMANDED IN PART** and **AFFIRMED IN PART**.

FREDERICK H. NELSON (Kenneth R. Slater, Jr., Halloran & Sage, LLP, Hartford, CT, *on the brief*), American Liberties Institute, Orlando, FL, *for Plaintiffs-Appellants-Cross-Appellees*.

C. SCOTT SCHWEFEL, Shipman, Shaiken & Schwefel LLC, West Hartford, CT, *for Defendants-Appellees-Cross-Appellants Litchfield Historic Commission and Borough of Litchfield, Connecticut*.

JAMES STEDRONSKY, Stedronsky & D'Andrea, LLC, Litchfield, CT, *for Defendants-Appellees-Cross-Appellants Glenn Hillman and Kathleen Crawford*.

April J. Anderson, Jessica Dunsay Silver, U.S. Department of Justice, Civil Rights Division, Washington, DC, *for Amicus Curiae United States of America*.

Kevin T. Snider, Pacific Justice Institute, Sacramento, CA, *for Amicus Curiae Pacific Justice Institute*.

DEBRA ANN LIVINGSTON, *Circuit Judge*:

The Chabad Lubavitch of Litchfield County, Inc. ("Chabad"), a Connecticut membership corporation founded and currently presided over by Rabbi Joseph Eisenbach ("Rabbi Eisenbach"), purchased property in the Borough of Litchfield's Historic District with the intention of expanding the existing building on the property to accommodate the Chabad's religious mission. Pursuant to Connecticut state law, the Chabad applied to the Borough of Litchfield's Historic District Commission ("HDC") for leave to undertake its desired modifications. However, following multiple meetings on and amendments to the Chabad's proposal, the HDC denied the application with leave to submit an amended proposal consistent with enumerated conditions. In this ensuing suit, the Chabad and Rabbi Eisenbach (collectively, the "plaintiffs") assert that the Borough of Litchfield, the HDC, and HDC members Glenn Hillman ("Hillman") and Kathleen Crawford ("Crawford") (collectively, the "defendants") abridged their rights under 42 U.S.C. §§ 1983, 1985, and 1986; the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*; and Connecticut state law by denying the application.[1] They seek damages, injunctive and

[1] The Chabad and Rabbi Eisenbach did not name the Town of Litchfield, Connecticut as a defendant in the Second Amended Complaint, following the Town's motion to dismiss the claims against it. Further, the plaintiffs dropped their claims against certain Doe defendants in the Third Amended Complaint. On appeal, a panel of this Court also dismissed plaintiffs' appeal as

(Continued on following page)

declaratory relief, attorneys' fees, and the appointment of a federal monitor.

On the defendants' motion to dismiss for lack of subject matter jurisdiction, the district court (Hall, *C.J.*) dismissed Rabbi Eisenbach's claims for lack of standing, citing the Rabbi's want of a sufficient property interest under RLUIPA and his failure to distinguish his claims from the Chabad's under federal and state law. *Chabad Lubavitch of Litchfield Cnty., Inc. v. Borough of Litchfield,* 796 F. Supp. 2d 333, 338-39 (D. Conn. 2011) [hereinafter *Chabad I*]. Subsequently, following the Chabad's motion for partial summary judgment and the defendants' motion for summary judgment, the district court ruled in favor of the defendants. Significantly, the district court concluded that Connecticut's statutory scheme governing historic districts is "neutral and generally applicable" and, consequently, that the HDC's denial of the Chabad's application could not "as a matter of law" impose a substantial burden on the Chabad's religious exercise under RLUIPA's substantial burden provision. *Chabad Lubavitch of Litchfield Cnty., Inc. v. Borough of Litchfield,* 853 F. Supp. 2d 214, 225 (D. Conn. 2012) [hereinafter

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to the claims against HDC member Wendy Kuhne as a defendant, on Kuhne's motion. *See* U.S.C.A. No. 12-1057, doc. 182. Finally, while the United States intervened as a plaintiff below, it did so only to defend the constitutionality of RLUIPA, an issue not raised on appeal. Therefore, the United States appears here only as *amicus curiae.*

Chabad II]. The district court also held that the Chabad's failure to identify a religious institution that was more favorably treated than and "identical in all relevant respects" to the Chabad barred the Chabad's claim under RLUIPA's nondiscrimination provision. *Chabad II,* 853 F. Supp. 2d at 229-31.

On appeal, we conclude that the district court erred in dismissing Rabbi Eisenbach's RLUIPA claims for lack of standing. Accordingly, we vacate the district court's June 20, 2011 ruling insofar as it concerns Rabbi Eisenbach's standing under RLUIPA and remand for consideration, instead, whether Rabbi Eisenbach failed to state a claim under RLUIPA. We affirm the remainder of that judgment due to Rabbi Eisenbach's failure to brief his remaining claims. Additionally, we conclude that the HDC's review of the Chabad's application was an "individual assessment" subject to RLUIPA's substantial burden provision and that the Chabad need not cite an "identical" comparator to establish a claim under RLUIPA's nondiscriminaton provision. Accordingly, we vacate the district court's February 21, 2012 judgment insofar as it concerned these RLUIPA claims and remand for consideration whether these claims survive summary judgment under an analysis consistent with this opinion. We affirm the remainder of the district court's February 21, 2012 judgment, albeit largely due to the Chabad's failure to brief most of its remaining claims.

BACKGROUND

A. Facts[2]

The Chabad, a Connecticut membership corporation, and Rabbi Eisenbach, president of the Chabad, offer weekly religious and other services to its Orthodox Hasidic parishioners in the Litchfield area. Prior to the events at issue, the Chabad rented space to provide these services, at a cost of thousands of dollars per year. Deeming the rented space inadequate to practice its faith and accommodate its religious mission, the Chabad in 2005 purchased a property at 85 West Street in the Borough of Litchfield to serve as its new place of worship. The property, located in the Litchfield Historic District – once deemed to be "[p]robably the finest surviving example of a typical late 18th century New England town" – boasts a two-story, "stick-style" Victorian residence constructed in the 1870s encompassing 2,600 square feet and a basement. Known as the "Deming House," the building was constructed as a residence by the grandson of a prominent Revolutionary War-era Litchfield resident but, by the time of the Chabad's purchase, had been altered to accommodate a commercial establishment.

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[2] In review of the district court's grant of summary judgment to the defendants, we view the facts in the light most favorable to the Chabad. *Ne. Research, LLC v. One Shipwrecked Vessel,* 729 F.3d 197, 200 (2d Cir. 2013).

In accordance with Connecticut's statutory scheme governing development in historic districts, the Chabad sought leave to alter 85 West Street to meet its needs. Specifically, Connecticut General Statutes § 7-147d(a) directs that "[n]o building or structure shall be erected or altered within an historic district until after an application for a certificate of appropriateness as to exterior architectural features has been submitted to the historic district commission and approved by said commission."[3] The HDC, established in 1989 pursuant to this scheme, reviews such applications for the Litchfield Historic District. The Connecticut General Statutes empower the HDC to approve or deny applications following notice and a public hearing, *see id.* §§ 7-147c, 7-147e, and direct that, when weighing applications to alter exterior architectural features, the HDC consider, "in addition to any other pertinent factors, the historical and architectural value and significance, architectural style, scale, general design, arrangement, texture and material of the architectural features involved and the relationship thereof to the exterior architectural style and pertinent features of other buildings and structures in the immediate neighborhood," *id.* § 7-147f(a).

The HDC first considered the Chabad's application at a pre-hearing meeting on September 6, 2007. The defendants assert that the Chabad's proposed

[3] "Nonprofit institutions of higher education" are exempted from this requirement. Conn. Gen. Stat. § 7-147k(b).

modifications called for a 17,000-square-foot addition to be built at 85 West Street, including administrative offices, classrooms, a nearly 5,000-square-foot residence for Rabbi Eisenbach and his family, an indoor swimming pool, guest accommodations, kitchens, and a ritual bath. Though the Chabad disputes the defendants' characterization of its proposed expansion, it does not specify a smaller footprint. In addition, the Chabad sought to top the property with a clock tower featuring the Star of David and to incorporate several external elements that would restore some of the property's period details. The Chabad contends that, at that meeting, HDC member Wendy Kuhne ("Kuhne") voiced her opposition to its application, due in part to the size of the addition and her belief that the Star of David was not "historically compatible with the [Historic] District." Other HDC members, including Crawford, also expressed concerns regarding the size of the addition, with one member urging that "[w]e have to get the public out on this project for the public hearing." At the conclusion of the meeting, the HDC scheduled a second prehearing meeting for the following month.

At the second meeting, held on October 18, 2007, the Chabad announced its changes in response to the requested modifications, which included altering the shape of windows and lowering the roof line of the addition. Following the Chabad's presentation, Kuhne commented, "[I]s this all there is?" J.A. 747. Though the Chabad did not object to Kuhne's comments at the meeting, it later requested that she recuse herself

from the public meetings and decisionmaking process, which she did. The HDC then bifurcated the hearing process concerning the Chabad's application, reserving the first hearing to address the Chabad's proposed modifications and the second to address whether denial of the Chabad's application would place a "substantial burden" on its religious exercise. Following the first public hearing, held on November 15, 2007, the Chabad altered its proposal to, among other changes, lower the foundation of its addition, use alternative exterior building material, reduce the height of the Star of David finial atop the clock tower, and reconstruct a front porch that had been removed during an earlier renovation. At the second hearing, held on December 17, 2007, the Chabad asserted its need for a larger structure, but did not disclose the size of its assembly or the number of students likely to attend religious classes.

The HDC denied the Chabad's application on December 20, 2007. In its written opinion, the HDC catalogued the history and importance of the Deming House to the historic character of the Borough of Litchfield. Per the HDC, the altered but nonetheless distinctively residential structure serves as one of the "last vestiges" of the Borough's residential district, "significant alteration" of which would destroy the "residential character" of the property's environs. As such, the HDC "commended" the Chabad's proposals to rehabilitate the existing structure, but nevertheless denied three of the Chabad's proposed modifications: hanging a double door on the front of the house,

incorporating a clock tower, and building an addition on the property. The HDC concluded that the double door would conflict with the house's original design and would require removal of a single door that was "probably the original door of the house." J.A. 330. The HDC deemed the clock tower "incongruous with the immediate neighborhood and the district as a whole," and found that it would "in one stroke transform[ ] the house from a residential structure in appearance to an institutional structure." *Id.* Finally, the HDC objected to the size of the proposed addition, which it characterized as "massive" and "nearly 20,000 square f[ee]t," a size "over five times as large as" the Deming House that would "dwarf[ ] and overwhelm[ ]" not only the house but also the neighborhood as a whole. J.A. 328, 331.

However, in light of the Chabad's proposed religious use of the property, the HDC also granted accommodations to substitute for the rejected modifications. Specifically, the HDC stated that it would accept a proposal replacing the clear glass currently in the house's front door with stained glass, incorporating a finial with a Star of David atop the house, and including an addition that was no larger than the original structure. The HDC granted the Chabad leave to file an amended application consistent with these conditions. Thereafter, five HDC members voted unanimously to deny the Chabad a certificate of appropriateness, including Hillman. Crawford was not recorded as having cast a vote. The Chabad did

not administratively appeal the denial or file an amended application. *See* Conn. Gen. Stat. § 7-147i.

B. Procedural History

The Chabad and Rabbi Eisenbach filed the underlying action in September 2009. In their Third Amended Complaint, filed on April 26, 2010, the plaintiffs asserted that the HDC's denial of the Chabad's application abridged their rights under the First Amendment's Free Exercise, Free Speech, and Free Association Clauses; the Fourteenth Amendment's Equal Protection and Due Process Clauses; RLUIPA's substantial burden, equal terms, and nondiscrimination provisions; as well as provisions of the Connecticut state constitution and the Connecticut Religious Freedom Act ("CFRA"), Conn. Gen. Stat. § 52-571b. The plaintiffs also asserted that the named HDC members conspired to violate and failed to prevent the violation of their civil rights under 42 U.S.C. §§ 1985 and 1986, respectively.

In January 2011, the defendants moved to dismiss Rabbi Eisenbach's claims for lack of standing under Federal Rule of Civil Procedure 12(b)(1).[4] The district court granted this motion on June 20, 2011. The district court first concluded that "RLUIPA

[4] In that same motion, the defendants sought judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c), which the district court denied. *See Chabad I,* 796 F. Supp. 2d at 346. The defendants do not contest this ruling.

requires a plaintiff to hold some property interest that he has attempted to use and which has been threatened by the illegal conduct of the defendant." *Chabad I,* 796 F. Supp. 2d at 338 (citing 42 U.S.C. § 2000cc-5(5)). Because Rabbi Eisenbach's proposed use of the facilities at 85 West Street "[did] not qualify" as such a property interest and his claim of "a right to place a mortgage lien" on the property for unpaid salary "barely warrant[ed] addressing," the district court determined the Rabbi lacked standing to press his claims under RLUIPA. *Id.* at 338-39. In addition, the district court concluded that Rabbi Eisenbach's failure to distinguish his claims from those of the Chabad denied him standing under 42 U.S.C. §§ 1983, 1985, and 1986, the Connecticut constitution, and CFRA. *Id.* at 339.

The Chabad subsequently moved for partial summary judgment on May 14, 2011, and on May 16, 2011, the defendants cross-moved for summary judgment.[5] In February 2012, the district court denied the Chabad's motion and granted the defendants'. Pertinently, the district court found that, because Connecticut General Statutes § 7-147a *et seq.* applies to any entity seeking to *alter* ~~modify~~ a property in a historic district (save for nonprofit institutions of higher education) it is a neutral law of general applicability and thus could not, as a matter of law,

[5] Rabbi Eisenbach joined the Chabad's motion, but due to the dismissal of his claims for lack of subject matter jurisdiction, his involvement is not considered here.

impose a substantial burden on the Chabad's religious exercise, thereby barring the Chabad's claim under RLUIPA's substantial burden provision. *Chabad II,* 853 F. Supp. 2d at 224-25. In addition, the district court concluded that the Chabad's failure to cite a valid secular comparator was fatal to its claim under RLUIPA's equal terms provision, *id.* at 226-29, and that its failure to identify a religious institution that was more favorably treated and identically situated to the Chabad precluded its claim under RLUIPA's nondiscrimination provision, *id.* at 229-31. Finally, the district court rejected the Chabad's remaining constitutional and state law claims for many of the same reasons described above. *Id.* at 231-37. Because the district court granted summary judgment to the defendants on the merits, it did not address the HDC members' asserted entitlement to either absolute or qualified immunity. *Id.* at 237. The Chabad and Rabbi Eisenbach appealed both of the district court's rulings, and the defendants cross-appealed.

