IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 13-1401

NATIVE AMERICAN COUNCIL OF TRIBES;
BLAINE BRINGS PLENTY; and CLAYTON CREEK,

Plaintiffs and Appellees,

-vs-

DOUGLAS WEBER,
Warden of the South Dakota State Penitentiary; and
DOUGLAS KAEMINGK,
Secretary of the Department of Corrections,

Defendants and Appellants,

On Appeal from the United States District Court
District of South Dakota

HON. KAREN E. SCHREIER

BRIEF OF THE APPELLEES

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SUMMARY OF THE CASE

Plaintiffs Native American Council of Tribes, Blaine Brings Plenty, and Clayton Creek brought this action alleging violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, and seeking injunctive relief to require the defendants to allow them to use tobacco in their religious ceremonies. The evidence at trial demonstrated that it is the *presence* of tobacco, not the amount, that is critical to the plaintiffs' right to exercise their traditional Lakota religious rites. Following a trial, the district court entered detailed findings of fact and conclusions of law and granted narrowly tailored injunctive relief pursuant to RLUIPA and the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626(a)(1), to lift the recently enacted ban and reinstate the longstanding rights of inmates in the South Dakota Department of Corrections to use a mixture containing at least one percent tobacco, a traditional Lakota sacrament, in their religious ceremonies.

The district court's orders and judgment reflect an appropriate balance between accommodation of Lakota religious practices and the needs of the prison administration and were the product of a proper application of the law to the facts as determined at trial. They should be affirmed. Should oral argument be granted, the Appellees respectfully request fifteen (15) minutes.

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STATEMENT OF THE ISSUE

I. Did the district court properly grant narrowly tailored injunctive relief pursuant to RLUIPA and the PLRA to lift a recently enacted ban and reinstate the rights of inmates in the South Dakota Department of Corrections who practice the Native American religion to use a mixture containing at least one percent tobacco, a traditional Lakota sacrament, in their religious ceremonies?

Following a trial, the district court entered findings of fact, conclusions of law, and a narrowly tailored remedial order to that effect.

- *Cutter v. Wilkinson*, 544 U.S. 709 (2005)
- *Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008)
- *Gladson v. Iowa Dep't of Corrections*, 551 F.3d 825 (8th Cir. 2009)
- *Van Wyhe v. Reisch*, 581 F.3d 639 (8th Cir. 2009)

STATEMENT OF THE CASE

Plaintiffs Native American Council of Tribes, Blaine Brings Plenty, and Clayton Creek brought this action against Defendants Douglas Weber, Warden of the South Dakota State Penitentiary, and Douglas Kaemingk, Secretary of the Department of Corrections (DOC), alleging violations of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc, as well as the First and Fourteenth Amendments, seeking injunctive relief to require the defendants to allow them to use tobacco in their religious ceremonies. The plaintiffs filed their second amended complaint on June 15, 2010. (Doc. 71). The defendants moved for summary judgment. (Doc. 80).

On September 20, 2011, the district court granted in part and denied in part the defendants' motion. (Doc. 109). Regarding the RLUIPA claim, the district court first held that because the sincerity of the plaintiffs' claims regarding the use of tobacco in the exercise of their religion was at issue, questions of fact precluded summary judgment on whether the total ban constituted a substantial burden within the meaning of that statute. (Doc. 109 at 12). Second, the district court held that the defendants had not submitted evidence showing that the total ban on tobacco advanced a compelling government interest and instead offered "only post hoc rationalizations to defend their alleged security concerns." (Doc. 109 at 18).

Finally, the district court held that the defendants did not choose the least restrictive means available to further the compelling interest that they sought to advance. (Doc. 109 at 18-20).

The district court also denied summary judgment on the plaintiff's First and Fourteenth Amendment claims and granted the motion on the claims involving the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. § 1996, and international law. (Doc. 109 at 20-25). A court trial was held on March 27-29, 2012 on the plaintiffs' remaining claims. Following trial, the district court granted a motion made by the United States to file a statement of interest in support of the plaintiffs. (Doc. 181).

Following post-trial briefing, on September 19, 2012, the district court entered its amended memorandum opinion and order granting relief to the plaintiffs on their RLUIPA claim. (Doc. 189). "After considering all the evidence," the district court found that "tobacco is part of the exercise of the Lakota religion and the plaintiffs' own views about tobacco's role in their religion are sincere." (Doc. 189 at 28). It also found that "[t]he majority of DOC's evidence demonstrated that the tobacco ban was implemented because of the DOC's incorrect belief that the Lakota religion does not necessitate tobacco use for its practice." (Doc. 189 at 28). Next the district court found that,

notwithstanding the complete tobacco ban, the defendants had admitted that tobacco was still entering DOC facilities illegally, including through visitors, employees, volunteers, and other inmates. (Doc. 189 at 28-29). Finally, the district court found that several other penal institutions, including maximum security prisons in Minnesota, Iowa, Wisconsin, and California, as well as the federal prison system, allow Native American inmates to use tobacco in their religious ceremonies. (Doc. 189 at 30).

Based upon its factual findings, the district court entered its conclusions of law regarding the plaintiffs' RLUIPA claim. First, it held that the plaintiffs demonstrated that the use of tobacco in their religious ceremonies involving the pipe, tobacco ties, and prayer flags is a religious exercise protected by RLUIPA. (Doc. 189 at 40). Next, it held that "[b]ecause tobacco is an essential and fundamental part of plaintiffs' religious exercise, a total ban on tobacco is 'a substantial burden on the religious exercise of a person residing in or confined to an institution'" under RLUIPA. (Doc. 189 at 40). After considering the defendants' proffered reasons for enacting the ban, the district court then concluded that they had not shown a sufficient compelling government interest in enacting a *complete* ban on the use of tobacco in all Lakota religious ceremonies. (Doc. 189 at 48). The district court further held that, given the widespread

accommodation of tobacco use in Native American religious ceremonies in penal institutions, the lack of compelling precedent supporting defendants' posture, and the lack of evidence supporting their position, the defendants did not meet their burden under RLUIPA to demonstrate that they implemented the least restrictive means available to further a compelling interest. (Doc. 189 at 57). Having determined that the defendants violated RLUIPA by banning any use of tobacco in Lakota religious ceremonies, the district court ordered the parties to meet and propose an appropriate, narrowly tailored injunction that included revisions to the tobacco policy for inmates practicing the Lakota religion. (Doc. 189 at 59).

The parties complied with the district court's order and submitted their proposals for injunctive relief. (Docs. 190-94). On January 25, 2013, the district court entered its narrowly drawn remedial order pursuant to the Prison Litigation Reform Act (PLRA), 18 U.S.C. § 3626(a)(1). (Doc. 196). This order was intended to enforce the district court's prior conclusion that a complete ban of tobacco in Lakota religious ceremonies is a substantial burden on the exercise of the Native American religion and that inmates who practice that religion must be afforded the opportunity to use tobacco during certain religious ceremonies. (Doc. 196 at 3). The remedial order provided that:

1. Mixtures used during Native American ceremonies that include tobacco will not contain more than 1 percent tobacco by volume.

2. Tobacco ties and prayer flags can contain mixtures that include tobacco. All tobacco and prayer flags used during ceremonies must be burned at the conclusion of the ceremonies.

3. The mixtures used for tobacco ties and prayer flags must be ground, but the mixtures that are smoked in pipe do not need to be ground.

4. The mixtures used during ceremonies will be provided by volunteers who are cleared by the DOC. The volunteers must be eligible for and receive a "pink-tag" or some equivalent clearance level. Volunteers who violate the tobacco policy may be refused admission to any DOC facility and may be subject to prosecution.

5. Mixtures provided by the approved volunteers must be brought into the facility in a sealed, clear plastic bag that is subject to search and marked for identification. Mixtures must be premixed to comply with the 1 percent tobacco by volume requirement.

6. Each DOC facility will determine where ceremonies take place within the facility, including the locations where tobacco ties and prayer flags are made. The DOC may require certain activities that involve tobacco to take place under video surveillance. The video surveillance requirement does not apply to the sweat lodge ceremony.

7. Inmates participating in the Native American religion can participate in the making of tobacco ties and prayer flags.

8. The process for handling and distributing tobacco ties and prayer flags will revert back to the procedures used prior to the tobacco ban.

9. An abuse of ceremonial tobacco by an inmate will result in a one-year suspension from any ceremony that includes tobacco.

(Doc. 196 at 3-9). The remedial order concluded:

> All other procedures and processes should revert back to the manner in which they were done prior to the tobacco ban and consistent with this order. As discussed at the beginning of this section, inmates who practice the Native American religion must be afforded the opportunity to use tobacco during certain religious ceremonies. Because the DOC previously permitted and implemented a system in which members of the Native American religion used tobacco during ceremonies, reimplementing such a system with the additional requirements discussed above is limited in its intrusiveness and still provides a narrowly tailored remedy to plaintiffs.

(Doc. 196 at 9). On January 28, 2013, the district court entered its judgment. (Doc. 197). This appeal followed.

