IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

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No. 13-1401

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

Plaintiffs/Appellees,

vs.

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

Defendants/Appellants.

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Appeal from the United States District Court
for the District of South Dakota
Southern Division

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# APPELLANTS' BRIEF

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James E. Moore
Michele A. Munson
Woods, Fuller, Shultz & Smith P.C.
PO Box 5027
Sioux Falls, SD 57117-5027
(605) 336-3890
Attorneys for Defendants/Appellants

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## Summary of the Case

In October, 2009, after nine years of failing to prevent the abuse of tobacco allowed for use in Native American spiritual ceremonies, the South Dakota Department of Corrections banned all tobacco use. Two inmates at the South Dakota State Penitentiary challenged the ban as a violation of the United States Constitution and the Religious Land Use and Institutionalized Persons Act (RLUIPA). The district court denied summary judgment, and the case was tried to the court over three days. The court found against the prison officials on all three RLUIPA factors. The court then entered a remedial order requiring that the DOC allow tobacco to be smoked in the ceremonial pipe and used in making prayer ties and flags.

The case presents important issues in the Eighth Circuit under RLUIPA: (1) whether the district court's failure to give any deference to prison officials resulted in erroneous decisions on the issues of the DOC's compelling governmental interest and the least restrictive means; (2) whether the ban substantially burdened the inmates' religious exercise; and (3) whether the remedial order was narrowly tailored as required by the Prison Litigation Reform Act.

Appellants Douglas Weber and Dennis Kaemingk respectfully request that the Court grant 20 minutes of oral argument per side.

## Jurisdictional Statement

Inmates Blaine Brings Plenty and Clayton Creek, and the Native American Council of Tribes, brought this case under 42 U.S.C. § 1983 and the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc-1 (RLUIPA), so the district court, the Honorable Karen E. Schreier, exercised federal question jurisdiction under 28 U.S.C. § 1331. After concluding in an amended memorandum decision and order dated September 19, 2012 (Add. 1-59), that banning tobacco for use in Native American spiritual ceremonies violated RLUIPA, the district court entered a remedial order dated January 25, 2013 (Add. 60-71), and a final judgment dated January 28, 2013 (Doc. 197). Douglas Weber and Dennis Kaemingk filed a notice of appeal on February 14, 2013 (Doc. 200). As of the date of this brief, a petition for attorney fees and a motion for a stay of the remedial order are pending before the district court.

## Statement of the Issues

1. This Court has held that "[a] prison's interest in order and security is always compelling." *Fowler v. Crawford*, 534 F.3d 931, 939 (8th Cir. 2008). Prison officials testified that allowing tobacco for Native

American spiritual ceremonies for over nine years created a black market for tobacco, with resulting disciplinary infractions for possession of contraband, gang activity, and threats and violence; they offered evidence that Brings Plenty and Creek themselves were disciplined for abusing tobacco. Did the prison officials establish a compelling governmental interest in banning tobacco?

*Cutter v. Wilkinson*, 544 U.S. 709 (2005)
*Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008)
*Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008)
*Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996)

2. For nine years after the general tobacco ban, prison officials tried unsuccessfully to control the abuse of tobacco for Native American spiritual ceremonies by reducing the percentage of tobacco allowed in the pipe mixture, reducing the amount of tobacco, grinding the tobacco, installing a security camera in the room where prayer ties and flags were made, and enforcing a six-month ban on tobacco use by inmates disciplined for abusing tobacco. Warden Weber testified at trial that he rejected alternatives proposed by the inmates as not feasible or ineffective. Did the prison officials establish that the ban was the least restrictive means under RLUIPA?

*Cutter v. Wilkinson*, 544 U.S. 709 (2005)
*Fowler v. Crawford*, 534 F.3d 931 (8th Cir. 2008)
*Fegans v. Norris*, 537 F.3d 897 (8th Cir. 2008)
*Hamilton v. Schriro*, 74 F.3d 1545 (8th Cir. 1996)

3. The inmates offered testimony that tobacco is historically important to Lakota spirituality and fundamental to their own beliefs. It was also undisputed that Lakota spiritual leaders advised the DOC, and testified at trial that cansasa, or red willow bark, should be used, and that Native American inmates have many other ways to practice traditional Lakota spirituality. Does the tobacco ban substantially burden the inmates' religious exercise under RLUIPA?

*Van Wyhe v. Reisch*, 581 F.3d 639 (8th Cir. 2009)
*Runningbird v. Weber*, 198 Fed. Appx. 576 (8th Cir. 2006), *affirming* 2005 U.S. Dist. LEXIS 25234 (D.S.D. 2005)
*Love v. Reed*, 216 F.3d 682 (8th Cir. 2000)

4. At trial, the prison officials offered an exhibit of disciplinary reports for the 33 inmates on NACT's list of inmates prohibited from using tobacco because of abuse, which list was itself in evidence. The district court agreed that the reports were relevant, but refused the exhibit as untimely even though a short continuance of the bench trial could have been ordered. Did the district court abuse its discretion in refusing to consider this relevant evidence?

   *Life Plus Int'l v. Brown*, 317 F.3d 799 (8th Cir. 2003)
   *Wegener v. Johnson*, 527 F.3d 687 (8th Cir. 2008)

5. Under the Prison Litigation Reform Act (PLRA), prospective relief must be narrowly drawn, extend no further than necessary to correct the violation of a federal right, and be the least intrusive means necessary to correct the violation. The district court's remedial order allows tobacco to be used for making prayer ties and flags, which process cannot be adequately supervised, and rejected previous limits enforced before the ban without finding that such limits violated RLUIPA. Is the relief granted consistent with the PLRA?

   18 U.S.C. § 3626(a)(1)
   *Hines v. Anderson*, 547 F.3d 915 (8th Cir. 2008)
   *Tyler v. Murphy*, 135 F.3d 594 (8th Cir. 1998)

## Statement of the Case

This case was started in early 2010 by inmates Blaine Brings Plenty, Clayton Creek, and others, including the Native American Council of Tribes ("NACT"), a non-profit corporation made up of inmates at the South Dakota

State Penitentiary (SDSP) in Sioux Falls. (Add. 1, 3.)[1] They complained that the decision to ban tobacco from the Department of Corrections for any purpose, including Native American spiritual ceremonies, violated the United States Constitution and RLUIPA. The inmates started the case pro se, but Mario Gonzalez entered an appearance on their behalf in April, 2010. (Doc. 57, 61.) On May 18, 2010, the district court entered an order dismissing NACT as a plaintiff on the RLUIPA claim. (Doc. 67.) Gonzalez withdrew as counsel in July, 2011. (Doc. 95.) On September 20, 2011, the district court denied summary judgment on the RLUIPA claim and the constitutional claims, but granted summary judgment dismissing other claims not at issue on appeal. (Doc. 109.) The district court appointed counsel and set a trial date. (*Id.*)

The parties exchanged expert disclosures, and exhibit and witness lists. The court dismissed all of the plaintiffs except Brings Plenty, Creek, and NACT, and refused to join other inmates. (Docs. 111, 112, 121.) The court entered an order striking the jury demand (Doc. 120), so the case

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[1] The caption in this case includes NACT, but the district court's order dated May 18, 2010, dismissed NACT as a plaintiff on the RLUIPA claim. (Doc. 67 at 22.) In its memorandum decision, the court treated the constitutional claims as abandoned, and decided only the RLUIPA claim. (Add. 2 n.2.) Thus, NACT should not be a party to this appeal.

proceeded to a court trial on March 27 through March 29, 2012. The parties submitted post-trial briefs, and the United States filed a statement of interest to address the substantial-burden issue under RLUIPA. (Docs. 173, 176, 179-85.) The court issued a decision on September 19, 2012. (Doc. 188.) The court issued an amended decision on the same date finding for the inmates on their RLUIPA claim, but not deciding the constitutional claims. (Add. 1-59.) The court instructed the parties to meet and confer "about the terms of a narrowly tailored tobacco policy." (Add. 59.) The parties were unable to agree, and so submitted competing proposals and objections. (Docs. 190-194.) The district court then entered a remedial order dated January 25, 2013. (Add. 60-71.) The court entered a final judgment dated January 28, 2013. (Doc. 197.)

After entry of judgment, Brings Plenty and Creek filed a petition seeking attorney fees and costs. (Doc. 203.) Weber and Kaemingk filed a motion for a stay of the remedial order pending appeal. (Doc. 209.)

## Statement of the Facts

### a. The parties

Clayton Creek and Blaine Brings Plenty are both inmates in the custody of the South Dakota Department of Corrections. Creek is an

enrolled member of the Cheyenne River Sioux Tribe. (Tr. 1.69; Add. 11.)[2] He is serving a 15-year sentence, and has been incarcerated since December, 2000. (Tr. 1.113; Ex. 136.) He has been housed in the SDSP, a medium-security facility in Sioux Falls, the Jameson Annex, a maximum security facility in Sioux Falls, and at the Mike Durfee State Prison, a low-medium security facility in Springfield. (Ex. 2.136; Tr. 2.261.) Brings Plenty has been incarcerated since February, 1989, is an enrolled member of the Oglala Sioux Tribe, and grew up on the Pine Ridge Reservation. (Tr. 1.149-151.) He has been housed at the SDSP. (Tr. 2.260, Ex. 135.) Both Creek and Brings Plenty are pipe carriers, meaning that each has a personal pipe that he is allowed to use while incarcerated. (Tr. 1.75-77, 154; Add. 12.) Brings Plenty is also a fire keeper, a position for which he is paid by the State to tend to the fires used to heat the rocks for the sweat lodge. (Tr. 1.155; Add. 14.) The DOC does not control or limit who can be a pipe carrier in prison. (App. 167, ¶ 4.)

Both Creek and Brings Plenty have been officers of NACT, which is a non-profit corporation whose members are inmates at the SDSP, and

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[2] Transcript references are to volume and page of the three-volume transcript.

whose purpose is to fund and foster Native American spiritual ceremonies for inmates. (Tr. 1.99-102, 159.) There are corresponding corporations for the other institutions in the DOC. (Tr. 1.101-02.)