DISCUSSION

We review *de novo* a district court's grant of a motion to dismiss for lack of standing. *Fed. Treasury Enter. Sojuzplodoimport v. SPI Spirits Ltd.,* 726 F.3d 62, 71 (2d Cir. 2013). As with any motion to dismiss, we "accept [ ] all well-pleaded allegations in the complaint as true [and] draw[ ] all reasonable inferences in the plaintiff's favor." *Bigio v. Coca-Cola Co.,* 675 F.3d 163, 169 (2d Cir. 2012) (internal quotation

marks omitted) (second alteration in original). "To survive a motion to dismiss, the complaint must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Fed. Treasury Enter. Sojuzplodoimport,* 726 F.3d at 71 (quoting *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 570 (2007)). A claim is facially plausible when the complaint contains "'factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Id.* (quoting *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009)).

We also review *de novo* a district court's grant of summary judgment, again drawing all factual inferences in favor of the non-moving party. *See Miller v. Wolpoff & Abramson, L.L.P.,* 321 F.3d 292, 300 (2d Cir. 2003). Summary judgment is appropriate when there is "no genuine dispute as to any material fact" and the moving party is "entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). There is no "genuine" dispute when "the record taken as a whole could not lead a rational trier of fact to find for the non-moving party." *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

A. The Chabad's RLUIPA Claims

The Chabad asserts claims under three of RLUIPA's land use provisions: the with a land use applicant's religious exercise in the absence of a compelling justification, 42 U.S.C. § 2000cc(a)(1); and the equal terms and nondiscrimination provisions,

which prohibit unequal treatment of and discrimination against religious assemblies and institutions by a government, *id.* § 2000cc(b)(1)-(2). We address each in turn.

1. The Chabad's RLUIPA Substantial Burden Claim

RLUIPA's substantial burden provision provides:

> No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution – (A) is in furtherance of a compelling governmental interest; and (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc(a)(1). The provision applies only when a substantial burden (1) occurs attendant to a federally funded program; (2) implicates interstate or international commerce or commerce with Indian tribes; or (3) "is imposed in the implementation of a land use regulation or system of land use regulations, under which a government makes, or has in place formal or informal procedures or practices that permit the government to make, individualized assessments of the proposed uses for the property involved." *Id.* § 2000cc(a)(2). To establish a claim, a plaintiff bears the burden of demonstrating that at least one of

these predicates applies and that the defendant's implementation of a "land use regulation" placed a "substantial burden" on the plaintiff's "religious exercise." 42 U.S.C. § 2000cc-2(b). The burden then shifts to the defendant to demonstrate that it "acted in furtherance of a compelling governmental interest and that its action is the least restrictive means of furthering that interest." *Id.* at 353 (citing 42 U.S.C. § 2000cc-2(b)).

We agree with the Chabad that RLUIPA's substantial burden provision applies in this case under the statute's "individualized assessment" predicate.[6] Under the "plain meaning" of 42 U.S.C. § 2000cc(a)(2)(C), this predicate is satisfied when "the government may take into account the particular details of an applicant's proposed use of land when deciding to permit or deny that use." *Guru Nanak Sikh Soc'y v. Cnty. of Sutter,* 456 F.3d 978, 986 (9th Cir. 2006). Thus, while the mere application of a neutral and generally applicable zoning law likely would not trigger RLUIPA (at least, not under this

[6] Although the Chabad's proposed construction of a 17,000-square-foot addition at 85 West Street almost certainly renders RLUIPA applicable under the interstate commerce predicate, *see Westchester Day Sch. v. Vill. of Mamaroneck,* 504 F.3d 338, 354 (2d Cir. 2007) (noting that denial of application to modify property satisfied RLUIPA's interstate commerce predicate because "commercial building construction is activity affecting interstate commerce" (citing *Reich v. Mashantucket Sand & Gravel,* 95 F.3d 174, 181 (2d Cir. 1996))), the district court did not address this predicate and we decline to do so in the first instance.

predicate), application of a zoning law that permits a governmental entity to consider the applicant's intended use of a property, applying at least partly subjective criteria on a case-by-case basis, likely would. *See id.* at 987; *see also Westchester Day Sch. v. Vill. of Mamaroneck,* 417 F. Supp. 2d 477, 542 (S.D.N.Y. 2006) (noting that application of neutral and generally applicable law "to particular facts" may constitute individualized assessment where such "application does not involve a mere numerical or mechanistic assessment," but instead "involv[es] criteria that are at least partially subjective in nature"), *aff'd,* 504 F.3d 338 (2d Cir. 2007).

RLUIPA's substantial burden provision combats "subtle forms of discrimination" by land use authorities that may occur when "a state delegates essentially standardless discretion to nonprofessionals operating without procedural safeguards." *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New Berlin,* 396 F.3d 895, 900 (7th Cir. 2005). Accordingly, when a governmental entity conducts a "case-by-case evaluation" of a land use application, carrying as it does "the concomitant risk of idiosyncratic application" of land use standards that may permit (and conceal) "potentially discriminatory" denials, RLUIPA applies. *Midrash Sephardi, Inc. v. Town of Surfside,* 366 F.3d 1214, 1225 (11th Cir. 2004) (holding that ordinance permitting such evaluations was "quintessentially an 'individual assessment' regime" under RLUIPA); *see also* Dep't of Justice Policy Statement on the Land-Use Provisions of

RLUIPA at 6 (Sept. 22, 2010) [hereinafter "DOJ Statement"], *available at* http://www.justice.gov/crt/rluipa_q_a_9-22-10.pdf (noting that, due to idiosyncracies of zoning law, "*solely* . . . mechanical, objective" assessments exempt from this predicate would be "extremely rare").

The broad reach of this predicate is no accident. In regulating individualized assessments by government of the proposed uses to which property is to be put, the substantial burden provision codifies principles announced in *Sherbert v. Verner,* 374 U.S. 398 (1963), insofar as that case held that a "[government] system for granting individual exemptions from a general rule must have a compelling reason to deny a religious group an exemption that is sought on the basis of hardship." *Sts. Constantine & Helen Greek Orthodox Church, Inc.,* 396 F.3d at 897 (discussing individualized assessment predicate). Because "almost all" land use regimes implicate such "individualized" review, *see River of Life Kingdom Ministries v. Vill. of Hazel Crest,* 611 F.3d 367, 381 (7th Cir. 2010) (en banc) (Sykes, *J.,* dissenting), almost all "impos[itions]" or "implementation[s]" of land use regimes, 42 U.S.C. § 2000cc(a)(2)(C), will satisfy this predicate.

Under this rubric, Connecticut's statutory scheme undeniably demands an individual assessment of applications to alter historic properties. While Connecticut General Statutes § 7-147d(a) requires that nearly all entities seeking to modify a property in a historic district "shall" obtain a certificate of

appropriateness, the scheme also requires that local commissions implement that general rule by applying loosely defined and subjective standards to discrete applications. *See id.* §§ 7-147c, 7-147e, 7-147f. To that end, § 7-147e commands that commissions "hold a public hearing upon *each* application." *Id.* § 7-147e(a) (emphasis added). Similarly, § 7-147f directs that commissions, when weighing an application, must determine whether "*the proposed* erection, alteration or parking will be appropriate." *Id.* § 7-147f(a) (emphasis added). And, in assessing the appropriateness of a modification, commissions are further directed to consider such criteria as "the historical and architectural value and significance" of the modification, its "architectural style, scale, general design, arrangement, texture and material" used, "the relationship [of . . .] the exterior architectural style" to the neighborhood – and "any other pertinent factors." *Id.* Even the district court found these standards to be "subjective in nature," but nonetheless deemed the statutory scheme to be immune from substantial burden analysis. *See Chabad II,* 853 F. Supp. 2d at 235. In the absence of more definite standards limiting the HDC's discretion in reviewing applications, we disagree. *See* DOJ Statement at 6.[7]

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[7] Connecticut General Statutes § 7-147f(b) does bar consideration of the so-called "interior arrangement or use" of a property, a limitation which may be typical of many historic preservation laws. However, this limitation is of no moment to our consideration of the scheme under RLUIPA. While the "individualized assessment" predicate reaches only review of the

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Were there any doubt as to the type of assessment at issue, even a cursory review of the HDC's consideration of the Chabad's application confirms that the process was patently individualized. The HDC probed the Chabad's proposed window and roof measurements, door selections, building materials, roof adornments, and glass type, and imposed a size limitation on the Chabad's development based on a tailored review of surrounding properties. Moreover, the HDC conducted this inquiry without the guidance of laws or regulations that dictated the specific metes and bounds either of its inquiry or of the conditions it imposed. Regardless of whether the HDC's inquiry was defensible, it was thus at a minimum *individualized*. Because Connecticut's statutory scheme therefore permits – indeed, demands – application of subjective standards to individual land use applications, and because the HDC applied such subjective standards to the Chabad's application, we conclude that the HDC's denial of the Chabad's application

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"proposed uses" for a property, 42 U.S.C. § 2000cc(a)(2)(C), RLUIPA contemplates "land use" as broadly encompassing the "use or development of land," 42 U.S.C. § 2000cc-5(5) (defining "land use regulation" as "a zoning or landmarking law, or the application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land)"). The "development of land" is explicitly regulated by the scheme instated pursuant to Connecticut General Statutes § 7-147a *et seq*. *See also Roman Catholic Bishop of Springfield v. City of Springfield,* 724 F.3d 78, 98 (1st Cir. 2013) (concluding that RLUIPA substantial burden provision applied to creation of historic preservation district that limited church's ability to alter exterior of its property).

resulted from an "individual assessment," triggering RLUIPA's substantial burden provision.[8] The district court consequently erred in determining that the Chabad could not establish a claim under RLUIPA's substantial burden provision "as a matter of law," and we vacate the district court's judgment insofar as it concerns that claim.

In reaching its decision, the district court improperly read our opinion in *Westchester Day School* as holding that, as a matter of law, generally applicable land use regulations may only result in a substantial burden when arbitrarily and capriciously imposed. *See Chabad II,* 853 F. Supp. 2d at 225 (citing *Westchester Day Sch.,* 504 F.3d at 350). This holding would be in tension with the plain language of RLUIPA's substantial burden provision, which in certain instances regulates "burden[s that] result[ ] from a rule of general applicability" – suggesting that such burdens fall within RLUIPA's cognizance, even when imposed in the regular course. 42 U.S.C. § 2000cc(a)(2)(A), (B). Moreover, such a rule would render the substantial burden provision largely superfluous given RLUIPA's nondiscrimination and equal terms provisions, which regulate overtly

[8] The defendants effectively concede this point. In one affidavit submitted by the HDC, Rachel Carley, an architectural historian, notes that "[e]ach property [under review] is unique, and each proposal for change introduces a different set of circumstances. For this reason, proposals are always considered case by case." J.A. 317.

discriminatory acts that are often characterized by arbitrary or unequal treatment of religious institutions. *See id.* § 2000cc(b)(1)-(2); *Bethel World Outreach Ministries v. Montgomery Cnty. Council,* 706 F.3d 548, 557 (4th Cir. 2013) ("Requiring a religious institution to show that it has been targeted on the basis of religion in order to succeed on a substantial burden claim would render the nondiscrimination provision superfluous."); *Sts. Constantine & Helen Greek Orthodox Church, Inc.,* 396 F.3d at 900 ("[T]he 'substantial burden' provision backstops the explicit prohibition of religious discrimination in the later section of [RLUIPA], much as the disparate-impact theory of employment discrimination backstops the prohibition of intentional discrimination. If a land-use decision . . . imposes a substantial burden on religious exercise . . . and the decision maker cannot justify it, the inference arises that hostility to religion . . . influenced the decision." (citations omitted)).

Instead, *Westchester Day School* enumerates some of the factors that may be considered to determine whether a substantial burden is imposed, including whether the law is neutral and generally applicable. In conducting the substantial burden analysis, we considered several factors. *See* 504 F.3d at 352 (stating that the "arbitrary and unlawful nature" of defendant's conduct "support[ed]" a substantial burden claim, while also looking to "other factors"); *see also Fortress Bible Church,* 694 F.3d at 219 (finding that arbitrary and capricious application of land use regulation "bolstered" a substantial

burden claim). In addition to the arbitrariness of a denial, our multifaceted analysis considered whether the denial was conditional; if so, whether the condition was itself a substantial burden; and whether the plaintiff had ready alternatives. *See Westchester Day Sch.,* 504 F.3d at 352; *see also Fortress Bible Church,* 694 F.3d at 219 (considering whether rejection of land use application denied plaintiff the "ability to construct an adequate facility" for its religious exercise, or was merely a "rejection of a specific building proposal"). Our sister circuits have contributed additional texture to this analysis. *See, e.g., Bethel World Outreach Ministries,* 706 F.3d at 558 (weighing whether plaintiff had "reasonable expectation" of receiving approval to build church when it bought property and deeming it "significant that the [defendant] has completely prevented [the plaintiff] from building any church on its property"); *Petra Presbyterian Church v. Vill. of Northbrook,* 489 F.3d 846, 851 (7th Cir. 2007) (considering as a factor whether plaintiff "bought property reasonably expecting to obtain a permit," particularly when alternative sites were available); *Midrash Sephardi, Inc.,* 366 F.3d at 1228 (deeming it significant that the plaintiff could operate a church "only a few blocks from" its preferred location). Thus, while we conclude that the substantial burden provision applies, we leave it to the district court to determine as a question of first instance, *see Dardana Ltd. v. Yuganskneftegaz,* 317

F.3d 202, 208 (2d Cir. 2003), whether the denial here in fact "impose[d] a substantial burden on the [Chabad's] religious exercise,"[9] 42 U.S.C. § 2000cc(a)(1); *see Fortress Bible Church v. Feiner,* 694 F.3d 208, 219 (2d Cir. 2012) (requiring that the substantial burden have a "close nexus" with religious exercise to be cognizable under RLUIPA); *Westchester Day Sch.,* 504 F.3d at 349 (holding that substantial burden occurs when government "coerces the religious institution to change its behavior" (emphasis omitted)). We note that, in conducting the substantial burden analysis on remand, the district court should consider, *inter alia,* whether the conditions attendant to the HDC's denial of the Chabad's application themselves imposed a substantial burden on the Chabad's religious exercise, whether feasible alternatives existed for the Chabad to exercise its faith, and whether the Chabad reasonably believed it would be permitted to undertake its proposed modifications when it purchased the property at 85 West Street. The district court should also consider, of course, whether the proposed modifications shared a "close nexus" with and would be consistent with accommodating the Chabad's religious exercise. *See Fortress Bible Church,* 694 F.3d at 219.

