

1 **UNITED STATES COURT OF APPEALS**
2 **FOR THE SECOND CIRCUIT**

3
4 August Term 2013

5
6 (Argued: September 16, 2013 Decided: September 19, 2014)

7
8 Nos. 12-1057-cv (Lead), 12-1495-cv (Con)
9 _____

10
11 CHABAD LUBAVITCH OF LITCHFIELD COUNTY, INC., JOSEPH EISENBACH,
12 *Plaintiffs-Appellants–Cross-Appellees,*

13
14 UNITED STATES OF AMERICA,
15 *Plaintiff,*

16
17 - v. -

18
19 LITCHFIELD HISTORIC DISTRICT COMMISSION, BOROUGH OF LITCHFIELD,
20 CONNECTICUT, GLENN HILLMAN, KATHLEEN CRAWFORD,

21 *Defendants-Appellees–Cross-Appellants,*

22
23 TOWN OF LITCHFIELD, CONNECTICUT, DOE, POLICE DOG, WENDY KUHNE,

24 *Defendants.**
25 _____

26
27 Before: WALKER, LIVINGSTON, and CHIN, *Circuit Judges.*
28

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

1 Chabad Lubavitch of Litchfield County, Inc. ("Chabad") appeals from the
2 February 21, 2012 judgment of the United States District Court for the District of
3 Connecticut (Hall, C.J.) denying its motion for partial summary judgment and
4 granting the defendants' motion for summary judgment on each of the Chabad's
5 claims, brought pursuant to 42 U.S.C. §§ 1983, 1985, and 1986; the Religious Land
6 Use and Institutionalized Persons Act ("RLUIPA"), 42 U.S.C. § 2000cc *et seq.*; and
7 Connecticut state law, and stemming from the denial of the Chabad's application to
8 alter its property, located in the Borough of Litchfield's historic district. Because we
9 conclude that the district court applied erroneous legal standards to the Chabad's
10 claims under RLUIPA's substantial burden and nondiscrimination provisions, we
11 **VACATE** the grant of summary judgment in the defendants' favor on these claims
12 and **REMAND** them for further consideration consistent with this opinion. By
13 contrast, we **AFFIRM** the grant of summary judgment in the defendants' favor on
14 the remainder of the Chabad's claims, largely due to the Chabad's failure adequately
15 to brief these claims.

16
17 Rabbi Joseph Eisenbach ("Rabbi Eisenbach") appeals from the June 20, 2011
18 order of the district court dismissing his claims, coextensive with the Chabad's, for
19 lack of standing. Because we conclude that the district court erred in finding that
20 Rabbi Eisenbach lacked standing under RLUIPA, we **VACATE** the dismissal of his
21 claims on that ground and **REMAND** for consideration whether he nonetheless
22 failed to state a claim. However, we **AFFIRM** the dismissal of Rabbi Eisenbach's
23 remaining claims for failure adequately to brief these claims.

24
25 Accordingly, the February 21, 2012 judgment is **VACATED AND**
26 **REMANDED IN PART** and **AFFIRMED IN PART**, and the June 20, 2011 order is
27 **VACATED AND REMANDED IN PART** and **AFFIRMED IN PART**.

28
29 FREDERICK H. NELSON (Kenneth R. Slater, Jr.,
30 Halloran & Sage, LLP, Hartford, CT, *on the brief*),
31 American Liberties Institute, Orlando, FL, *for*
32 *Plaintiffs-Appellants-Cross-Appellees*.

33
34 C. SCOTT SCHWEFEL, Shipman, Shaiken & Schwefel
35 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

1 with enumerated conditions. In this ensuing suit, the Chabad and Rabbi Eisenbach
2 (collectively, the “plaintiffs”) assert that the Borough of Litchfield, the HDC, and
3 HDC members Glenn Hillman (“Hillman”) and Kathleen Crawford (“Crawford”)
4 (collectively, the “defendants”) abridged their rights under 42 U.S.C. §§ 1983, 1985,
5 and 1986; the Religious Land Use and Institutionalized Persons Act (“RLUIPA”), 42
6 U.S.C. § 2000cc *et seq.*; and Connecticut state law by denying the application.¹ They
7 seek damages, injunctive and declaratory relief, attorneys’ fees, and the appointment
8 of a federal monitor.

9 On the defendants’ motion to dismiss for lack of subject matter jurisdiction,
10 the district court (Hall, C.J.) dismissed Rabbi Eisenbach’s claims for lack of standing,
11 citing the Rabbi’s want of a sufficient property interest under RLUIPA and his
12 failure to distinguish his claims from the Chabad’s under federal and state law.
13 *Chabad Lubavitch of Litchfield Cnty., Inc. v. Borough of Litchfield*, 796 F. Supp. 2d 333,
14 338-39 (D. Conn. 2011) [hereinafter *Chabad I*]. Subsequently, following the Chabad’s

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 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*.

1 motion for partial summary judgment and the defendants' motion for summary
2 judgment, the district court ruled in favor of the defendants. Significantly, the
3 district court concluded that Connecticut's statutory scheme governing historic
4 districts is "neutral and generally applicable" and, consequently, that the HDC's
5 denial of the Chabad's application could not "as a matter of law" impose a
6 substantial burden on the Chabad's religious exercise under RLUIPA's substantial
7 burden provision. *Chabad Lubavitch of Litchfield Cnty., Inc. v. Borough of Litchfield*, 853
8 F. Supp. 2d 214, 225 (D. Conn. 2012) [hereinafter *Chabad II*]. The district court also
9 held that the Chabad's failure to identify a religious institution that was more
10 favorably treated than and "identical in all relevant respects" to the Chabad barred
11 the Chabad's claim under RLUIPA's nondiscrimination provision. *Chabad II*, 853 F.
12 Supp. 2d at 229-31.