Douglas Weber is the Director of Prison Operations for the DOC, and the Warden of the SDSP and the Jameson Annex. (Tr. 3.525-26; Add. 2-3.) He has been employed by the DOC for 31 years, starting as a correctional officer; he spent nine or ten years in uniform as security staff. (Tr. 3.525, 528.) He describes himself as a hands-on warden, and makes daily rounds so that he is accessible to inmates; he is on every unit in the Sioux Falls institutions every day. (*Id.* 3.530.) He is an advocate for inmates to participate in religious activities, and testified that religious activity is important to rehabilitation and that he has seen it change many lives. (*Id.* 3.531-32, 572.) In a ceremony in which NACT participated, he received a star quilt, a mark of honor, from the Oglala Sioux Tribe, and has it on display in Sioux Falls. (*Id.* 1.169-70, 174, 3.536-37.) When asked about his understanding of Lakota spirituality, Weber testified that he knows only what he has learned from those who have reached out to him. (*Id.* 3.579-80.) He has, however, insisted that every DOC facility in South Dakota have a sweat lodge, and he testified that the sweat lodge at the SDSP has

been in use for more than 31 years with no security problems. (*Id.* 3.532-33.) Dennis Kaemingk is the Secretary of Corrections in South Dakota and was substituted for the previous Secretary. (Add. 1 n.1.)

The DOC has a Native American inmate population that is "significantly higher than any other state's." (Add. 3.) Jennifer Wagner, an associate warden at the SDSP, testified that of the DOC's total inmate population, Native Americans are approximately 27%; the next highest percentage that she could find was about 10%. (*Id.* 2.209, 2.233.) Of the Native American inmates in South Dakota, most are Lakota, with about 27% coming from the Pine Ridge Reservation. (*Id.* 2.231-33; Ex .114; Add. 3.) Even though Creek and Brings Plenty are both Lakota, they asked, and Weber agreed, that the district court's judgment in this case would apply throughout the DOC. (Tr. 3.571.)

**b. The history of tobacco use in Native American spirituality in the DOC.**

Before 1998, any inmate in the DOC could smoke or use tobacco. Warden Weber testified that cigarettes were banned throughout the DOC in 1998. (Tr. 3.545-46.) Chewing tobacco was initially allowed after the general ban, but was also banned in 2000. (*Id.* 3.546-47.) Tobacco

remained available, however, for Native American spiritual uses, until the decision was made to remove it altogether. (*Id.* 2.238-39, 2.301-02; Exs. 109 (App. 131-44), 110, 103 (App. 126).) On October 19, 2009, the DOC enacted a policy banning all tobacco throughout the DOC. (Add. 5; App. 131-44.) The policy was not prompted by or directed at Creek or Brings Plenty.

The decision was the result of "a very long process," including, as the Warden testified, "at least nine years of efforts to try to control the problems we were experiencing with still allowing tobacco in for the Native American ceremonies." (*Id.* 3.547-48.) Initially, Mary Montoya, a full-time volunteer who works exclusively with the Native American inmates, brought tobacco into the SDSP and the Jameson Annex where it was distributed to inmates for use in pipe ceremonies or to make tobacco ties or flags. (Add. 4.) Pipe carriers could obtain tobacco for use in ceremonies and keep it in their cells. (Tr. 2.242-43.) Beginning in 2005, tobacco could not be kept in an inmate's cell. (*Id.* 2.243.) Instead, it was kept in locked boxes in the offices of unit staff. (*Id*. 2.241-42; Add. 4.) In October of 2004, the DOC sponsored a spiritual conference at the Warden's request with multiple spiritual leaders to discuss the use and abuse of tobacco. (*Id.*

2.243, 3.471; Add. 4.) In addition to DOC staff, at least three spiritual leaders attended: John Around Him, Rick Two Dogs, and Charlie White Elk. (*Id.* 2.244; Add. 4.) Around Him and White Elk were both deceased by the time of trial. (Tr. 2.448-49.)

As a result of the spiritual conference, the amount of tobacco allowed was changed to a 50/50 mixture of tobacco and red willow bark, or cansasa, and only 1/4 cup of tobacco was allowed for each ceremony. (*Id*. 2.244-45.) It had previously been unlimited. (*Id.*; Add. 4.) In July, 2005, the mixture was further changed to 25% tobacco, 75% cansasa, and the tobacco had to be ground. (*Id.* 2.245-47, 3.474, Ex. 133; Add. 4-5.) The amount of tobacco in the mixture was later reduced to 1/8 cup. (*Id.* 2.459, 3.472; Add. 4.) In *Runningbird v. Weber*, some of these limitations were upheld as not violating RLUIPA. 198 Fed.Appx. 576 (8th Cir. 2006), *affirming* 2005 U.S. Dist. LEXIS 25234 (D.S.D. 2005).

In addition to these steps, in early 2009, NACT itself imposed a six-month ban prohibiting inmates who were disciplined for abusing tobacco from purchasing pipe mixture containing tobacco. (Tr. 1.134; 2.248; Add. 5.) The list introduced at trial included 36 names. (Tr. 2.275-76; Ex. 146; App. 165.) In the summer of 2009, the DOC started policing the ban

because NACT's enforcement was ineffective. (*Id.* 2.249-50; Add. 5.) Mary Montoya testified that from 2007 to 2008, the amount of tobacco being purchased for spiritual ceremonies increased markedly, by a factor of almost three. (*Id.* 3.476-77; Ex. 148.) Prison officials were concerned that many inmates were attending ceremonies just to get tobacco. (Tr. 3.518, 2.323, 2.259-61.)

**c. Tobacco for spiritual uses was abused.**

It is undisputed that after the general tobacco ban starting in 1998, tobacco has been contraband except as authorized for use in spiritual ceremonies. It is also undisputed that the tobacco available for Native American spiritual ceremonies was abused.

Both Brings Plenty and Creek were disciplined for abusing tobacco. Creek was disciplined on June 13, 2006, for having a plastic bag and yellow envelope containing tobacco that was divided up into small packages. (*Id.* 1.135-36; Ex. 121 (App. 152-54); Add. 12.) Creek was disciplined on July 8, 2005, when he gave tobacco from his pipe mixture to another inmate. (*Id*. 1.136-37; Ex. 122 (App. 155); Add. 13.) Creek was disciplined again on April 6, 2005, for having an envelope stuffed with a small bag of tobacco and cigarette rolling papers. (*Id.* 1.137-39; Ex. 124 (App. 156-58); Add.

13.) On July 28, 2003, Creek was disciplined for having tobacco in a sock stored in his locker box. (*Id.* 1.139-40; Ex. 127 (App. 159-60); Add. 13.) Creek also testified that there were inmates who he thought attended a sweat or a pipe ceremony because they wanted tobacco. (*Id.* 1.132-33.) He had heard about inmates removing the tobacco from tobacco ties, but he had not seen it. (*Id*. 1.132.)

Brings Plenty was disciplined on April 25, 2008, for having a bag of Zig-Zag rolling papers containing a trace of tobacco in his pocket. (*Id.* 1.186; Ex. 116 (App. 145-49); Add. 14-15.) On December 13, 2006, after making tobacco ties, Brings Plenty was written up for having a small pouch hidden in his pipe bag in which he had tobacco and a small screen. (*Id.* 1.188; Ex. 117 (App. 150-51); Add. 15.) Wagner testified that inmates had used screens in baseball caps to separate ground tobacco from the pipe mixture, although an objection to her testimony was sustained as hearsay because she saw the baseball hat only after it had been used as a screen. (Tr. 2.246-47.)[3]

[3] Her testimony that she knew inmates had used garbage can liners and static electricity to separate ground tobacco from the mixture was admitted. (Tr. 2.246-47.)

Breon Lake, a Dakota spiritual leader from Flandreau and a member of the Sisseton Wahpeton Sioux Oyate, testified not only as a spiritual leader, but as a former inmate from 2005-2007. (*Id.* 2.330-32.) Lake testified that as a pipe carrier while in prison, he was approached by other inmates who offered him sodas and tokens in exchange for his pipe mixture. (*Id.* 2.336.) He saw that other inmates who were pipe carriers "would have stores" and were "wealthy." (*Id.*) He asked that tobacco be removed from his pipe mixture, and said that he was threatened because of it. (*Id.*) He saw Native Americans "picking apart the tobacco," removing and discarding the cansasa. (*Id.* 2.337; Add. 16.) Lake saw inmates roll cigarettes with tobacco, and testified to a black market. (*Id.* 2.338-39.) It was valuable. "If you had tobacco, you were the big man in there. You were a rich man." (*Id.* 2.339.) He also testified that he was threatened by inmates. (*Id.* 2.338.) Lake's firsthand account was undisputed, but the district court's discussion of it is limited to two sentences. (Add. 16.)[4]

Jennifer Wagner testified that she learned of abuses "almost immediately" when she became the Cultural Activities Coordinator in 2003.

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[4] The only mention of the significance of this testimony is in the court's legal conclusions, where it was rejected as inconsistent with the experience of Creek and Brings Plenty. (Add. 46.)

(*Id.* 2.209, 2.233.) She learned that the inmates were taking pages made of rice-paper from Bibles and using them to roll cigarettes with tobacco that was separated from the pipe mixture[5]; that Mary Montoya's nickname among the inmates was "Tobacco Packin' Mama;" and that she had posted a sign above her office door that said "No tobacco stored here." (*Id.* 2.234.) Based on the disciplinary reports that she saw and conversations with security staff, Wagner knew that tobacco was contraband that could be used to pay off gambling debts, for gang activity, and for sexual favors. (*Id.* 2.235.)

Warden Weber also testified to the challenges posed by tobacco abuse. Recognizing that "[s]ecurity is the top thing we do, the No. 1 priority, safety and security" (*id*. 3.538), Weber testified that contraband is a serious issue that the DOC handles aggressively with over 300 video cameras, 200-plus security staff, searches, and two dogs, among other means. (*Id.* 3.540-41.) He was aware after the general tobacco ban in 1998 that tobacco available for Native American spiritual purposes created a black market. (*Id.* 3.549.) Part of the basis for his knowledge was

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[5]This particular abuse was written into DOC policy. (App. 132, ¶ D.3 (App. 131-44).) It is also documented in Exhibit 149 (App. 10-125), which was refused, as discussed below in section 5.

conversations with inmates who have talked to him "dozens and dozens of times each year about the problems caused by certain individuals who may want the trafficking contraband, and the problems they are causing them and others." (*Id.*) Weber testified to his knowledge of inmate-on-inmate violence related to the possession of tobacco. (*Id.* 3.549-50, 3.575.) He was aware of instances when Native Americans making tobacco ties were caught smoking the tobacco in the room where ties were made, and that the tobacco that was ground for use in the pipe mixture was "confiscated out in the general population." (*Id.* 3.550-51.)[6] He testified to rule infraction reports in which inmates admitted that contraband tobacco came from tobacco intended for spiritual ceremonies. (*Id.* 3.551.)