STATEMENT OF THE FACTS

Blaine Brings Plenty and Clayton Creek are American Indians and direct descendants of their ancestral Lakota people. The *Lakota* traditionally lived in the Dakotas west of the Missouri River. (T 232). In contrast, the *Dakota* lived east of the Missouri River and the *Nakota* lived in the Yankton area. (T 232). In South Dakota prisons, 27 percent of the total population is Native American, the highest percentage of any state, with the vast majority being Lakota affiliated with the Oglala Sioux Tribe. (T 232-33; Ex. 114).

Blaine Brings Plenty

Blaine John Brings Plenty is an enrolled member of the Oglala Sioux Tribe. (T 150). He grew up in Porcupine on the Pine Ridge Indian Reservation. (T 149). From an early age, Brings Plenty was raised in the traditional Lakota religion. (T 150). One of his early memories is making tobacco ties with his mother. (T 150). His grandfather, Dave Badger, was a pipe carrier and famous announcer at Pow Wows. (T 150). Brings Plenty has been incarcerated at the South Dakota State Penitentiary in Sioux Falls since 1989. (T 150-51). He is a former president of NACT and remains on its council. (T 59, 101, 158-59; Ex. 25).

Clayton Creek

Clayton Creek was born on the Cheyenne River Indian Reservation. (T 69). He is an enrolled member of the Minnecojou Lakota from the Cheyenne River Sioux Tribe. (T 113). One of his earliest memories is participating at the age of five in a traditional Lakota *Yuwipi* healing ceremony conducted by his grandfather, Moses Afraid of Lighting, in which tobacco was used as an offering to the spirits. (T 70-72). Creek was an inmate at the South Dakota State Penitentiary in Sioux Falls from 2001 to 2010. (T 93, 115). Since September of 2010, he has served at the Mike Durfee State Prison, a low-medium facility in Springfield. (T 93, 115). Creek is a former vice-president of NACT. (T 100).

Lakota spirituality

Brings Plenty and Creek practice a traditional form of Lakota spirituality dating back hundreds if not thousands of years before European settlement of the Americas. The Lakota religion emphasizes ritual and ceremony as a means of connecting to the universe and the sprits in all living things. (T 29). Many Lakota teachings, passed down throughout the ages by oral history, were first documented in the 1920's by Black Elk, a medicine man or traditional healer (the preferred term), in his invaluable account of the seven sacred rites of the Oglala Sioux. (T 57, 196, 200-01; Ex. 30). Three of the most important ceremonial gifts to the Lakota from the Creator are the sweat lodge, the sacrament of tobacco in the fire, and the sacred pipe. Tobacco is an integral part of each of these ceremonies.[1]

The sweat lodge

The sweat is a purification ritual in which the lodge, or *Inipi*, represents the female womb and the ceremony's culmination, a rebirth. (T 26-27, 151-53; Ex. 30). In a sweat ceremony, the interior of the structure fills with steam from stones heated in a fire supervised and guarded by a person of honor called the fire keeper. (T 44, 156, 179-80). Here is an example of a sweat lodge:

[1] A Lakota word for some tobacco is "cunli." (T 62). "Kinnikinnick" refers to various mixtures of tobacco and other plants used by different tribes. (T 53, 63).

(Exs. 14, 15). After the lodge is prepared, the individuals enter and kneel in a circle to be led in rounds of ritual songs, prayers, and a pipe ceremony in which tobacco and cansasa (red willow bark) are smoked. (T 41, 153-54). As Brings Plenty described:

> When it gets real hot, the drops are hot when you put the water on the rocks, and it makes a lot of steam and it starts to hurt. That's like *Tunkashila* [the Creator] blowing his breath on you to let you know how small and weak you are, but he's blowing life on you at the same time.
>
> The darkness inside the sweat, I was told that's kind of like – like when it gets hot in there and you can't breathe or its gets too hot for you, the steam does, that's the darkness that's inside you, your own darkness, your own fear that you feel inside you. That's *Tunkashila*, the darkness, that's part of his creation you see. And when the door opens, each door that opens, it's kind of like a new – it's bringing new life to you.

> … It's a purification ceremony to purify all of your – to help your negativity, the negative energy you feel in your body. It helps release that …

(T 152). Brings Plenty is one of two fire keepers for the sweat lodge at the South Dakota State Penitentiary. (T 155, 178). He and Clayton Creek have participated in sweats as a part of their Lakota religion since their youth. (T 73, 86, 157).

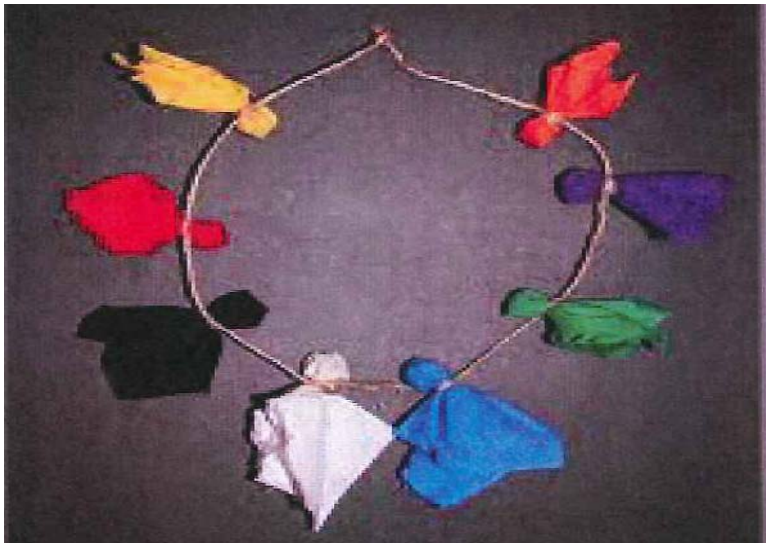
The sacrament of burning tobacco

The sacrament of tobacco in the fire, called the *Ta Awi Cha*, is a form of prayer and communion with the Creator and other spirits. (T 27-28). "Tobacco ties" are made using tobacco, string, and some cloth. (T 30-31; Ex. 32). Each tie represents a prayer and an offering to the spirits:

> Tobacco is used to make tobacco tie offerings. Each offering, as you see here, represents a prayer, each prayer. A long time ago before the cloth, this was done by leather, a real fine leather. Each tie represents a prayer, and is offered to the spirit and later burned into a fire.

(T 31). In that way, a tobacco tie is similar to a rosary in the Catholic faith. (T 53, 490-91). In a rosary, "[e]ach bead represents a certain prayer. The tobacco tie is the same. Each tie represents a certain prayer." (T 53).

Tobacco ties and prayer flags are often hung outside on trees before they are taken down and burned as offerings. These are traditional Lakota tobacco ties:



(Ex. 23).

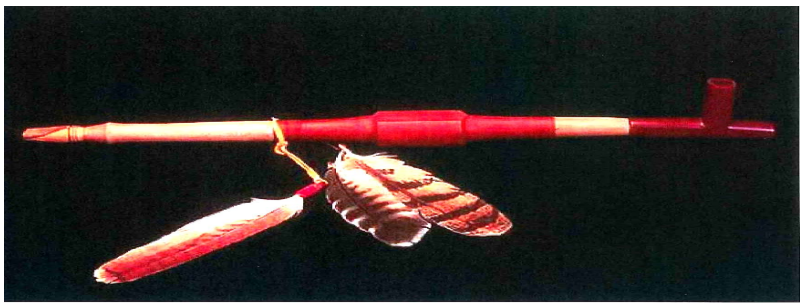
(Exs. 22, 35; T 39-40, 85). The colors of these particular flags signify the four directions, as well as all of the races of humanity. (T 38-40, 90).

Tobacco ties and prayer flags are placed inside the stone altar and hung inside the sweat lodge and then burned as an offering in the fire when the ritual is over. (T 41-42, 86, 153, 155-56). Tobacco ties and prayer flags are also burned as

offerings at other Lakota religious ceremonies such as the *Lawampi* (a thanksgiving ceremony in which tobacco is offered to the spirits), *Pow Wows*, and the Sun Dance. (T 42, 84, 87-91, 105-06, 379, 490-91, 495; Ex. 30). For Lakota, tobacco is the only acceptable offering used in tobacco ties and prayer flags. (T 33-34, 40, 85-86, 90, 381; Ex. 33). Once they are burned, the smoke of the tobacco carries the prayers to the Creator. (T 91). Brings Plenty and Creek have used tobacco ties and prayer flags as a central part of their Lakota religion since the earliest days of their youth. (T 73, 85-86, 90, 109, 157).

The sacred pipe

The sacred pipe is also a form of prayer in which tobacco, often in combination with other herbs including red willow bark (cansasa), are smoked as an offering to the Creator to bring peace to all living things. (T 28-29). This occurs during the sweat ceremony, as well as individual pipe ceremonies and other Lakota rituals. (T 153-54). Here are some modern examples of a sacred pipe:



(Exs. 16, 17, 19, 20).

In Lakota tradition, the sacred pipe was brought to their people by the White Buffalo Calf Woman, a beautiful maiden dressed in white buckskin who transformed herself into a snow white calf. (T 35-36, 109, 148). The coming of the Buffalo Maiden is somewhat akin to a "New Testament" of the traditional Lakota religion. (T 64). Along with the sacred pipe, she brought red willow bark to be smoked as a mixture with tobacco in the pipe, as well as sweet grass to use as a smudge to cleanse. (T 63, 199). From that time, "[t]he Lakota mixed tobacco and cansasa together using sweet grass to smudge." (T 148-49).

