**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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**NO. 07-2946**

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**CLIFFORD CHARLES FOWLER,**

**Appellant,**

**v.**

**LARRY CRAWFORD, *et al.*,**

**Appellees.**

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**ON APPEAL FROM THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF MISSOURI**
**CENTRAL DIVISION**
**Honorable Nanette Laughrey**
**United States District Judge**

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# REPLY BRIEF FOR APPELLANT CLIFFORD CHARLES FOWLER

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**Respectfully submitted by,**

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## ARGUMENT

MDOC's case depends upon assertions belied by 14 years of evidence. Worse, MDOC sidesteps Fowler's lead arguments that settled precedent establishes the District Court erred by requiring Fowler, not MDOC, to present evidence that MDOC failed to consider less-restrictive alternatives to an outright sweat-lodge prohibition, and that MDOC offered no evidence that it considered less-restrictive alternatives to an outright sweat-lodge prohibition. Standing alone, either error mandates reversal. These aside, substantial evidence refutes MDOC's professed "security concerns," creating genuine issues of fact for trial. The Court should remand this case for a trial on the merits.

### I. MDOC FAILS TO REFUTE THAT THE DISTRICT COURT COMMITED LEGAL ERROR.

MDOC dodges Fowler's lead argument that RLUIPA requires the state, not Fowler, to submit evidence that it considered and rejected less-restrictive alternatives to the policy at issue. Beginning with *Murphy v. Missouri Department of Corrections*, all federal circuits interpreting RLUIPA have held the state must seriously consider alternatives to the policy under judicial review to satisfy strict scrutiny. *Murphy v. Missouri Dept. of Corrections*, 372 F.3d 979, 989 (8th Cir.

2004) (reversing summary judgment because MDOC failed to submit evidence demonstrating serious consideration of alternatives to the challenged policy).[1]

Of even greater import, MDOC cannot refute that the Third Circuit reversed summary judgment where the district court committed a legal error identical to the one at issue in this case. *Washington v. Klem*, 497 F.3d 272, 274 (3d Cir. 2007) (government must "consider and reject other means before it can conclude that the policy chosen is the least restrictive means."); *see also Spratt v. Rhode Island Dept. of Correction*, 42 F.3d 33, 41-2 (1st Cir. 2007) ("a prison 'cannot meet its burden of proof of least restrictive means unless it demonstrates that it has actually

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[1] Despite MDOC's bald assertions to the contrary, this standard does not impose the burden of ruling out each and every conceivable option to a complete sweat-lodge prohibition; rather, it requires a reasoned consideration of alternatives and an explanation why such alternatives are insufficient. Here, MDOC failed to produce evidence that it considered any alternatives.

Moreover, MDOC's repeated attempt to characterize Fowler's sweat lodge request as "all-or-nothing" is another misleading attempt to find false parallels with *Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996). Although MDOC contends that Fowler would accept nothing less than full access to a sweat lodge a minimum of 17 times a year, it is uncontroverted that Fowler would have accepted a transfer to Potosi. At the time Fowler requested transfer, Potosi operated a sweat lodge with numerous staff-imposed restrictions. For instance, Potosi only held sweat-lodge ceremonies twice a year and the modified ceremony was shorter and included significant oversight. Fowler even testified he would accept restrictions beyond those in place at Potosi at the time the request was made (i.e., additional guard supervision and allowing a guard in the sweat lodge). MDOC's attempt to find a false parallel with *Hamilton* is thus unavailing.

considered and rejected the efficacy of less restrictive measures before adopting the challenged practice'"); *Warsoldier v. Woodford*, 418 F.3d 989 (9th Cir. 2005) (same); *Greene v. Solano Cty. Jail*, --- F.3d ----, 2008 WL 170313 (9th Cir. Jan. 22, 2008) (reminding that a prison must "actually consider[] and reject[] the efficacy of less restrictive measures before adopting the challenged practice" to satisfy strict scrutiny). That MDOC does not contest these principles acknowledges the District Court's error. Granting summary judgment to MDOC because Fowler failed to come forward with ". . . evidence to support his claim that there are less restrictive means of achieving prison safety and security, other than completely prohibiting the sweat lodge ceremony[]" (Order, at p. 10) contravenes RLUIPA and its interpretive law. *Washington*, 497 F.3d at 274 (finding error in the district court's conclusion that "Washington has not suggested, any way in which Defendants can better keep inmates' cell safe, other than limiting the amount of personal property inmates may store within their cell.") *Id.* at 285-86. Because the District Court impermissibly shifted the burden of proof to Fowler, this Court should reverse for trial. *Id.*

## II. MDOC OFFERED NO EVIDENCE IT CONSIDERED ANY LESS-RESTRICTIVE ALTERNATIVES TO A COMPLETE SWEAT-LODGE PROHIBITION.

Nor does MDOC offer any evidence demonstrating it considered less-restrictive alternatives to a complete ban on sweat lodges. MDOC's failure to offer

such evidence is confirmed by the below argument purporting to address the issue—a paragraph predicated upon an incorrect reading of RLUIPA, rife with unsupported assertions and devoid of authority:

> Fowler repeatedly asserts that the Department did not consider any alternative to the prohibition of sweat lodges. This broad assertion is not supported by the record. Fowler cites to the testimony of three officials at MDOC who testified only based on their personal knowledge. He also bases this on the testimony of Santha, but that testimony does not support the broad reading he would give it. Additionally, as a non-employee, Santha, who had only attended approximately three meetings of the Religious Programming Advisory Council, would not be competent to testify as to what the Department considered. The fact that at one point a sweat lodge was operated intermittently at Potosi Correctional Center contradicts the notion that the Department has never considered the sweat lodge.