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[9] The parties do not dispute (and it is indisputable) that Connecticut General Statutes § 7-147a *et seq*. constitutes a "land use regulation" under RLUIPA, defined as "a zoning or landmarking law, or application of such a law, that limits or restricts a claimant's use or development of land (including a structure affixed to land)." 42 U.S.C. § 2000cc-5(5).

2. The Chabad's RLUIPA Equal Terms Claim

We can address the Chabad's equal terms claim in comparatively short order. RLUIPA's equal terms provision states that "[n]o government shall impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution." 42 U.S.C. § 2000cc(b)(1). Under this provision, the plaintiff bears the initial burden to "produce[ ] *prima facie* evidence to support a claim" of unequal treatment, after which the "government . . . bear[s] the burden of persuasion on any element of the claim." *Id.* § 2000cc-2(b).

Division exists among our sister circuits concerning whether the equal terms provision invariably requires evidence of a "similarly situated" secular comparator to establish a claim and, where such evidence is necessary, on what ground the comparison must be made. *See generally River of Life Kingdom Ministries,* 611 F.3d at 368-71 (en banc majority opinion) (discussing circuits' conflicting approaches); *id.* at 377-78 (Sykes, J., dissenting) (same discussion). We need not enter the fray here, as the Chabad has failed to present sufficient evidence to establish a prima facie equal terms claim under any standard.

In this Court's sole analysis of the equal terms provision, we declined to define "the precise outlines of what it takes to be a valid comparator under RLUIPA's equal-terms provision." *Third Church of Christ, Scientist v. City of New York,* 626 F.3d 667,

669 (2d Cir. 2010). Nevertheless, we noted that "organizations subject to different land-use regimes may well not be sufficiently similar to support a discriminatory-enforcement challenge." *Id.* at 671 (emphasis omitted). In support, we cited *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County,* in which the Eleventh Circuit held that a church and school were insufficiently comparable to establish an equal terms claim, given that the properties sought different forms of zoning relief from different land use authorities applying "sharply different" criteria. *See* 450 F.3d 1295, 1311 (11th Cir. 2006). Because the evidence of the church's and school's treatment was thus "consistent with the . . . neutral application of different zoning regulations" – suggesting "*different* treatment, not *unequal* treatment" – the court held that the plaintiff had failed to establish a prima facie equal terms claim. *Id.* at 1313; *see also Vision Church v. Vill. of Long Grove,* 468 F.3d 975, 1003 (7th Cir. 2006) (rejecting equal terms claim, in part, because "the fact that [the religious land use applicant] and the elementary schools were subject to different standards because of the year in which their special use applications were considered compels the conclusion that there was no unequal treatment").

The same is true here; the Chabad has failed to establish a prima facie equal terms claim. Its sole support for its equal terms claim comes in the form of one alleged comparator: the Wolcott Library, a building in Litchfield's Historic District that, according to uncontested evidence submitted by the Chabad, was

permitted to construct a "substantial" addition on its property that altered the character of the property from residential to institutional.[10] However, the Wolcott Library's expansion was approved in 1965 by a different land use authority pursuant to a different land use regime. Specifically, the Board of Warden and Burgesses, the predecessor to the HDC, approved construction of the addition under a law that explicitly barred consideration of "the relative size of buildings." J.A. 192. By contrast, Connecticut General Statutes § 7-147f(a), which guided the HDC's

[10] The Chabad argues that two other properties in Litchfield's Historic District, the Rose Haven Home and the Cramer and Anderson building, should also serve as comparators because additions on those properties were "substantially larger" than the original structures. However, the Chabad's only support for this argument comes from an affidavit submitted by one of its attorneys that cited "research" the attorney performed for the Chabad's application to the HDC. The attorney did not provide any analysis or basis for her conclusion, nor did the Chabad. Because the affidavit failed to show that these contentions could be established at trial by competent evidence, it cannot create a triable issue of fact. *See ABB Indus. Sys., Inc. v. Prime Tech., Inc.,* 120 F.3d 351, 357 (2d Cir. 1997) (citing Fed. R. Civ. P. 56(e)); *see also Jeffreys v. City of New York,* 426 F.3d 549, 554 (2d Cir. 2005) (noting that, to defeat summary judgment, "a nonmoving party must offer some hard evidence showing that its version of the events is not wholly fanciful" (internal quotation marks omitted)); *Bickerstaff v. Vassar Coll.,* 196 F.3d 435, 452 (2d Cir. 1999) ("Statements that are devoid of any specifics, but replete with conclusions, are insufficient to defeat a properly supported motion for summary judgment."). Because the affidavit was so lacking, we agree with the district court that it provided insufficient ground to require further consideration of these comparators at summary judgment.

consideration of the Chabad's application, explicitly requires that commissions "shall" consider "scale."

While minor differences in land use regimes may not defeat a comparison under the equal terms provision in all disputes, the centrality of the size of the Chabad's proposed addition to *this* dispute renders the Wolcott Library an inappropriate comparator to support the Chabad's equal terms claim. As such, the Chabad has (at most) established "*different* treatment, not *unequal* treatment." *Primera Iglesia Bautista Hispana,* 450 F.3d at 1313. Because the Chabad has thus failed to identify any evidence that it endured "less than equal" treatment as compared to a secular assembly or institution, we affirm the district court's grant of summary judgment to the defendants on this claim.[11]

3. The Chabad's RLUIPA Nondiscrimination Claim

RLUIPA's nondiscrimination provision states that "[n]o government shall impose or implement a

[11] As indicated above, the Chabad did not argue and we do not address whether an equal terms claim may be based solely on an inference of unequal treatment from a law that is facially discriminatory or "'gerrymandered' to place a burden solely on religious, as opposed to nonreligious, assemblies or institutions." *See Primera Iglesia Bautista Hispana,* 450 F.3d at 1308-10. In any event, the scheme under Connecticut General Statutes § 7-147a *et seq.* does not facially discriminate against religious assemblies or institutions, and there is no evidence in the record suggesting that it was enacted with the purpose of doing so.

land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." 42 U.S.C. § 2000cc(b)(2). As with the equal terms provision, the plaintiff bears the initial burden of establishing a prima facie claim, after which the government bears the burden of persuasion on the elements of the nondiscrimination claim. *Id.* § 2000cc-2(b).

This Court has not previously interpreted the nondiscrimination provision. Nonetheless, the plain text of the provision makes clear that, unlike the substantial burden and equal terms provisions, evidence of discriminatory *intent* is required to establish a claim. *See* 42 U.S.C. § 2000cc(b)(2) (prohibiting discrimination "*on the basis* of religion or religious denomination" (emphasis added)). As such, courts consider the provision have held that the nondiscrimination provision "enshrine[s]" principles announced in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520 (1993), which cast a jaundiced eye on laws that target religion. *See Midrash Sephardi, Inc.,* 366 F.3d at 1231-32.

Lukumi looked to equal protection principles in analyzing whether a law was discriminatory. *See Lukumi,* 508 U.S. at 540 (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.,* 429 U.S. 252, 266 (1977)). Other courts analyzing RLUIPA's nondiscrimination provision, as well as the related equal terms provision, have similarly looked to equal protection precedent in weighing such claims. *See, e.g., Bethel World Outreach Ministries,* 706 F.3d at 559; *Church of*

Scientology of Ga., Inc. v. City of Sandy Springs, 843 F. Supp. 2d 1328, 1370 (N.D. Ga. 2012). We join in employing this approach. RLUIPA, after all, codified "existing Free Exercise, Establishment Clause[,] and Equal Protection rights against states and municipalities" that discriminated against religious land use. *Midrash Sephardi, Inc.,* 366 F.3d at 1239 (discussing the equal terms provision, but also noting that "RLUIPA tailors the nondiscrimination prohibitions [in 42 U.S.C. § 2000cc(b)(1) and (2)] to land use regulations because Congress identified a significant encroachment on the core First and Fourteenth Amendment rights of religious observers"). Accordingly, establishing a claim under RLUIPA's nondiscrimination provision, as with the Supreme Court's equal protection precedent, requires evidence of "discriminatory intent." *See Arlington Heights,* 429 U.S. at 265 ("Proof of . . . discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.").

This Court has generally recognized three types of equal protection violations: (1) a facially discriminatory law; (2) a facially neutral statute that was adopted with a discriminatory intent and applied with a discriminatory effect (*i.e.,* a "gerrymandered" law); and (3) a facially neutral law that is enforced in a discriminatory manner. *See, e.g., Hayden v. Cnty. of Nassau,* 180 F.3d 42, 48 (2d Cir. 1999); *see also Lukumi,* 508 U.S. at 535 ("Apart from the text, the effect of a law in its real operation is strong evidence of object."). In determining whether a facially neutral

statute was selectively enforced, we look to both direct and circumstantial evidence of discriminatory intent, as instructed by the Supreme Court in *Arlington Heights. See Southside Fair Hous. Comm. v. City of New York,* 928 F.2d 1336, 1354 (2d Cir. 1991) (citing *Arlington Heights,* 429 U.S. at 266); *see also Bethel World Outreach Ministries,* 706 F.3d at 559 (citing *Arlington Heights* to support analysis of 17 circumstantial evidence in weighing nondiscrimination claim).

The Chabad asserts that HDC enforced Connecticut General Statutes § 7-147d(a) *et seq.* against it in a discriminatory manner; yet, in weighing the Chabad's claim, the district court looked solely to whether the Chabad had identified comparator religious institutions that were "'identical in all relevant respects'" to the Chabad. *Chabad II,* 853 F. Supp. 2d at 231 (quoting *Racine Charter One, Inc. v. Racine Unified Sch. Dist.,* 424 F.3d 677, 680 (7th Cir. 2005)). This was in error. As in *Arlington Heights,* analysis of a claim brought under RLUIPA's nondiscrimination provision requires a "sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights,* 429 U.S. at 266. Accordingly, courts assessing discriminatory intent under RLUIPA's nondiscrimination provision have considered a multitude of factors, including the series of events leading up to a land use decision, the context in which the decision was made, whether the decision or decisionmaking process departed from established norms, statements made by the

decisionmaking body and community members, reports issued by the decisionmaking body, whether a discriminatory impact was foreseeable, and whether less discriminatory avenues were available. *See Bethel World Outreach Ministries,* 706 F.3d at 559-60; *Church of Scientology of Ga., Inc.,* 843 F. Supp. 2d at 1370-76.

Here, the district court bypassed consideration of circumstantial evidence that might have supported the Chabad's claim and instead considered only the Chabad's cited comparators. While such evidence is certainly germane to a selective enforcement analysis, it is not necessary to establish a nondiscrimination claim. Contrary to the equal terms provision, which turns on "less than equal" treatment of religious as compared to nonreligious assemblies or institutions, the nondiscrimination provision bars discrimination "on the basis of religion or religious denomination," a fact that may be proven without reference to a religious analogue.[12] 42 U.S.C. § 2000cc(b)(1), (2). Moreover, while comparators must exhibit some similarity to permit meaningful analysis, a requirement that they be "identical" is unduly restrictive. *See Third Church of Christ, Scientist,* 626

[12] While it is thus possible that a nondiscrimination plaintiff could establish a selective enforcement claim based on facially discriminatory conduct or arbitrary decisionmaking alone, it is difficult to imagine an equal terms plaintiff succeeding in an as-applied challenge without evidence of a secular comparator that was more favorably treated.

F.3d at 670 (surveying various bases for comparison relied upon by circuits, none of which require comparators to be "identical"). Indeed, such a requirement would exempt many historic districts from RLUIPA's reach, given the likelihood that newer faiths would be absent.[13]

Because the district court did not look beyond religious comparators in weighing the Chabad's nondiscrimination claim, we vacate the grant of summary judgment to the defendants on this claim and remand for consideration of whether the Chabad established a prima facie nondiscrimination claim, cognizant of the fact that such discrimination must be "on the basis of religion" and not other, legitimate factors. *See Bethel World Outreach Ministries,* 706 F.3d at 559-60 (affirming grant of summary judgment for defendants on a nondiscrimination claim where evidence showed that opposition to plaintiff's proposed land use was due to size of the proposed facility, and the plaintiff failed to present comparative

[13] We decline to address the exact parameters of the religious assemblies or institutions that may properly serve as comparators in this case, both because such delineation may prove unnecessary on remand if there are none, *see Chabad II,* 853 F. Supp. 2d at 231 ("[I]t does not appear that any of the houses of worship to which Chabad points have made any additions since the current HDC regime was implemented."), and because we leave the selective enforcement inquiry to the district court to conduct in the first instance.

evidence that could demonstrate the concern with size was pretextual).[14]

B. The Chabad's Remaining Claims

We conclude that the Chabad has waived appeal of its remaining claims due to insufficient briefing. *See Norton v. Sam's Club,* 145 F.3d 114, 117 (2d Cir. 1998) ("Issues not sufficiently argued in the briefs are considered waived and normally will not be addressed on appeal."). The Chabad's brief devotes sections to each of its federal Constitutional claims, but these sections simply recite the district court's ruling and are thus insufficient to preserve the Chabad's appeal. The brief fails even to mention the Chabad's conspiracy and state law claims. Accordingly, we affirm the district court's grant of summary judgment to the defendants on these claims.