The sacred pipe is used by the Lakota "as a prayer to create or to bring peace and harmony to people in their future." (T 36). As traditional healer Richard Moves Camp explained:

> When we fill the bowl and when we smoke the pipe, the smoke is significant. It represents the spirit, the spirit of the being, all the human beings, all walks of life, including the winged, the four-legged, the creation story. When you smoke the pipe, the smoke is a sign that there is life. There's a life. There's a spirit of everything there is that we talk about, and the smoke is what that represents.

(T 52). The smoke from the tobacco mixture in the pipe is the vehicle that carries prayers to the *Wakan-Tanka*, the Creator or Great Spirit. (T 61, 154). As described by the Buffalo Maiden in Black Elk's traditional account, "[a]ll these peoples, and all the things of the universe, are joined to you who smoke the pipe –

all send their voices to *Wakan-Tanka*, the Great Spirit. When you pray with this pipe, you pray for and with everything."[2]

The original pipe from the Buffalo Maiden has been passed down for generations and is held today by Arvol Looking Horse, pipe carrier for the Seven Council Fires, which includes the Lakota, Dakota, and Nakota peoples. (T 36-3, 427). Each Lakota family carries their own family pipe that is passed down from generation to generation. (T 43, 195-96).

Individual Lakota may also carry their own sacred pipes that represent the original pipe given to their people by the Buffalo Maiden. (T 43). It is a great honor and responsibility to be a pipe carrier in the Lakota religion. (T 43). A person that carries the pipe is required to live a good, clean, and healthy life, abstaining from drugs and alcohol and following the traditional ways. (T 43). Both Brings Plenty and Creek are pipe carriers (there are five at the South Dakota State Penitentiary) and have used tobacco in their pipes since they began practicing their Lakota religion until the recent ban. (T 73-76, 109, 154, 157, 177).

Richard Moves Camp

At trial, the plaintiffs presented the expert testimony of Richard Moves Camp, a respected Oglala holy man of the Lakota faith whose spiritual beliefs

[2] Joseph Epes Brown, *The Sacred Pipe: Black Elk's Account of the Seven Rites of the Oglala Sioux*, 6-7 (University of Oklahoma Press 1953, 1989).

reflect their own. (T 21-23, 85, 157). Moves Camp was born and grew up on the Pine Ridge Indian Reservation. (T 21). He is a member of the Teton Band of Oglala Lakota and has been a traditional healer for more than 36 years. (T 22; Ex, 31). For most of his life, Moves Camp was mentored by elders in the ways of Lakota spirituality. (T 23). His ancestors were among the spiritual advisors to Crazy Horse. (T 32).

In the 1970's, Moves Camp was instrumental in consulting with Warden Herman Solem regarding the initial placement of a traditional Lakota sweat lodge at the South Dakota State Penitentiary and participated in the blessing ceremony when it was first used. (T 25). Moves Camp has consulted with several penal institutions that permit the use of tobacco in traditional Lakota religious ceremonies, including San Quentin, Folsom, Fort Leavenworth, and facilities in Wisconsin, Minnesota, and California. (T 26, 237; Exs. 1, 2, 3). He has also testified before Congress on behalf of Native American religious freedom. (T 50).

The use of tobacco in sweats, tobacco ties, prayer flags, and the sacred pipe is fundamental to the Lakota religion. (T 55). As Moves Camp testified, tobacco has been a significant part of Lakota spirituality and culture for more than a thousand years, long before the Europeans made contact. (T 24). Its use among North America's indigenous peoples can be traced to contact with Central and

South America. (T 24).[3] As a traditional healer, Moves Camp smokes a mixture of tobacco and red willow bark in his pipe. (T 63-64, 67). Every Lakota medicine man or traditional healer (the preferred term) uses tobacco in traditional religious ceremonies. (T 52). As Moves Camp testified:

> Being deprived, like taking the tobacco away from, it's almost like taking a Bible away from the church. It's like saying you can go to church, but you can't use the Bible. Like I said earlier, tobacco is a very important part of the ceremonies of the indigenous people for thousands of years. The concept of the tobacco, the plant, is a sacred plant. It's like a God to many people. It's a sacrament.
>
> So before the pipe was ever brought to the people, there was the tobacco for particularly Lakota people. It's played an important role. It's like a center. We have these offerings. We put tobacco in them. When we see an elder, we give them tobacco. It doesn't mean we smoke it all the time. That has nothing to do with it. The idea of the tobacco is a holy sacrament to our people. That goes with many different Tribes. So being deprived is probably not so good.

(T 51-52). For a traditional Lakota, the total ban on tobacco at the penitentiary is taking away their ability to pray in the way that their religion teaches. (T 55).

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[3] "If there is one aspect unique to aboriginal religion in the Americas, it is the ritual use of tobacco. As noted by an eighteenth-century observer: 'All the Indian nations we have any acquaintance with, frequently use it on the most religious occasions.' (Adair 117: 408). Elsewhere in the world one can find such relatively common particulars of Native American religion as the ritual use of sweat ceremonials, fermented beverages, dog sacrifice, and shamanic trance. The focus on tobacco as the primary sacred plant is ubiquitous throughout the Americas save for the Artic, but in parts of Central and South America other sacred plants may be of equal importance." Jordan Paper, *Offering Smoke: The Sacred Pipe and Native American Religion*, 3 (University of Idaho Press 1988).

The Native American Church

Although sometimes confused by outsiders, the Native American Church is very different and separate from the traditional Lakota religion practiced by Brings Plenty and Creek. (T 45, 106, 172, 184). In fact, the Native American Church is a blending of Native American spirituality and *Christianity* that also has roots in the religious use of peyote in the southwestern United States. (T 45-46, 273, 348-49, 385, 498). Members of the Native American Church has also used tobacco, but rolled it in corn husks to smoke it rather than using a pipe. (T 47, 106, 499). Richard Two Dogs, Roy Stone, Bud Johnston and Breon Lake, witnesses called by the defendants at trial, are all members of the Native American Church or other churches that are different from the traditional Lakota religion practiced by Brings Plenty and Creek. (T 106-07, 498). Moreover, as recognized by the defendants, "[t]here is no formal guide to practicing [the Native American] religion so there are variances in the manner of practice among and between individuals, groups and tribes." (Ex. 110 at NACT 036).

The prison's ban on tobacco in Lakota religious ceremonies

When Brings Plenty and Creek first entered the South Dakota State Penitentiary, Native American inmates were permitted to purchase tobacco from the prison and practice their Lakota religion by attending sweat ceremonies,

making tobacco ties and prayer flags to offer to the spirits, and smoking tobacco and red willow bark in pipe ceremonies. (T 80, 91, 160). Of course, the prison did not pay for the tobacco and does not pay for any religious items used in Lakota ceremonies. (T 100, 198-99). Rather, after the prison itself stopped selling tobacco, such materials were paid for through donations to the Native American Council of Tribes, a non-profit organization dedicated to helping Indian prisoners freely practice their religion. (T 100, 160).

Mary Montoya, the volunteer supervisor of religious activities at the state penitentiary, was the "outside treasurer" for NACT, as well as other religious organizations in the prison, and was responsible for purchasing and distributing religious supplies, including tobacco for use in Lakota religious ceremonies. (T 102-03, 181, 241, 458-59). In that capacity, Montoya worked with Blaine Brings Plenty and other officers of NACT to help coordinate Lakota religious ceremonies. (T 167-68).

General tobacco ban

In 1998, the smoking of tobacco was banned at all South Dakota prisons. (T 545). That same year, the sacred pipe used by NACT was taken away by the prison administration, apparently at the urging of a staff member who was also a Christian minister. (T 160; Ex. 127). After the Lakota inmates filed a protest with

Warden Weber, the pipe was returned and Native American inmates were permitted to continue to use tobacco in their traditional religious ceremonies. (Ex. 127). In 2000, a ban on all tobacco (to include chewing tobacco) went into effect at South Dakota correctional facilities, again with an exception for the use of tobacco in traditional Native American religious ceremonies. (T 546).

Change in the mixtures

In 2004, as the result of accusations that tobacco was being misused, the mixture of tobacco permitted to be used was changed to 50 percent tobacco and 50 percent red willow bark. (T 91, 163-64, 244). In 2005, the allowed mixture was changed to 25 percent tobacco and 75 percent red willow bark and they began to grind the mixture into a dust. (T 245, 472). This mixture remained the same until the date of the total ban on ceremonial tobacco in 2009. (Ex. 109 at NACT 013).