13 On appeal, we conclude that the district court erred in dismissing Rabbi
14 Eisenbach's RLUIPA claims for lack of standing. Accordingly, we vacate the district
15 court's June 20, 2011 ruling insofar as it concerns Rabbi Eisenbach's standing under
16 RLUIPA and remand for consideration, instead, whether Rabbi Eisenbach failed to
17 state a claim under RLUIPA. We affirm the remainder of that judgment due to
18 Rabbi Eisenbach's failure to brief his remaining claims. Additionally, we conclude

1 that the HDC's review of the Chabad's application was an "individual assessment"
2 subject to RLUIPA's substantial burden provision and that the Chabad need not cite
3 an "identical" comparator to establish a claim under RLUIPA's nondiscrimination
4 provision. Accordingly, we vacate the district court's February 21, 2012 judgment
5 insofar as it concerned these RLUIPA claims and remand for consideration whether
6 these claims survive summary judgment under an analysis consistent with this
7 opinion. We affirm the remainder of the district court's February 21, 2012 judgment,
8 albeit largely due to the Chabad's failure to brief most of its remaining claims.

9 BACKGROUND

10 A. Facts²

11 The Chabad, a Connecticut membership corporation, and Rabbi Eisenbach,
12 president of the Chabad, offer weekly religious and other services to its Orthodox
13 Hasidic parishioners in the Litchfield area. Prior to the events at issue, the Chabad
14 rented space to provide these services, at a cost of thousands of dollars per year.
15 Deeming the rented space inadequate to practice its faith and accommodate its
16 religious mission, the Chabad in 2005 purchased a property at 85 West Street in the

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).

1 Borough of Litchfield to serve as its new place of worship. The property, located in
2 the Litchfield Historic District – once deemed to be “[p]robably the finest surviving
3 example of a typical late 18th century New England town” – boasts a two-story,
4 “stick-style” Victorian residence constructed in the 1870s encompassing 2,600 square
5 feet and a basement. Known as the “Deming House,” the building was constructed
6 as a residence by the grandson of a prominent Revolutionary War-era Litchfield
7 resident but, by the time of the Chabad’s purchase, had been altered to
8 accommodate a commercial establishment.

9 In accordance with Connecticut’s statutory scheme governing development
10 in historic districts, the Chabad sought leave to alter 85 West Street to meet its needs.
11 Specifically, Connecticut General Statutes § 7-147d(a) directs that “[n]o building or
12 structure shall be erected or altered within an historic district until after an
13 application for a certificate of appropriateness as to exterior architectural features
14 has been submitted to the historic district commission and approved by said
15 commission.”³ The HDC, established in 1989 pursuant to this scheme, reviews such
16 applications for the Litchfield Historic District. The Connecticut General Statutes

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

1 empower the HDC to approve or deny applications following notice and a public
2 hearing, *see id.* §§ 7-147c, 7-147e, and direct that, when weighing applications to alter
3 exterior architectural features, the HDC consider, “in addition to any other pertinent
4 factors, the historical and architectural value and significance, architectural style,
5 scale, general design, arrangement, texture and material of the architectural features
6 involved and the relationship thereof to the exterior architectural style and pertinent
7 features of other buildings and structures in the immediate neighborhood,” *id.* §
8 7-147f(a).

9 The HDC first considered the Chabad’s application at a pre-hearing meeting
10 on September 6, 2007. The defendants assert that the Chabad’s proposed
11 modifications called for a 17,000-square-foot addition to be built at 85 West Street,
12 including administrative offices, classrooms, a nearly 5,000-square-foot residence for
13 Rabbi Eisenbach and his family, an indoor swimming pool, guest accommodations,
14 kitchens, and a ritual bath. Though the Chabad disputes the defendants’
15 characterization of its proposed expansion, it does not specify a smaller footprint.
16 In addition, the Chabad sought to top the property with a clock tower featuring the
17 Star of David and to incorporate several external elements that would restore some
18 of the property’s period details. The Chabad contends that, at that meeting, HDC

1 member Wendy Kuhne (“Kuhne”) voiced her opposition to its application, due in
2 part to the size of the addition and her belief that the Star of David was not
3 “historically compatible with the [Historic] District.” Other HDC members,
4 including Crawford, also expressed concerns regarding the size of the addition, with
5 one member urging that “[w]e have to get the public out on this project for the
6 public hearing.” At the conclusion of the meeting, the HDC scheduled a second
7 pre-hearing meeting for the following month.

8 At the second meeting, held on October 18, 2007, the Chabad announced its
9 changes in response to the requested modifications, which included altering the
10 shape of windows and lowering the roof line of the addition. Following the
11 Chabad’s presentation, Kuhne commented, “[I]s this all there is?” J.A. 747. Though
12 the Chabad did not object to Kuhne’s comments at the meeting, it later requested
13 that she recuse herself from the public meetings and decisionmaking process, which
14 she did. The HDC then bifurcated the hearing process concerning the Chabad’s
15 application, reserving the first hearing to address the Chabad’s proposed
16 modifications and the second to address whether denial of the Chabad’s application
17 would place a “substantial burden” on its religious exercise. Following the first
18 public hearing, held on November 15, 2007, the Chabad altered its proposal to,

1 among other changes, lower the foundation of its addition, use alternative exterior
2 building material, reduce the height of the Star of David finial atop the clock tower,
3 and reconstruct a front porch that had been removed during an earlier renovation.
4 At the second hearing, held on December 17, 2007, the Chabad asserted its need for
5 a larger structure, but did not disclose the size of its assembly or the number of
6 students likely to attend religious classes.