C. Rabbi Eisenbach's Standing

Rabbi Eisenbach appeals from the district court's dismissal of his claims for lack of standing under federal and state law. The district court first determined that Rabbi Eisenbach did not have standing under RLUIPA because he did not assert a sufficient property interest in 85 West Street. *Chabad I,* 796

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[14] We decline to address the Chabad's "class-of-one" equal protection argument in support of its nondiscrimination claim, which it raises for the first time on appeal. *See O'Hara v. Weeks Marine, Inc.,* 294 F.3d 55, 67 n.5 (2d Cir. 2002).

F. Supp. 2d at 338 (citing 42 U.S.C. § 2000cc-5(5), which requires a claimant to have "an ownership, leasehold, easement, servitude, or other property interest in the regulated land or a contract or option to acquire such an interest"). The court held that Rabbi Eisenbach's use of the proposed facilities and his speculative "right to place a mortgage lien" on the property to recoup unpaid salary were not "property interest[s]" under RLUIPA. *Id.* at 338. We disagree at least insofar as the district court analyzed Rabbi Eisenbach's property interest as a jurisdictional matter.

The Supreme Court has recently clarified the distinction between Article III standing – which is a prerequisite to the invocation of federal court jurisdiction – and what has been referred to as "statutory standing" – which has at times been held to be jurisdictional and at others nonjurisdictional. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.,* 134 S. Ct. 1377, 1386-88 & n.4 (2014). Under Article III's "case" or "controversy" requirement, a party invoking federal court jurisdiction must demonstrate that he has "suffered or [is] imminently threatened with a concrete and particularized 'injury in fact' that is fairly traceable to the challenged action of the defendant and likely to be redressed by a favorable judicial decision." *Id.* at 1386 (quoting *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992)). Where this "'irreducible constitutional minimum of standing'" is satisfied, *id.* (quoting *Lujan,* 504 U.S. at 560), "a federal court's obligation to hear and decide cases

within its jurisdiction is virtually unflagging," *id.* (internal quotation marks omitted).

By contrast, determination whether a statute permits a plaintiff to pursue a claim "is an issue that requires [courts] to determine . . . whether a legislatively conferred cause of action encompasses a particular plaintiff's claim." *Id.* at 1387. As opposed to whether the plaintiff may invoke a court's jurisdiction, the question is whether the plaintiff "has a cause of action under the statute." *Id.* The determination whether a statute grants a plaintiff a cause of action is "a straightforward question of statutory interpretation," operating under the presumptions that the plaintiff must allege interests that "fall within the zone of interests protected by the law invoked," *id.* at 1388 (internal quotation marks omitted), and injuries that were "proximately caused by [the alleged] violations of the statute," *id.* at 1390. As the Supreme Court has made clear, determination whether a claim satisfies these requirements goes not to the court's jurisdiction – that is, "*power*" – to adjudicate a case, but instead to whether the plaintiff has adequately pled a claim. *Id.* at 1387 n.4; *see id.* at 1389 n.5.

There can be little doubt that Rabbi Eisenbach has met the constitutional requirements of Article III standing to assert his RLUIPA claim. At a minimum, Rabbi Eisenbach alleged that he intended to live at the proposed facilities. The HDC's denial of the Chabad's application, and the conditions it imposed on any renewed application, thus deprived Rabbi

Eisenbach of the ability to live in the facilities as proposed, an injury that may be redressed by relief from the district court.

Instead, the issue of Rabbi Eisenbach's standing to pursue his RLUIPA claims turns on whether his allegations place him in the class of plaintiffs that RLUIPA protects – that is, whether he has stated a claim upon which relief can be granted.[15] Accordingly, we vacate the district court's holding that Rabbi Eisenbach lacked standing under RLUIPA and remand for determination whether he has stated a claim. In so doing, we note that, while Rabbi Eisenbach's alleged "right" to impose a lien is seemingly distinct from the other property interests cited in RLUIPA, the allegation will nonetheless "warrant[ ] addressing" on remand. *See Chabad I,* 796 F. Supp. 2d at 339.

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[15] Prior to *Lexmark International,* at least two other circuit courts held that the existence of a property interest under RLUIPA goes to the plaintiff's standing. *See Covenant Christian Ministries, Inc. v. City of Marietta,* 654 F.3d 1231, 1239 (11th Cir. 2011) (holding that pastor's lack of a property interest denied him standing to pursue RLUIPA claim); *DiLaura v. Ann Arbor Charter Twp.,* 30 F. App'x 501, 507 (6th Cir. 2002) (finding that memorandum of understanding to transfer property to plaintiff was a sufficient property interest under RLUIPA to confer standing); *but cf. Taylor v. City of Gary,* 233 F. App'x 561, 562 (7th Cir. 2007) ("assum[ing]" that plaintiff who failed to plead a property interest had standing for RLUIPA, but dismissing the action for failure to state a claim). However, in light of *Lexmark International,* we cannot join these holdings.

Finally, the district court dismissed Rabbi Eisenbach's federal and Connecticut constitutional claims, as well as his claim pursuant to the CFRA, on the ground that they were derivative of the Chabad's claims. In his brief, Rabbi Eisenbach merely asserts – conclusorily and without record citations – that he "has independent constitutional claims" that are "clearly expressed in the [complaint]." Appellants' Br. at 61-62. The brief fails to cite a single Connecticut case to support his argument, nor does it cite pertinent cases regarding federal law under 42 U.S.C. §§ 1985 and 1986. As such, we deem his appeal of these claims to be waived and affirm their dismissal. *See Sam's Club,* 145 F.3d at 117.

D. The Individual Defendants' Immunity

Hillman and Crawford argue that they are entitled to absolute immunity because they acted in a quasi-judicial capacity as members of the HDC and, in the alternative, are entitled to qualified immunity, as the Chabad's right to a certificate of appropriateness was not clearly established at the time of the denial. We leave these issues to the district court to address in the first instance, in addition to consideration whether Crawford is properly subject to this suit in the absence of evidence that she voted on the application. *See Dardana Ltd.,* 317 F.3d at 208.

CONCLUSION

For the foregoing reasons, we vacate the district court's order dismissing Rabbi Eisenbach's RLUIPA claims for lack of standing and remand for further proceedings as to these claims, but affirm the dismissal of the remainder of Rabbi Eisenbach's claims. We also vacate the district court's judgment as to the Chabad's claims under RLUIPA's substantial burden and nondiscrimination provisions, and remand for further proceedings as to those claims, but affirm the dismissal of the Chabad's claim under RLUIPA's equal terms provision, as well as its claims under the federal and Connecticut constitutions and Connecticut state law. Thus, the June 20, 2011 order of the district court is VACATED IN PART AND AFFIRMED IN PART, the February 21, 2012 judgment of the district court is VACATED IN PART AND AFFIRMED IN PART, and the case is REMANDED for further proceedings.

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHABAD LUBAVITCH OF
LITCHFIELD COUNTY INC.

v.

LITCHFIELD HISTORIC
DIST COMM
BOROUGH OF LITCHFIELD,
CONNECTICUT
WENDY KUHNE
GLENN HILLMAN and
KATHLEEN CRAWFORD

3:09cv01419(JCH)

JUDGMENT

This matter came on before the Honorable Janet C. Hall, United States District Judge, as a result of defendants' Motions for Summary Judgment and plaintiff's Motion for Partial Summary Judgment.

The Court has reviewed all of the papers filed in conjunction with the Motions and on February 17, 2012, entered a Ruling granting defendants' Motions and denying plaintiff's Motion.

Therefore, it is ORDERED and ADJUDGED that judgment is entered for the defendants, against the plaintiff, and the case is closed.

Dated at Bridgeport, Connecticut, this 21st day of February, 2012.

Robin D. Tabora, Clerk

By /s/ Bernadette DeRubeis
Deputy Clerk

Entered on Docket _____

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

CHABAD LUBAVITCH OF LITCHFIELD COUNTY, INC. Plaintiff, v. BOROUGH OF LITCHFIELD, CONNECTICUT, ET AL. Defendants.	)))))))	CIVIL ACTION NO. 3:09-CV-1419 (JCH) February 17, 2012

RULING RE: DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT (DOC. NOS. 138, 140) AND PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT (DOC. NO. 137)

I. INTRODUCTION

Plaintiff, Chabad Lubavitch of Litchfield County, Inc. ("Chabad"), brings this action against defendants, the Borough of Litchfield, Connecticut ("the Borough") and the Historic District Commission of the Borough ("the HDC") (collectively, "Borough defendants"); and Wendy Kuhne, Glenn Hillman, and Kathleen Crawford, members of the HDC (collectively, "individual defendants"), for declaratory relief and damages for injuries plaintiff allegedly sustained as a result of the discriminatory activity of defendants.

Defendants have filed two separate motions for summary judgment. The Borough defendants seek summary judgment as to all counts against them, Counts One through Eight, Eleven, and Twelve (Doc.

No. 140). The individual defendants filed a separate Motion for Summary Judgment (Doc. No. 138) on all counts against them.[1] In addition, Chabad filed a Motion for Partial Summary Judgment as to Count Eight (Doc. No. 137).

II. STATEMENT OF FACTS[2]

The Borough of Litchfield is an independent municipal corporation, whose boundaries are wholly within the Town of Litchfield. Borough Defs.' L.R. 56(a)(1) Stmt. ¶ 10; Pl.'s L.R. 56(a)(2) Stmt. Supporting Pl.'s Opp. to Borough of Litchfield and Historic District Commission of the Borough of Litchfield ¶ 10 (hereafter "Pl.'s Borough L.R. 56(a)(2) Stmt."). The Borough is governed by a municipal charter adopted in 1989, pursuant to the Connecticut General Statutes. Borough Defs.' L.R. 56(a)(1) Stmt. ¶ 10; Pl.'s Borough L.R. 56(a)(2) Stmt. ¶ 10. Since 1978, the Borough of Litchfield has been enrolled in the National Register of Historic Places. *See Borough Defs.' Mem.,* Ex. D, Attachment 5. In addition, the National Park Service has described Litchfield as "[p]robably

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[1] The individual defendants are named in all twelve counts. At oral argument, plaintiff's counsel acknowledged that Wendy Kuhne, who recused herself from the HDC proceeding, was only sued for the conspiracy, Counts Nine and Ten. Tr. at 13-14.

[2] In connection with a motion for summary judgment, the court relies on the undisputed facts or, if a fact is disputed, the court views the evidence in the light most favorable to the party opposing summary judgment.

the finest surviving example of a typical late 18th century New England town." *See id.,* Ex. D, Attachment 6.

In 1989, pursuant to the provisions of Chapter 97a of the Connecticut General Statutes §§ 7-147a *et seq.*, the Borough established the Historic District Commission (hereafter "HDC") to govern aspects of the construction and modification of buildings within the Litchfield Historic District. Borough Defs.' L.R. 56(a)(1) Stmt. ¶ 11; Pl.'s Borough L.R. 56(a)(2) Stmt. ¶ 11. Pursuant to the authority granted in section 7-147c(e) of the Connecticut General Statutes, the HDC adopted regulations which set forth the criteria by which it would judge applications. *See* Borough Defs.' L.R. 56(a)(1) Stmt. ¶ 12; Pl.'s Borough L.R. 56(a)(2) Stmt. ¶ 12. In addition, the HDC also adopted the criteria set forth in the Secretary of the Interior's Standards for Rehabilitating Historic Buildings. Borough Defs.' L.R. 56(a)(1) Stmt. ¶ 14; Pl.'s Borough L.R. 56(a)(2) Stmt. ¶ 14.

Rabbi Joseph Eisenbach is an ordained Hasidic Rabbi and is the President of the plaintiff, Chabad Lubavitch of Litchfield County, Inc.[3] Borough Defs.' L.R. 56(a)(1) Stmt. ¶ 1; Pl.'s Borough L.R. 56(a)(2) Stmt. at ¶ 1. Rabbi Eisenbach is a member of the

[3] Rabbi Eisenbach was originally a plaintiff in this case; however, the court terminated him as a party after finding that he did not have individual standing to bring these claims. *See* Doc. No. 151.

Chabad. Borough Defs.' L.R. 56(a)(1) Stmt. ¶ 2; Pl.'s Borough L.R. 56(a)(2) Stmt. ¶ 2. Currently, Chabad holds weekly religious services at a rented location in a Litchfield shopping center; however, Chabad alleges that its current space is inadequate to carry out its religious practices. Borough Defs.' L.R. 56(a)(1) Stmt. ¶¶ 4-6; Pl.'s Borough L.R. 56(a)(2) Stmt. ¶¶ 4-6.

Chabad purchased property at 85 West Street, Litchfield, Connecticut. Borough Defs.' L.R. 56(a)(1) Stmt. ¶ 8; Pl.'s Borough L.R. 56(a)(2) Stmt. ¶ 8. The property was constructed in the late 1870s, as a two story, stick-style Victorian residential house, consisting of approximately 2600 square feet, plus a basement. Borough Defs.' L.R. 56(a)(1) Stmt. ¶ 24; Pl.'s Borough L.R. 56(a)(2) Stmt. ¶ 24. The house is commonly known as the "Deming House." Borough Defs.' L.R. 56(a)(1) Stmt. ¶ 25; Pl.'s Borough L.R. 56(a)(2) Stmt. ¶ 25. The property was originally residential; however, it was rezoned to commercial property in 1971. Pl.'s L.R. 56(a)(1) Stmt. ¶ 38; Defs.' L.R. 56(a)(2) Stmt. ¶ 38.