NACT's policies

Before the complete ban was enacted, NACT had written to the cultural affairs coordinator requesting enforcement of a policy whereby only the NACT pipe keeper and two spiritual committee members could have access to the materials used to make tobacco ties. (Ex. 26; T 95, 161-63). NACT then voluntarily enacted a sanction among its members for misusing tobacco:

MISUSE OF PIPE AND/OR TIE MIXTURE:

> The ability to have pipe and tie mixture with tobacco in it is a privilege accorded only to the Native groups in the prison system, which is otherwise tobacco free. To protect this privilege, NACT wants to ensure the mixture is used in the sacred way for which it is intended.
>
> Any NACT member who has received pipe or tie mixture containing tobacco from the group and has been found with it in the unit or any other area not designated for ceremonies, will be banned from receiving pipe and tie mixture containing tobacco for a period of six months. The transportation of the mixture from where it is distributed to the site of the ceremony is permissible, as is the return of unused mixture to the distribution point. A second offense will result in an indefinite ban, which may be lifted only by action of the NACT council when they are convinced he will not misuse the mixture again.

(Ex. 28 – NACT Bylaws, Article XIV; T 164-66, 277-78).

The prison administration, however, did not enforce NACT's policy of only allowing certain Lakota spiritual advisors to make the tobacco ties and prayer flags. (T 484-85). Instead, the administration allowed anyone to sign up and purchase these materials. (T 163, 484-85). In 2008, Mary Montoya began allowing any person to purchase tobacco mixtures and make them into tobacco ties in a room without any direct supervision. (T 96, 254). In addition, the tobacco was stored in either Montoya's or the unit manager's office, which were not secure locations. (T 96-98, 168; Ex. 110 at NACT 036 ("Do NOT assume Unit staff offices are secure storage areas")). Predictably, lack of supervision and unmonitored access led to some abuse by insincere participants. (T 96-97). In 2009, the prison began

enforcing the same six-month ban on those caught with unauthorized tobacco, regardless of its source, though it did not adopt the indefinite ban for a second violation that NACT's bylaws imposed. (T 92, 133. 249, 276-78).

Removal of tobacco from Native American religious ceremonies

On September 19, 2009, a chance conversation occurred between Mary Montoya, Warden Weber, and Sidney Has No Horses, a holy man visiting the penitentiary, in which Has No Horses referred in some fashion to banning the use of tobacco. (T 300). As the result of this conversation, the prison administration mistakenly concluded that he had suggested a complete ban on tobacco. (T 250). That impression was false. As Has No Horses testified at trial, he only meant to convey two things: that he only uses red willow bark (cansasa) in his sacred pipe and that the use of tobacco should be banned for individual inmates caught desecrating the Lakota religion by removing tobacco from a tie or prayer flag to use for non-spiritual purposes. (T 380-81, 394-95, 600-01).

As he further testified, Has No Horses always uses tobacco in his tobacco ties and prayer flags and agrees that tobacco is central to the traditional Lakota religion. (T 376, 380-84, 389). In fact, he testified that he specifically notified the Warden and his staff of the importance of using tobacco in Lakota tobacco ties and prayer flags. (T 383).

The prison administration, however, saw an opportunity and immediately leapt into action as the result of Has No Horses' misinterpreted comments. Mary Montoya and Jennifer Wagner conferred briefly with a few outside individuals such as Roy Stone, Bud Johnston, and Breon Lake, who were all either affiliated with the Native American Church or, in the case of Bud Johnston, the President of his own self-created church. (T 250-51, 298, 308, 430-31). None of these outsiders could speak for the traditional Lakota religion practiced by Brings Plenty, Creek, and other inmates in the state prison system. (T 431). Moreover, the prison administration only spoke with them about pipe mixtures, and did not inquire regarding the use of tobacco as a sacrament in tobacco ties and prayer flags. (T 298-99).

Nonetheless, a revised policy was quickly drafted and enacted that completely banned the use of tobacco in all traditional Lakota or other Native American ceremonies at the penitentiary. (T 300-01, 552; Ex. 109). Jennifer Wagner, the cultural activities coordinator from 2003 to 2011, informed prison staff that tobacco was being removed from all Native American ceremonies as of October 19, 2009 at the request of "Medicine Men":

> Effective today, 10/19, tobacco is being removed from all Native American Ceremonies *per the request of Medicine Men* who lead ceremonies at our facilities. Please see the attached letter Warden Weber has sent to the inmates, Tribal Liaisons, and Medicine Men.

> This letter is being delivered to the pipe carriers and sundancers this morning by Unit Staff. **…**
>
> When inmates come to you to complain, please remind them that *we are honoring the request of the respected Medicine Men and are going back to their traditional ways.*

(Ex. 108 (emphasis supplied)). In her affidavit submitted in support of the defendants' summary judgment motion, Wagner likewise stated that the Department of Corrections decided to ban tobacco "Based upon the advise [sic] and recommendation of the Medicine Men and Spiritual Leaders who conducted Native American ceremonies at the DOC facilities …." (Doc. 81-1). At trial, Wagner initially claimed that the total ban was enacted for security concerns. (T 303). After she was confronted with her prior Affidavit and the e-mail that she wrote at the time of the ban (Ex. 108), however, she admitted that the Department of Corrections decided to institute the ban based upon the advice of the medicine men and spiritual leaders. (T 304). She further admitted that by removing all tobacco from religious ceremonies, the defendants believed that they would be returning the Native American inmates to their traditional ways. (T 304).

The Warden's October 19, 2009 letter attached to Wagner's e-mail likewise relied upon the misunderstanding that had its genesis in the comments of Sidney Has No Horses as the rationale for instituting a ban, although he did mention previous abuse of tobacco:

> Medicine Men and Spiritual Leaders, who lead ceremonies at our facilities, have brought to our attention that tobacco is not traditional to the Lakota/Dakota ceremonies and that it is too addictive to be used for ceremonies. They have requested that tobacco be removed from Native American Ceremonies so that participants of these ceremonies will focus on their spiritual paths and not abusing the tobacco.
>
> Effective 10/19/09, the SDDOC will follow the advice of the respected Medicine Men and Spiritual Leaders and remove tobacco from Native American Ceremonies. All Native American ceremonies will continue with the use of other botanicals (cansasa, sage, bitter root, bearberry, lovage, flat cedar, sweet grass, etc).

(Exs. 109, 108; T 201, 238). The prison administration did not consult with plaintiffs or any other Native American inmates about instituting this total ban. (T 201). It also did not reach out to the Oglala Sioux Tribe, although it is now aware, as expressed in a letter from its President, that the Oglala Tribe fully supports the inmates' use of tobacco in traditional Lakota religious ceremonies. (T 292-94).

SUMMARY OF ARGUMENT

1. The district court correctly held that the plaintiffs' use of tobacco in traditional Lakota ceremonies is a religious exercise protected by RLUIPA and the judgment below should be affirmed. The applicable standard of review is not, as suggested, the defendants' ally in this appeal. The factual findings undergirding the district court's judgment are fully supported by the record and surely not clearly erroneous. Tobacco is an essential sacrament in the Lakota religion. The recently

enacted total ban on its ceremonial use by inmates in the custody of the South Dakota Department of Corrections therefore constitutes a substantial burden on the plaintiffs' religious rights within the meaning of RLUIPA.

2. The district court did not err in holding that the defendants did not meet their affirmative burdens under RLUIPA to demonstrate that a complete ban on the use of tobacco in all Native American religious ceremonies was in furtherance of a compelling government interest, or that the total removal of that essential Lakota sacrament was the least restrictive alternative available to further any such compelling interest. The defendants' post-hoc rationalizations for enacting the ban, which contradicted their contemporaneous internal statements, were not credible and not entitled to deference.

3. The narrowly tailored order issued by the district court to lift the violation of the plaintiffs' religious rights protected by RLUIPA reflects the least intrusive available remedy and fully comports with the PLRA. The replacement of a mixture to be used in Lakota ceremonies constituting 100 percent red willow bark with a mixture constituting 99 percent red willow bark and 1 percent tobacco allows the plaintiffs and those who practice the Native American religion to use their essential sacrament and means of prayer in practicing their religion while preserving the essential order and security of the prison system.

STANDARD OF REVIEW

When a district court enters judgment after a trial on a RLUIPA claim, this Court reviews the findings of fact for clear error and the legal rulings de novo. *See Singson v. Norris*, 553 F.3d 660, 662 (8th Cir. 2009); *Fegans v. Norris*, 537 F.3d 897, 902 (8th Cir. 2008).

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN GRANTING INJUNCTIVE RELIEF UNDER RLUIPA.

In order to protect the exercise of religious beliefs by prisoners, Congress enacted the Religious Land Use and Institutionalized Persons Act (RLUIPA), which provides that:

> No government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution, ... even if the burden results from a rule of general applicability, unless the government demonstrates that imposition of the burden on that person—
>
> (1) is in furtherance of a compelling governmental interest; and
>
> (2) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. § 2000cc–1(a)(1)–(2) ("Section 3"); *see also Sossamon v. Texas*, 131 S.Ct. 1651, 1656 (2011). "RLUIPA thus protects institutionalized persons who are unable to freely attend to their religious needs and are therefore dependent on the

government's permission and accommodation for exercise of their religion." *Cutter v. Wilkinson*, 544 U.S. 709, 721 (2005). Before enacting this statute, "Congress documented, in hearings spanning three years, that 'frivolous or arbitrary' barriers impeded institutionalized persons' religious exercise." *Id.* at 716 (2005) (citation omitted). Among its concerns were that religious or ceremonial "items needed by Native Americans[,] … were frequently treated with contempt and were confiscated, damaged or discarded" by prison officials." *Id.* at n. 5.

