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' REPLY BRIEF

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**Cases:**

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Inmates Clayton Creek and Blaine Brings Plenty ("the inmates") are joined in supporting the district court's judgment by the United States, which has filed a brief as *amicus curiae* addressing the issues of substantial burden and the least restrictive means under the Religious Land Use and Institutionalized Persons Act (RLUIPA).[1] For the following reasons, the arguments of the inmates[2] and the United States do not establish that the tobacco ban violated RLUIPA.

**1. The standard of review.**

Neither the United States in its *amicus* brief nor Brings Plenty and Creek dispute that this Court reviews de novo the issues of compelling governmental interest and least restrictive means. Nor do they challenge that "'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*

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[1] Before the district court, the United States filed a Statement of Interest to address only the issue of substantial burden. (Doc. 181.)

[2]The inmates do not challenge the argument that the Native American Council of Tribes, which was dismissed as a plaintiff on the RLUIPA claim, is not a party to this appeal. (Appellants' Br. at 5 n.2; *see also* Amicus Br. at 8 n.3.) Weber and Kaemingk respectfully request that NACT be dismissed as a party to the appeal.

*v. Norris*, 537 F.3d 897, 903 (8th Cir. 2008) (quoting *Hamilton v. Schriro*, 74 F.3d 1545, 1553 (8th Cir. 1996)). Instead, they ignore this requirement and contend only that Appellees Douglas Weber[3] and Dennis Kaemingk confuse deference with credibility. (Appellees' Br. at 36.) But the district court's discussion of compelling governmental interest and least restrictive means does not turn on any credibility determinations. The district court made only two credibility findings: (1) that Bud Johnston's testimony was not credible (App. at 27); and (2) that Montoya and Weber "misunderstood" what Sidney Has No Horses told them about the inmates using tobacco. (App. at 51.) Weber and Kaemingk do not rely on Johnston's testimony on appeal, and the dispute with Has No Horses at trial may be relevant to the issue of substantial burden, but not the other RLUIPA standards.[4] Thus, this

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[3] Douglas Weber retired from the DOC on June 7, 2013. The new Warden at the South Dakota State Penitentiary is Darin Young. The new Chief Warden and Director of Prison Operations for the DOC is Robert Dooley. Weber held both positions before his retirement.

[4]To the extent that the court concluded that Weber and Montoya "misunderstood" that Has No Horses supported removing all tobacco from the prisons, that conclusion does not impugn their credibility or motive. Rather, the court found that they mistakenly believed that Has No Horses supported what they were doing, when, the court found based on his trial testimony, he supported removing tobacco only from the ceremonial pipe. Weber and Kaemingk maintain, based on the testimony of Weber and Montoya, and Montoya's contemporaneous and unchallenged notes, that the

Court can and must determine without deference to the district court's decision whether the district court afforded the required deference due to the judgment of experienced correctional officials. Notably, neither the United States nor the inmates argue that the district court gave the deference required by law.

**2. The DOC proved a compelling governmental interest.**

**a. The United States concedes this issue.**

The inmates and the United States disagree on this issue. Although not addressing it directly, the United States concedes that "[c]ontrolling contraband is among a prison's legitimate security concerns," and then states that "the question in this case, then, is whether South Dakota has employed the least restrictive means of controlling tobacco contraband." (Amicus Br. at 18.)

The United States is incorrect, however, that Weber and Kaemingk cannot reasonably argue that allowing tobacco for spiritual use "created a black market" for tobacco. (*Id.* at 18 n.4.) That tobacco is contraband and that inmates are still disciplined for possessing tobacco does not mean that a

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district court's conclusion about what Has No Horses said when he was at the SDSP was clearly erroneous.

thriving black market exists after the ban. While testifying that tobacco is still a sought-after item in prison, Weber did not state that a black market exists after the tobacco ban. To the contrary, he testified that the problem was significantly improved and that "[t]here certainly aren't inmates that are running stores, as many as there were in the past in terms of selling things out of their cells." (Tr. at 3.563-64.) Only by giving no deference to Weber's testimony can the United States claim that a black market for tobacco exists today at the SDSP.