**d. The decision to ban the use of tobacco in Native American spirituality.**

When asked how long it took for him to conclude that a tobacco ban for all uses throughout the DOC was necessary, Weber answered, "[a] very long time. All of the nine-year period" from 2000-2009. (*Id.* 3.552.) Following the spiritual conference in 2004 and the various efforts to reduce the amount of tobacco trafficking, Weber met with Sidney Has No Horses, a

[6] These problems are also documented in refused exhibit 149.

spiritual leader from the Pine Ridge Reservation, at Has No Horses' request. (*Id.* 3.555, 2.362.) Weber testified that Has No Horses said "that he thought tobacco should not be allowed at the prison." (*Id.* 3.555.) He said that Has No Horses "totally agreed it was a problem," and that "he felt very strongly about the subject, about not wanting any tobacco inside the prison." (*Id.* 3.555-56.) Mary Montoya's recollection was similar. (*Id*. 3.478.) She first heard Has No Horses address the inmates with whom he was meeting. (*Id*.) He told them "that they should not be using commercial tobacco in their ceremonies." (*Id.*) When Has No Horses met with Montoya and the Warden, Weber testified that he said "he thought that tobacco should be taken out of the Penitentiary because it was not something traditional." (*Id.* 3.479.) Montoya made notes of the conversation, which the district court's decision does not mention, in which she stated that Has No Horses said that he was "removing cunli from the prison." (*Id*. 3.479-80; Ex. 105 (App. 128-29).) She testified that she used those words because the inmates had asked Has No Horses "to be, for lack of a better word, to be their main medicine man," and that "[h]e thought, as such, he had the authority to tell them what to do in the spiritual matter, so he told them that he was removing tobacco." (Tr. 3.480.) She thought it "was a very historical occasion." (*Id.*)

Consistently with these notes and the testimony of Montoya and Weber, Has No Horses testified that he told the inmates that the Lakota use only cansasa, and that "this mixture never was, never should be." (*Id*. 2.374.) He also told "Mr. Weber that it should be cansasa that is put in that sacred bowl." (*Id*. 2.376.)[7]

After the meeting, the Warden told Jennifer Wagner that she needed to consult other spiritual leaders and medicine men about the use of tobacco. (*Id.* 2.250.) She "continued conversations" she had previously had with spiritual leaders Charlie White Elk, Rick Two Dogs, Roy Stone, and Bud Johnston. (*Id.* 2.250-52.) White Elk, who is deceased, wrote a letter in which he supported the idea of removing tobacco from spiritual ceremonies. (*Id.* 2.251-52; App. 162.)[8] Based on this support, Weber discussed the idea

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[7] The district court's decision refers to comments Has No Horses later made to the inmates. (Add. 21.) The transcript references are to rebuttal testimony of Brings Plenty, not to the testimony of Has No Horses. (Tr. 3.601.)

[8]The letter was not received for the truth of the matter asserted, but to show that the DOC acted in part on the letter. (Tr. 2.252; Add. 28.) The letter was later re-offered, but refused, to prove the truth of the matter asserted based on corroborating testimony from Mary Montoya. (*Id.* 3.506; 3.598-99.) In the letter, White Elk discussed his observation of "addictive behavior patterns," and stated that he supported the positions of Has No Horses and Roy Stone concerning the use of mixing commercial tobacco with "traditional pipe tobacco for use in their ceremonies." (Ex. 138 (App.

of a tobacco ban with the Secretary of Corrections, Tim Reisch, and then implemented the ban. (*Id.* 3.557-58.) Weber made the decision after trying everything else he thought could correct the problem. "We had tried everything we knew to do and weren't being real effective. So the decision was made then to take tobacco out completely." (*Id.* 3.552.) Weber repeated that he "didn't think there were anymore options available." (*Id.* 3.559.)

The decision was made public to tribal liaisons,[9] spiritual leaders, pipe carriers, and sundancers through a letter from the Warden dated October 19, 2009. (Tr. 3.557-58; Ex. 103 (App. 126).) After sending the letter, Weber heard back from no one. "Nobody called me to ask if there were exceptions or why I had gotten to the point I had gotten to, other than the explanation in the letter. No one, not one single person, called me to talk to me about it." (Tr. 3.558-59.) Jennifer Wagner testified that she

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162).) Nothing in the contemporaneous document limits the discussion to smoking tobacco in the pipe.

[9] The tribal liaisons were designated at the DOC's request by the tribes in South Dakota to facilitate contact between the DOC and the tribes. (Tr. 2.222, 2.320-21.) Weber wrote to the liaisons in 2009 rather than the tribal chairmen because of the ongoing relationship and designation. (Tr. 3.558.)

talked to several tribal liaisons, who told her that they "understood that we had tried everything that we could, and they respected the decision." (*Id*. 2.258; 2.320-21.)[10] Wagner testified that several inmates thanked her for the decision. (*Id*. 2.258.) Weber, too, testified that he talked to dozens of inmates, and that they "appreciate the fact that tobacco was removed, and since reduced the problems and incidence of violence in living quarters." (*Id*. 3.574-75.)

**e. The Warden banned all tobacco for security reasons.**

Warden Weber's letter announcing the ban in 2009 begins with a discussion of the issues created by allowing tobacco only for Native American spiritual ceremonies:

> Over the years, tobacco tie mixtures and pipe mixtures have increasingly been abused and this problem is directly impacting the Native American Ceremonies. Many inmates have been caught separating the tobacco from their tie and pipe mixtures. This tobacco is then sold or bartered to other inmates.

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[10] The district court's statement that Oglala Sioux Tribe President John Yellow Bird Steele supported the lawsuit is clearly erroneous because there is no evidence in the record to support it. (Add. 18-19.) Yellow Bird Steele wrote a letter to Wagner dated March 13, 2012 (App. 164), but the letter was refused as hearsay and Yellow Bird Steele did not testify. (Add. 19.) Even though the letter was produced to counsel just the week before trial (Tr. 2.324), and Wagner got it from counsel (*id*.), the decision faults Wagner for not speaking to him about it or taking any action. (Add. 19.)

> Sometimes the prison gangs are pressuring the inmates to sell their tobacco instead of using it for spiritual reasons.
>
> Many times the SDDOC has reached out to the elders of the NACT/LDN/LCT groups to help prevent the abuse of tobacco. The quantities of tobacco have been adjusted to prevent the separation. Inmates caught abusing tobacco are suspended for six months from purchasing tobacco tie and pipe mixtures. However, unfortunately the tobacco continues to be abused.

(Tr. 2.301; Ex. 103 (App. 126).) The testimony of prison officials was consistent about the difference between security decisions within the scope of the DOC's authority and decisions made for religious or spiritual reasons. Mary Montoya testified that she did not consider herself an expert on Lakota spiritual matters, and that "the Penitentiary did not hold itself out to be an expert in Native American spirituality." (Tr. 3.484, 487.)[11] Jennifer Wagner similarly testified that the ban was imposed for security reasons.

> Q: And the DOC further believed, before it banned tobacco on October 19, 2009, that to be traditional, the inmate should only

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[11]Counsel's examination at trial indicates an understanding of this distinction. Montoya's answer was in response to a question whether the DOC had tried to limit making prayer ties and flags to only pipe carriers and fire keepers. (Tr. 3.484.) Counsel then asked, "[y]ou know that the Penitentiary can impose security measures like that. Correct?" (*Id.* 3.485.) Montoya answered, "Yes, I'm sure they can." (*Id.*) This exchange neatly encapsulates the difference between acting based on security concerns related to a spiritual matter, and having the support of spiritual leaders for the decision.

> smoke cansasa, red willow, the inner bark of the red twig dogwood, in their pipes and in their tobacco ties. Correct?
>
> A: The DOC wasn't -- no, the DOC was not stating that they had to be traditional. We banned it because of security issues. We had the support of the medicine men to say that it wasn't traditional, but we were banning it because of security issues.

(Tr. 2.302-303.) Conversation with spiritual leaders gave Weber reason to think that banning tobacco from the DOC was consistent with traditional Lakota spirituality, but the DOC acted to improve prison order and security, not to dictate religious practice.

After the tobacco ban, the number of inmates attending the time for making prayer ties and flags dropped from 30-35 each week with a four-week waiting list to less than 10 each week and no waiting list. (*Id*. 2.259, 3.511, Ex. 141.) The number of inmates attending pipe ceremonies fell from almost 25 before the ban to 13 after, with a similar decrease in the numbers attending Native American Church. (*Id*. 2.259-60.) Weber testified that he believes the facilities are safer after the ban than before. (Tr. 3.564.)

**f. The conflicting positions of spiritual leaders on the role of tobacco.**

It is undisputed that Native American spiritual leaders disagree whether it is essential to use tobacco in the ceremonial pipe or in tobacco ties. Richard Moves Camp testified at trial as an expert for the Plaintiffs. Moves Camp is a traditional healer from Pine Ridge. (Tr. 1.21-22.)[12] He testified that tobacco is traditional and essential to Lakota spirituality. (*Id.* 1.27-28, 1.34, 1.51.) Before trial, Moves Camp had not been to the SDSP since the mid-1980's, and he had not met Creek or Brings Plenty. (Tr. 1.57-60.) Unlike Has No Horses, Stone, and Two Dogs, he had never been the Plaintiffs' spiritual leader.