As this Court has explained, section 3 of RLUIPA "prohibits substantial burdens on religious exercise, without regard to discriminatory intent." *Van Wyhe v. Reisch*, 581 F.3d 639, 654 (8th Cir. 2009). Under this provision, "religious exercise" is defined as "including the exercise of religion, whether or not compelled by, or central to, a system of religious belief." *Id.* § 2000cc-5(7)(A). It is thus acknowledged that "[b]y enacting RLUIPA, Congress established a statutory free exercise claim encompassing a higher standard of review than that which applies to constitutional free exercise claims." *Gladson v. Iowa Dep't of Corrections*, 551 F.3d 825, 832 (8th Cir. 2009); *Murphy v. Missouri Dep't of Corrections*, 372 F.3d 979 (8th Cir. 2004) (*Murphy I*).

RLUIPA provides for "a cause of action to enforce the heightened free exercise right it creates." *Van Wyhe*, 581 F.3d at 649 (citing *id.* § 2000cc-2(a)-(g)

("Section 4")). In such an action, "if the institutionalized person 'produces prima facie evidence to support a claim,' by showing that the government practice substantially burdens the person's exercise of religion, then the government bears the burden of persuasion on every other element of the claim." *Van Wyhe*, 581 F.3d at 649 (quoting *id.* § 2000cc-2(b)).

A. The district court correctly found that the prison policy prohibiting all tobacco use in religious ceremonies has placed a substantial burden on the plaintiffs' ability to exercise their Lakota religion.

The Supreme Court has recognized that "the 'exercise of religion' often involves not only belief and profession but the performance of … physical acts [such as] assembling with others for a worship service [or] participating in sacramental use of bread and wine[.]" *Cutter*, 544 U.S. at 720 (quoting *Employment Div., Dept. of Human Resources of Ore. v. Smith*, 494 U.S. 872, 877 (1990)). Sacraments of the Christian variety, however, are not the only such items accorded protection by RLUIPA. *See Cutter*, 544 U.S. at 723 (explaining that "RLUIPA does not differentiate among bona fide faiths"). As the district court found, tobacco is an "essential and fundamental" part of the sacraments used in the plaintiffs' Lakota religion. (Doc. 189 at 40). That finding, owed true deference, is fully supported by the trial record and should not be disturbed.

Even so, the defendants contest the district court's finding that the complete ban on tobacco in Native American religious ceremonies places a substantial burden on the plaintiffs' religious exercise within the meaning of RLUIPA. (Brief at 51-57). In order to make out a prima facie claim under RLUIPA against a state official, a plaintiff "must show, as a threshold matter, that there is a substantial burden on his ability to exercise his religion."' *Van Wyhe*, 581 F.3d at 655 (quoting *Singson*, 553 F.3d at 662). In order to constitute a substantial burden, this Court previously required that government policy or actions must significantly inhibit or constrain conduct or expression that manifests some central tenet of a person's individual religious beliefs, meaningfully curtail the ability to express adherence to his or her faith, or deny a reasonable opportunity to engage in those activities that are fundamental to his or her religion. *See Gladson*, 551 F.3d at 832; *Murphy v. Missouri Dep't of Corrections*, 506 F.3d 1111, 1115 n. 7 (8th Cir. 2007) (*Murphy II*) (quoting *Murphy I*, 372 F.3d at 988).

More recently, however, the Supreme Court clarified that "RLUIPA bars inquiry into whether a particular belief or practice is 'central' to a prisoner's religion." *Cutter*, 544 U.S. at 725 (citing 42 U.S.C. at § 2000cc-5(7)(A)). In later decisions, this Court has recognized this limitation of its prior jurisprudence. *See Van Wyhe*, 581 F.3d at 656; *Gladson*, 551 F.3d at 832-33; *Patel v. U.S. Bureau of*

Prisons, 515 F.3d 807, 813 n. 7 (8th Cir. 2008). Under the *Murphy* test, modified by *Cutter*, "the inmate bears the burden of establishing that the correction facility has placed a substantial burden on his sincerely-held religious beliefs." *Gladson*, 551 F.3d at 833. Whether a plaintiff "can establish the truth or sincerity" of a religious belief "is a matter to be decided at trial" by the fact finder. *See id.* Prisons "must permit a reasonable opportunity for an inmate to engage in religious activities but need not provide unlimited opportunities." *Van Wyhe*, 581 F.3d at 657.

The defendants' argument on this issue boils down its suggestion that cansasa (red willow bark) should be deemed on appeal as an acceptable substitute for tobacco in the plaintiffs' Lakota religious ceremonies. The defendants contend that the plaintiffs "fail to explain" why allowing cansasa "is not sufficient" in the practice of their religion. The prison administration's conception of a proper substitute for the traditional Lakota sacraments eludes the proper legal inquiry. That fact that other individuals might disagree with the plaintiffs and deem cansasa to be an acceptable substitute for tobacco in religious ceremonies has no bearing in this case. Indeed, it might seem acceptable to non-believers to provide Lakota inmates with pure sawdust to try to smoke and use in their religious ceremonies. Rather, as discussed above, the newly instituted tobacco ban violates RLUIPA if it burdens the *plaintiffs'* sincere exercise of their bona fide religious beliefs.

It is clear from the trial record that the district court's finding that tobacco is a central or fundamental part of the traditional Lakota religion is not clearly erroneous, and that it correctly determined that the complete removal of tobacco from Lakota religious ceremonies at the facilities of the South Dakota Department of Corrections has placed a substantial burden on the sincerely held religious beliefs of Brings Plenty and Creek. Contrary to the defendants' argument, the plaintiffs explained in detail why the use of tobacco is essential. As Creek testified, "[t]obacco is essential to our belief. Tobacco is an offering. It's one of the greatest offerings we can give to our Higher Power. He gives us life, and he gives us what we have today. In return, we offer – we can offer tobacco." (T 86-87). "Tobacco," he continued, "the fundamental part about it is the offering that we make, the sacrament that we give. As Lakotas, we believe we should always give rather than receive." (T 111). Brings Plenty, as well, testified sincerely that the use of tobacco in offerings and ceremonies is crucial to his Lakota beliefs. (T 158).

As further explained by Richard Moves Camp and averred by both plaintiffs, the complete prohibition on the use of tobacco in their religious ceremonies has essentially stripped them of the ability to properly pray and substantially interferes with the proper expression of their religious beliefs. (T 21-23, 51-55, 85, 111, 157). After hearing the plaintiffs testify, even Warden Weber

did not appear to doubt the sincerity of their beliefs regarding the central importance of tobacco to their traditional Lakota religion. (T 587-88).

In addition, the information relied upon by the defendants to institute a complete ban on tobacco referred only to the use of tobacco in their sacred pipes. The essential use of tobacco as a sacrament to burn in the fire and as an offering in tobacco ties and prayer flags was not contradicted at trial. (T 73, 85-86, 90, 109, 157). Sidney Has No Horses, the traditional healer whose statements initiated the defendants' swiftly enacted ban on tobacco, corrected the defendants' misconstruction of those statements at trial and testified that he always uses tobacco in his tobacco ties and prayer flags and, in fact, specifically notified the Warden and his staff of that fact. (T 376, 380-84, 389). The defendants' actions accordingly did not simply *limit* the amount of ceremonial tobacco that could be used by a Native American inmate in traditional Lakota religious practices, as occurred in *Runningbird v. Weber*, 198 Fed. Appx. 576 (8th Cir. 2006), but banned and abolished that sacrament completely upon the basis of misinterpreted comments by a particular holy man preferred by the prison administration. Clearly, the plaintiffs met their prima facie burden under RLUIPA of establishing a substantial burden on their ability to exercise their religion.

B. The district court correctly held that the defendants did not establish that a complete ban on the use of tobacco in Lakota religious ceremonies was in furtherance of a compelling governmental interest.

Under RLUIPA, once a plaintiff's prima facie burden has been met, prison officials are charged with the affirmative burden to establish that a challenged policy or action is the "least restrictive means" to achieve a "compelling government interest." 42 U.S.C. § 2000cc–1(a)(1)–(2); *Sossamon*, 131 S.Ct. at 1656. On appeal, the defendants also challenge the district court's conclusion that the complete tobacco ban served a compelling government interest. (Brief at 30-39). In the application of the "compelling government interest" standard, the Supreme Court has stated that "context matters" and the RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety." *Fegans*, 537 F.3d at 901 (quoting *Cutter*, 544 U.S. at 722). The analysis, however, must also be conducted with reference to the particular individuals and circumstances at issue and religious rights cannot be substantially burdened simply out of a desire to enforce general policies. 42 U.S.C. § 2000cc-1(a) (providing that prisons cannot "impose a substantial burden on the religious exercise of a person residing in … an institution … even if the burden results from a rule of general applicability").

It is recognized, of course, that "prison security is a compelling state interest, and that deference is due to institutional officials' expertise in that area." *Fowler v. Crawford*, 534 F.3d 931, 933 (8th Cir. 2008) (quoting *Cutter*, 544 U.S. at 725 n. 13). The evidence in this case, however, failed to demonstrate that the complete ban on tobacco was instituted "*in furtherance of* a compelling governmental interest" in prison order and security or some other compelling governmental interest as the statute requires. 42 U.S.C. § 2000cc-1(a) (emphasis supplied). Significantly, it is the *defendants* who carry the burden of proof on this issue. *See Van Wyhe*, 581 F.3d at 649 (quoting 42 U.S.C. § 2000cc-2(b)).