After it purchased the property, Chabad filed an application for a certificate of appropriateness with the HDC. Borough Defs.' L.R. 56(a)(1) Stmt. ¶¶ 9, 11; Pl.'s Borough L.R. 56(a)(2) Stmt. ¶¶ 9, 11. Through its proposed facility, Chabad seeks to serve the needs of the community; host prayer, religious ceremonies, religious education; and provide living quarters for Rabbi Eisenbach and his family, and a guest apartment. *See* Pl.'s L.R. 56(a)(1) Stmt. ¶¶ 6-8; Defs.' L.R. 56(a)(2) Stmt. ¶¶ 6-8. Chabad's proposal would add a

three story, 17,000 square foot addition to the Deming House. *See* Borough Defs.' L.R. 56(a)(1) Stmt. ¶ 26; Pl.'s Borough L.R. 56(a)(2) Stmt. ¶ 26.[4] A fourth floor is a sub-basement level set completely below ground. The guest apartment is in part of the third,[5] attic floor.

The parties contest much of what occurred during the hearing process after Chabad submitted its application, including which commissioners actually voted on the application.[6] *See* Borough Defs.' L.R. 56(a)(1) Stmt. ¶ 37; Pl.'s Borough L.R. 56(a)(2) Stmt. ¶ 37. It is clear, however, that the HDC voted unanimously to deny the motion without prejudice, and it invited Chabad to resubmit its application with a proposal that provided for an addition no larger than the original house on the property. *See* Borough Defs.' L.R. 56(a)(1) Stmt. ¶ 36; Pl.'s Borough L.R. 56(a)(2) Stmt. ¶ 36. Chabad did not resubmit its application.

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[4] Chabad denies this paragraph as a whole; however, the evidence it cites in support of its denial does not contest the square footage of the proposal. Consequently, the court deems this portion of the asserted fact to be admitted. *See* L.R. 56(a)(3).

[5] The attic is a partial floor located above the Rabbi's apartment (second floor), the sanctuary (first floor at ground level at front), the classrooms (basement), and pool (sub-basement).

[6] In their arguments, counsel noted that the HDC has a system where not all members vote on each application. The HDC's Chair, Wendy Kuhne, recused herself from voting, at Chabad's request. Individual Defs.' L.R. 56(a)(1) Stmt. ¶ 14; Pls.' 56(a)(2) Stmt. ¶ 14.

See Borough Defs.' L.R. 56(a)(1) Stmt. ¶ 49; Pl.'s Borough L.R. 56(a)(2) Stmt. ¶ 49.

III. STANDARD OF REVIEW

A motion for summary judgment "may properly be granted . . . only where there is no genuine issue of material fact to be tried, and the facts as to which there is no such issue warrant judgment for the moving party as a matter of law." *In re Dana Corp.,* 574 F.3d 129, 151 (2d Cir. 2009). Thus, the role of a district court in considering such a motion "is not to resolve disputed questions of fact but only to determine whether, as to any material issue, a genuine factual dispute exists." *Id.* In making this determination, the trial court must resolve all ambiguities and draw all inferences in favor of the party against whom summary judgment is sought. *See Loeffler v. Staten Island Univ. Hosp.* 582 F.3d 268, 274 (2d Cir. 2009).

"[T]he moving party bears the burden of showing that he or she is entitled to summary judgment." *United Transp. Union v. Nat'l R.R. Passenger Corp.,* 588 F.3d 805, 809 (2d Cir. 2009). Once the moving party has satisfied that burden, in order to defeat the motion, "the party opposing summary judgment . . . must set forth 'specific facts' demonstrating that there is 'a genuine issue for trial.'" *Wright v. Goord,* 554 F.3d 255, 266 (2d Cir. 2009) (quoting Fed. R. Civ. P. 56(e)). In determining whether a triable issue of fact exists, the court may only rely on admissible evidence. *See ABB Indus. Sys., Inc. v. Prime Tech., Inc.,*

120 F.3d 351, 357 (2d Cir. 1997). Where the opposing party relies on affidavits or declarations, the affidavit or declaration "must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on matters stated." Fed. R. Civ. Pro. 56(c)(4). "A dispute about a 'genuine issue' exists for summary judgment purposes where the evidence is such that a reasonable jury could decide in the non-movant's favor." *Beyer v. County of Nassau,* 524 F.3d 160, 163 (2d Cir. 2008) (quoting *Guilbert v. Gardner,* 480 F.3d 140, 145 (2d Cir. 2007)); *see also Havey v. Homebound Mortg., Inc.,* 547 F.3d 158, 163 (2d Cir. 2008) (citing *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 252 (1986)) (stating that a non-moving party must point to more than a mere "scintilla" of evidence in order to defeat a motion for summary judgment).

IV. DISCUSSION

A. Substantial Burden (Counts One, Six, and Twelve)

1. Constitutional and Statutory Principles

The Free Exercise Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. Const. Amdt. 1. Religious exercise not only includes the exercise of religious beliefs, but "the performance of (or abstention from) physical acts" pertaining to religion as well. *See Emp't Div. Dep't of Human Res. v. Smith,*

494 U.S. 872, 877 (1990). Where the object of a law is to restrict particular practices because of their religious motivation, the law is subject to strict scrutiny and, therefore, must be justified by a compelling government interest and narrowly tailored to advance that interest. *See Church of the Lukumi Babalu Aye v. Hialeah,* 508 U.S. 520, 533 (1993). Where the law is neutral and of general applicability, however, the law does not need to be justified by a compelling government interest, even if the effect of the law is to incidentally burden a particular religion or religious practice. *See id.* at 531; *Westchester Day Sch. v. Vill. of Mamaroneck,* 504 F.3d 338, 350 (2d Cir. 2007) ("This reasoning helps to explain why courts confronting free exercise challenges to zoning restrictions rarely find the substantial burden test satisfied even when the resulting effect is to completely prohibit a religious congregation from building a church on its own land.").

Pursuant to the Religious Land Use and Institutionalized Persons Act (hereafter "RLUIPA"), "[n]o government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution," unless the government demonstrates that the regulation furthers a compelling interest and is the least restrictive means of furthering that interest. *See* 42 U.S.C. § 2000cc(a)(1). Religious exercise is defined broadly to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."

42 U.S.C. § 2000cc-5(7)(A).[7] It is clear, however, that not every project undertaken by a religious group constitutes religious exercise. *See, e.g., Westchester Day Sch.,* 504 F.3d at 347 ("For example, if a religious school wishes to build a gymnasium to be used exclusively for sporting activities, that kind of expansion would not constitute religious exercise. Or, had the ZBA denied the Westchester Religious Institute's 1986 request for a special permit to construct a headmaster's residence on a portion of the property, such a denial would not have implicated religious exercise."); *Living Water Church of God v. Charter Twp. of Meridian,* 258 Fed. Appx. 729, 741 (6th Cir. 2007) ("We find no substantial burden because Living Water has failed to demonstrate that, without the [permit] that the Township has refused to approve, it cannot carry out its church missions and ministries. Instead, Living Water has demonstrated only that it cannot operate its church on the *scale* it desires.") (emphasis in original). Furthermore, generally applicable burdens – imposed neutrally – are not "substantial." *See Westchester Day Sch.* at 350 (quoting *Jimmy Swaggart Ministries v. Bd. of Equalization,* 493 U.S. 378, 389-91 (1990)). Finally, where the denial of a religious organization's application to build is not absolute and, instead invites an amended application, it is less

[7] Here, most if not all of the activities planned for the building are "religious exercise," inter alia, the sanctuary, kosher kitchens, and seven religious education classrooms.

likely to constitute a substantial burden. *See id.* at 349.

Courts look to the Supreme Court's free exercise jurisprudence in analyzing whether a substantial burden exists. *See id.* at 348. Consequently, the substantial burden analysis under RLUIPA tracks the analysis under the Free Exercise Clause. *See id.*; *Living Water Church of God,* 258 Fed. Appx. at 733 (noting that RLUIPA's legislative history indicates that the "term 'substantial burden' as used in this Act is not intended to be given any broader interpretation than the Supreme Court's articulation of the concept of substantial burden or religious exercise.") (internal quotations and citations omitted). As such, the court will consider these claims together.

In considering whether a statute is neutral and generally applicable, a court first looks to the language of the statute, to determine whether the statute is facially neutral as to religion. *See Ungar v. New York City Hous. Auth.,* 363 Fed. Appx. 53, 56 (2d Cir. 2010). Where the statute contains particular exceptions, the court considers whether the exceptions apply to specific categories, or whether they are made on an ad hoc basis. *See id.* The fact that a law contains particular exceptions does not cause the law not to be generally applicable, so long as the exceptions are broad, objective categories, and not based on religious animus. *See id.*; *Grace United Methodist v. City of Cheyenne,* 451 F.3d 643, 651 (10th Cir. 2006) (noting that "although zoning laws may permit some individualized assessment for variances, they are

generally applicable if they are motivated by secular purposes and impact equally all land owners in the city seeking variances.").

2. Parties' Positions

Borough defendants argue that Chabad cannot demonstrate that the HDC's decision imposes a substantial burden on the practice of their religion. *See Defs.' Mem. in Support* at 22 (hereafter "Borough Defs.' Mem."). In support of this position, Borough defendants first argue that the laws and regulations applied by the HDC are neutral, and consequently, cannot constitute a substantial burden on Chabad's religious exercise as a matter of law. *See id.* at 20. Next, the Borough defendants argue that the size of Chabad's proposed renovation is unnecessary given the size of Chabad's congregation. *See id.* at 24. In addition, Borough defendants argue that large portions of the proposed renovation "would be devoted to secular purposes," including the Rabbi's residential quarters and a swimming pool in the basement. *See id.* at 27.

In response, Chabad asserts that the HDC's decision was arbitrary and illegal because the HDC improperly considered the proposed square footage of Chabad's proposed renovation. *See Pl.'s Mem. Resp. Borough Defs.* at 35. Further, Chabad contends that the current needs of its congregation are not being met, and that every aspect of the renovation "reflects the spiritual and physical needs to further Plaintiff's

mission." *See id.* at 41-43. Chabad states that even the residential areas of the proposed renovation will be dedicated "to serve the religious needs of Plaintiff's participants and the Rabbi's family." *Id.* at 14-15. Chabad finally argues that the statutory scheme requiring a certificate of appropriateness is an individualized assessment because it "involves the application of discretionary standards" and, consequently, the court must apply strict scrutiny to the scheme. *See Pl.'s Mot. Partial Summ. J.* at 9-11. Chabad relies on *Sherbert v. Verner,* 374 U.S. 398 (1963), and its progeny for the proposition that "laws burdening religious exercise that have 'eligibility criteria [that] invite consideration of the particular circumstances' and lend themselves 'to individualized governmental assessment of the reasons for the relevant conduct,' are subject to heightened scrutiny."[8] *Id.* at 11.

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[8] With regard to *Sherbert,* the Supreme Court has clarified that, "[e]ven if we were inclined to breathe into *Sherbert* some life beyond the unemployment compensation field, we would not apply it to require exemptions from a generally applicable . . . law." *See Empl. Div. Dep't of Human Res. v. Smith,* 494 U.S. 872, 884 (1990). Further, most courts that have considered this issue have found that the mere existence of discretionary standards or categorical exemptions does not "amount to a system of individualized exemptions triggering strict scrutiny." *See Grace United Methodist v. City of Cheyenne,* 451 F.3d 643, 653 (10th Cir. 2006); *Lighthouse Inst. for Evangelism v. Long Branch,* 510 F.3d 253, 276 (3rd Cir. 2007); *but see Fortress Bible Church v. Feiner,* 734 F. Supp. 2d 409, 498-99 (S.D.N.Y. 2010) (finding a zoning application process to be an individual assessment where the Town had no "mechanistic assessments in place for evaluating the Church's application," relied on subjective opinions of the

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3. Connecticut Statutory Scheme: Historic District Commission

Where a town, such as the Borough of Litchfield, has established a historic district, section 7-147d(a) of the Connecticut General Statutes specifies that "[n]o building or structure shall be erected or altered within an historic district until after an application for a certificate of appropriateness as to exterior architectural features has been submitted to the historic district commission and approved by said commission." Section 7-147k(b), however, provides an exception to this general rule, in that the "provisions of this part shall not apply to any property owned by a nonprofit institution of higher education, for as long as a nonprofit institution of higher education owns such a property." Plaintiff contends that this exception facially differentiates between religious and nonreligious assemblies or institutions. *See Pl.'s Mem. Supp. Mot. Partial Summ. J.* at 21. Defendants respond that the exception applies equally to religious, nonprofit institutions of higher education and to secular non-profit institutions of higher learning.

The language of section 7-147d clearly makes no reference to any religious practice or particular religion. As a result, section 7-147d is facially neutral. *See Ungar,* 363 Fed. Appx. at 56. Though section 7-147k(b) excepts non-profit institutions of higher

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Town Board's members, and treated the Church differently than other applicants).

education from the requirement of obtaining a certificate of appropriateness, the statutory language does not indicate that the exception would benefit a secular nonprofit institution of higher education, but not a religious non-profit institution. That is, nothing in the statute indicates that a religious, non-profit institution of higher education could not take advantage of the exception in the same way a secular institution could.

At oral argument, Chabad argued that the statutory scheme is facially discriminatory because a religious group, such as Chabad, is required to obtain a certificate of appropriateness, but a secular, nonprofit institution of higher education would not have to comply with the same requirement. As a result, Chabad argues, Chabad's use of the property may be prohibited if they are unable to obtain a certificate of appropriateness, but if the University of Connecticut were to buy the same land and propose to build a law school exactly like Chabad's proposed structure, it would be exempt from the requirement of obtaining a certificate of appropriateness.