7 The HDC denied the Chabad's application on December 20, 2007. In its
8 written opinion, the HDC catalogued the history and importance of the Deming
9 House to the historic character of the Borough of Litchfield. Per the HDC, the
10 altered but nonetheless distinctively residential structure serves as one of the "last
11 vestiges" of the Borough's residential district, "significant alteration" of which
12 would destroy the "residential character" of the property's environs. As such, the
13 HDC "commended" the Chabad's proposals to rehabilitate the existing structure,
14 but nevertheless denied three of the Chabad's proposed modifications: hanging a
15 double door on the front of the house, incorporating a clock tower, and building an
16 addition on the property. The HDC concluded that the double door would conflict
17 with the house's original design and would require removal of a single door that
18 was "probably the original door of the house." J.A. 330. The HDC deemed the clock

1 tower “incongruous with the immediate neighborhood and the district as a whole,”
2 and found that it would “in one stroke transform[] the house from a residential
3 structure in appearance to an institutional structure.” *Id.* Finally, the HDC objected
4 to the size of the proposed addition, which it characterized as “massive” and “nearly
5 20,000 square f[ee]t,” a size “over five times as large as” the Deming House that
6 would “dwarf[] and overwhelm[]” not only the house but also the neighborhood as
7 a whole. J.A. 328, 331.

8 However, in light of the Chabad’s proposed religious use of the property, the
9 HDC also granted accommodations to substitute for the rejected modifications.
10 Specifically, the HDC stated that it would accept a proposal replacing the clear glass
11 currently in the house’s front door with stained glass, incorporating a finial with a
12 Star of David atop the house, and including an addition that was no larger than the
13 original structure. The HDC granted the Chabad leave to file an amended
14 application consistent with these conditions. Thereafter, five HDC members voted
15 unanimously to deny the Chabad a certificate of appropriateness, including
16 Hillman. Crawford was not recorded as having cast a vote. The Chabad did not
17 administratively appeal the denial or file an amended application. *See Conn. Gen.*
18 *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 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."

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.

1 *Chabad I*, 796 F. Supp. 2d at 338 (citing 42 U.S.C. § 2000cc-5(5)). Because Rabbi
2 Eisenbach’s proposed use of the facilities at 85 West Street “[did] not qualify” as
3 such a property interest and his claim of “a right to place a mortgage lien” on the
4 property for unpaid salary “barely warrant[ed] addressing,” the district court
5 determined the Rabbi lacked standing to press his claims under RLUIPA. *Id.* at 338-
6 39. In addition, the district court concluded that Rabbi Eisenbach’s failure to
7 distinguish his claims from those of the Chabad denied him standing under 42
8 U.S.C. §§ 1983, 1985, and 1986, the Connecticut constitution, and CFRA. *Id.* at 339.

9 The Chabad subsequently moved for partial summary judgment on May 14,
10 2011, and on May 16, 2011, the defendants cross-moved for summary judgment.⁵
11 In February 2012, the district court denied the Chabad’s motion and granted the
12 defendants’. Pertinently, the district court found that, because Connecticut General
13 Statutes § 7-147a *et seq.* applies to any entity seeking to alter ~~modify~~ a property in a
14 historic district (save for nonprofit institutions of higher education) it is a neutral
15 law of general applicability and thus could not, as a matter of law, impose a
16 substantial burden on the Chabad’s religious exercise, thereby barring the Chabad’s

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.

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

14 DISCUSSION

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

1 favor.” *Bigio v. Coca-Cola Co.*, 675 F.3d 163, 169 (2d Cir. 2012) (internal quotation
2 marks omitted) (second alteration in original). “To survive a motion to dismiss, the
3 complaint must plead ‘enough facts to state a claim to relief that is plausible on its
4 face.’” *Fed. Treasury Enter. Sojuzplodoimport*, 726 F.3d at 71 (quoting *Bell Atl. Corp. v.*
5 *Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when the complaint
6 contains “‘factual content that allows the court to draw the reasonable inference that
7 the defendant is liable for the misconduct alleged.’” *Id.* (quoting *Ashcroft v. Iqbal*, 556
8 U.S. 662, 678 (2009)).

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

17 **A. The Chabad’s RLUIPA Claims**

18 The Chabad asserts claims under three of RLUIPA’s land use provisions: the

1 substantial burden provision, which prohibits substantial government interference
2 with a land use applicant's religious exercise in the absence of a compelling
3 justification, 42 U.S.C. § 2000cc(a)(1); and the equal terms and nondiscrimination
4 provisions, which prohibit unequal treatment of and discrimination against religious
5 assemblies and institutions by a government, *id.* § 2000cc(b)(1)-(2). We address each
6 in turn.