Although a prison's interest in order and security is compelling, "to ensure prison policies are in furtherance of that compelling interest, officials' security concerns must be 'grounded on more than mere speculation, exaggerated fears, or post-hoc rationalizations." *Fowler*, 534 F.3d at 939 (citation omitted); *see also Hamilton v. Schriro*, 74 F.3d 1545, 1554 n. 10 (8th Cir. 1996) ("prison authorities must do more than offer conclusory statements and post hoc rationalizations for their conduct"). Prison officials cannot justify restrictions on religious exercise simply by citing to the need to maintain order and security in a prison.

The defendants' argument on appeal is anchored upon its suggestion that the district court did not accord sufficient deference to the views of the prison

officials that a complete ban on the use of any tobacco in Lakota religious ceremonies served the compelling government interest of prison security. In large part, the defendants are confusing the concepts of deference and *credibility*, the latter being a factual finding owed tremendous deference on appeal. *See Fegans*, 537 F.3d at 904-05. The defendants' evolving rationales for enacting the ban are not due controlling deference where, as here, they were deemed insufficiently credible by the fact finder at trial. (Doc. 189 at 15-20, 28). The defendants' failure throughout their brief to confront the "clear error" standard of review applicable to findings of fact is fatal to their appeal. *See Fegans*, 537 F.3d at 905 n.2.

As the district court recognized, the defendants offered largely post-hoc rationalizations that security issues were the motivation for the removal of tobacco from Lakota religious ceremonies. Similar to their predicament at the summary judgment stage, however, the defendants' written communications in October 2009 demonstrated that the reason that they instituted the complete ban on tobacco use in Lakota religious ceremonies was their interpretation of Has No Horses' comments in September 2009 and their desire to return the Native American inmates to what the prison administration defined as their traditional ways. (Ex. 108, 109). The cultural activities coordinator, who was integral in making and implementing the swift decision to ban tobacco from Lakota religious

ceremonies, likewise admitted that the decision was rooted in what they believed to be the advice and recommendation of religious leaders. (T 304).

The record demonstrates that from the time that Warden Weber misinterpreted Has No Horses' comments on September 18, 2009 to the date of the ban one month later, the investigation conducted by prison staff was to determine if they could justify the ban for religious reasons, rather than safety or security reasons. (T 250). The defendants did not consult religious leaders for safety or security reasons, rather they sought justification for the ban on religious grounds. In fact, prison officials drafted written statements for religious leaders to sign (T 252) and solicited other written justifications to support the ban (Ex. 138, 6). Of course, the individuals that they briefly consulted during this time were not even practitioners of the traditional Lakota religion and had different religious practices than the plaintiffs. (T 106-07, 498). Immediately after obtaining what they believed was sufficient evidence of a religious justification for the complete ban of tobacco, the defendants abolished the decades-long policy of allowing inmates practicing the Lakota religion to use tobacco in their religious ceremonies. (Ex. 109). Interestingly, the defendants continued to refer to "tobacco ties" in new policies adopted after the ban on tobacco for religious purposes. (Ex. 110).

At the trial, however, the defendants, their counsel and their witnesses renamed "tobacco" ties to "prayer" ties. (T 229, 237, 477, 560, 578).

The primary grounds cited by the prison administration in its communications announcing the policy change was its mistaken conclusion, based upon misinformation, that "tobacco is not traditional to the Lakota/Dakota ceremonies…" (Exs. 109, 108; T 201, 238, 304). The official memorandum drafted by the prison to inform their staff of the complete ban makes clear that tobacco was being banned "per the request of Medicine Men who lead ceremonies at our facilities" and advised that "[w]hen inmates come to you to complain, please remind them that we are honoring the request of the respected Medicine Men and are going back to their traditional ways." (Ex. 108). Warden Weber's letter to the tribal liaisons, spiritual leaders, pipe carriers, and sundancers also focused primarily upon the conclusion he had reached that tobacco "is not traditional to the Lakota/Dakota ceremonies and that it is too addictive to be used for ceremonies" and his desire to "follow the advice of the respected Medicine Men and Spiritual Leaders" in instituting a complete ban. (Ex. 103). The operational memorandum instituting the ban contains a "Revision Log" that succinctly describes the institution of the complete ban as being done in order to grant preference to a

pipe mixture that the Warden had deemed to be more "traditional" in the Lakota religion:

> 10/2009: Warden decides to remove tobacco from the "pipe mixture" used by the Native American religion in favor of a more traditional pipe mixture. Removed all sections that deal with or reference the preparation of pipe mixture or tobacco ties. Added additional information about the prohibition against tobacco on state property.

(Ex. 109 at 3). Thus, according to the defendants' own internal records created at the time of the ban and before this lawsuit was filed, the complete ban was instituted in furtherance of a perceived request made by a particular prison volunteer whom the state believed wanted to replace the use of tobacco or tobacco mixtures with cansasa.

Such a rationale, however, is expressly prohibited under RLUIPA in denying religious accommodation. 42 U.S.C. § 2000cc-5(7)(A); *see also Koger v. Bryan*, 523 F.3d 789, 798 (7th Cir. 2008) (explaining that prison officials who denied dietary accommodation on the ground that prisoner's professed religion did not impose such restrictions required the prisoner "to establish exactly what RLUIPA does not require"). Defendants' after-the-fact attempt in this litigation to assert that the primary motivation for complete removal of tobacco from all Lakota religious ceremonies was the safety or security of DOC facilities was contradicted by substantial evidence in the record.

As the district court correctly determined, moreover, the defendants did not carry their burden of proving that a total ban on the use of tobacco for religious purposes was in furtherance of the compelling interest in safety and security. Warden Weber made conclusory statements that he believes that there is less violence in the prison and it is a safer environment than before the removal of tobacco from Lakota religious ceremonies and that there have been "[f]ar less rule infraction reports for possession of or use of tobacco." (T 563-64). As the district court correctly found, these broad generalizations are not supported by the record evidence in this case. First, the prison maintains written records of violence among the inmates and they could have been produced to the court. (T 596, 282). The failure to produce even one such record of violence discredited the accuracy of the Warden's testimony on this issue. The general ban on tobacco was imposed in 1998 and the ban on its use for religious purposes began on October 19, 2009. (T 545; Ex. 109). Thus, for a period of eleven years in which Native American inmates were allowed to use tobacco for their religious ceremonies, the defendants could not produce credible evidence of even one specific incident of violence related to tobacco that was used in religious ceremonies. In fact, the Warden admitted that in over 31 years of working for the DOC and being in charge of security he was not aware "of there ever being a problem, whether it was a

problem of violence or any other issues that may cause us concern at the sweat lodge." (T 533). He stated that there were "incidents" in the unsupervised room where tobacco ties were made, but he clarified that he was not aware of any actual violence during any of the Native American religious ceremonies. (T 575). Jennifer Wagner testified that if there was a video recording of an incident of violence in the room where tobacco ties were made she certainly would have retained a copy and could have produced it at trial. (T 283).

Second, as for Warden Weber's pronouncement regarding a decrease in the number of disciplinary reports since the ban, he admitted that he does not receive the actual disciplinary reports or any reports that advise him of the type of violations that occurred. (T 592). Rather, he is supplied with only summary reports that show the number of minor and major disciplinary infractions on a monthly basis. (T 592). The defendants' failure to produce even one of those reports before the ban and after the ban to demonstrate the alleged effectiveness of the ban further called into doubt the accuracy of the Warden's testimony.

Third, the defendants produced a list of tobacco-related violations before the total ban on tobacco for religious purposes went into effect (Ex. 146), but failed to produce similar proof of violations after the ban. Thus, the defendants'

proof failed to establish the extent of the disciplinary problem before the ban in comparison to after the ban was enacted.

Fourth, the list of tobacco-related violations shows that for a 13-month period of time, there were 33 tobacco-related violations by NACT members, which includes inmates found with commercial cigarettes and chewing tobacco that could not possibly have originated with the religious ceremonies. (Ex. 146). The defendants did not introduce evidence to establish that 33 routine violations involving small amounts of contraband in a 13-month period of time posed any risk to the safety and security of either the inmates or staff at the prison. Warden Weber received reports on a monthly basis to show the total number of disciplinary violations (T 592), but the defendants chose not to present that evidence that would have allowed the district court to evaluate the alleged severity of tobacco-related disciplinary violations. This failure is likely because it would have refuted their claims given that there are likely several hundred disciplinary violations in a 13-month period of time, which would dwarf the disciplinary issues involving ceremonial tobacco used in religious ceremonies.

Fifth, Jennifer Wagner testified that tobacco-related violations are not severe enough to warrant sentencing inmates to administrative segregation, which is the most severe form of disciplinary segregation at the penitentiary. (T 324-25).