The DOC offered testimony from several spiritual leaders who had been invited to the SDSP by NACT. Roy Stone, a Lakota spiritual leader from the Rosebud Reservation, testified that the inmates do not need to use commercial tobacco, and that cansasa is traditional for the Lakota. (Stone

[12] The prison officials did not question Moves Camp's qualifications, but the district court's statement that he has consulted with multiple prisons "about the use of tobacco in Lakota religious ceremonies" (Add. 6 n.7) is a very loose reading of his testimony. (Tr. 1.26.)

depo., Doc. 153-2, at 11-12.)[13] Rick Two Dogs, a Lakota spiritual leader from Porcupine on the Pine Ridge Reservation, testified that inmates do not need to use commercial tobacco in their pipes or ties and flags, and that cansasa is traditional and acceptable. (Two Dogs depo., Doc. 153-1, at 18-19; Ex. 143.) Through a written statement he brought to his deposition, and which was admitted as Exhibit 143 (App. 163) (Tr. 3.598), Two Dogs testified that, "[i]deally, the sacred red willow bark should be used for making the canli wapahta (chanh-lee wah-pahta) or tobacco ties and waunyeyapi (prayer flags)." (Ex. 143 (App. 163).) Breon Lake testified that the White Buffalo Calf Woman brought cansasa for use in the pipe, and that cansasa is therefore traditional. (Tr. 2.338-40.) Sidney Has No Horses testified that he uses cansasa in his pipe because that was what he "was taught generation after generation." (*Id.* 2.372.) Stone, Two Dogs, and Has

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[13] The district court's statement that "[t]here is no indication that NACT has invited Stone to lead religious ceremonies or that his religious beliefs reflect those of Plaintiffs" (Add. at 23) is clearly erroneous. Creek testified that he got his pipe from Roy Stone after a sweat lodge ceremony that Stone led at the SDSP in 2003. (Tr. 1.76.) Creek testified that he offered a traditional remedy to Stone for a heart condition. (*Id*. 1.76-77.) Creek recalled Stone being one of the spiritual leaders coming to the SDSP during his incarceration, and testified that he never objected to Stone being invited as a spiritual leader. (*Id*. 1.125.) Brings Plenty testified that NACT invited Stone to the SDSP. (*Id*. 1.182.)

No Horses are all spiritual leaders who were invited to the SDSP by NACT. (*Id.* 1.125-26; 1.182.)

It is also undisputed that cansasa, or red willow bark, is traditional to Lakota spirituality. Richard Moves Camp, Lake, and Has No Horses all testified to slightly-different versions of the White Buffalo Calf Woman story. In his testimony, Moves Camp agreed that the White Buffalo Calf Woman brought cansasa to the Lakota, and that it was traditional for the Lakota people to smoke cansasa. (*Id.* 1.63.)[14] Moves Camp himself uses a mixture of cunli and cansasa in his own pipe--about 5% cunli, but as little as 1%, and the rest cansasa. (*Id.* 1.29-30, 1.63-64.) There was no evidence at trial that cansasa is not traditional to the Lakota. Both Creek and Brings Plenty testified that they have continued to smoke their pipes using cansasa. (*Id.* 1.144; 1.192; Add. 13.) When they came to the SDSP, Charlie White Elk, Roy Stone, and Sidney Has No Horses all asked that tobacco be removed from their pipe mixture. (*Id*. 3.491-93.)

Testimony about the significance of smoke from the pipe was generally consistent. Lake, Has No Horses, Stone, and Two Dogs testified

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[14] The district court's version of this story is taken entirely from Moves Camp's testimony. (Add. 8-9.)

that the pipe is used for prayer, that the smoke carries the prayers to the Creator or the Great Spirit, and that it is possible to pray without using a pipe. (*Id.* 2.339-40, 342, 370-72; Doc. 153-2 at 10; Doc. 153-1 at 17.) Richard Moves Camp testified that without tobacco "[i]t would be hard for [a Lakota] to pray. I guess you'd have to really go deep within." (Tr. 1.55.) Moves Camp also testified that people who are not pipe carriers "still find a way to pray." (*Id*. 1.62.)

**g. Native American spirituality in context within the DOC.**

Native American inmates have many opportunities for spiritual exercise. The weekly schedule of events at both the SDSP and Jameson was in evidence. (Ex. 112, 113.) There are two weekly sweat ceremonies at both the SDSP and Jameson. (Tr. 2.225.) There is a sweat lodge at every DOC facility in South Dakota. (*Id.* 2.219.) Approximately 35 inmates can fit in the sweat lodge at one time. (*Id*. 1.127.) The sweats are not supervised by a volunteer or a correctional officer. (*Id*. 1.128; 2.226.) There are also two weekly pipe ceremonies at the SDSP and Jameson, and one at Unit C, the minimum-security unit. (*Id*. 2.219-20.) There are also sweats for special reasons, like a family death, the opportunity to participate in making tobacco or prayer ties, NACT or LDN council meetings, Native

American Church, Native American culture class, and spiritual conferences. (*Id.* 2.229-31.) The activities for both Creek and Brings Plenty were documented in Exhibit 132. (*Id.* 2.228-29.) Clayton Creek, for instance, testified that he attends sweats every week, that he has attended NACT and LDN council meetings, that he goes to pipe ceremonies every week, that he participates in making prayer ties every week, and that he has taught a class on Native American culture since 2004. (*Id.* 1.119-23.) In general, Jennifer Wagner testified that Native American inmates are allowed more activities than many other religious groups, and more activities than are allowed in neighboring states with Lakota populations. (*Id.* 2.228, 2.238.)

**Summary of the Argument**

RLUIPA prohibits regulations that substantially burden an inmate's religious exercise, unless the regulation is supported by a compelling governmental interest and is the least restrictive means of achieving that interest. In assessing both the DOC's interest in prison security and whether the tobacco ban is the least restrictive means, this Court owes considerable deference to the DOC's decision, and can hold for the inmates only if there is substantial evidence that the DOC's decision to ban tobacco was an

exaggerated response. The district court incorrectly applied these standards, and its decision cannot be reconciled with Eighth Circuit precedent.

The tobacco ban is not a substantial burden on the inmates' ability to practice traditional Lakota spirituality because the inmates retain a consistent and dependable way to practice Lakota spirituality, including using cansasa, which is indisputably traditional to the Lakota, in both the ceremonial pipe and in making ties and flags for prayer.

The district court erred in refusing proposed Exhibit 149, a compilation of disciplinary reports for inmates banned by NACT from attending ceremonies involving tobacco for six months because they had been disciplined for abusing tobacco. The district court agreed that the exhibit was relevant, but refused it because of late disclosure, but could have resolved any prejudice to the inmates with a short continuance during the bench trial.

Under the Prison Litigation Reform Act, the district court's remedial order is not the least intrusive means of remedying the RLUIPA violation found by the court. The record does not contain evidence that allowing inmates to make ties and flags containing tobacco can be managed without further abuse, and the remedial order does not require that the tobacco for

smoking be ground, does not contain a limit on the amount of tobacco allowed in the pipe mixture, does not limit where tobacco can be smoked, and does not address the handling of the pipes in which tobacco is to be smoked.

## Argument

### 1. Standard of review

After a court trial, the district court's findings of fact can be reversed only for clear error, but its legal rulings are reviewed de novo. *See, e.g., Singson v. Norris*, 553 F.3d 660, 661 (8th Cir. 2009). In a case brought under the Religious Freedom Restoration Act, this Court held that whether prison officials "failed to satisfy the statutorily imposed test under RFRA is a question of law which is subject to de novo review." *Hamilton v. Schriro*, 74 F.3d 1545, 1552 (8th Cir. 1996). Because RLUIPA succeeded RFRA and the standards are the same, this Court has held that certain "observations about RFRA are equally applicable to RLUIPA." *Fegans v. Norris*, 537 F.3d 897, 903 (8th Cir. 2008) (applying the rationale of *Hamilton* to a RLUIPA case). Thus, the district court's conclusions that the tobacco ban did not serve a compelling governmental interest, that the tobacco ban was not the least restrictive means of achieving that interest,

and that the ban substantially burdened the religious exercise of Creek and Brings Plenty are reviewed de novo.

Whether the remedial order satisfied the PLRA is similarly a legal question, subject to de novo review. *See Hines v. Anderson*, 547 F.3d 915, 920 (8th Cir. 2008) (whether an ongoing violation exists is a mixed question of law and fact, with findings reviewed for clear error and conclusions of law reviewed de novo).

**2. The tobacco ban served a compelling interest.**

Under RLUIPA, "[n]o government shall impose a substantial burden on the religious exercise of a person residing in or confined to an institution . . . 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. RLUIPA requires deference to prison officials.**

The United States Supreme Court has stated that RLUIPA does not "elevate accommodation of religious observances over an institution's need to maintain order and safety." *Cutter v. Wilkinson*, 544 U.S. 709, 722 (2005). The Court noted that "[w]e have no cause to believe that RLUIPA

would not be applied in an appropriately balanced way, with particular sensitivity to security concerns." *Id.* The Court noted that "context matters," and lawmakers who supported RLUIPA "were mindful of the urgency of discipline, order, safety, and security in penal institutions." *Id.* 723. Finally, the Court noted that "[it] bears repetition . . . that prison security is a compelling state interest, and that deference is due to institutional officials' expertise in this area." *Id.* 725 n.13. The Eighth Circuit has repeatedly and consistently adhered to this required deference. *See Singson*, 553 F.3d at 662; *Fegans*, 537 F.3d at 902-03; *Fowler v. Crawford*, 534 F.3d 931, 941 (8th Cir. 2008). Prison officials may not rely on "conclusory statements and post hoc rationalizations for their conduct." *Hamilton*, 74 F.3d at 1554 n.11. But given that "[a] prison's interest in order and security is always compelling," *Fowler*, 534 F.3d at 939, and given the deference due to prison officials, "'in the absence of *substantial* evidence in the record to indicate that the officials have exaggerated their response to these considerations, courts should ordinarily defer to their expert judgment in such matters.'" *Fegans*, 537 F.3d at 903 (quoting *Hamilton*, 74 F.3d at 1553).

**b. The district court's decision was not deferential.**

The district court's decision correctly cites these standards and required deference (Add. 42-44), but does not apply them. At trial, Weber and Kaemingk offered considerable evidence of actual problems-- including documentation--caused by tobacco associated with spiritual ceremonies.