7 ***1. The Chabad's RLUIPA Substantial Burden Claim***

8 RLUIPA's substantial burden provision provides:

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

16
17 42 U.S.C. § 2000cc(a)(1). The provision applies only when a substantial burden
18 (1) occurs attendant to a federally funded program; (2) implicates interstate or
19 international commerce or commerce with Indian tribes; or (3) "is imposed in the
20 implementation of a land use regulation or system of land use regulations, under
21 which a government makes, or has in place formal or informal procedures or
22 practices that permit the government to make, individualized assessments of the

1 proposed uses for the property involved.” *Id.* § 2000cc(a)(2). To establish a claim,
2 a plaintiff bears the burden of demonstrating that at least one of these predicates
3 applies and that the defendant’s implementation of a “land use regulation” placed
4 a “substantial burden” on the plaintiff’s “religious exercise.” 42 U.S.C. § 2000cc-2(b).
5 The burden then shifts to the defendant to demonstrate that it “acted in furtherance
6 of a compelling governmental interest and that its action is the least restrictive
7 means of furthering that interest.” *Id.* at 353 (citing 42 U.S.C. § 2000cc-2(b)).

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

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.

1 RLUIPA (at least, not under this predicate), application of a zoning law that permits
2 a governmental entity to consider the applicant's intended use of a property,
3 applying at least partly subjective criteria on a case-by-case basis, likely would. *See*
4 *id.* at 987; *see also Westchester Day Sch. v. Vill. of Mamaroneck*, 417 F. Supp. 2d 477, 542
5 (S.D.N.Y. 2006) (noting that application of neutral and generally applicable law "to
6 particular facts" may constitute individualized assessment where such "application
7 does not involve a mere numerical or mechanistic assessment," but instead
8 "involv[es] criteria that are at least partially subjective in nature"), *aff'd*, 504 F.3d 338
9 (2d Cir. 2007).

10 RLUIPA's substantial burden provision combats "subtle forms of
11 discrimination" by land use authorities that may occur when "a state delegates
12 essentially standardless discretion to nonprofessionals operating without procedural
13 safeguards." *Sts. Constantine & Helen Greek Orthodox Church, Inc. v. City of New*
14 *Berlin*, 396 F.3d 895, 900 (7th Cir. 2005). Accordingly, when a governmental entity
15 conducts a "case-by-case evaluation" of a land use application, carrying as it does
16 "the concomitant risk of idiosyncratic application" of land use standards that may
17 permit (and conceal) "potentially discriminatory" denials, RLUIPA applies. *Midrash*
18 *Sephardi, Inc. v. Town of Surfside*, 366 F.3d 1214, 1225 (11th Cir. 2004) (holding that

1 ordinance permitting such evaluations was “quintessentially an ‘individual
2 assessment’ regime” under RLUIPA); *see also* Dep’t of Justice Policy Statement on the
3 Land-Use Provisions of RLUIPA at 6 (Sept. 22, 2010) [hereinafter “DOJ Statement”],
4 *available at* http://www.justice.gov/crt/rluipa_q_a_9-22-10.pdf (noting that, due to
5 idiosyncracies of zoning law, “solely . . . mechanical, objective” assessments exempt
6 from this predicate would be “extremely rare”).

7 The broad reach of this predicate is no accident. In regulating individualized
8 assessments by government of the proposed uses to which property is to be put, the
9 substantial burden provision codifies principles announced in *Sherbert v. Verner*, 374
10 U.S. 398 (1963), insofar as that case held that a “[government] system for granting
11 individual exemptions from a general rule must have a compelling reason to deny
12 a religious group an exemption that is sought on the basis of hardship.” *Sts.*
13 *Constantine & Helen Greek Orthodox Church, Inc.*, 396 F.3d at 897 (discussing
14 individualized assessment predicate). Because “almost all” land use regimes
15 implicate such “individualized” review, *see River of Life Kingdom Ministries v. Vill. of*
16 *Hazel Crest*, 611 F.3d 367, 381 (7th Cir. 2010) (en banc) (Sykes, J., dissenting), almost
17 all “impos[itions]” or “implementation[s]” of land use regimes, 42 U.S.C.
18 § 2000cc(a)(2)(C), will satisfy this predicate.

1 Under this rubric, Connecticut’s statutory scheme undeniably demands an
2 individual assessment of applications to alter historic properties. While Connecticut
3 General Statutes § 7-147d(a) requires that nearly all entities seeking to modify a
4 property in a historic district “shall” obtain a certificate of appropriateness, the
5 scheme also requires that local commissions implement that general rule by
6 applying loosely defined and subjective standards to discrete applications. *See id.*
7 §§ 7-147c, 7-147e, 7-147f. To that end, § 7-147e commands that commissions “hold
8 a public hearing upon *each* application.” *Id.* § 7-147e(a) (emphasis added). Similarly,
9 § 7-147f directs that commissions, when weighing an application, must determine
10 whether “*the proposed* erection, alteration or parking will be appropriate.” *Id.*
11 § 7-147f(a) (emphasis added). And, in assessing the appropriateness of a
12 modification, commissions are further directed to consider such criteria as “the
13 historical and architectural value and significance” of the modification, its
14 “architectural style, scale, general design, arrangement, texture and material” used,
15 “the relationship [of . . .] the exterior architectural style” to the neighborhood – and
16 “any other pertinent factors.” *Id.* Even the district court found these standards to
17 be “subjective in nature,” but nonetheless deemed the statutory scheme to be
18 immune from substantial burden analysis. *See Chabad II*, 853 F. Supp. 2d at 235. In

1 the absence of more definite standards limiting the HDC's discretion in reviewing
2 applications, we disagree. *See* DOJ Statement at 6.⁷

3 Were there any doubt as to the type of assessment at issue, even a cursory
4 review of the HDC's consideration of the Chabad's application confirms that the
5 process was patently individualized. The HDC probed the Chabad's proposed
6 window and roof measurements, door selections, building materials, roof
7 adornments, and glass type, and imposed a size limitation on the Chabad's
8 development based on a tailored review of surrounding properties. Moreover, the
9 HDC conducted this inquiry without the guidance of laws or regulations that
10 dictated the specific metes and bounds either of its inquiry or of the conditions it
11 imposed. Regardless of whether the HDC's inquiry was defensible, it was thus at

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 "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).