Appellees' Brief, pp. 29-30.

The above paragraph is condemning on several levels. First, it again implies Fowler carried the burden of proving that MDOC did not consider alternatives to the sweat-lodge prohibition. Second, it lacks a single citation to evidentiary material suggesting MDOC considered alternatives to an outright ban. Third, it fails to offer even hypothetical alternatives that MDOC considered and rejected.[2]

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[2] Any such argument would be hypothetical because there is no evidentiary record suggesting MDOC considered any alternatives.

MDOC thus failed to satisfy strict scrutiny and this Court should reverse for trial. *Washington*, 497 F.3d at 274.

## III. THE SWEAT-LODGE PROHIBITION DOES NOT *FURTHER* A COMPELLING INTEREST.

MDOC's successful operation of a sweat lodge at Potosi for 14 years belies its assertion that the sweat lodge poses a danger. This alone justifies a trial. *Spratt*, 42 F.3d at 40 ("seven-year track record as a preacher. . . unblemished by any hint of unsavory activity" created fact issues for trial). This success—coupled with MDOC's admission that it could accommodate a sweat lodge (Roper Dep. p. 48) (JA-70), and evidence that other penal institutions with the same security interests operate sweat lodges—demonstrates that the sweeping legal conclusion that MDOC's sweat-lodge policy *furthers* a compelling interest was erroneous. *Warsoldier*, 418 F.3d at 1000 (the failure "to explain why another institution with the same compelling interest could accommodate the same religious practices may constitute a failure to establish that the defendant was using the least restrictive means").

Indeed, the record eviscerates the "evidence" MDOC cites to justify the sweat-lodge prohibition. First, most of MDOC's professed security concerns would exist without the sweat lodge; thus, only MDOC's argument that the sweat lodge poses a security concern because it secludes inmates from oversight has any bearing on the issue before the Court. (MDOC's Brief, pp. 13, 21).

And even this argument unravels under scrutiny. MDOC's own witnesses admitted that routine checks and screening procedures alleviated any such concerns at Potosi. (Roper Dep. pp. 37, 40) (Long Dep. p. 51) (JA-68, 27). Fowler also testified that a guard could remain in the sweat lodge to monitor the ceremony. (Fowler Dep. pp. 27-28) (JA-46). Thus, testimony from MDOC's own witnesses and its track record at Potosi refute its argument regarding the seclusiveness of the sweat lodge, creating fact issues for trial.[3]

MDOC next contends that the sweat-lodge prohibition is necessary to conserve prison resources. But this contention runs contrary to MDOC's admission that institutional resources are irrelevant to whether it can operate a sweat lodge. (Long Dep. p. 58) (JA-463).[4] And MDOC's track record of

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[3] MDOC continues to cite the possibility of violence during religious call out times and group conspiracy in the chapel as bases for the sweat-lodge prohibition. The evidence demonstrates that this concern exists with or without the operation of the sweat lodge. Thus, MDOC's concerns cannot *further* a security interest because they are unaffected by the sweat lodge policy. *Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418 (2006) ("It is established in our strict scrutiny jurisprudence that 'a law cannot be regarded as protecting an interest "of the highest order" . . . when it leaves appreciable damage to that supposedly vital interest unprohibited.'").

[4] Q. Are there any budgetary concerns you would have with respect to accommodating the sweat lodge, would that ever come into your trouble with the sweat lodge because of the materials cost too much?

A. Generally not. Generally not for any religion because the funding is normally the inmate canteen fund, which is the profit that's generated off of sales. Our canteens are our little quick shop stores inside, profits from sales are spent on recreation, religion and education. That's kind of the self funding source they have.

successfully operating a sweat lodge at Potosi also refutes this theory. Once again, MDOC's testimony and conduct at Potosi refute its assertions. *Id.*

MDOC's argument regarding prison resources is also legally deficient: the desire to conserve financial resources does not rise to the level of a compelling interest. *Memorial Hosp. v. Maricopa County*, 415 U.S. 250, 263 (1974) ("[t]he conservation of the taxpayers' purse is simply not a sufficient state interest" to withstand strict scrutiny); *O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft*, 342 F.3d 1170, 1186 (10th Cir. 2003) *aff'd by* 546 U.S. 418 (government cannot satisfy strict scrutiny by citing an "increased need for resources"); *Finley v. Nat'l Endowment for the Arts,* 100 F.3d 671, 683 n.23 (9th Cir. 1996) (protecting taxpayers from "unwanted expenditures" is not a compelling interest); *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1280 (10th Cir. 1996) ("A city or state's desire for federal funds is not a compelling government interest.").