This comparison, however, misses the fact that a secular, non-educational organization that bought the same land would likewise be required to obtain a certificate of appropriateness, while a religious, nonprofit institution of higher learning would also be exempt from that same requirement. Put another way, as a non-profit institution, if Chabad had proposed to place a higher education yeshiva in the proposed facility, instead of a synagogue, it would have

been exempt from section 7-147d. That is, both the general scheme and the exemption apply equally to religious and secular groups alike. As a result, the statutory exception is neutral and generally applicable because the exception is granted to any organization, religious or secular, that meets the defined category. *See Ungar,* 363 Fed. Appx. at 56 ("In the present case, [the scheme] is facially neutral, making no reference to religious practice."); *see also Konikov v. Orange Cnty.,* 410 F.3d 1317, 1326 (11th Cir. 2005) (holding that a law that "treats religious and nonreligious organizations differently offends the principles of the Free Exercise Clause because it is not neutral or generally applicable."). As a result, the statutory scheme is neutral and generally applicable.

Consequently, as a matter of law, Chabad cannot establish a substantial burden on the free exercise of its religion, because the statutory scheme Chabad challenges is neutral and of general applicability, and not imposed arbitrarily, capriciously, or unlawfully.[9]

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[9] Chabad's argument that the HDC acted arbitrarily and capriciously in considering the square footage of Chabad's proposal does not warrant a different conclusion. Section 7-147f clearly states that the HDC may consider "scale [of the proposal] . . . and the relationship thereof to the exterior architectural style and pertinent features of other buildings and structures in the immediate neighborhood." Consequently, the HDC's consideration of the proposal's square footage, as part of its consideration of the scale of the proposal, did not render its decision arbitrary, capricious, or unlawful. Further, there is nothing in the record to indicate that it is not the HDC's normal procedure to consider the square footage – as a measure of "scale" – of a

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See Jimmy Swaggart Ministries v. Bd. of Equalization, 493 U.S. 378, 392 (1990) ("[T]he collection and payment of the generally applicable tax . . . imposes no constitutionally significant burden on appellant's religious practices or beliefs."); *Westchester Day School v. Vill. of Mamaroneck,* 504 F.3d 338, 350 (2d Cir. 2007) (collecting cases). As a result, defendants are entitled to summary judgment with regard to their substantial burden claim in Count Six.[10]

With regard to Count Twelve, the Connecticut Supreme Court has determined that, "as applied in the land use context, § 52-571b is no broader than RLUIPA." *See Cambodian Buddhist Soc. of Connecticut v. Planning and Zoning Comm'n of the Town of Newtown,* 285 Conn. 381, 422 (2008). Therefore, defendants are entitled to summary judgment with regard to Count Twelve as well.

As Chabad cannot prove a substantial burden, even if the statute has the effect of incidentally burdening Chabad's religious exercise, the statute is

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proposed project. However, it is not clear from the record that Chabad's proposed addition must necessarily be less than or equal to the square footage of the current property in order to be an appropriate "scale", especially given the downward slope of the property and Chabad's proposed underground level. As that issue is not before the court, however, the court will not address it here.

[10] In addition, the court notes that the HDC's decision was not final, but instead invited Chabad to resubmit its application. *See Westchester Day School,* 504 F.3d at 349. *See also Borough Defs.' Mem.,* Ex. K at 8-9.

constitutional so long as it satisfies rational basis review. *See Church of the Lukumi Babalu Aye v. Hialeah,* 508 U.S. 520, 531 (1993); *Ungar v. New York City Hous. Auth.,* 363 Fed. Appx. 53, 56 (2d Cir. 2010). Under rational basis review, the statute "must be reasonable and not arbitrary, and it must bear 'a rational relationship to a [permissible] state objective.'" *See Lighthouse Inst. for Evangelism,* 510 F.3d at 277 (quoting *Belle Terre v. Boraas,* 416 U.S. 1, 8 (1974)).

The preservation of aesthetic values is recognized as a legitimate government interest. *See Lusk v. Vill. of Cold Spring,* 475 F.3d 480, 491 (2d Cir. 2007). The statute's requirement that anyone proposing to build in a historic district obtain a certificate of appropriateness is rationally related to this interest. Consequently, the statute survives rational basis review, and defendants are entitled to summary judgment as to the Free Exercise claim (Count One).

B. Valid Comparators (Counts Four, Seven, and Eight)

1. Equal Terms (Count Eight)

RLUIPA further prohibits a government from treating a religious institution on "less than equal terms with a nonreligious assembly or institution." *See* 42 U.S.C. § 2000cc(b)(1). To determine "whether a municipality has treated a religious entity on 'less than equal terms'," courts look to "a comparison between that religious entity and a secular one." *Third Church of Christ v. City of New York,* 626 F.3d 667,

669 (2d Cir. 2010). Although other Courts of Appeal have considered what constitutes a valid comparator under RLUIPA's Equal Terms provision, the Second Circuit has not specifically addressed the issue of how to select an appropriate secular comparator. *See id.* at 669-70 ("The differences in the mechanism for selecting an appropriate secular comparator . . . need not concern us today. . . . [I]t suffices for our present purposes that the district court concluded the Church's and the hotels' catering activities were similarly situated with regard to their legality under New York City law. And so they are."). It is clear that the main inquiry under this section, however, is "whether, in practical terms, secular and religious institutions are treated equally." *See id.* at 671.

Under RLUIPA, the plaintiff bears the initial burden of coming forward with *prima facie* evidence of a violation. *See* 42 U.S.C. § 2000cc-2(b); *Primera Iglesia Bautista Hispana v. Broward Cnty.,* 450 F.3d 1295, 1308 (11th Cir. 2006). If the plaintiff fails to offer *prima facie* evidence of a similarly situated comparator, "then there can be no cognizable evidence of less than equal treatment, and the plaintiff has failed to meet its initial burden of proof." *See Primera Iglesia Bautista Hispana,* 450 F.3d at 1311.

Borough defendants argue that Chabad cannot point to a valid comparator within the historic district that was treated differently than Chabad. See *Borough Defs.' Mem.* at 29. Chabad points to three secular entities, which it argues are similarly situated to Chabad and were treated differently than Chabad:

the Wolcott Library, the Rose Haven Home, and the Cramer and Anderson law firm building. *See Pl.'s Mem. Resp. Borough Defs.* at 24-26, 46-47. Chabad contends that each of these entities was permitted to build additions that "changed the appearance from a residence to an institutional property" and were "very large in comparison to the original structure." *See id.* 25-26. Chabad contends that, because the HDC's decision focused on the "residential character" of the Deming House and specified that it would only approve an addition that was no larger than the original structure, Chabad was treated on less than equal terms with these secular entities. *See id.* at 23-24, 33.

First, Chabad points to the Wolcott Library as an example of a secular entity that "was allowed to make modifications that caused it to lose its 'residential' character." *See Pl.'s Mem. Resp. Borough Defs.* at 24. Chabad notes that, in 1965, "a substantial addition to the residence changed the appearance from a residence to an institutional property," and that the "addition was substantially larger than the original structure." *Id.* at 25. In addition, Chabad asserts that the library addition includes industrial features that contribute to an "overall modern appearance." *See id.* While the parties contest various attributes of the library's addition, it is uncontested that the original building was built as a residence and that the addition is larger than the original structure. *See Nelson Aff.,* Exs. 1, 11.

Borough defendants respond that the library is not an appropriate comparator because the 1965

addition Chabad references was not approved by the HDC, as the HDC was not established until 1989. *See Borough Defs.' Mem.* at 30. Instead, the addition was approved by the Board of Warden and Burgesses, pursuant to "An Act Establishing the Old and Historic Litchfield District," in which the Board was specifically prohibited from considering the size and scale of buildings. *See id.*; Ex. D, Attachment 2, Section 7.

The Second Circuit has asserted that "organizations subject to different land-use *regimes* may well not be sufficiently similar to support a discriminatory-enforcement challenge." *See Third Church of Christ,* 626 F.3d at 671 (emphasis in original). Here, the Wolcott Library is not a valid comparator because the library's addition was approved under a significantly different regime. The regime under which the library addition was approved specifically prohibited the Board of Warden and Burgesses from considering relative size. *See Borough Defs.' Mem.,* Ex. D, Attachment 2, Section 7 ("[T]he warden and burgesses shall not consider . . . relative size of buildings. . . ."). In contrast, section 7-147f specifically directs the HDC to consider, *inter alia,* relative scale. Consequently, the Wolcott Library is not sufficiently similar to act as a valid comparator for Chabad's Equal Terms claim.

Next, Chabad argues that the Rose Haven Home is a valid comparator. Chabad asserts that, similar to Chabad's property, the Rose Haven Home was once a residence, but that "[a] substantial addition . . . changed the appearance from a residence to an institutional property," and that "[t]he addition was

substantially larger than the original structure." In support of these assertions, Chabad cites to an affidavit from one of Chabad's attorneys. *See Pl.'s Mem. Resp. Borough Defs.* at 25; Ex. C (hereafter "Bearns Aff."). In response, Borough defendants assert that there is no public record of the HDC permitting an addition onto the Rose Haven Home, although it concedes that it appears from the assessor's card that "at some point there was a small addition added to the main house." *See Borough Defs.' Mem.* at 30; Ex. L at 6-9.

In opposing a motion for summary judgment, a party must produce evidence sufficient to raise a material issue of fact. *See Clayborne v. OCE Bus. Servs.,* 381 Fed. Appx. 32, 34 (2d Cir. 2010). It is well established that "[m]ere conclusory allegations or denials . . . are not evidence and cannot by themselves create a genuine issue of material fact where none would otherwise exist." *See id.* (quoting *Fletcher v. Atex, Inc.,* 68 F.3d 1451, 1456 (2d Cir. 1995)). Chabad's assertions regarding the Rose Haven Home rest entirely on the Bearns affidavit. *See Pl.'s Mem. Resp. Borough Defs.* at 25, 47. The Bearns affidavit, however, merely makes conclusory assertions "based upon [her] research and review of the official records," without providing the court with any of this research or the official records. *See Bearns Aff.* at ¶ 3. For instance, Bearns baldly asserts that "[a] substantial addition to [the Rose Haven Home] changed the appearance from a residence to an institutional property, [t]he addition was very large in comparison to the original

structure, [and the] addition was substantially larger than the original structure." *See id.* at ¶ 5. Neither Bearns, nor Chabad, however, provides the court with any admissible evidence or documentation to substantiate these assertions. The affidavit is hearsay, and without the records, there is no basis for these statements. *See* Fed. R. Civ. Pro. 56(c)(4).

In reviewing the entire record, the court found two pictures of the Rose Haven Home, in the property assessor's cards provided by the Borough Defendants. *See Borough Defs.' Mem.,* Ex. L at 7, 9. These pictures, and the assessor's cards, however, are insufficient for the court to determine that Chabad has come forward with sufficient evidence to create a material issue of fact as to whether it can meet its *prima facie* burden of demonstrating that the Rose Haven Home is a valid comparator for Chabad. First, Chabad has failed to explain why there appear to be two assessor's cards for the Rose Haven Home. *See id.* If the court were to speculate, it appears that two freestanding structures exist; however, if this speculation is wrong, Chabad has not offered any explanation as to how to interpret the relationship between the two cards or structures. As such, on the basis of this evidence, a jury would also be left to speculate as to the relationship between these two pictures. In addition, the cards appear to indicate that the "effective date" is 1985, which would presumably mean that any renovation to the Rose Haven Home occurred under a different land use regime than that which is in currently in place. *See id.* In sum, Chabad

has failed to come forward with any admissible evidence which would allow the court to determine that Chabad can meet its *prima facie* burden of demonstrating to the jury that the Rose Haven Home is a valid comparator. Without any competent evidence to support Bearns's assertions that "the addition was substantially larger than the original structure" – and without any evidence as to when any changes to Rose Haven occurred, or that they occurred under the current land use regime and with the HDC's approval – these assertions alone are insufficient to raise a material issue of fact with regard to the Rose Haven Home as a valid comparator.

Finally, Chabad points to the Cramer and Anderson building as a valid comparator, asserting that this building was also previously used as a residence. *See Pl.'s Mem. Resp. Borough Defs.* at 25-26. Once again, Chabad baldly asserts that, "[a] substantial addition to the residence changed the appearance from a residence to an institutional property, [t]he addition was very large in comparison to the original structure, [and the] addition was substantially larger than the original structure." *See id.* at 25-26, 47. Again, Chabad solely relies on the Bearns affidavit in support of these assertions. *See id.* And again, the Bearns affidavit merely states conclusory assertions, without any supporting evidence. *See* Bearns Aff. at ¶ 6. For the same reasons as stated above, these conclusory statements are insufficient to raise a material issue of fact on the record before the court with regard to

whether the Cramer and Anderson building is similarly situated to Chabad.

In addition, even if Chabad had met its burden of demonstrating that Cramer and Anderson was a valid comparator,[11] it does not appear that the HDC treated Chabad differently than Cramer and Anderson. In fact, the HDC specifically used the Cramer and Anderson building as a comparator property in its decision,[12] and stated that it "agreed with [Chabad] that the addition to the Cramer and Anderson building is appropriate in terms of size and scale." *See Borough Defs.' Mem.,* Ex. K at 8. As a result, the HDC stated that it "would approve an addition equal in square footage to the Deming house," in recognition that the addition to the Cramer and Anderson building was approximately the size of the original structure. *See id.* While Chabad appears to contest the assertion that the Cramer and Anderson addition was approximately the size of the original structure, it has failed to raise a material issue of fact in support of that assertion, by relying on the Bearns affidavit only.

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[11] At oral argument, the parties appeared to agree that the Cramer and Anderson building was an appropriate comparator property. *See* Tr. at 38-39, 63.

[12] The HDC decision notes that Chabad's attorney "requested that the Commission consider that [the Cramer and Anderson] addition to the house was equal in size to the original structure and was permitted by an earlier Commission in 1985." *Borough Defs.' Mem.,* Ex. K at 8.

As Chabad fails to point to a secular property in the historic district that was treated more favorably than Chabad, it has failed to come forward with evidence upon which a jury could find it met its burden of producing *prima facie* evidence of a valid comparator property. Consequently, summary judgment in favor of the defendants is granted with regard to the equal terms claim in Count Eight. *See Primera Iglesia Bautista Hispana,* 450 F.3d at 1313-14.