1 a minimum *individualized*. Because Connecticut’s statutory scheme therefore permits
2 – indeed, demands – application of subjective standards to individual land use
3 applications, and because the HDC applied such subjective standards to the
4 Chabad’s application, we conclude that the HDC’s denial of the Chabad’s
5 application resulted from an “individual assessment,” triggering RLUIPA’s
6 substantial burden provision.⁸ The district court consequently erred in determining
7 that the Chabad could not establish a claim under RLUIPA’s substantial burden
8 provision “as a matter of law,” and we vacate the district court’s judgment insofar
9 as it concerns that claim.

10 In reaching its decision, the district court improperly read our opinion in
11 *Westchester Day School* as holding that, as a matter of law, generally applicable land
12 use regulations may only result in a substantial burden when arbitrarily and
13 capriciously imposed. *See Chabad II*, 853 F. Supp. 2d at 225 (citing *Westchester Day*
14 *Sch.*, 504 F.3d at 350). This holding would be in tension with the plain language of
15 RLUIPA’s substantial burden provision, which in certain instances regulates
16 “burden[s that] result[] from a rule of general applicability” – suggesting that such

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.

1 burdens fall within RLUIPA's cognizance, even when imposed in the regular course.
2 42 U.S.C. § 2000cc(a)(2)(A), (B). Moreover, such a rule would render the substantial
3 burden provision largely superfluous given RLUIPA's nondiscrimination and equal
4 terms provisions, which regulate overtly discriminatory acts that are often
5 characterized by arbitrary or unequal treatment of religious institutions. *See id.*
6 § 2000cc(b)(1)-(2); *Bethel World Outreach Ministries v. Montgomery Cnty. Council*, 706
7 F.3d 548, 557 (4th Cir. 2013) ("Requiring a religious institution to show that it has
8 been targeted on the basis of religion in order to succeed on a substantial burden
9 claim would render the nondiscrimination provision superfluous."); *Sts. Constantine*
10 *& Helen Greek Orthodox Church, Inc.*, 396 F.3d at 900 ("[T]he 'substantial burden'
11 provision backstops the explicit prohibition of religious discrimination in the later
12 section of [RLUIPA], much as the disparate-impact theory of employment
13 discrimination backstops the prohibition of intentional discrimination. If a land-use
14 decision . . . imposes a substantial burden on religious exercise . . . and the decision
15 maker cannot justify it, the inference arises that hostility to religion . . . influenced
16 the decision." (citations omitted)).

17 Instead, *Westchester Day School* enumerates some of the factors that may be
18 considered to determine whether a substantial burden is imposed, including

1 whether the law is neutral and generally applicable. In conducting the substantial
2 burden analysis, we considered several factors. *See* 504 F.3d at 352 (stating that the
3 “arbitrary and unlawful nature” of defendant’s conduct “support[ed]” a substantial
4 burden claim, while also looking to “other factors”); *see also Fortress Bible Church*, 694
5 F.3d at 219 (finding that arbitrary and capricious application of land use regulation
6 “bolstered” a substantial burden claim). In addition to the arbitrariness of a denial,
7 our multifaceted analysis considered whether the denial was conditional; if so,
8 whether the condition was itself a substantial burden; and whether the plaintiff had
9 ready alternatives. *See Westchester Day Sch.*, 504 F.3d at 352; *see also Fortress Bible*
10 *Church*, 694 F.3d at 219 (considering whether rejection of land use application denied
11 plaintiff the “ability to construct an adequate facility” for its religious exercise, or
12 was merely a “rejection of a specific building proposal”). Our sister circuits have
13 contributed additional texture to this analysis. *See, e.g., Bethel World Outreach*
14 *Ministries*, 706 F.3d at 558 (weighing whether plaintiff had “reasonable expectation”
15 of receiving approval to build church when it bought property and deeming it
16 “significant that the [defendant] has completely prevented [the plaintiff] from
17 building any church on its property”); *Petra Presbyterian Church v. Vill. of Northbrook*,
18 489 F.3d 846, 851 (7th Cir. 2007) (considering as a factor whether plaintiff “bought

1 property reasonably expecting to obtain a permit,” particularly when alternative
2 sites were available); *Midrash Sephardi, Inc.*, 366 F.3d at 1228 (deeming it significant
3 that the plaintiff could operate a church “only a few blocks from” its preferred
4 location). Thus, while we conclude that the substantial burden provision applies,
5 we leave it to the district court to determine as a question of first instance, *see*
6 *Dardana Ltd. v. Yuganskneftegaz*, 317 F.3d 202, 208 (2d Cir. 2003), whether the denial
7 here in fact “impose[d] a substantial burden on the [Chabad’s] religious exercise,”⁹
8 42 U.S.C. § 2000cc(a)(1); *see Fortress Bible Church v. Feiner*, 694 F.3d 208, 219 (2d Cir.
9 2012) (requiring that the substantial burden have a “close nexus” with religious
10 exercise to be cognizable under RLUIPA); *Westchester Day Sch.*, 504 F.3d at 349
11 (holding that substantial burden occurs when government “coerces the religious
12 institution to change its behavior” (emphasis omitted)) . We note that, in conducting
13 the substantial burden analysis on remand, the district court should consider, *inter*
14 *alia*, whether the conditions attendant to the HDC’s denial of the Chabad’s
15 application themselves imposed a substantial burden on the Chabad’s religious
16 exercise, whether feasible alternatives existed for the Chabad to exercise its faith,

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).