Finally, MDOC cites the hypothetical concern that unidentified, insincere Native American inmates lacking genuinely-held religious beliefs could attempt to participate in the sweat-lodge ceremony. This assertion is undermined by actual

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> We also allow religious organizations or groups, I shouldn't say organizations that relates to procedures. Religious groups to take donations of materials and/or funds for various purposes. The sweat lodge case, as I recall, when we put that one in in Potosi it's not stuff you can go buy anyway, generally its usually the medicine man or the – I can't think, the ranking Native American whatever he is. Somebody that is appropriately trained and skilled goes and gathers more than anything.
>
> So I don't believe there's a significant cost.

testimony and lacks any basis in the record. At Potosi, MDOC ensured that inmates participating in the sweat-lodge ceremony did so for the "right reasons" by screening procedures. (Roper Dep. p. 24-30) (JA-448). Behavior inconsistent with MDOC's expectations for sincere faith would result in a revocation of privileges. *Id.* Such procedure was successful for 14 years at Potosi, dispelling MDOC's hypothetical concern.

## IV. THE *HAMILTON* FALLACY.

MDOC's misplaced reliance on *Hamilton* borders duplicity. By attempting to replicate *Hamilton's* facts through affidavits, MDOC turns a blind eye to the evidentiary distinctions between this case and *Hamilton*, chief among them the 14 years MDOC spent at Potosi refuting the very representations it made to this Court in *Hamilton*.

Beyond this glaring distinction, MDOC does not dispute that *Hamilton* is also legally and procedurally inapposite. MDOC cannot refute that appellate jurisprudence interpreting RLUIPA's least-restrictive-means analysis has evolved since *Hamilton*, a case decided before several federal circuits applied the strict-scrutiny framework of *U.S. v. Playboy Entm't. Group, Inc.*, 529 U.S. 803 (2000) to RLUIPA cases. *See e.g., Washington*, 497 F.3d 272. That the Honorable David R. Hansen of this Court, one of two judges in the *Hamilton* majority, endorsed the *Washington* court's reading of RLUIPA leaves *Hamilton* without import. *Id.*

MDOC also fails to address procedural distinctions between this case and *Hamilton*. As *Spratt* held, *Hamilton* does not apply to RLUIPA cases at summary judgment. *See e.g.*, *Spratt*, 42 F.3d at 41-2. Like *Spratt*, this case queries whether MDOC's policy satisfies RLUIPA as a matter of law at summary judgment; *Hamilton* reviewed the grant of injunctive relief following a full evidentiary hearing. *Id.* *Hamilton* is therefore procedurally distinguishable; this case instead parallels the numerous federal circuit cases reversing the dismissal of a RLUIPA claim at summary judgment. *Murphy*, 372 F.3d 979 (reversing summary judgment); *Spratt*, 42 F.3d 33 (same, and distinguishing *Hamilton* on this very basis); *Washington*, 497 F.3d 272 (same); *Warsoldier*, 418 F.3d 989 (same); and *Lovelace v. Lee*, 472 F.3d 174 (4th Cir. 2006) (same).

## CONCLUSION

The District Court erred in construing RLUIPA to require Fowler to present evidence of less-restrictive alternatives to a sweat-lodge prohibition. RLUIPA requires the government, not the prisoner, to present evidence of what less-restrictive means were considered and ruled out before settling on the policy subject to judicial review. Because MDOC failed to submit such evidence at summary judgment, this Court must reverse and remand for trial.

MDOC also failed to carry its burden at summary judgment. The record demonstrates MDOC successfully operated a sweat lodge for 14 years and admits

it could still do so. Under prevailing law, such facts, with all other evidence in the record, establish genuine issues of material fact for trial.[5]

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[5] At the end of its Brief, MDOC asks the Court to strike record material not presented at summary judgment. Notably, MDOC makes no argument that such material impacts the disposition of the issues before the Court. The argument is thus immaterial and time-wasting. Regardless, the Court has the inherent power to consider materials not filed before the District Court and should do so in this case. *Dakota Industries, Inc. v. Dakota Sportswear, Inc*., 988 F.2d 61, 63 (8th Cir. 1993).

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## CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C) and Eighth Circuit Local Rule 28(A)(c), I certify that this reply brief complies with the type volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). This brief was prepared with Microsoft Word 2003 and, pursuant to the word count of that software, the brief contains 2,324 Words. This brief was prepared in Times New Roman 14 point font. I further certify that pursuant to Eighth Circuit Local Rule 28(A)(d), the attached computer diskette containing the brief has been scanned for viruses and is virus-free.

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the Appellant's Reply Brief was mailed, on this 31st day of January 2008, by Federal Express priority overnight delivery, postage prepaid, addressed to:

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