- Both Brings Plenty and Creek were disciplined for possessing tobacco, which both had access to as pipe carriers for spiritual ceremonies. (Exs. 116, 117, 121-25, 127; Tr. 1.75-76; 1.135-40; 1.154; 1.186-89.)

- Brings Plenty was disciplined for having tobacco and a screen in his tobacco pouch after making tobacco ties. (Ex. 117; Tr. 1.188-89.)

- NACT itself recognized that tobacco was abused because it enacted a policy to prevent inmates who abused tobacco from obtaining pipe mixture, and no inmate whose name was on the list challenged that fact. (Ex. 146 (App. 165); Tr. 1.134, 2.248.)

- Tobacco that was ground for use in spiritual ceremonies was confiscated as contraband elsewhere in the institution. (*Id.* 3.550-51.)

- Breon Lake testified to his firsthand experience as an inmate to being threatened by inmates who wanted his tobacco. (Tr. 2.331-32, 2.336-39.)

- Mary Montoya testified to her personal observation of inmates attending ceremonies because they wanted to smoke tobacco. (*Id.* 3.518.)

- Charlie White Elk told Mary Montoya, and wrote a letter to the Warden, about his observation of inmates attending ceremonies who exhibited "addictive behavior." (Ex. 138; Tr. 3.506.)

- Jennifer Wagner testified from her regular review of disciplinary reports and conversations with security staff that tobacco was used to pay off gambling debts, gay activity, and sexual favors. (Tr. 2.234-35.)

- The Warden and his senior staff discussed the problems and issues created by tobacco being allowed only for spiritual ceremonies on a regular, if not weekly, basis for over nine years. (*Id*. 3.564, 3.549-50, 3.552.)

- The Warden knows based on his experience that allowing inmates to run "stores" is "never good for anybody, the institution, or even the person who maybe is collecting contraband and reselling it" because eventually "he'll get in trouble, either by us if we find out about it, or the other inmates will hurt him at some point, because they're either going to rob him, or they'll believe they've been ripped off by him, or they will incur debt, and somebody will need to collect on that debt. All of those things have happened and happened numerous times over the years." (*Id*. 3.548.)

Instead of offering any deference based on this evidence, the district court brushed it aside. First, the court stated that there were "only two contemporaneous written documents about the DOC's decision to ban tobacco," the Warden's letter announcing the ban (Ex. 103 (App. 126)), and Jennifer Wagner's e-mail to prison staff of the same date (Ex. 108; App. 130.) (Add. 44.) The question, however, is not the adequacy of the

documents explaining the decision, but whether the evidence of the DOC's actual experience from 2000 until the decision was made in 2009 to ban tobacco established legitimate security and safety concerns. The district court was critical of the Warden's announcement because his discussion of security concerns was "limited to two out of five paragraphs of [the] letter." (*Id.* 45.) Not only is this analysis not even slightly deferential, it ignores the testimony at trial. Ironically, the district court reached a conclusion about the DOC's motivation based on a letter written after the fact rather than on the undisputed evidence of what happened for nine years leading up to the decision.

Second, the district court dismissed evidence that Brings Plenty had himself been disciplined for abusing tobacco without explaining why (Add. 46), and ignored the evidence of Creek's disciplinary conduct. (*Id.*) The district court rejected the undisputed testimony of Breon Lake because Brings Plenty and Creek, "who have been incarcerated for longer than Lake, testified that they have not been subject to threats from other inmates." (*Id.*) By this standard, the testimony of Brings Plenty and Creek trumps all other evidence on the issue, including their own disciplinary records. That Creek

or Brings Plenty have not been threatened, of course, is not evidence that such threats were not made to Lake and others.

Third, the district court's decision discounted the list of inmates banned from using tobacco for six months (Ex. 146 (App. 165)) because "Defendants offered no evidence that these 33 violations posed any security risk," and "did not offer a similar report for the time period after the tobacco ban took effect." (Add. 46 n. 30.) It is unclear what evidence would satisfy the district court's first concern, given that a disciplinary infraction is per se evidence of a security risk. As to the second concern, NACT no longer maintained such a list after the ban. The Warden testified, however, that there were fewer such disciplinary reports and issues after the ban, and that in his judgment, the institutions were safer as a result. (Tr. 3.563-64.)

The district court's analysis is inconsistent with this Court's rejection in *Fegans* of the argument that "empirical proof" is required to establish a compelling interest. 537 F.3d at 904. Instead, quoting *Hamilton*, this Court approved as sufficient "the testimony of prison officials, 'based on their collective experience in administering correctional facilities,'" that prison security precluded inmates from being able to wear long hair, which created the potential for concealing contraband. *Id.* (quoting 74 F.3d at 1555.) It

was sufficient that experienced prison officials described specific examples of inmates "who had done just these things under a previous policy that permitted long hair." *Id.* Here, the Warden offered not only his opinion, but evidence of actual disciplinary violations based on actual tobacco misuse. Contrary to the district court's opinion, the defense never argued "that they do not need to provide the documentation." (Add. 47.) To the contrary, documentation was provided; the issue is how much was needed. Based on *Hamilton*, what was presented was legally sufficient.

Finally, the district court's opinion states that "the DOC presented no other evidence that tobacco from Native American religious ceremonies created a security or safety risk." (Add. 46.) This conclusion is plainly inconsistent with the evidence outlined above.[15]

**c. The district court's decision is inconsistent with Eighth Circuit precedent.**

The conclusion that the evidence in this case did not establish a compelling interest is also inconsistent with the reasoning and results in *Fowler*, *Fegans*, and *Hamilton*. In *Fowler*, prison officials at the Jefferson City Correctional Center refused to allow a sweat lodge. 534 F.3d at 932.

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[15] The statement is offered as a legal conclusion, but would be clearly erroneous as a statement of fact.

This Court affirmed summary judgment based on the testimony of officials who "offered a myriad of reasons why they believe Fowler's request for a sweat lodge compromises security at JCCC to an unacceptable degree." *Id.* at 934-35. Those concerns included: incidents of violence had occurred during ring-out for religious services; misconduct during religious programming time; the sweat lodge ceremony would be in an enclosed area; and the sweat lodge created the risk of sexual misconduct, physical assault, drug use, and fire and heat-related safety concerns. *Id.* Thus, the prison officials in *Fowler* satisfied their burden based on their "legitimate fears." *Id.* at 939.

The *Fowler* standard is not what the district court in this case required. "Prison officials need not endure assaults, drug indulgence, or sexual improprieties before implementing policies designed to prevent such activities in an uneasy atmosphere. *Nor do prison officials charged with managing such a volatile environment need present evidence of actual problems to justify security concerns.*" *Id.* (emphasis added). Here, however, prison officials endured years of disciplinary misconduct, threats, violence, and contraband trafficking before banning tobacco.

*Hamilton* was decided in 1996 under RFRA. 74 F.3d at 1547. This Court reversed a judgment involving the denial of a weekly sweat lodge ceremony, and upheld the validity of hair-length regulations. Prison officials were concerned that tools like a shovel and an axe could be used as weapons; that problems commonly arise when inmates typically prone to violence are allowed to congregate in groups; and that close supervision was impossible because of the secluded nature of the sweat lodge. *Id.* at 1548. The hair-length regulations were based on concerns that inmates could conceal contraband in their long hair or that hair length would identify them with a particular gang. *Id.* at 1548, 1555 n. 12.

And in *Fegans*, this Court affirmed a decision following a bench trial that a grooming regulation governing hair length did not violate RLUIPA. 537 F.3d at 900. Again following *Hamilton*, this Court agreed that the regulation served a compelling interest. *Id*. at 907. Prison officials testified that the policy was "all about security," and that it was designed to minimize opportunities for disguise and smuggling contraband. *Id.* at 903. They testified to "specific examples showing that inmates had used their hair to conceal contraband and to change their appearance after escaping." *Id.* In rejecting the dissent's position that a greater quantum of proof was

required, the opinion cited the deference due to prison administrators. "The district court here relied on testimony of experienced prison officials, who opined that the hair-length policy was necessary to prevent inmates from concealing contraband in their long hair or changing appearance after an escape, and who described specific (i.e. empirical) examples of inmates who had done just these things under a previous policy that permitted long hair." *Id.* at 904. These cases cannot be reconciled with the district court's decision.

Weber and Kaemingk presented more than sufficient evidence to establish a compelling interest in prison order and security. The district court's contrary conclusion resulted from a failure to give appropriate deference to Weber and Wagner's testimony, and should be reversed.

**3. The tobacco ban was the least restrictive means.**

**a. This consideration also requires deference.**

RLUIPA requires that Weber and Kaemingk prove that the tobacco ban is the least restrictive means of furthering the DOC's compelling interest. 42 U.S.C. § 2000cc-1. This standard again requires deference to prison officials. An overly-restrictive approach "would be inconsistent with congressional intent," and the Supreme Court in *Cutter* counseled restraint

and due deference to the experience and expertise of prison officials. *Fowler*, 534 F.3d at 941 (citing 544 U.S. at 722-723). The standard does not require that prison officials consider and reject every conceivable alternative. "It would be a herculean burden to require prison administrators to refute every conceivable option in order to satisfy the least restrictive means prong of [RLUIPA]." *Hamilton*, 74 F.3d at 1556; *accord Fowler*, 534 F.3d at 940. The courts must be careful not to construe the least restrictive means test so narrowly that federal judges become "'the primary arbiters of what constitutes the best solution to every religious accommodation problem' in state penal institutions." *Fowler*, 534 F.3d at 941 (quoting *Lovelace v. Lee*, 472 F.3d 174, 215 (4th Cir. 2006) (Wilkinson, J., dissenting)). In this context, the testimony of prison officials about why a possible alternative to the challenged action would not protect the state's interest in order and security must be rebutted "'by substantial evidence' that the officials exaggerated their response to security considerations." *Id.* at 941 n.11 (quoting *Hoevenaar v. Lazaroff*, 422 F.3d 366, 371-72 (6th Cir. 2005)).