1 and whether the Chabad reasonably believed it would be permitted to undertake its
2 proposed modifications when it purchased the property at 85 West Street. The
3 district court should also consider, of course, whether the proposed modifications
4 shared a “close nexus” with and would be consistent with accommodating the
5 Chabad’s religious exercise. *See Fortress Bible Church*, 694 F.3d at 219.

6 ***2. The Chabad’s RLUIPA Equal Terms Claim***

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

15 Division exists among our sister circuits concerning whether the equal terms
16 provision invariably requires evidence of a “similarly situated” secular comparator
17 to establish a claim and, where such evidence is necessary, on what ground the
18 comparison must be made. *See generally River of Life Kingdom Ministries*, 611 F.3d at

1 368-71 (en banc majority opinion) (discussing circuits’ conflicting approaches); *id.*
2 at 377-78 (Sykes, J., dissenting) (same discussion). We need not enter the fray here,
3 as the Chabad has failed to present sufficient evidence to establish a prima facie
4 equal terms claim under any standard.

5 In this Court’s sole analysis of the equal terms provision, we declined to
6 define “the precise outlines of what it takes to be a valid comparator under
7 RLUIPA’s equal-terms provision.” *Third Church of Christ, Scientist v. City of New*
8 *York*, 626 F.3d 667, 669 (2d Cir. 2010). Nevertheless, we noted that “organizations
9 subject to different land-use regimes may well not be sufficiently similar to support
10 a discriminatory-enforcement challenge.” *Id.* at 671 (emphasis omitted). In support,
11 we cited *Primera Iglesia Bautista Hispana of Boca Raton, Inc. v. Broward County*, in
12 which the Eleventh Circuit held that a church and school were insufficiently
13 comparable to establish an equal terms claim, given that the properties sought
14 different forms of zoning relief from different land use authorities applying “sharply
15 different” criteria. *See* 450 F.3d 1295, 1311 (11th Cir. 2006). Because the evidence of
16 the church’s and school’s treatment was thus “consistent with the . . . neutral
17 application of different zoning regulations” – suggesting “*different* treatment, not
18 *unequal* treatment” – the court held that the plaintiff had failed to establish a prima

1 facie equal terms claim. *Id.* at 1313; *see also Vision Church v. Vill. of Long Grove*, 468
2 F.3d 975, 1003 (7th Cir. 2006) (rejecting equal terms claim, in part, because “the fact
3 that [the religious land use applicant] and the elementary schools were subject to
4 different standards because of the year in which their special use applications were
5 considered compels the conclusion that there was no unequal treatment”).

6 The same is true here; the Chabad has failed to establish a prima facie equal
7 terms claim. Its sole support for its equal terms claim comes in the form of one
8 alleged comparator: the Wolcott Library, a building in Litchfield’s Historic District
9 that, according to uncontested evidence submitted by the Chabad, was permitted
10 to construct a “substantial” addition on its property that altered the character of the
11 property from residential to institutional.¹⁰ However, the Wolcott Library’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

1 expansion was approved in 1965 by a different land use authority pursuant to a
2 different land use regime. Specifically, the Board of Warden and Burgesses, the
3 predecessor to the HDC, approved construction of the addition under a law that
4 explicitly barred consideration of “the relative size of buildings.” J.A. 192. By
5 contrast, Connecticut General Statutes § 7-147f(a), which guided the HDC’s
6 consideration of the Chabad’s application, explicitly requires that commissions
7 “shall” consider “scale.”

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

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.

1 judgment to the defendants on this claim.¹¹

2 **3. *The Chabad's RLUIPA Nondiscrimination Claim***

3 RLUIPA's nondiscrimination provision states that "[n]o government shall
4 impose or implement a land use regulation that discriminates against any assembly
5 or institution on the basis of religion or religious denomination." 42 U.S.C.
6 § 2000cc(b)(2). As with the equal terms provision, the plaintiff bears the initial
7 burden of establishing a prima facie claim, after which the government bears the
8 burden of persuasion on the elements of the nondiscrimination claim. *Id.* § 2000cc-2
9 (b).

10 This Court has not previously interpreted the nondiscrimination provision.
11 Nonetheless, the plain text of the provision makes clear that, unlike the substantial
12 burden and equal terms provisions, evidence of discriminatory *intent* is required to
13 establish a claim. *See* 42 U.S.C. § 2000cc(b)(2) (prohibiting discrimination "*on the*
14 *basis of religion or religious denomination*" (emphasis added)). As such, courts

¹¹As 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.

1 consider the provision have held that the nondiscrimination provision “enshrine[s]”
2 principles announced in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508
3 U.S. 520 (1993), which cast a jaundiced eye on laws that target religion. *See Midrash*
4 *Sephardi, Inc.*, 366 F.3d at 1231-32.