2. Nondiscrimination (Count Seven)

RLUIPA further prohibits a government from imposing or implementing "a land use regulation that discriminates against any assembly or institution on the basis of religion or religious denomination." *See* 42 U.S.C. § 2000cc(b)(2) To determine whether a government has discriminated against a religious institution on the basis of religion, courts look to whether the government has applied a land use provision to one religion differently than it has applied the provision to another. *See, e.g., Church of Scientology of Georgia, Inc. v. City of Sandy Springs, Georgia,* 2011 WL 4793144, at *23 (N.D. Ga Sept. 30, 2011); *Adhi Parasakthi Charitable v. Twp. of W. Pikeland,* 721 F. Supp. 2d 361, 385 (E.D.Pa. 2010). Again, plaintiff bears the initial burden of coming forward with *prima facie* evidence to support its claim under the nondiscrimination portion of RLUIPA. *See* 42 U.S.C. § 2000cc-2(b); *Church of Scientology of Georgia,* 2011 WL 4793144, at *23.

Defendants argue that Chabad cannot point to a religious entity within the historic district that the HDC treated more favorably than Chabad because none of the churches within the historic district, nor any other entity, has ever been permitted "to place an addition on a historic residential structure larger than the original structure." *See Borough Defs.' Mem.* at 31-32. In response, Chabad points to four Christian churches located within the historic district. *See Pl.'s Mem. Resp. Borough Defs.* at 26-32. Chabad contends that three of these churches "are substantially larger in visual mass" than Chabad's proposed building, and that the fourth church is "almost identical in visual mass as that called for in [Chabad's] Application." *Id.* at 26.

Chabad first points to the Congregational Church and asserts that, in 1966,[13] the HDC permitted the Congregational Church "to expand to a size larger than the square footage requested in [Chabad's] Application," and that, currently, the church has a "total comparative scale of 41,354 square feet."[14] *See Pl.'s*

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[13] As already discussed, the current HDC regime was established in 1989. *See Borough Defs.'* Mem., Ex. D.

[14] Again, Chabad relies on the Bearns affidavit for many assertions regarding the various churches. *See Pl.'s Mem. Resp. Borough Defs.* at 26-32. However, Chabad also produced assessor's cards for the churches. On the basis of the assessor's card, however, it does not appear that the Congregational Church is actually 41,354 square feet, but that the actual size of the Church building is 14,370 square feet, and Chabad has calculated its "comparative scale" assertion by adding the square footages of the main church building, meeting house, parsonage, plus two

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Mem. Resp. Borough Defs. at 27; Nelson Aff., Ex. 16. In addition, the Congregational Church has capacity to hold four hundred people, though its average weekly attendance is one hundred seventy-five people. *See Pl.'s Mem. Resp. Borough Defs.* at 28 (citing Nelson Aff., Ex. 17, Hauer depo.).

Next, Chabad asserts that the United Methodist Church is "almost identical in mass (visual size) than [sic] that called for in [Chabad's] Application." *See id.* at 28. Further, Chabad states that the United Methodist Church has seating capacity for three hundred people, though its weekly attendance is only twenty-eight to thirty people. *Id.* at 29. Finally, Chabad contends that the HDC allowed the Methodist Church to apply vinyl siding to three sides of its building "to help the United Methodist Church save money" in the mid-1980s, even though no other buildings in the historic district have vinyl siding. *See id.* at 39-30.

Next, Chabad points to St. Michael's Parish, an Episcopal parish, which Chabad contends is substantially larger in visual size than Chabad's proposed addition, with a total square footage of 16,330.[15] *See*

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additional floors within the church building (in the vaulted space) that do not actually exist, but would exist if the Congregational Church had built two extra floors, using Chabad's "stacking" method. *See Pl.'s Mem. Resp. Borough* Defs. at 27; Nelson Aff., Exs. 15-16.

[15] Chabad's proposed addition totals approximately 18,000 square feet, for a total proposed area of 21,011 square feet. *See* Nelson Aff., Ex. 15.

id. at 30. In addition, Chabad asserts that the Parish has seating capacity for four hundred people and is usually at capacity on Saturday and Sunday services, though only at half capacity for services that fall during the week. *See id.* at 31.

Finally, Chabad points to St. Anthony of Padua, a Roman Catholic Church in the historic district, which Chabad asserts is substantially larger in visual size than Chabad's proposal. *See id.* at 31. Chabad states that the square footage of the main building is similar to the design in Chabad's application. *See id.* at 31-32.

Demonstrating that two entities are similarly situated generally requires some specificity. *See Racine Charter One v. Racine Unified Sch. Dist.,* 424 F.3d 677, 680 (7th Cir. 2005) (holding that "comparators must be *prima facie* identical in all relevant respects"); *Church of Scientology of Georgia, Inc. v. City of Sandy Springs,* 2011 WL 4793144, at *25 (N.D.Ga. Sept. 30, 2011) ("In the zoning context, a showing that two projects were similarly situated requires some specificity."). While it is clear that each of the churches within the historic district is larger than the Deming House, and that several of the churches may be larger than the Deming House even with Chabad's proposed addition, the churches differ from Chabad in significant aspects. Each of the churches in the historic district was initially built as a church (notably before 1989) and was not remodeled into a church from an existing residential home. Further, the churches were originally built to sizes essentially the same

as their current sizes. The HDC did not authorize their construction or scale. Had Chabad purchased a building within the historic district of the size of the churches (or even half) and sought to build an addition, Chabad might be closer to supporting its argument that one or more of these churches is a valid comparator. Instead, however, Chabad purchased a relatively small building that was historically residential. These differences are significant, because the two types of buildings are inherently dissimilar. It cannot be said that the church buildings, which were originally erected specifically as places of worship and designed accordingly, are "identical in all relevant respects" to a two story, stick-style Victorian residential home, even if it has lost many of its original features in conversion to commercial use. *See Racine Charter One,* 424 F.3d at 680. In addition, it does not appear that any of the houses of worship to which Chabad points have made any additions since the current HDC regime was implemented.[16] For each of

[16] Chabad asserts that the HDC granted a Certificate of Appropriateness to the United Methodist Church to apply vinyl siding "[i]n the mid-eighties." *See Pl.'s Mem. Resp. Borough Defs.* at 29. As discussed above, the current HDC regime was implemented in 1989.

Though Chabad does not raise this argument, the court notes that some of the houses of worship have undertaken construction in recent history, though on the record before the court, none since 1989. Such additions have included structures such as garages, or single story structures, and each addition was substantially smaller than both Chabad's proposed addition, and the size of the house of worship. *See Borough Defs.' Mem.,* Ex. L. Consequently, none of these additions are *prima facie* identical

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these reasons, the churches are not similarly situated entities. As a result, Chabad fails to raise a material issue of fact to support its claim that other religious entities were treated more favorably, and summary judgment is appropriate with regard to the claim of nondiscrimination in Count Seven.

3. Equal Protection (Count Four)

In order to prevail on its equal protection claim, Chabad must show (1) that it was treated differently from other similarly situated entities and (2) that this differential treatment was "based on impermissible considerations, such as . . . religion, intent to inhibit or punish the exercise of constitutional rights, or malicious or bad faith intent to injure a person." *See Cine SK8, Inc. v. Town of Henrietta,* 507 F.3d 778, 790 (2d Cir. 2007).

As discussed above with regard to Chabad's Equal Terms and Nondiscrimination claims, Chabad has failed to come forward with evidence to support its *prima facie* burden to point to any entities, secular or religious, that were similarly situated but treated differently. Consequently, Chabad fails to raise a material issue of fact with regard to its equal protection claim, and summary judgment is appropriate as a matter of law with regard to Count Four.

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in all relevant respects, *see Racine One,* 424 F.3d at 680, and none raise a material issue of fact to support Chabad's claim.

C. Claims Pursuant to 42 U.S.C. § 1983 (Counts Two, Three, and Five)

Borough defendants assert that they are not liable under section 1983 because Chabad does not point to any policy or custom that led to the violation of Chabad's constitutional rights. *See Borough Defs.' Mem.* at 33-34. The law is clear, however, that a plaintiff may hold a municipality liable for a single decision by a municipal policymaker so long as the plaintiff demonstrates that the defendant had final policymaking power. *See Roe v. City of Waterbury,* 542 F.3d 31, 37 (2d Cir. 2008). An official has final authority if the official's decisions constitute the municipality's final decision. *See id.* at 38. Courts look to state law to determine, as a matter of law, whether an official, or group of officials, has final policymaking authority with respect to the challenged conduct. *See City of St. Louis v. Praprotnik,* 485 U.S. 112, 123 (1988).

Pursuant to Conn. Gen. Stat. §§ 7-147b and 7-147c, the legislative body of a municipality may take steps to establish a historic district commission and, once established, the historic district commission may adopt regulations with regard to the historic district in order to provide guidance to property owners seeking a certificate of appropriateness. Further, no building may be erected or altered within the historic district "until after an application for a certificate of appropriateness as to exterior architectural features has been submitted to the historic district

commission and approved by said commission." Conn. Gen. Stat. § 7-147d.

The Litchfield HDC clearly had final policymaking authority with regard to the decision of whether or not to approve Chabad's certificate of appropriateness. Notably, the Borough defendants fail to address this aspect of Chabad's argument. Accordingly, Chabad may assert its section 1983 claims against the HDC and the Borough of Litchfield.

Borough defendants also argue that Chabad lacks standing to assert a First Amendment claim.[17] *See Borough Defs.' Mem.* at 37-38. It is well-established that standing under Article III requires the plaintiff to show that "(i) [the plaintiff] personally has suffered some actual or threatened injury as a result of defendants' putatively illegal conduct; (ii) the injury is fairly traceable to the challenged action; and (iii) the injury is likely to be redressed by a favorable decision." *See Jackson-Bey v. Hanslmaier,* 115 F.3d 1091, 1095 (2d Cir. 1997). Chabad asserts that its members' ability to fully practice their religion has been injured by the HDC's denial of its application. *See Pl.'s Mem. Resp. Borough Defs.* at 13-16. A decision in Chabad's favor – that the HDC violated its rights in denying its application – would redress this injury, in that

[17] It is unclear from the Borough defendants' brief whether they challenge Chabad's standing for all of its First Amendment claims, or just for its Free Speech claim. However, for the purposes of the court's analysis, this lack of clarity is irrelevant.

Chabad would be free to build the structure it claims is necessary for its religious exercise. Therefore, Chabad has standing to assert its First Amendment claim.

1. Freedom of Speech (Count Two)

First Amendment jurisprudence draws a distinction between laws and regulations that are content based and those that are content neutral. *See Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n,* 512 U.S. 622, 642-43 (1994). Generally, laws that, "by their terms distinguish favored speech from disfavored speech on the basis of the ideas or views expressed[,] are content based." *See id.* at 643. Such content based laws require "the most exacting scrutiny." *See id.* at 642. In contrast, laws that "confer benefits or impose burdens on speech without reference to the ideas or views expressed" are generally content neutral. *See id.* at 643.

A content neutral law or regulation will be sustained if it meets intermediate scrutiny, in that it "furthers an important or substantial governmental interest," and "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *See id.* at 662 (quoting *United States v. O'Brien,* 391 U.S. 367, 3772 (1968)). The narrow tailoring requirement is met if the law or regulation does not "burden substantially more speech than is necessary to further the government's legitimate interests." *Id.* (quoting

Ward v. Rock Against Racism, 491 U.S. 781, 799 (1989)).

The statutory scheme requiring Chabad to obtain a certificate of appropriateness prior to building within the historic district does not, by its terms, distinguish favored speech from disfavored speech. As discussed above, section 7-147d of the Connecticut General Statutes requires any person, or entity, building or altering a structure in the historic district to obtain a certificate of appropriateness, subject only to one limited, generally applicable exception for non-profit institutions of higher learning. In addition, section 7-147f(b) specifically provides that the HDC "shall not consider interior arrangement or use" when determining whether to approve a certificate of appropriateness. Consequently, the statutory scheme at issue here is content neutral, and subject to intermediate scrutiny. *See Turner Broad. Sys., Inc.,* 512 U.S. at 662.

As discussed above, *see supra* Section IV.A.3, it is well established that the preservation of aesthetic values is a legitimate government interest. *See Lusk v. Vill. of Cold Spring,* 475 F.3d 480, 491 (2d Cir. 2007). The parties agree that the appropriate analysis for Chabad's free speech claim mirrors the substantial burden analysis previously undertaken with regard to Chabad's RLUIPA claim and claim

pursuant to the Free Exercise Clause.[18] *See Borough Defs.' Mem.* at 20, 39; *Pl.'s Mem. Resp. Borough Defs.* at 54. For the same reasons as stated above, *see supra* Section IV.A.3, Chabad does not raise a material issue of fact in support of its position, and the court finds as a matter of law that Chabad does not demonstrate a substantial burden. Consequently, defendants are entitled to summary judgment as to Count Two.

2. Freedom of Association

Defendants assert that they are entitled to summary judgment as to Chabad's Freedom of Association claim because the laws and regulations enforced by the HDC are content neutral and survive intermediate scrutiny. *See Borough Defs.' Mem.* at 42-44. Chabad does not appear to contest that the laws are in fact facially neutral, yet contends that, as applied, the laws and regulations allow the HDC "excessive discretion" and, as a result, the HDC's denial of Chabad's application was arbitrary and capricious. *See Pl.'s Mem. Resp. Borough Defs.* at 54-56.

A law or regulation that vests excessive discretion in a decision maker – such that the law is applied arbitrarily – may violate the First Amendment.

[18] Other courts that have addressed free speech rights in the context of zoning laws have applied a "time, place, and manner" analysis. *See San Jose Christian Coll. v. City of Morgan Hill,* 360 F.3d 1024, 1032 (9th Cir. 2004); *Easlick v. City of Lansing,* 875 F.2d 863 (6th Cir. 1989). As neither party raised this argument, the court will not address it.