**b. This Court's cases are controlling and dispositive.**

The most striking omission from the inmates' discussion of compelling governmental interest is any discussion of the facts of *Fegans*, *Fowler v. Crawford*, 524 F.3d 931 (8th Cir. 2008), and *Hamilton*. These are controlling and dispositive decisions, and the district court's resolution of this case cannot be reconciled with them. Weber and Kaemingk could not have stated this argument more plainly (Appellants' Br. at 36-39), but it drew no response. The inmates concede, therefore, that the decisions in those cases are inconsistent with the district court's judgment.

**c. Unlike the district court, this Court has relied on the testimony of prison administrators to establish a compelling governmental interest.**

The inmates argue that Weber and Kaemingk offered only "conclusory" evidence that the DOC had a compelling interest in banning tobacco because they did not produce enough "written records of violence among the inmates" (Appellees' Br. at 40); because they did not produce a report showing that the number of disciplinary violations related to tobacco before and after the ban changed (*id.* at 41); because they did not produce a list of tobacco-related violations after the ban that could be compared to a list of violations before the ban (*id.* at 41-42); because the documented tobacco violations were not shown to pose "any risk to the safety and security of either the inmates or staff" (*id.* at 42); because tobacco-related disciplinary violations could have been punished with administrative segregation, but were not (*id.* at 42-43); and because Weber and Kaemingk did not prove that the ban was successful–that it was the cause of improved safety and security. (*Id.* at 43.) This Court, however, has previously rejected exactly these sorts of arguments in similar contexts.

In discussing the least restrictive means under RLUIPA, this Court has rejected an argument that a party must "make a formal statistical presentation to support the testimony of experienced prison officials" as

"contrary to the law of our circuit." *Fegans*, 537 F.3d at 905 n.2. The Court cited *Hamilton*, in which the opinion "relied for 'empirical proof' on the testimony of prison officials, 'based on their collective experience in administering correctional facilities.'" *Id.* at 904 (quoting *Hamilton*, 74 F.3d at 1554-55). Thus, this Court in *Fegans* found the testimony of experienced prison officials itself sufficient. *Id.* at 904-05.

Weber and Kaemingk argued in their opening brief that in addition to the testimony of Warden Weber, Jennifer Wagner, and Breon Lake about security and safety problems related to ceremonial tobacco, they provided documentation of tobacco violations specifically related to ceremonial use, and that the issue was therefore not whether documentation was necessary, but how much. (Appellants' Br. at 36.) In other words, their quantum of proof exceeded what this Court found sufficient in *Fegans*. The inmates neither address nor answer this question.

All of the following were undisputed: (1) that Brings Plenty and Lake themselves were disciplined for possessing contraband tobacco;[5] (2) that

[5]Contrary to the argument that discipline for possessing tobacco and cigarette rolling papers was not evidence of a problem with ceremonial tobacco (Amicus Br. at 22), Weber and Kaemingk presented evidence that inmates rolling their own cigarettes with tobacco intended for spiritual use was one of the long-standing problems they confronted. (Tr. at 2.234; App.

NACT itself imposed a ban preventing inmates who were disciplined for abusing tobacco from participating in ceremonies with tobacco for six months, that the names of 33 inmates were on the list before the ban, and that no inmate ever challenged the list or the ban;[6] (3) that a black market

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132, ¶ D.3.) Just because rolling paper is not part of traditional Lakota spirituality does not mean that tobacco intended for spiritual use did not end up in a rolled cigarette.