Administrative segregation is reserved for "repeated rule violations that jeopardize the security and safety of staff and inmates." (T 284). Inmates committing tobacco-related violations are typically sentenced to five days in the special housing unit, a significantly less restrictive form of punishment. (T 285). Accordingly, Wagner's admission regarding punishment for such infractions discredits the defendants' claim that a total ban on tobacco was necessary to the security and safety of the prison.

Finally, even if the defendants had proved that there was any positive change in the safety or security of the prison after October 19, 2009, they did not meet their burden to show that the tobacco ban was the *cause* of any such increase in safety or security. The defendants did not claim or produce evidence that the only change in safety and security measures from 2009 to 2012 was the ban on the religious use of tobacco. No evidence of the other measures implemented in the DOC facilities to improve the safety or security of the prisons was submitted for the district court to make a determination that somehow the ban on tobacco for religious purposes *resulted in* an increase in safety or security.

Moreover, defendants did not meet their burden to establish that a complete ban on tobacco at the lower security-level institutions in South Dakota would further any security or safety interests at those particular institutions. Creek

is housed at the Mike Durfee State Prison, which is a low-medium security institution. (T 93, 115). No evidence exists in the record of the extent of any safety or security issues at the Mike Durfee State Prison or of any incidents of violence related to the religious use of tobacco at that institution.

The fact that the defendants could only produce vague, conclusory and unsupported statements of safety or security concerns related to the religious use of tobacco further demonstrates that they were attempting to marshal a post-hoc rationalization for their October 2009 decision to remove tobacco from traditional Lakota religious ceremonies. Although the presence of tobacco as contraband among the general inmate population might be considered, like the presence of other contraband such as food from unapproved sources, part of the "hassle" of running a prison system, that generality does not equate to a broader conclusion that *anything* done in an effort to limit non-dangerous contraband was done in an effort to further a compelling governmental interest in order and security. Indeed, for most of South Dakota history until relatively recently, tobacco was freely available and even sold by the prison to the general inmate population. And here, of course, the remedial order permits only minute amounts of tobacco – *one* percent of any mixture – into the facility under close supervision.

In sum, there was no persuasive evidence in this case that the specific policy change at issue here – a complete ban on the *religious* use of tobacco by the plaintiffs in their traditional Lakota ceremonies – was done in furtherance of a compelling governmental interest, rather than a general desire to be free from the burden imposed by RLUIPA of allowing the plaintiffs to practice their traditional religion. Given the state of the record, the district court correctly held that the defendants did not meet their burden of proof to establish that the complete ban on the use of tobacco in Lakota religious ceremonies was done in furtherance of a compelling governmental interest. *See Van Wyhe*, 581 F.3d at 649 (quoting 42 U.S.C. § 2000cc-2(b)) (explaining that "if the institutionalized person 'produces prima facie evidence to support a claim,' by showing that the government practice substantially burdens the person's exercise of religion, then the government bears the burden of persuasion on every other element of the claim").

C. The district court correctly held that a total ban on the use of tobacco in Lakota religious ceremonies was not the least restrictive means of furthering any compelling government interests in this case.

The defendants also challenge the district court's determinations regarding the "least restrictive alternative" element of the plaintiffs' RLUIPA claim. The defendants bore the burden of proof on this issue as well. As with all of the issues on appeal, the factual basis for the district court's legal conclusion must be

sustained unless clearly erroneous. *See Fegans*, 537 F.3d at 904-05 ("This finding of fact is not clearly erroneous, and given that factual premise, the district court correctly held that the differing hair regulations for men and women did not undermine the ADC's contention that its hair-length regulation for males was the least restrictive means available to satisfy its security concerns"). Even assuming that the prison's recent ban of tobacco in Lakota religious ceremonies was in fact motivated by a compelling governmental interest in order and security, rather than an attempt to impose their definition of Lakota religion to eliminate a particular hassle associated with accommodation of the plaintiffs' traditional beliefs, it is clear that the district court was correct in concluding that the total ban imposed was not the least restrictive alternative available to further that interest.

Both the plaintiffs and Richard Moves Camp, a Lakota traditional healer, agreed that it would be acceptable if only pipe carriers and fire keepers were responsible for making the tobacco ties and prayer flags and even if tobacco ties were made by someone else, such as a volunteer outside of the prison. (T 56, 97, 131-32). This option could also be limited to only pipe carriers and fire keepers who have no tobacco-related disciplinary infractions. Warden Weber admitted that limiting the number of inmates making tobacco ties could be effective in controlling the unauthorized use of tobacco. (T 562). Plaintiffs and Moves Camp

further agreed that it would be acceptable if prison staff or volunteers transported tobacco ties, prayer flags, and tobacco pipe mixture directly to the site of their religious ceremonies where the tobacco would then immediately be burned or consumed in the fire. (T 44, 56, 99, 173). The record further indicated that a pipe mixture containing only one percent tobacco was acceptable, as opposed to a total ban. (T 103, 145, 173). Finally, the defendants were free to impose other additional security measures, such as searches after a sweat ceremony, and more severe penalties for misusing tobacco, such as cell restriction, disciplinary segregation or administrative segregation. (T 145-47). The injunction entered by the district court, and the proposal submitted by the defendants in compliance with the district court's initial order (Doc. 190), confirm that less restrictive alternatives were readily available.

The record supports the district court's findings that none of these less restrictive alternatives was seriously considered by the defendants before the total ban was instituted less than a month after the administration received information from one individual outside of the prison suggesting that tobacco was not essential to Lakota pipe ceremonies. (T 109-10, 285, 310-11, 327, 563, 589). This decision was rushed through the moment the prison believed that it had a *religious* justification for imposing it. The defendants' failure to consider less restrictive

alternatives, and the availability of many such reasonable alternatives to a complete ban on any religious use of tobacco by the plaintiffs, was a clear violation of RLUIPA, warranting prospective injunctive relief. *See Murphy I*, 372 F.3d at 989 (holding that the court is to explore any possible least restrictive means).

Although not controlling, courts may consider evidence of what other prisons have done to accommodate inmates' religious practices in assessing claims brought under RLUIPA. *See Fowler*, 534 F.3d at 942. The federal prison system, for example, allows the traditional use of tobacco in Native American religious ceremonies. *See Cryer v. Massachusetts Dep't of Correction*, 763 F.Supp.2d 237, 248 (D.Mass. 2011) (citing Federal Bureau of Prisons, Program Statement: Religious Beliefs and Practices, Statement P5360.09 12/31/2004) at 20(I)-(J) (directing each institution to develop supplement which must include procedures for "using tobacco for rituals").[4]

In addition, numerous state prison systems, including Minnesota, Wisconsin, and California allow inmates to use tobacco for religious rituals. (T 26, 237; Exs. 1, 2, 3; Doc. 194, Exs. A-G). Indeed, many courts have concluded that a prison's restrictions regarding tobacco do not impose a substantial burden precisely because they still allow the use of tobacco in some form. *See Fowler*, 534

[4] http://www.bop.gov/policy/progstat/5360_009.pdf ; (Doc. 194 at Ex. A).

F.3d at 933 (noting that practitioners of Native American faith at Jefferson City Correctional Center are permitted to possess a "sacred bundle" consisting of "a prayer pipe, sage, cedar, sweet grass, tobacco, a medicine bag, and prayer feathers"); *Cryer v. Clarke*, 2012 WL 6800791 * 2 (D.Mass. Sept. 7, 2012); *Caldwell v. Folino*, 2011 WL 4899964 * 8-9 (W.D.Pa. Oct. 14. 2011) (noting that Pennsylvania Department of Corrections allows limited access of tobacco to Native American inmates); *Delgado v. Ballard*, 2011 WL 7277826 * 8 (S.D.W.Va. Oct. 6, 2011) (noting that "MOCC's Operational Procedure permits the plaintiff to smoke a tobacco mixture in a prayer service"); *Hopson v. TDCJ-CID*, 2011 WL 4554379 * 2-3 (E.D.Tex. Sept. 29, 2011) (noting that TDCJ policies only prohibited Native American's possession of tobacco in his individual cell); *Newberg v. GEO Group, Inc.*, 2011 WL 2533804 * 2-5 (M.D.Fla. June 27, 2011) (holding that "Plaintiff's claims are moot due to the implementation of a new FCCC policy permitting Native American residents to smoke tobacco, smudge, and perform other Native American rites and ceremonies"); *Vega v. Rell*, 2011 WL 2471295 * 3 (D.Conn. June 21, 2011) (noting that Native American prisoners "can burn tobacco"); *Bostwick v. Oregon Dep't of Corrections*, 2011 WL 1261168 * 2 (D.Or. March 31, 2011) (noting that while "inmates are not permitted to have tobacco in their cells because the inmate could use it himself or sell it to other inmates, … Religious volunteers

do bring tobacco for use during ceremonies where the volunteer supervises its use"); *Taylor v. Hubbard*, 2010 WL 3033773 * 2 (E.D.Cal. July 30, 2010) (explaining that inmate was permitted tobacco during ceremonies but not in cell); *Thunderhorse v. Pierce*, 364 Fed. Appx. 141, 147-48 (5th Cir. 2010) (per curium) (upholding ban on pipe use in cells); *Bailey v. Rubenstein*, 2009 WL 1034614 * 2 (S.D.W.Va. April 15, 2009) (denying motion for injunctive relief and RLUIPA claim because prison policy permitted Native American inmate "to smoke in religious ceremonies despite the generally applicable tobacco ban"); *Skenandore v. Endicott*, 2006 WL 2587545 * 13 (E.D.Wis. Sept. 26, 2006) (upholding restrictions where inmates were permitted to smoke tobacco in religious ceremonies outside of cell); *Farrow v. Stanley*, 2005 WL 2671541 * 5 (D.N.H. Oct. 20, 2005) (granting summary judgment to prison officials where system-wide prohibition on pure tobacco did not impose substantial burden because prison policy permitted use of kinnikinnick and tobacco mixture).