5 *Lukumi* looked to equal protection principles in analyzing whether a law was
6 discriminatory. *See Lukumi*, 508 U.S. at 540 (citing *Vill. of Arlington Heights v. Metro.*
7 *Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)). Other courts analyzing RLUIPA’s
8 nondiscrimination provision, as well as the related equal terms provision, have
9 similarly looked to equal protection precedent in weighing such claims. *See, e.g.,*
10 *Bethel World Outreach Ministries*, 706 F.3d at 559; *Church of Scientology of Ga., Inc. v.*
11 *City of Sandy Springs*, 843 F. Supp. 2d 1328, 1370 (N.D. Ga. 2012). We join in
12 employing this approach. RLUIPA, after all, codified “existing Free Exercise,
13 Establishment Clause[,] and Equal Protection rights against states and
14 municipalities” that discriminated against religious land use. *Midrash Sephardi, Inc.*,
15 366 F.3d at 1239 (discussing the equal terms provision, but also noting that “RLUIPA
16 tailors the nondiscrimination prohibitions [in 42 U.S.C. § 2000cc(b)(1) and (2)] to
17 land use regulations because Congress identified a significant encroachment on the
18 core First and Fourteenth Amendment rights of religious observers”). Accordingly,

1 establishing a claim under RLUIPA's nondiscrimination provision, as with the
2 Supreme Court's equal protection precedent, requires evidence of "discriminatory
3 intent." See *Arlington Heights*, 429 U.S. at 265 ("Proof of . . . discriminatory intent or
4 purpose is required to show a violation of the Equal Protection Clause.").

5 This Court has generally recognized three types of equal protection violations:
6 (1) a facially discriminatory law; (2) a facially neutral statute that was adopted with
7 a discriminatory intent and applied with a discriminatory effect (*i.e.*, a
8 "gerrymandered" law); and (3) a facially neutral law that is enforced in a
9 discriminatory manner. See, *e.g.*, *Hayden v. Cnty. of Nassau*, 180 F.3d 42, 48 (2d Cir.
10 1999); see also *Lukumi*, 508 U.S. at 535 ("Apart from the text, the effect of a law in its
11 real operation is strong evidence of object."). In determining whether a facially
12 neutral statute was selectively enforced, we look to both direct and circumstantial
13 evidence of discriminatory intent, as instructed by the Supreme Court in *Arlington*
14 *Heights*. See *Southside Fair Hous. Comm. v. City of New York*, 928 F.2d 1336, 1354 (2d
15 Cir. 1991) (citing *Arlington Heights*, 429 U.S. at 266); see also *Bethel World Outreach*
16 *Ministries*, 706 F.3d at 559 (citing *Arlington Heights* to support analysis of
17 circumstantial evidence in weighing nondiscrimination claim).

1 The Chabad asserts that HDC enforced Connecticut General Statutes
2 § 7-147d(a) *et seq.* against it in a discriminatory manner; yet, in weighing the
3 Chabad's claim, the district court looked solely to whether the Chabad had
4 identified comparator religious institutions that were "'identical in all relevant
5 respects'" to the Chabad. *Chabad II*, 853 F. Supp. 2d at 231 (quoting *Racine Charter*
6 *One, Inc. v. Racine Unified Sch. Dist.*, 424 F.3d 677, 680 (7th Cir. 2005)). This was in
7 error. As in *Arlington Heights*, analysis of a claim brought under RLUIPA's
8 nondiscrimination provision requires a "sensitive inquiry into such circumstantial
9 and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266.
10 Accordingly, courts assessing discriminatory intent under RLUIPA's
11 nondiscrimination provision have considered a multitude of factors, including the
12 series of events leading up to a land use decision, the context in which the decision
13 was made, whether the decision or decisionmaking process departed from
14 established norms, statements made by the decisionmaking body and community
15 members, reports issued by the decisionmaking body, whether a discriminatory
16 impact was foreseeable, and whether less discriminatory avenues were available.
17 *See Bethel World Outreach Ministries*, 706 F.3d at 559-60; *Church of Scientology of Ga.,*
18 *Inc.*, 843 F. Supp. 2d at 1370-76.

1 Here, the district court bypassed consideration of circumstantial evidence that
2 might have supported the Chabad’s claim and instead considered only the Chabad’s
3 cited comparators. While such evidence is certainly germane to a selective
4 enforcement analysis, it is not necessary to establish a nondiscrimination claim.
5 Contrary to the equal terms provision, which turns on “less than equal” treatment
6 of religious as compared to nonreligious assemblies or institutions, the
7 nondiscrimination provision bars discrimination “on the basis of religion or
8 religious denomination,” a fact that may be proven without reference to a religious
9 analogue.¹² 42 U.S.C. § 2000cc(b)(1), (2). Moreover, while comparators must exhibit
10 some similarity to permit meaningful analysis, a requirement that they be
11 “identical” is unduly restrictive. *See Third Church of Christ, Scientist*, 626 F.3d at 670
12 (surveying various bases for comparison relied upon by circuits, none of which
13 require comparators to be “identical”). Indeed, such a requirement would exempt
14 many historic districts from RLUIPA’s reach, given the likelihood that newer faiths

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.

1 would be absent.¹³

2 Because the district court did not look beyond religious comparators in
3 weighing the Chabad's nondiscrimination claim, we vacate the grant of summary
4 judgment to the defendants on this claim and remand for consideration of whether
5 the Chabad established a prima facie nondiscrimination claim, cognizant of the fact
6 that such discrimination must be "on the basis of religion" and not other, legitimate
7 factors. *See Bethel World Outreach Ministries*, 706 F.3d at 559-60 (affirming grant of
8 summary judgment for defendants on a nondiscrimination claim where evidence
9 showed that opposition to plaintiff's proposed land use was due to size of the
10 proposed facility, and the plaintiff failed to present comparative evidence that could
11 demonstrate the concern with size was pretextual).¹⁴

12 **B. The Chabad's Remaining Claims**

13 We conclude that the Chabad has waived appeal of its remaining claims due

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.