[6] The United States, again showing no deference, argues that this list proves nothing. (Amicus Br. at 22 n.5.) A review of the disciplinary reports in refused Ex. 149, however, which correspond to the inmates whose names were on the list, proves either that ceremonial tobacco was abused or that inmates with access to ceremonial tobacco were violating the tobacco policy. (*See* App. 10 (inmate with full bag tobacco mixture found in pipe bag); *id*. at 22 (inmate making cigarette from a page from the Bible and ground tobacco); *id*. at 24 (inmate with rolled cigarettes); *id*. at 43 (inmate with rolled cigarettes); *id*. at 45 (inmate with rolled cigarette); *id*. at 47 (inmate with rolled cigarettes); *id*. at 56 (inmate with rolled cigarette and loose tobacco); *id*. at 57 (inmate with rolled cigarette); *id*. at 58 (inmate with rolled cigarette); *id*. at 64 (Bible-paper cigarette); *id*. at 66 (cigarettes and Bible with torn pages); *id*. at 71 (loose tobacco); *id*. at 72 (tobacco mixture in pipe bag); *id*. at 76 (inmate searched after making tobacco ties, located tobacco); *id*. at 78 (tobacco tie material hidden in cell); *id*. at 81 (rolled cigarette); *id*. at 83 (rolled cigarette); *id*. at 85 (inmate separating tobacco from mixture in his cell); *id*. at 86 (rolled cigarette); *id*. at 88 (loose tobacco and rolling paper); *id*. at 89 (rolling paper and loose tobacco); *id*. at 90 (loose tobacco); *id*. at 92 (rolled cigarette); *id*. at 93 (loose tobacco and rolled cigarettes); *id*. at 94 (rolled cigarette); *id*. at 95 (rolled cigarettes); *id*. at 96 (inmate smoking rolled cigarette in chapel classroom); *id*. at 97 (rolled cigarette); *id*. at 98 (rolled cigarette); *id*. at 104 (inmate searched after tobacco ties, located tobacco in shoe); *id*. at 109 (loose tobacco); *id*. at 116 (rolled cigarette); *id*. at 117 (rolled cigarette); *id*. at 118 (rolled cigarette); *id*. at 122 (loose tobacco); *id*. at 123 (pipe mixture in pipe bag).

for tobacco existed; (4) that Breon Lake, a former inmate, was threatened during his incarceration by inmates who wanted his tobacco and that he observed inmates removing tobacco from the mixture; (5) that inmates attended Native American ceremonies just to get tobacco; (6) that inmates were caught removing tobacco from the mixture used to make ties and flags; (7) that Weber knew of inmate-on-inmate violence related to the possession of tobacco (Tr. at 3.549-50, 3.575); and (8) that the DOC struggled with ceremonial tobacco for nine years before imposing the ban. This proof was not "vague, conclusory and unsupported." (Appellees' Br. at 44.) Based on this Court's established cases, this proof was particular and sufficient to establish a compelling governmental interest.

**d. The conclusion that the DOC banned tobacco to dictate religious doctrine, instead of to control contraband, is clearly erroneous and inconsistent with the deference due to Weber.**

After rejecting the evidence of tobacco abuse as proof of nothing, the inmates are left arguing that the district court correctly concluded, based on the Warden's letter giving notice of the ban and the fact that the DOC talked to Native American spiritual leaders before imposing the ban, that the DOC banned tobacco to dictate religious doctrine to the Native American inmate

population. (Appellees' Br. at 36-39.) The logical conclusion from this position is that the DOC should have entirely disregarded the role of tobacco in Native American spirituality and the opinions of Native American spiritual leaders invited to the prisons by NACT in deciding whether to ban tobacco for security reasons. It makes no sense, however, to suggest that prison administrators should not consider the context in which security decisions are made, and should not consult about matters involving religious practice with knowledgeable religious leaders. No case from this Circuit requires or counsels that prison officials should make decisions implicating RLUIPA in a vacuum.

The inmates do not address the argument that a distinction exists between a decision made for security reasons and a stated justification for that decision that includes a statement that it was supported by spiritual leaders. (Appellants' Br. at 21 & n. 11, 33-34.) The support of spiritual leaders created an opportunity for the ban, but it was motivated by long-standing security issues. It is undisputed that the Warden's letter announcing the ban (App. 126) expressly stated that tobacco had been abused for years, that it was sold and bartered, that prison gangs were pressuring inmates to sell tobacco, and that efforts to prevent the abuse had

failed.[7] The district court rejected this expressly-stated reason because "it was only two paragraphs," even though it was undisputed based on the evidence of problems and efforts to prevent abuse over nine years. Absent some evidence of a compelling reason why the DOC would want to dictate religious doctrine to the Native American inmates population, especially given undisputed testimony of goodwill by Warden Weber and the DOC to Native American spirituality, this undisputed testimony renders the district court's conclusion clearly erroneous.

The conclusion also lacks deference to the judgment of Warden Weber. Like the district court's decision, the inmates on appeal ignore the fact that the decision was supported by spiritual leaders who themselves were invited to the prisons by NACT.[8] That the ban was not supported by

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[7] Would the Warden's letter have been better if it had said that the DOC was removing tobacco for security reasons, and did not care how it affected the inmates' ability to practice traditional Lakota spirituality?