See Lusk v. Vill. of Cold Spring, 475 F.3d 480, 494 (2d Cir. 2007). Courts must ask whether the provision in question vests "unbridled discretion in a government official over whether to permit or deny expressive activity." *See id.* Although regulations regarding aesthetic standards may apply subjective criteria, where such subjective criteria are sufficiently tied to objective aesthetic standards, the law will not violate the First Amendment. *See id.* at 495.

Section 7-147f of the Connecticut General Statutes instructs that the HDC "shall consider, in addition to other pertinent factors, the type and style of exterior windows, doors, light fixtures, signs, aboveground utility structures, mechanical appurtenances and the type and texture of building materials," as well as "the historical and architectural value and significance, architectural style, scale, general design, arrangement, texture and material of the architectural features involved and the relationship thereof to the exterior architectural style and pertinent features of other buildings and structures in the immediate neighborhood." Though some of these criteria are subjective, they are sufficiently tied to objective aesthetic standards to provide necessary guidance to the HDC such that the Commission is not vested with unbridled discretion.[19] *See Lusk,* 475 F.3d at 494-95

[19] Further, the court notes that the HDC's regulations specifically adopted the Department of Interior's Standards for Rehabilitating Historic Buildings, *See Borough Defs.' Mem.,* Ex. G

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(upholding a law as constitutional where it instructed the Review Board to consider general design, character, scale, texture and materials, and visual compatibility); *Mayes v. City of Dallas,* 747 F.2d 323, 325 (5th Cir. 1984) (upholding a law that called for building details to "harmonize," be "architecturally and historically appropriate," and "be compatible with . . . surrounding structures").

As previously discussed, *See supra* Section IV.C.1, regulations that are content-neutral, and only incidentally burden speech, are subject to intermediate scrutiny. *See Vincenty v. Bloomberg,* 476 F.3d 74, 84 (2d Cir. 2007). When considering whether government activity has impermissibly infringed an individual's right of expressive association, a court must first consider "whether and to what extent defendants' actions burdened that right." *See Tabbaa v. Chertoff,* 509 F.3d 89, 101 (2d Cir. 2007). To be cognizable, the interference with plaintiff's associational rights must be more than merely incidental. *See id.* at 101. Rather, the plaintiff must demonstrate that the interference with its associational rights is "direct and substantial, or significant." *See id.* (internal quotations omitted).

As discussed above, *See supra* Section IV.A.3, Chabad cannot demonstrate a substantial burden on its associational rights, because any burden imposed

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at 3, which provide additional objective standards. *See Borough Defs.' Mem.,* Ex. H.

is merely incidental to a neutral, generally applicable law, and there is no basis in the record upon which a reasonable jury could rest a finding that the HDC's decision was improperly based on Chabad's religion. Consequently, defendants are entitled to summary judgment as to Count Three.

3. Due Process

Chabad argues that HDC's "regulatory activities" are void for vagueness pursuant to due process jurisprudence. *See Pl.'s Resp. to Borough Defs.* at 63. Chabad does not specify which statute or regulation it challenges.[20] In response, Borough defendants assert that C.G.S. § 7-147f sets forth specific factors the HDC must consider in enforcing the statute and, consequently, the statute is not unconstitutionally vague. *See Borough Defs.' Reply* at 10-11.

A statute may be void for vagueness "if it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits" or "if it authorizes or even encourages arbitrary and discriminatory enforcement." *See VIP of Berlin, LLC v. Town of Berlin,* 593 F.3d 179, 186 (2d Cir. 2010). In determining whether a statute is impermissibly vague, the court must look to the words of the statute

[20] Chabad asserts that its claim is based "on the fact that the unfettered discretion afforded by the vague and ambiguous standards to deny a religious land use is unconstitutional." *See Pl.'s Mem. Resp. Borough Defs.* at 63.

and, to some degree, the interpretation of the statute given by those charged with enforcing it. *See id.* A law that is capable of infringing First Amendment rights demands "a greater degree of specificity." *Id.*

As discussed above, section 7-147f of the Connecticut General Statutes specifies factors the HDC "shall consider" in determining whether to issue a certificate of appropriateness. Though these factors are somewhat subjective, they are not so subjective that a reasonable person could not ascertain what factors the HDC will consider in deciding whether to grant an application for a certificate of appropriateness. *See Lusk,* 475 F.3d at 494-95; *see also Grayned v. City of Rockford,* 408 U.S. 104, 110 (1972) ("Condemned to the use of words, we can never expect mathematical certainty from our language.").

Similarly, section 7-147f is not void for vagueness due to arbitrary enforcement. A statute may be found unconstitutionally vague if that statute "does not 'provide explicit standards for those who apply [it].'" *See VIP of Berlin, LLC* at 191 (quoting *Thibodeau v. Portuondo,* 486 F.3d 61, 65 (2d Cir. 2007)). Nonetheless, a statute is not void for vagueness simply because its enforcement requires some exercise of discretion. See *Grayned,* 408 U.S. at 114; *VIP of Berlin, LLC,* 593 F.3d at 192. As discussed above, though section 7-147f instructs the HDC to consider factors that are subjective in nature, those factors are sufficiently tied to objective aesthetic standards, such as scale, texture, and material of the architectural features involved, to provide the required guidance to

the HDC in enforcing the law. *See Lusk,* 475 F.3d at 495. Consequently, Chabad's claim that section 7-147f is unconstitutionally vague fails as a matter of law, and summary judgment is granted as to Count Five.

D. Individual Defendants[21]

The individual defendants seek summary judgment on Counts Nine and Ten, which assert that the individual defendants conspired to violate the plaintiff's rights to equal protection of the law, or of equal privileges and immunities. To state a claim for conspiracy under 42 U.S.C. § 1985(3), a plaintiff must show: "(1) a conspiracy; (2) for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; (3) an act in furtherance of the conspiracy; (4) whereby a person is either injured in his person or property or deprived of any right of privilege of a citizen of the United States." *Cine SK8, Inc. v. Town of Henrietta,* 507 F.3d 778, 791 (2d Cir. 2007). Although a plaintiff is not required to show a conspiracy by demonstrating proof of an explicit agreement, "a plaintiff must demonstrate at least that 'parties have a tacit understanding to carry out the prohibited conduct.'" *See id.* at 792 (internal citations omitted). Evidence that may

[21] In their brief, the individual defendants begin by arguing that RLUIPA does not provide a cause of action against individuals. As this argument was subsequently withdrawn at oral argument, the court will not address it. *See* Tr. at 4.

be sufficient to demonstrate animus on the part of an individual is not necessarily sufficient to demonstrate a tacit agreement between individuals. *See id.* ("Nor does this evidence suffice to support a fact-finder's conclusion that three members of the Board (whose comments would permit a jury to find that they *individually* acted with racial animus) had an understanding among themselves to do so.") (emphasis in original).

The individual defendants contend that there is no evidence to indicate an agreement of any kind between Kuhne, Hillman, and Crawford. *See Individual Defs.' Mem. in Support* at 29. In response, Chabad points to two alleged instances where one or more of the individual defendants discussed Chabad's planned renovations outside the context of a formal hearing. *See Pl.'s Mem. in Response to Individual Defs.' Mot.* at 45-46. First, Chabad notes that, after the first HDC (pre-application) meeting where the renovation was discussed, Hillman, Crawford, and Kuhne spoke outside after the meeting about the size of Chabad's proposed building.[22] Chabad does not present any additional evidence regarding the matters discussed during this conversation, other than to assert that

[22] Hillman and Kuhne both submitted affidavits stating that this conversation never occurred. *See Borough Defs.' Mot. for Summ. J.,* Ex C at ¶ 5; *Borough Defs.' Mot. for Summ. J.,* Ex. F at ¶ 5. Crawford, however, testified at her deposition that she spoke with Hillman and Kuhne after the first meeting where Chabad presented their plans. *See* Nelson Aff. Ex. 4 at 69-70.

the conversation took place "outside the public hearings to discuss Plaintiff's planned renovations to the Property." *Id.* at 46. Second, Chabad points to a phone call between Hillman and Camila Crist, another HDC member who is not named as a defendant. As to this second conversation, the record is uncontested that the telephone call concerned questions Ms. Crist had about the scale on the architect's drawings (as distinguished from the scale of the project). *Borough Defs.' Mem.,* Ex. C at ¶ 4 ("To the best of my recollection her question concerned the scales on the plans. I think there was an inconsistency between the plans, perhaps the scales were different on different sheets. I'm not sure. In any case, I explained some technical aspect of the plans to her.").[23] In further support, Chabad states that both Hillman and Crist voted to deny Chabad's application. *See Pl.'s Mem. in Response to Individual Defs.' Mot.* at 45-46. Finally, Chabad contends there is evidence of animus on the part of the individual defendants, as a result of Kuhne's comment during the September 6, 2007 pre-hearing meeting that the Star of David is not "historically compatible with the District," which Chabad contends is an anti-Semitic statement. *See id.* at 20, 47.

Even taking the evidence in the light most favorable to Chabad, it fails to raise a material issue of

[23] The issue of mis-scaling the plans, or using different scales on different drawings, arose at the hearing as well. *See* HDC Ex. 67, Disc 2.

fact to support the existence of even a tacit understanding between the defendants to deny Chabad equal protection under the law or equal privileges and immunities. As to the first conversation, Crawford's testimony specifies that the conversation with Hillman and Kuhne related "to the size of the building." *See* Nelson Aff. Ex. 4 at 69-70. With regard to the phone call between Crist and Hillman, the only evidence as to the topic of the phone call comes from Hillman's affidavit, where he asserts that he "explained some technical aspect of the plans to [Crist]" regarding the scales of the drawings. *See Borough Defs.' Mem.,* Ex. C ¶ 4.

Finally, with regard to Kuhne's comment regarding the Star of David during the pre-application meeting, the court agrees with Chabad that, had Kuhne voted on Chabad's application, Kuhne's comment could raise a material issue of fact as to whether Kuhne's decision was motivated by religious animus. However, at the request of Chabad's counsel, Kuhne recused herself from voting on Chabad's application, and it is undisputed that she did not vote on Chabad's application. *See* Indiv. Defs.' L.R. 56(a)(1) Stmt. ¶ 14; Pls.' L.R. 56(a)(2) Stmt. ¶ 14. Further, Chabad's counsel confirmed at oral argument that, because Kuhne recused herself, the only counts pressed against her are those regarding conspiracy. *See supra* n. 1. While Kuhne's comment may be sufficient to raise an inference of animus on her part, had she voted on the application, it is insufficient to raise a reasonable inference of a tacit agreement between Kuhne,

Hillman, and Crawford. *See Cine SK8,* 507 F.3d at 792. In addition, nothing in the record suggests that religious animus was a significant influence on those HDC members who did vote on Chabad's application. *See id.* at 786. Consequently, Chabad failed to come forward with evidence that raises a material issue of fact to support its claim of a conspiracy among the individual defendants to violate Chabad's constitutional rights. *See Scotto v. Almenas,* 143 F.3d 105, 115 (2d Cir. 1998). Summary judgment is therefore appropriate with regard to Count Nine.[24]

Chabad also asserts that the individual defendants failed to prevent the violation of plaintiff's

[24] Chabad also asserts that the Freedom of Information Act prohibits any discussion between the defendants of an application outside the public hearings. Given the apparent nature of these communications, however, there is no evidence to support a finding by a jury that they rose to the level of a "meeting" as defined by the Freedom of Information Act, and consequently, would not be prohibited by the statute. *See* Conn. Gen. Stat. § 1-200(2) ("'Meeting' means any hearing or other proceeding of a public agency, any convening or assembly of a quorum of a multimember public agency, any any communication by or to a quorum of a multimember public agency . . . to discuss or act upon a matter of which the public agency has supervision, control, jurisdiction or advisory power. 'Meeting' does not include . . . any chance meeting, or a social meeting neither planned nor intended for the purpose of discussing matters relating to official business"); *Lawson v. East Hampton Planning and Zoning Comm'n,* 2005 WL 3662907 at *1-3 (Conn. Super. Ct. Dec. 13, 2005) (holding that procedural irregularities do not amount to a denial of fundamental fairness, even where there was "a recess, [during] which there were unrecorded conversations between commission members")).

rights, in violation of section 1986. A claim under section 1986 "must be predicated upon a valid § 1985 claim." *See Mian v. Donaldson, Lufkin & Jenrette Sec. Corp.,* 7 F.3d 1085, 1088 (2d Cir. 1993). Consequently, Chabad fails to raise a material issue of fact to support its claim under section 1986 as well. As a result, the individual defendants are entitled to summary judgment as to Count Ten.

As the court grants summary judgment on the merits of the plaintiff's claims, it is unnecessary for the court to address the various immunity issues raised by the individual defendants. *See Walczyk v. Rio,* 496 F.3d 139, 154 (2d Cir. 2007) ("[W]here there is no viable . . . claim, defendants have no need of an immunity shield.") (citing, *inter alia, Farrell v. Burke,* 449 F.3d 470, 499 n.14 (2d Cir. 2006) ("Because we have found no cognizable violation of [p]laintiff's rights in this case, we need not reach the question of qualified immunity.")).

Neither party asserts any argument that Chabad's claim in Count Eleven as to a conspiracy by the individual defendants to violate Chabad's constitutional rights under the Connecticut Constitution is governed by any different law. Accordingly, for the same reasons stated with regard to Count Nine, Chabad fails to raise a material issue of fact with regard to its conspiracy claim in Count Eleven, and summary judgment is granted.

III. CONCLUSION

For the reasons stated above, the Borough defendants' Motion for Summary Judgment (Doc. No. 140) is **GRANTED**. The individual defendants' Motion for Summary Judgment (Doc. No. 138) is **GRANTED**. Chabad's Motion for Partial Summary Judgment (Doc. No. 137) is **DENIED**.

SO ORDERED.

Dated at Bridgeport, Connecticut this 17th day of February, 2012.

/s/ Janet C. Hall
Janet C. Hall
United States District Judge