**b. Weber tried, considered, and rejected alternatives before banning tobacco.**

The evidence established that Weber considered and rejected every alternative proposed by Brings Plenty and Creek in this case. They proposed the following alternatives: (1) search all inmates attending sweats, pipe ceremonies, or the time set for making tobacco ties; (2) station a correctional officer inside the sweat lodge or allow tobacco only at sweats; (3) reduce the amount of tobacco to 10% or even 5% of the mixture; (4) station a correctional officer inside the room when tobacco ties are made; (5) allow only pipe carriers to make tobacco ties; (6) tighten up storage and distribution methods; (7) impose stiffer sanctions for tobacco abuse; (8) vary the policy by institution; and (9) limit tobacco to fewer ceremonies. (Doc. 173 at 27-28.) The Warden addressed these proposals in his trial testimony.

He testified that searches were impractical, staff-intensive, ineffective, and would appear to discriminate against Native Americans. Except for the random searches that have been done as a matter of course, the Warden testified that he

> would not consider searching every Native American inmate that participated in a sweat or any other Native activity, for that

> matter, because I don't do that with any of the other religious groups, the Buddhists, Christians, the Jewish inmates, the Asatru, or anyone else. I strongly believe if I were to search all Native Americans, I better be prepared to search all inmates who participate in cultural or religious activities, or I believe it sends a horrible message, and, frankly, I would be and probably should be in trouble for that practice.

(Tr. 3.559-60.) He further testified that pat searches are ineffective.

> [T]rying to recover small amounts in which the tobacco bundles or ties would be of contraband off an inmate through a pat search is very ineffective. It usually is not going to be fruitful. It usually won't produce any contraband, just because inmates can be rather ingenious where they place these items on their body or on their person or in their clothing, which would make it virtually impossible to discover on a pat search.

(*Id.* 3.560.)

Warden Weber considered limiting tobacco tie attendance to only pipe carriers. He testified that "[i]t was talked about," but he thought it would be "terribly unfair" for the DOC to determine who could attend a spiritual activity. (*Id.* 3.560-61.) "Furthermore, I know that I learned that it was, in fact, pipe carriers, and in some cases Sundancers, and others who did, in fact, pick up rule infractions for trafficking in or using commercial-type tobacco either during or after their ceremonies. So I think that would have been ineffective." (*Id.* 3.561.) Both Brings Plenty and Creek are pipe carriers, and both had tobacco violations. Even after the ban, a past

president of NACT was recently disciplined for possessing tobacco. (Ex. 139; Tr. 2.236.)[16]

Warden Weber further testified that storage and distribution methods were secure and could not reasonably be improved. (Tr. 3.561-62.) He was aware of only one instance when tobacco was stolen from Mary Montoya's office (within the first week; after she started work as a volunteer) and after that, tobacco was stored in a locked box behind a locked door. (*Id.*) Brings Plenty and Creek offered no evidence that additional staff could be available to carry tobacco directly to an activity. There was no evidence either that outside volunteers are available to make prayer ties, or that the idea, which they did not present at trial, would be acceptable for security reasons. A sealed prayer tie could obviously contain contraband.

The Warden testified that senior staff talked "over the years" about putting uniformed security staff in the room during each Native American

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[16]The district court's opinion cites this testimony in discussing the DOC's compelling governmental interest, but inaccurately describes it as occurring "during the time period in which DOC permitted inmates to use tobacco in religious ceremonies." (Add. 46.) Instead, the disciplinary violation occurred on March 5, 2012, well after the tobacco ban. (Tr. 2.236.)

spiritual ceremony, but he thought it would be ineffective, and he did not have sufficient staff to do it.

> We talked about 30-plus inmates in the room doing tobacco ties. In my mind a one-to-one, one inmate to one staff member, probably would have prevented any manipulation of that tobacco. Of course that's not feasible. So I could have placed a correctional officer in that room or two correctional officers in that room, if I had the staff, which I don't have for that particular post, but I could have done that. In my mind I would not have been effective. I would not have prevented anything. Staff are easily distracted. Staff are easily pulled in one direction when something happens, where they've maybe even left. Again, I think it could have easily been defeated if I would have assigned one or two correctional officers to that room.

(*Id.* 3.562-63.)

Senior staff considered reducing the percentage of tobacco to 5% or 10%, but did not think it would change anything.

> We had gradually reduced the amount of tobacco over the years systematically until we got to the 25 percent mixture. It really didn't have a whole lot of effect. In my mind whether it's 25 percent or 10 percent or 5 percent, it's still tobacco, and it's still a sought-after commodity and still something that made some inmates very rich, and it also gave some inmates the currency and clout and influence they needed at the prison to do some sometimes less-than-honorable things.

(*Id.* 3.563.)

There is no evidence in the record that the sanctions imposed for tobacco abuse were outside correctional standards, or that harsher sanctions would have had a greater deterrent effect. Notably, the disciplinary sanction imposed on Clayton Creek for having tobacco in his sock on July 28, 2003, was 20 days of disciplinary segregation (Ex. 127 (App. 159-60); Tr. 1.139-40), but the sanction did not deter Creek, who was disciplined again for an incident on April 6, 2005, and given 10 days of disciplinary segregation. (Ex. 124 (App. 156-58); Tr. 1.137-38.) The Warden testified that he does not favor long periods of disciplinary segregation; he sees it as poor correctional practice. "It's the last resort. It's kind of a dead end. Not much good comes out of placing inmates in those units." (Tr. 3.543.) He tells staff that he does not "want them to write a rule infraction report as the first option," and that where possible, disciplinary issues should be resolved informally. (*Id.*) Disciplinary segregation also "interrupts other positive things happening in inmates' lives, like the ability to participate in cultural activities or religious activities. It also, in all likelihood in the case of major rule infractions, would and could cause an inmate to stay in prison longer than his presumptive parole would dictate." (*Id.* 3.544.) Jennifer Wagner testified that it would not be standard correctional practice to use

administrative segregation, which is a long-term administrative placement starting at 90 days, for disciplinary reasons. (*Id.* 2.324-25.)

The district court's decision cites none of the Warden's testimony on these alternatives. Instead, the decision dismisses the testimony as insufficient because it was not evidence that these alternatives were considered "before banning all tobacco." (Add. 50.) This statement is clearly erroneous and contradicted by the transcript. Weber testified that he considered the option of putting staff in the sweat lodge and searching inmates "over, again, the period of years," but that he rejected those options. (Tr. 3.559.) He testified that limiting the attendance of inmates at the prayer tie opportunity "was talked about." (*Id.* 3.560.) He testified that there were conversations about storage and distribution methods (*id.* 3.561), and that the possibility of putting uniformed security staff in the room during each ceremony was "talked about over the years, but totally ineffective again." (*Id.* 3.562.) The inmates did not present substantial evidence that the Warden's testimony about alternatives was greatly exaggerated.

### c. The district court's reasons for concluding that the ban was not the least restrictive means are flawed.

Having rejected the Warden's testimony for a reason contradicted by the record, the district cited three reasons why the ban did not satisfy the least-restrictive-means test. First, the court was critical that "defendants did not discuss their plans to ban tobacco with plaintiffs before implementing the ban." (Add. 48. *See also id.* 51 ("defendants never suggested any alternative to plaintiffs").) The court's decision cites no authority for such a requirement. Brings Plenty and Creek are two of 941 Native American inmates in the custody of the Department of Corrections. (Ex. 114 (App. 161).) This is not a case in which prison officials rejected a project application or proposal from specific inmates before taking action. There is no evidence that in October 2009 Weber knew that Brings Plenty and Creek would object to the ban or file this lawsuit. The record does contain evidence, however, that Weber and others discussed alternatives many times with Native American spiritual leaders. (*See, e.g.*, Tr. 2.243-45, 3.582-88.)

Second, the court's decision states that "Weber admitted that limiting the number of inmates who may make tobacco ties could control the unauthorized use of tobacco." (Add. 48-49.) The decision does not cite to

the transcript and the Appellants cannot locate any such testimony in the record. Instead, when asked "[d]id you consider limiting the attendance of inmates at the prayer tie opportunity to only pipe carriers," the Warden answered that it was considered and rejected as unfair and ineffective. (Tr. 3.560-61.) Indeed, doing so would likely violate the First Amendment. *See Brown v. Schuetzle*, 368 F.Supp.2d 1009, 1023-24 (D.N.D. 2005).

Third, the decision indicates that although Weber and his staff looked at what some other states were doing, their investigation was insufficient. (Add. 51.) Specifically, the decision is critical that Jennifer Wagner looked at practices in North Dakota, Minnesota, and Nebraska, but did not consider Wyoming, New Hampshire, or Idaho. (*Id.*)

Jennifer Wagner testified that in considering alternatives she looked at the practices of other states with significant Lakota populations, and those states were North Dakota, Nebraska, and Minnesota. (Tr. 2.237, 289.) Wagner testified that North Dakota and Nebraska are tobacco-free, and that Minnesota allows a small amount of tobacco only if it is brought in by a Native American volunteer. (Tr. 2.237.) When Wagner was asked whether inmates in Minnesota are allowed to make prayer ties, the district court sustained an objection to the question as calling for hearsay (Tr. 2.237-38),

although Warden Weber later testified that Minnesota does not allow tobacco to be used in "their tobacco tie ceremony." (Tr. 3.590.) Weber also testified that Iowa still allows smoking so tobacco for spiritual ceremonies is not an issue. (*Id.*) North Dakota and Nebraska don't allow tobacco. (*Id.*) He testified that "[g]enerally what I come away with when I meet on a national level with my counterparts, a lot of states do a lot of very different things." (*Id.*) The district court's decision cites no authority that Wagner or Weber were obligated to look at more states than they did.

Finally, the district court's decision states that "evidence of what other prisons have done to accommodate inmates' religious practices does not support defendants' decision to ban all tobacco." (Add. 54.) This statement was made in response to cases cited by the prison officials in which other courts had affirmed the denial of tobacco. (Add. 51-54.) The court distinguished the cases and found the evidence from other states unpersuasive. In the same discussion, however, the court then faults the DOC for not looking at other states, and notes that "[m]ultiple state prisons allow their inmates to use tobacco for religious purposes." (*Id.* 55.) The district court cites not policies, but reported decisions involving policies in Pennsylvania, West Virginia, Texas, Florida, California, Connecticut,

Oregon, and Wisconsin. (*Id.* 55-57.) The district court concluded from these case citations (with no discussion of the particular policies or the facts of each case) that "[t]his widespread allowance of tobacco in prisons lends substantial credence to plaintiffs' position that less restrictive alternatives to a complete ban on the use of tobacco in Lakota religious ceremonies is possible." (*Id.* 57.)