[8]Setting aside the disputed testimony of Sidney Has No Horses, the decision to remove tobacco was supported by Roy Stone, Richard Two Dogs, John Around Him, and Charlie White Elk. All of these spiritual leaders were invited to the prisons by NACT. (Tr. at 1.125-26; 1.182.) Two Dogs and Stone have led traditional ceremonies at the SDSP. (Doc. 153 #1, at 9; Doc. 153 #2, at 11-12.) Two Dogs is related to Richard Moves Camp. (Tr. at 1.67-68.) Contrary to the inmates' argument, Stone and Two Dogs were not even asked if they are members of the Native American Church. There is no evidentiary basis to conclude that their opinions are

Richard Moves Camp and *every* Native American inmate does not establish that it was not based on a compelling governmental interest. In fact, the district court's conclusion is contrary to the burden of proof and standard of review, which require that the courts defer to the judgment of prison officials on matters of security "'in the absence of *substantial* evidence in the record to indicate that the officials have exaggerated their response.'" *Fegans*, 537 F.3d at 903 (quoting *Hamilton*, 74 F.3d at 1553). In other words, the support of some spiritual leaders for the ban, far from establishing that the DOC was motivated solely by a desire to dictate religious practice to the Native Americans, establishes that the ban was not an exaggerated response to the security problems the DOC faced. Similarly, the facts that the Warden heard nothing from the tribes after imposing the ban (Tr. at 3.558-59), that the tribal liaisons with whom Jennifer Wagner talked told her that they respected the decision (Tr. at 3.258, 2.320-21), and that many Native American inmates thanked her for imposing the ban ( Tr. at 2.258) establish that the ban was not an exaggerated response to an undisputed problem.

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

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outside the mainstream of traditional Lakota spirituality.

The United States correctly notes that the test is not whether the challenged regulation would be better than the status quo, but whether it is necessary to achieve the state's interest. (Amicus Br. at 23-24 (citing *Ashcroft v. American Civil Liberties Union*, 542 U.S. 656, 666 (2004).) The evidence offered by Weber and Kaemingk met this standard, as the United States effectively concedes. "Where prison officials familiarize themselves with and seriously consider proffered alternatives, and nonetheless reject them, they are entitled to the deference that their expertise and experience warrant." (Amicus Br. at 20.) Here, Weber, who has been in corrections for over 30 years, and was the Chief Warden and Director of Prison Operations for the DOC, testified that he dealt with the problem of tobacco for ceremonial use for nine years before banning it. His testimony at trial addressed at least nine alternatives to the tobacco ban, each of which he concluded was tried and was ineffective or would not have been effective based on his experience. (Appellants' Br. at 41-46.) Like the district court's decision, the United States and the inmates ignore his testimony on appeal. The silence is telling.

**a. The DOC was not obligated to prove that the ban would preclude all tobacco violations.**

The United States admits that Weber and Kaemingk presented evidence of a legitimate contraband problem (Amicus Br. at 28 ("the prison pointed to legitimate safety concerns")), but at the same time discounts the problem and suggests that the state bore an even higher burden than showing that the ban was necessary to address the problems caused by ceremonial tobacco. (Amicus Br. at 21-22.) The United States argues that because not every disciplinary violation was directly tied to tobacco intended for ceremonial use, Weber and Kaemingk were obligated to prove that the ban "would help the prison control these separate instances of non-ceremonial tobacco smuggled in from outside." (Amicus Br. at 21.) Not only does no authority support this proposition, it is contrary to the evidence at trial.

The United States cites to one example of an incident involving Marcel Boyd, the president of NACT, being disciplined for smuggling tobacco after the ban. (*Id.* (citing Appellants' Br. at 43 n.16).) This incident was offered because of the position Marcel Boyd held, and thus as evidence that limiting access to certain people, fire keepers or pipe carriers, for example, would be ineffective in preventing ceremonial tobacco from being abused.

That tobacco as contraband has not been eliminated by the tobacco ban is not evidence that the ban was not the least restrictive means of achieving the state's interest. Logically, the opposite is true. If not even the ban of all tobacco from the DOC's facilities could prevent contraband tobacco from entering the facilities, the problem would be much worse if tobacco were allowed for ceremonial use. That is in fact what the evidence proved.