Despite the Warden's claim that he had tried "everything he could think of," he did not even consider the alternatives to a complete ban that exists in written policies of several maximum security institutions, other than possibly Minnesota, that allow Native Americans to use tobacco for their religious purposes. (T 590). The widespread use of less restrictive alternatives in all of

these other facilities lends substantial credence to the practicality and workability of the less restrictive alternatives to a complete ban on the use of tobacco in Lakota religious ceremonies that the defendants never considered or attempted to implement. *C.f. Spratt v. Rhode Island Dep't of Corrections*, 482 F.3d 33, 42 (1st Cir. 2007) (explaining that ability of federal prison system to accommodate religious exercise with less restrictive alternatives constituted evidence of feasibility of such measures in state prison system for purposes of RLUIPA). As a result, the defendants failed to meet their affirmative burden of proof on this element of RLUIPA as well, warranting judgment in favor of the plaintiffs.

At bottom, the defendants presented nothing more than "speculation," "conclusory statements," "exaggerated fears," and "post hoc rationalizations" for a complete tobacco ban at trial. *Fowler*, 534 F.3d at 939; *Hamilton*, 74 F.3d at 1554 n.10. The process in which the defendants actually engaged in rushing through the complete ban on tobacco in October of 2009 was not focused in the slightest upon the consideration of less restrictive alternatives. Rather, as the evidence at trial demonstrated, the defendants were totally focused upon finding a *religious* justification from prison volunteers for eliminating tobacco from Lakota ceremonies. The district court correctly recognized that the defendants' trial testimony that alternatives to the complete ban were actually considered and

rejected was not supported in any of the documentation created when the decision was made and those conclusory suggestions were properly rejected. Based upon its factual findings, the district court correctly held that the defendants failed to meet their burden of proof on this element of the plaintiffs' RLUIPA claim.

D. The evidentiary ruling on Exhibit 149 provides no basis for reversal.

The defendants also assert that the district court committed reversible error in sustaining an objection to the attempted introduction of previously undisclosed evidence near the end of the three-day trial. As the defendants correctly observe, the district court enjoys broad discretion in the admission of evidence and its rulings are reviewed for a prejudicial abuse of discretion. *See Cole v. Homier Distrib. Co.*, 599 F.3d 856, 865 (8th Cir. 2010). In excluding this undisclosed evidence, the district court ruled as follows:

> THE COURT: Well, I think the Order that I did on summary judgment certainly called into question whether the security interest was the compelling reason for the change in policy. I know there was some discovery done before the trial began, and exhibits were exchanged before the trial began. We're on the third day of our trial, and a new exhibit that wasn't previously marked and an exhibit that appears to be over a hundred pages long has now been offered by the Defendants.
>
> So in light of the fact that I think the Defendants were on good notice, if nothing else, from my summary judgment Order, that this was a significant issue, and the fact the exhibit wasn't disclosed prior to today, and the fact it's voluminous, and the fact that the Plaintiffs

> have shown that they would be highly prejudiced by the late disclosure of this exhibit, I'm going to refuse this exhibit.

(T 570). The trial court's ruling in this regard was not an abuse of discretion. The defendants were plainly on notice that its own claimed "security" defense was at issue and were required to identify all exhibits prior to trial. The plaintiffs had no opportunity to inspect, test, or marshal a response to this exhibit. The claim by the defendants that the district court committed reversible error in not granting a continuance that they never requested also provides no basis for reversal. In their brief on appeal, the defendants have made no attempt to discuss or demonstrate that they were unduly prejudiced by the exclusion of this evidence. If anything, the fact that this evidence was never gathered – or even thought to be gathered – during the several years that this case was being litigated until the final day of trial demonstrates that the defendants were not focused on true "security" concerns when they banned ceremonial tobacco upon the basis of a misinterpreted comment by Sidney Has No Horses regarding the importance of tobacco to Lakota spirituality. This issue provides no basis for reversal.

E. The district court's remedial order is consistent with the PRLA.

Finally, the defendants contend that the district court's remedial order is inconsistent with the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(1). *See also Tyler v. Murphy*, 135 F.3d 594, 596 (8th Cir. 1998). This contention is in error. The

remedial order is narrowly tailored and specific, modeled in large part on the defendants' own proposed remedy (Doc. 190), and in full accordance with the PLRA. *See, e.g., El-Tabech v. Clarke*, 616 F.3d 834, 836 (8th Cir. 2010); *Crawford v. Clarke*, 578 F.3d 39, 44 (1st Cir. 2009) (finding no violation of PLRA where "[t]he Plaintiffs established a substantial burden on the exercise of their religion, and, in evaluating whether to enable Plaintiffs to participate in Jum'ah services in person or provide closed-circuit broadcasting of such services, the district court found that providing closed-circuit broadcasting was the least intrusive means to alleviate that burden on the Plaintiffs").

The specific criticisms levied by the defendants that the order does not reflect the least intrusive means to satisfy the plaintiffs' religious rights under RLUIPA do not hold water. To effectuate security regarding the making of tobacco ties and prayer flags, the order requires that only one percent of the mixture in these religious items may contain tobacco, that it must be ground, that it must be brought in by approved "pink tag" volunteers, that existing video surveillance be utilized, and that these items must be burned immediately upon completion of the ceremonies. The defendants' concern regarding the "amount" of tobacco coming in as "one percent" of a pipe mixture have no basis in the record and, again, is alleviated by requirement that only approved and well trained

volunteers may bring in the mixtures containing these exceedingly minute amounts. The district court properly rejected the suggestion that tobacco to be smoked in traditional Lakota peace pipes be ground into dust because the record demonstrated without contradiction that it could not be properly smoked that way because the dust, rather than burning, would simply be inhaled directly into the lungs. (T 193; Doc. 196 at 5; Doc. 194 at ¶ 2). The defendants' belated concerns regarding supervision in the sweat lodge and who should be able to handle the pipe are likewise addressed with the one percent requirement and other security measures.

Perfection is not the proper standard under PLRA. An absolute guarantee that a remedial order would totally eliminate any and all possible or conceivable violations of prison rules prohibiting tobacco possession could never be achieved, as the continued tobacco violations at the prison after enactment of the total ban of its use in Native American religious ceremonies makes perfectly clear. The narrow, reasonable, and minimally intrusive measures reflected in the district court's remedial order, however, allow the plaintiffs to practice their Lakota religion while furthering the prison's interest in order and security. The use of ceremonial tobacco by Lakota in their traditional religious ceremonies is accommodated throughout the federal prison system and multiple state prison

systems across the country. (Doc. 194, Exs. A-G). Contrary to the defendants' assertions, the fact that the South Dakota prison system has more Native Americans than any other system, almost a third of its population, indicates a *greater* urgency that essential Lakota beliefs be accommodated in accord with federal law. A belief by government officials, however vehement or sincere, that life would just be so much easier for the prison administration if essential Lakota religious sacraments and practices were not permitted or accommodated does not comport with the directives of Congress. The district court did not err in its exceedingly modest and limited grant of relief.

CONCLUSION

The plaintiffs appreciate Warden Weber's attempts on various levels over the years to work with them in accommodating their religion. In fact, NACT even assisted in presenting the Warden with a Star Quilt from the Oglala Sioux Tribe, a great honor and sign of respect. (T 169-70, 174, 536-37). Federal law, however, prohibits the prison administration from completely removing tobacco from the plaintiffs' traditional Lakota religious ceremonies where that action is not in furtherance of a compelling governmental interest or less restrictive alternatives were available, as evident in this case. The defendants have already conceded that appropriate injunctive relief entered by this Court on the Plaintiffs' RLUIPA claim

would be deemed applicable to all adherents to the traditional Lakota religion confined to the South Dakota Department of Corrections. (T 571).

The district court entered judgment in the plaintiffs' favor on their RLUIPA claim and granted narrowly tailored injunctive relief permitting those inmates who practice the Lakota religion to use the smallest possible modicum of tobacco, short of a complete ban, in their traditional religious ceremonies. The appellees respectfully request that this Honorable Court affirm the district court's orders and judgment in all respects.

Dated this 19th day of June, 2013.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 19, 2013, a true and correct copy of the foregoing Brief of Appellee was served by electronic notice through the Court's ECF system upon the following:

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CERTIFICATE OF COMPLIANCE

I hereby certify that the Brief of Appellee complies with the Type-Volume requirements of Fed. R. App. P. 32(a)(7)(B) in the following manner: The Brief was prepared using Microsoft Word, Version 2003. It is proportionately spaced in 14-point type, and contains 12,631 words.

/s/ Ronald A. Parsons, Jr.
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