This conclusion is contrary to established precedent from this Court. In *Fegans*, this Court rejected the argument that the grooming policy was not the least restrictive means "because other prison systems employ more liberal grooming policies." 537 F.3d at 905. Quoting *Hamilton*, the Court explicitly held that the required deference due to prison officials outweighs the practices of other states. *Id.* "We concluded in *Hamilton* that '[a]lthough prison policies from other jurisdictions provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security, *it does not outweigh the deference owed to the expert judgment of prison officials who are infinitely more familiar with their own institutions than outside observers.*'" *Id.* (quoting *Hamilton*, 74 F.3d at 1556 n. 15) (emphasis added). As the Court further explained in rejecting a similar argument in *Fowler*, in *Hamilton* the plaintiffs presented

"deposition testimony from prison administrators in other states" that they allowed sweat lodges without major problems, "[y]et that was not enough for us to strip PCC officials of their discretion." *Fowler*, 534 F.3d at 941.[17]

Here, South Dakota's position is unique. Almost one third of its inmate population is Native American, with no other state coming close. (Tr. 2.232-33.) Given the testimony about the problems actually experienced in trying to manage tobacco in South Dakota, evidence from other states is unpersuasive, and the record does not contain substantial evidence that Weber exaggerated his response. *Fowler*, 534 F.3d at 940. The decision that the ban was not the least-restrictive mans should be reversed.

**4. The tobacco ban did not substantially burden the inmates' religious exercise.**

The first inquiry under RLUIPA is often assumed or unchallenged in reported cases--that a plaintiff prove "a substantial burden on his ability to exercise his religion." *Gladson v. Iowa Dep't of Corr.*, 551 F.3d 825, 832

[17] The logic of the district court's decision is that if a practice works in one state, it cannot be disallowed in any other. By this reasoning, this Court's decision in *Fowler* would be incorrect, because a sweat lodge is allowed in South Dakota.

(8th Cir. 2009). The plaintiff bears the initial burden of proving a substantial burden. *Id*. at 833.

Congress intentionally did not define "substantial burden." 146 CONG. REC. S7774-01, S7776 (daily ed. July 27, 2000) (joint statement of Sens. Hatch and Kennedy). This Court has held, "largely consistent with [its] First Amendment cases, that to demonstrate a substantial burden on the exercise of religion, a government policy or action 'must significantly inhibit or constrain religious conduct or religious expression; must meaningfully curtail a person's ability to express adherence to his or her faith; or must deny a person reasonable opportunities to engage in those activities that are fundamental to a person's religion.'" *Van Wyhe v. Reisch*, 581 F.3d 639, 656 (8th Cir. 2009) (quoting *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807, 813 (8th Cir. 2008)). This constitutional standard is only "somewhat" altered based on RLUIPA's definition for "religious exercise" that extends to religious practices not "compelled by, or central to" a certain belief system. *Id.*[18] This Court has also stated that a rule imposes a

[18] In its statement of interest, the Department of Justice argued that "[t]he only appropriate avenue for judicial inquiry is whether an institution's policy interferes with an exercise of religion." (Doc. 181 at 8.) As the district court recognized, this is not the correct standard. (Add. at 31 n.25.)

substantial burden when it provides "no consistent and dependable way" to observe a religious practice. *Love v. Reed*, 216 F.3d 682, 689 (8th Cir. 2000). In deciding whether a burden is substantial, the court must consider other opportunities a plaintiff has for religious exercise. *Patel*, 515 F.3d at 812, 814-15. The definition of religious exercise, in other words, is broad and not limited to a particular act of worship. *See, e.g., Smith v. Allen*, 502 F.3d 1255, 1277 (11th Cir. 2007) (abrogated on other grounds, *Sossamon v. Texas*, 131 S.Ct. 1651, 1663 (2011)); *Adams v. Mosley*, 2008 U.S. Dist. LEXIS 124027 *30-31 (M.D. Ala. 2008).

This case presents an issue of first impression in this Circuit--whether providing cansasa rather than tobacco to Lakota and other Native American inmates substantially burdens their religious exercise under RLUIPA when they are allowed many other ways to practice traditional Lakota spirituality. While no reported decision anywhere directly addresses that issue, this Court has upheld a South Dakota decision limiting the tobacco allowed to Native American inmates because limiting the amount of tobacco did not substantially burden their religious exercise, and compelling governmental interests for safety and security supported the limit. *See Runningbird v. Weber*, 198 Fed. Appx. 576 (8th Cir. 2006), *affirming* 2005 U.S. Dist.

LEXIS 25234 (D.S.D. 2005). The reasoning in both opinions in *Runningbird* supports the complete tobacco ban here.

The district court's decision in *Runningbird* held that under RLUIPA, "[a] prisoner need not be afforded his preferred means of practicing his religion as long as he is afforded sufficient means to do so." 2005 U.S. Dist. LEXIS 25234 at * 9 (quotation omitted). Limiting the amount of tobacco did not substantially burden Runningbird's religious exercise because he could exercise his religion in other ways. *Id.* at 10; *see also Van Wyhe*, 581 F.3d at 657 (prison "must permit a reasonable opportunity for an inmate to engage in religious activities but need not provide unlimited opportunities").

The district court's decision in this case correctly noted that the restriction in *Runningbird* was a limit, not a ban (Add. 40), but the reasoning still applies. The tobacco ban infringes and is a burden, but it is not substantial. Inmates still have a "consistent and dependable way" to practice Lakota spirituality. *See also Farrow v. Stanley*, 2005 U.S. Dist. LEXIS 24374 *14-16 (D. N.H. 2005) (granting prison's motion for summary judgment and dismissing RLUIPA claim); *Farrow v. Stanley*, 2004 U.S. Dist. LEXIS 1518 at * 14-15 (D. N.H. 2004) (denying motion for

temporary injunction because prison tobacco ban did not substantially burden inmate's religious exercise); *Adams*, 2008 U.S. Dist. LEXIS 73879, adopting recommendation, 2:05-CV-352-MHT (Doc. 104 at 19-20) Sept. 5, 2008 (granting summary judgment in favor of prison officials where Native American inmate failed to demonstrate how use of the tobacco-free herb kinnikinick rather than tobacco itself imposes a substantial burden on his religious exercise or causes him to depart significantly from his religious traditions).

The tobacco ban here is not a substantial burden for the same reason. The inmates and Moves Camp testified that tobacco is fundamental to traditional Lakota spirituality. (Tr. 1.27-28, 34, 51.) But they fail to explain why the alternative, cansasa, which is available and is indisputably also traditional to the Lakota religion, is not sufficient. Moves Camp himself uses between 95% and 99% cansasa in his pipe and testified that, although tobacco is a sacrament and offering, that "doesn't mean we smoke it all the time." (*Id*. 1.51, 64.) Cansasa is also an offering, and is a means of prayer. (Tr. 1.62.) The district court in this case heard evidence that multiple Lakota spiritual leaders invited to the SDSP by NACT refused tobacco when they came. (Tr. 3.491-93). When asked on cross-examination about

his understanding of the importance of tobacco in tobacco ties, Weber testified to the ambivalence evident throughout the record. "I've been told by the testimony over the last two and a half days and others that it's important. I have also heard, though, from others, who are self-proclaimed medicine men and healers and other terms, that it's not so." (Tr. 3.594.)

Far from establishing that the DOC tried to impose its own understanding of traditional Lakota spirituality on the inmates, the record reflects that Weber tried to avoid banning tobacco for nine years. Ultimately, the record proves that: (1) cansasa is traditional; (2) the amount of tobacco is not important,[19] so that even 1% tobacco in the pipe mixture is sufficient; (3) Lakota spiritual leaders disagree whether any tobacco is

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[19] This statement from the district court's decision (Add. at 41 ("But the amount of tobacco present in the tobacco and red willow bark mixture is not at issue in this case."); ("It is not the amount of tobacco, but rather the fact that tobacco is present in the ceremonies, that is important."), illustrates the faulty analogy offered by Richard Moves Camp, and accepted by the district court, that "tobacco to the Lakota is like the Bible to Christians." (Add. 42; Tr. 1.51.) No Christian would say that the "amount" of the Bible is irrelevant--that only one book or one chapter or one verse was sufficient. Christians accept the Bible as God's word. Lakota spirituality, by contrast, is transmitted from generation to generation orally, and tobacco is an offering. (Add. 5-6; Tr. 1.31, 39-40, 84.) A better analogy is that banning tobacco is like prohibiting the use of hymns in Christian worship, or, Montoya's analogy, that tobacco ties are "referred to as the Native American rosary." (Tr. 3.491.)

required if cansasa is available; and (4) Native American inmates in South Dakota have many other ways to practice traditional Lakota spirituality. They still smoke the pipe, and they still pray. On these unique facts, the tobacco ban is not a substantial burden under RLUIPA.

**5. The district court should have considered Exhibit 149.**

Although Weber and Kaemingk maintain that they presented sufficient evidence at trial to establish a compelling governmental interest, it became clear during the cross-examination of Jennifer Wagner that her credibility was being challenged because she did not produce specific disciplinary reports documenting the kinds of disciplinary problems to which she testified. (*See, e.g.,* Tr. 2.282.) Based on that concern, during trial Weber asked staff to produce the disciplinary reports corresponding to the inmates whose names appeared on NACT's list of 33 inmates banned from tobacco use for six months. (Ex. 146 (App. 165).) During Weber's testimony, the disciplinary reports showing the nature of the violation that resulted in each inmate's name being on the list were offered into evidence as Exhibit 149 (App. 10-125). (Tr. 3.566-67.) Creek and Brings Plenty objected to the exhibit as hearsay and because the reports had not been disclosed before trial. (Tr. 3.567-71.) The district court overruled the

hearsay objection, and considered whether the reports should be excluded because they were not previously disclosed. (*Id.*) Counsel for Weber explained that the reports were being offered because of the cross-examination of Wagner, and they had not previously been produced because counsel thought that evidence of the plaintiffs' own disciplinary violations and the NACT list itself, together with the testimony of Lake, Wagner, and Weber, were sufficient to meet the DOC's burden, and because in a previous case a different judge had refused to admit disciplinary reports from the SDSP as hearsay. (*Id.*) Counsel also noted that the case was being tried by both sides with almost no discovery other than the initial and pretrial disclosures under Rule 26. (*Id*.) The district court refused the exhibit because the defense was on notice that the reports were relevant to a significant issue in the case and the inmates would be prejudiced if they were admitted. (*Id.*)

The district court enjoys broad discretion in ruling on the admissibility of evidence, and its rulings are reviewed for abuse of discretion. *Cole v. Homier Distrib. Co.*, 599 F.3d 856, 865 (8th Cir. 2010). Here, it is undisputed that the reports were relevant, so the only basis for refusing to consider them is because of prejudice. But the district court

could easily have granted a short continuance during the bench trial, thus resolving the issue of prejudice and favoring the process of discerning the truth.