**b. The Warden addressed the proferred alternatives.**

The inmates mention several alternatives in their brief, all of which Weber and Kaemingk have already addressed on appeal. First, they state that Moves Camp agreed that it would be acceptable to him if only pipe carriers and fire keepers were involved in making ties and flags, or if they were made by a volunteer. (Appellees' Br. at 46.) But Weber and Wagner testified that this option "was talked about," that the DOC does not want to limit who can participate in religious activities, and that the proposal would not prevent abuse because pipe carriers and fire keepers, witness Brings Plenty and Creek themselves, were disciplined for abusing tobacco. (Tr. at 3.561; 2.236; Ex. 139; Exs. 116, 117, 121, 122, 124, 127.) Weber did not admit that this limitation could be effective. (Appellees' Br. at 46.) The

transcript page cited for that proposition, volume 3 at page 562, does not support the statement.

Second, the inmates argue that the amount of tobacco in the mixture could be reduced to as little as 1%, but that was not tried. (Appellees' Br. at 47.) But Weber testified that limiting the amount of tobacco in the mixture did not prevent it from becoming contraband, and senior staff discussed further reductions, but concluded that it would not be effective. (Tr. at 3.563.) The inmates ignore this testimony and the logic and experience supporting it.

Third, the inmates suggest that the DOC could conduct more searches and impose harsher sanctions for disciplinary violations. (Appellees' Br. at 47.) Again, the Warden specifically addressed these options in his testimony (Tr. at 3.559-60, 3.543-44), and the disciplinary histories of Creek and Brings Plenty refute the supposed effectiveness of harsher sanctions. (Appellants' Br. at 45.) Surely the district court is in no position to dictate appropriate disciplinary sanctions.

Creek and Brings Plenty argue that the record supports the district court's reason for rejecting Weber's testimony on these issues (i.e., because they were not considered before the ban was imposed (*see* Appellants' Br. at

46; Appellees' Br. at 47)), but the citations to the record in their brief do not establish that the alternatives were not considered as the Warden testified. *See* Tr. at 1.109-10 (Creek testified that no one discussed alternatives with him before the ban); *id.* at 2.285 (Wagner testified that administrative segregation was not used as a disciplinary sanction for tobacco violations); *id.* at 2.310-11 (Wagner testified that after the meeting with Has No Horses on September 19, 2009, she did not talk with NACT or LDN about alternatives, and did not consider reducing the amount of tobacco in the mixture to 10%); *id.* at 2.327 (Wagner testified that between September to October, 2009, the DOC did not consider increasing the penalty for tobacco violations); *id.* at 3.563 (Weber testified that reducing the amount of tobacco did not have much effect, and whatever the percentage "it's still tobacco, and it's still a sought-after commodity); *id.* at 3.589 (Weber testified that he did not speak to Creek and Brings Plenty before the ban about alternatives).

Ultimately, Creek and Brings Plenty offer this Court no reason why the evidence at trial was insufficient to establish that the ban was the least restrictive means of preventing the abuse of ceremonial tobacco.

**c. Evidence of the practice in other states.**

Both the United States and the inmates argue that because other states and the Federal Bureau of Prisons allows some ceremonial tobacco, a ban in South Dakota is not the least restrictive means. (Amicus Br. at 24-27; Appellees' Br. at 47-51.) Trial of this case, however, involved very little evidence of how other states handle tobacco. The inmates presented no evidence at trial of how any other state or the Federal Bureau of Prisons handles tobacco. Jennifer Wagner testified that she considered the practices of other states with significant Lakota inmate populations in considering alternatives, and the Warden testified to his knowledge of Wagner's investigation, but there was no other testimony about different state practices, and no evidence of the policy and practice of the Federal Bureau of Prisons. In fact, when Wagner was asked a question about practice in Minnesota related to making prayer ties, the district court sustained an objection based on hearsay and did not allow an answer. (Tr. at 2.237-38.) On appeal, the arguments now center on citations to caselaw discussing various state practices, not evidence of particular policies and the prison systems in which they operate.