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).

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

8 **C. Rabbi Eisenbach’s Standing**

9 Rabbi Eisenbach appeals from the district court’s dismissal of his claims for
10 lack of standing under federal and state law. The district court first determined that
11 Rabbi Eisenbach did not have standing under RLUIPA because he did not assert a
12 sufficient property interest in 85 West Street. *Chabad I*, 796 F. Supp. 2d at 338 (citing
13 42 U.S.C. § 2000cc-5(5), which requires a claimant to have “an ownership, leasehold,
14 easement, servitude, or other property interest in the regulated land or a contract or
15 option to acquire such an interest”). The court held that Rabbi Eisenbach’s use of the
16 proposed facilities and his speculative “right to place a mortgage lien” on the
17 property to recoup unpaid salary were not “property interest[s]” under RLUIPA.
18 *Id.* at 338. We disagree at least insofar as the district court analyzed Rabbi

1 Eisenbach’s property interest as a jurisdictional matter.

2 The Supreme Court has recently clarified the distinction between Article III
3 standing – which is a prerequisite to the invocation of federal court jurisdiction –
4 and what has been referred to as “statutory standing” – which has at times been
5 held to be jurisdictional and at others nonjurisdictional. *See Lexmark Int’l, Inc. v.*
6 *Static Control Components, Inc.*, 134 S. Ct. 1377, 1386-88 & n.4 (2014). Under Article
7 III’s “case” or “controversy” requirement, a party invoking federal court jurisdiction
8 must demonstrate that he has “suffered or [is] imminently threatened with a
9 concrete and particularized ‘injury in fact’ that is fairly traceable to the challenged
10 action of the defendant and likely to be redressed by a favorable judicial decision.”
11 *Id.* at 1386 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)). Where this
12 “‘irreducible constitutional minimum of standing’” is satisfied, *id.* (quoting *Lujan*,
13 504 U.S. at 560), “a federal court’s obligation to hear and decide cases within its
14 jurisdiction is virtually unflagging,” *id.* (internal quotation marks omitted).

15 By contrast, determination whether a statute permits a plaintiff to pursue a
16 claim “is an issue that requires [courts] to determine . . . whether a legislatively
17 conferred cause of action encompasses a particular plaintiff’s claim.” *Id.* at 1387. As
18 opposed to whether the plaintiff may invoke a court’s jurisdiction, the question is

1 whether the plaintiff “has a cause of action under the statute.” *Id.* The
2 determination whether a statute grants a plaintiff a cause of action is “a
3 straightforward question of statutory interpretation,” operating under the
4 presumptions that the plaintiff must allege interests that “fall within the zone of
5 interests protected by the law invoked,” *id.* at 1388 (internal quotation marks
6 omitted), and injuries that were “proximately caused by [the alleged] violations of
7 the statute,” *id.* at 1390. As the Supreme Court has made clear, determination
8 whether a claim satisfies these requirements goes not to the court’s jurisdiction – that
9 is, “*power*” – to adjudicate a case, but instead to whether the plaintiff has adequately
10 pled a claim. *Id.* at 1387 n.4; *see id.* at 1389 n.5.

11 There can be little doubt that Rabbi Eisenbach has met the constitutional
12 requirements of Article III standing to assert his RLUIPA claim. At a minimum,
13 Rabbi Eisenbach alleged that he intended to live at the proposed facilities. The
14 HDC’s denial of the Chabad’s application, and the conditions it imposed on any
15 renewed application, thus deprived Rabbi Eisenbach of the ability to live in the
16 facilities as proposed, an injury that may be redressed by relief from the district
17 court.

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

10 Finally, the district court dismissed Rabbi Eisenbach’s federal and Connecticut
11 constitutional claims, as well as his claim pursuant to the CFRA, on the ground that
12 they were derivative of the Chabad’s claims. In his brief, Rabbi Eisenbach merely
13 asserts – conclusorily and without record citations – that he “has independent

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.

1 constitutional claims” that are “clearly expressed in the [complaint].” Appellants’
2 Br. at 61-62. The brief fails to cite a single Connecticut case to support his argument,
3 nor does it cite pertinent cases regarding federal law under 42 U.S.C. §§ 1985 and
4 1986. As such, we deem his appeal of these claims to be waived and affirm their
5 dismissal. *See Sam’s Club*, 145 F.3d at 117.

6 **D. The Individual Defendants’ Immunity**

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

14 **CONCLUSION**

15 For the foregoing reasons, we vacate the district court’s order dismissing
16 Rabbi Eisenbach’s RLUIPA claims for lack of standing and remand for further
17 proceedings as to these claims, but affirm the dismissal of the remainder of Rabbi
18 Eisenbach’s claims. We also vacate the district court’s judgment as to the Chabad’s

1 claims under RLUIPA's substantial burden and nondiscrimination provisions, and
2 remand for further proceedings as to those claims, but affirm the dismissal of the
3 Chabad's claim under RLUIPA's equal terms provision, as well as its claims under
4 the federal and Connecticut constitutions and Connecticut state law. Thus, the June
5 20, 2011 order of the district court is VACATED IN PART AND AFFIRMED IN PART, the
6 February 21, 2012 judgment of the district court is VACATED IN PART AND AFFIRMED
7 IN PART, and the case is REMANDED for further proceedings.