Presumably the district court excluded the exhibit as a sanction under Fed. R. Civ. P. 16(f) or 37(b)(2)(B) because the reports were not disclosed with the pretrial submissions. The district court had ordered that the parties produce a "list and brief description of exhibits that will be offered in evidence." (Doc. 143.)

This Court has "cautioned district courts not to 'adhere blindly' to the letter of a pretrial order without considering the reasons for a party's noncompliance." *Life Plus Int'l v. Brown*, 317 F.3d 799, 803 (8th Cir. 2003) (quoting *Dabney v. Montgomery Ward & Co.*, 692 F.2d 49, 52 (8th Cir. 1982)). The district court should consider the reason for failing to disclose the exhibit earlier, the importance of the excluded exhibit, the opposing party's need for time to prepare, and whether a continuance would be useful. *Id*. 803-804 (citing *Patterson v. F.W. Woolworth Co.*, 786 F.2d 874, 879 (8th Cir. 1986)).

In addition, the district court should employ the least restrictive remedy, such as a continuance, rather than excluding the untimely evidence.

*Wegener v. Johnson*, 527 F.3d 687, 692 (8th Cir. 2008). This is particularly true when the party's failure to comply is substantially justified or harmless. *Id.*

"'[T]he exclusion of evidence is a harsh penalty and should be used sparingly.'" *Wegener*, 527 F.3d at 692 (quoting *ELCA Enters. v. Sisco Equip. Rental & Sales*, 53 F.3d 186, 190 (8th Cir. 1995). The exclusion of evidence should be reversed when the decision bars meaningful examination or impedes the truth-finding process. *Nichols v. Am. Nat'l Ins. Co.*, 154 F.3d 875, 890 (8th Cir. 1998) (decision should be based on full and fair consideration of the evidence). As in *Central Distributors, Inc. v. M.E.T., Inc.*, "[t]his was a non-jury trial and a short continuance could have been ordered if necessary to guard against unfair surprise without any great disruption of calendars or waste of court time." 403 F.2d 943, 946 (5th Cir. 1968).

If the Court agrees that the reports were relevant and should have been considered, they can be reviewed in this appeal without the necessity of a new trial or a remand. *See United States v. McDaniel*, 482 F.2d 305, 311 (8th Cir. 1973) ("[w]e are free to consider the offer of proof as it is a part of the record before us, even though excluded from evidence by the

trial judge"); *Schaffart v. ONEOK, Inc.*, 686 F.3d 461, 470 (8th Cir. 2012) (in context of considering harmless error, holding that even if admitted, refused evidence would not have made a difference in the outcome).

The disciplinary reports are consistent with the testimony of both Weber and Wagner, but to the extent that this Court determines that the evidence at trial was not sufficient to establish a compelling interest because there were not enough documented instances of specific disciplinary violations, Weber and Kaemingk respectfully request that the Court consider refused Exhibit 149.

**6. The remedial order was not narrowly tailored as required by the PLRA.**

The Prison Litigation Reform Act provides that no injunction shall be granted "in any civil action with respect to prison conditions . . . unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). Congress enacted the PLRA "to impose greater procedural and substantive restrictions on federal court authority to issue

broad injunctions regulating conditions at state and local prisons." *Tyler v. Murphy*, 135 F.3d 594, 595 (8th Cir. 1998).

A court should also give substantial weight to any adverse impact to public safety or the operation of the criminal justice system. *See I.S.B. v. State Comm'r of Admin.*, 2011 U.S. Dist. LEXIS 37036 *8 (D.S.D. 2011). In *I.S.B.*, the court refused prospective relief because it would require interference with the management of South Dakota county jails. *Id.* The court acknowledged that it "is not the role of federal courts to micro-manage state corrections." *Id.* The court also recognized that federal courts owe deference and flexibility to state officials trying to manage a volatile environment. *Id.*

"The statute 'limits remedies to those necessary to remedy the proven violation of federal rights.'" *Tyler*, 135 F.3d at 596 (quoting H.R. Rep. No. 104-21, at 24 n.2 (1995)). Here, as discussed below in context, the district court's remedial order provides remedies beyond those necessary to remedy RLUIPA violation.

The district court's remedial order requires that tobacco be allowed in the mixture used for smoking the ceremonial pipe and for making ties and flags; that the mixture not contain more than one percent tobacco; that the

mixture for ties and flags contain ground tobacco, but not the pipe mixture; that the mixtures will be brought in by volunteers who have completed required training; that mixtures must be pre-mixed, and brought in a sealed, clear plastic bag; that the DOC may require certain activities to occur under video surveillance, except that video surveillance may not take place in the sweat lodge; and that an abuse of ceremonial tobacco will result in a one-year suspension from any ceremony including tobacco. (Add. 60-69.)

The order is not the least intrusive means necessary to correct the violation. First, the order requires that inmates be allowed to make ties and flags, even though the order contains no indication how that can be done without further disciplinary violations. The record contains evidence that abuses occurred in the room where ties and flags were made (Tr. 2.254-56); that Brings Plenty himself was disciplined for having tobacco on his person and a screen immediately after making ties and flags (Tr. 1.188; App. 150-51, Ex. 117); that a video camera was installed in the room, but did not prevent abuse (Tr. 2.254-55); and that the DOC does not have sufficient staff to place in the room, and that it would not want to single out Native Americans even if it did. (Tr. 3.562-63.) The record thus contains no evidence that this activity can be managed without further abuse.

Second, the remedial order contains no limit on the amount of tobacco. It limits the tobacco in the mixture by percentage, but not the overall amount allowed into the institution. (*See* Add. 62-63.) Because the DOC does not limit who can be a pipe carrier and does not limit who can attend ceremonies involving tobacco (App. 167, ¶ 4), there is no limit on the amount of tobacco that can be allowed inside. The court rejected Weber and Kaemingk's proposal to limit the amount of tobacco to 1/2 teaspoon per cup per 30 inmates (a 1% mixture), and the number of ceremonies at which tobacco was smoked. (App. 6, ¶ 5.) But under the PLRA the district court could not reject these proposals without concluding that they violated RLUIPA. *See Hines*, 547 F.3d at 921 ("[i]n the absence of evidence supporting a constitutional violation, the district court had no basis on which to make the findings the PLRA requires as a condition precedent to the maintenance of the decree").

Third, all tobacco should be ground. (App. 7, ¶ 9.) The trial testimony established that even ground tobacco became contraband, but if it is not ground, it will become contraband that much easier. The district court did not conclude that grinding the tobacco violated RLUIPA. In this sense, the remedial order is "the antithesis of narrowly constructed," and instead is

"broad and comprehensive, addressing concerns that are certainly related, but largely ancillary" to the RLUIPA violation. *See Hines*, 547 F.3d at 919.

Fourth, tobacco should not be smoked and ties or flags containing tobacco should not be allowed inside the sweat lodge, where no supervision is possible. (Tr. 3.559.)

Fifth, Weber and Kaemingk proposed that only the approved volunteer could load the pipe with tobacco (App. 7, ¶ 10), and that tobacco could be smoked only in the group pipe, and not in an inmate's personal pipe. (*Id*. 6, ¶ 6.) This proposal would further limit inmate access to tobacco, but still allow it to be smoked.

The decree in *Hines* involved "day-to-day oversight on all aspects of medical care" and therefore was "broader than necessary to assure protection of this right." 547 F.3d at 922. Here, the district court's remedial order violates the PLRA for the same reason. For all of these reasons, the remedial order is not the least intrusive means, and therefore violates the PLRA.

## Conclusion

If this Court affords to Weber the same deference given in *Fowler*, *Fegans*, and *Hamilton*, there is no question that the evidence at trial proved

that the DOC had a compelling interest in stopping the long-term abuse of tobacco available for spiritual ceremonies, and that the tobacco ban was the least restrictive means of achieving that objective. The case can be decided based on these two arguments alone. For all of the reasons argued, however, Weber and Kaemingk respectfully request that the judgment be reversed and the remedial order vacated.

Dated this 30th day of April, 2013.

WOODS, FULLER, SHULTZ & SMITH P.C.

By /s/ James E. Moore

James E. Moore
Michele A. Munson
PO Box 5027
300 South Phillips Avenue, Suite 300
Sioux Falls, SD 57117-5027
Phone (605) 336-3890
Fax (605) 339-3357
Email james.moore@woodsfuller.com
Attorneys for Defendants/Appellants

## Certificate of Compliance

I certify that this brief contains 13,992 words. I rely on the word count on the word count on the word-processing software, which was WordPerfect X4, used to create this brief.

Dated this 30th day of April, 2013.

/s/ James E. Moore
One of the attorneys for Appellants

## Certificate of Service

I hereby certify that on the 30th day of April, 2013, I electronically filed the foregoing Appellants' Brief, with the Eighth Circuit Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following:

Pamela R. Bollweg
pamela@jhalawfirm.com
Sara E. Show
sara@jhalawfirm.com
Ronald A. Parsons, Jr.
ron@jhalawfirm.com
Johnson, Heidepriem & Abdallah, LLP
PO Box 2348
Sioux Falls, SD 57101
Attorneys for Plaintiffs/Appellees

Michael J. Songer
michael.songer@usdoj.gov
Attorney with U.S. Dept. of Justice

/s/ James E. Moore
One of the attorneys for Appellants

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