Given this context, this Court does not need to look beyond its own decisions to determine the relevance of argument based on the policies of

other states. In *Hamilton*, this Court noted that policies from states other than Missouri could "provide some evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security," but that such evidence "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." 74 F.3d at 1556 n. 16. The district court had considered deposition testimony from prison officials in other states, but ultimately found it insufficient to outweigh the deference owed to the prison officials in Missouri. *Id.*

In *Fowler*, the court considered whether evidence of a sweatlodge at the Potosi Correctional Center in Missouri was evidence that not allowing a sweatlodge at the Jefferson City Correctional Center in Missouri was not the least restrictive means of ensuring prison safety and security. 534 F.3d at 941. Quoting from *Spratt v. Rhode Island Dept. of Corrections*, 482 F.3d 33, 42 (1st Cir. 2007), this Court stated that "[c]ourts have repeatedly recognized that 'evidence of policies at one prison is not conclusive proof that the same policies would work at another institution.'" *Id.* The decision also cited *Hamilton* and then concluded that while evidence of "what other prisons have done to accommodate inmates' religious practices" is not

irrelevant, it is not dispositive. *Id.* 941-42. "The point is that prison officials may, quite reasonably, exercise their discretion differently based upon different institutional circumstances." *Id.* at 942.

And in *Fegans*, the evidence at trial included unspecified evidence of more liberal grooming policies of other prison systems, which the Director of the Arkansas Department of Corrections, Larry Norris, rejected as "less effective in meeting the ADC's security and safety concerns." 537 F.3d at 905. This Court cited to *Hamilton* for the proposition that which evidence of other prison policies may be evidence of feasibility, it does not outweigh the deference of prison officials more familiar with the prison at issue. *Id.*

Nothing in these decisions establishes that Weber and Kaemingk had an affirmative obligation (*see* Appellees' Br. at 51) to present as part of their case evidence explaining why policy or practice in a different system allowing ceremonial tobacco would not work in South Dakota. Nor is there any basis in these cases to conclude that the inmates and the United States as an *amicus curiae* are free in post-trial briefing and on appeal to cite to policy and practice from other states and argue that because other states allow some ceremonial tobacco, a ban is thus not the least restrictive means.

The argument of the United States that Weber and Kaemingk bear the burden of showing differences between South Dakota and the federal system is doubly misplaced. (Amicus Br. at 27; *accord* Appellees' Br. at 51.) First, the decision on which the United States relies, *Spratt v. Rhode Island Dept. of Corrections*, 482 F.3d 33 (1st Cir. 2007), in which the First Circuit reversed a decision granting summary judgment to the defendants, is not binding precedent here, and itself cites to *Hamilton*. 482 F.3d at 42. Second, for Weber and Kaemingk to bear the burden of rejecting the allegedly "widespread practice" of allowing ceremonial tobacco (Amicus Br. at 27), the inmates must have presented evidence of what other states actually do. They presented no such evidence, and on appeal, like the district court (Add. at 55-56), cite to caselaw.

Instead, the district court took judicial notice of a policy of the Federal Bureau of Prisons that each federal facility must establish, "where applicable, procedures for procuring, storing, and using tobacco for rituals." (App. at 54.) The inmates offered no evidence of such a protocol in a particular institution, and the district court did not take judicial notice of such a protocol. Nor does the United States offer any further details about federal practice and policy in its amicus brief.

This case should be decided on the evidence received at trial, which was based on nine years of experience with ceremonial tobacco in a state with a significantly greater per capita population of Native American inmates than any other.

The feasibility of unknown practices was not at issue here. Weber did not speculate about why allowing ceremonial tobacco might not work in South Dakota--he testified that it had not worked under a variety of circumstances for over nine years, and that efforts to make it work failed. His experiential and informed judgment that a ban was the least restrictive means of achieving the state's compelling interest in safety and security is due deference under *Fegans*, *Fowler*, and *Hamilton*.

**4. The ban was not a substantial burden.**

Both the inmates and the United States begin their briefs with this issue, even though Weber and Kaemingk can prevail on appeal without the Court even deciding this issue. The arguments they raise on appeal, coupled with the district court's analysis, present this as an easy issue to dogmatize, but an issue that ultimately is less clear than it initially seems, perhaps because whether a burden is substantial is conceded in many cases.

Weber and Kaemingk based their argument that the tobacco ban is not a *substantial* burden on this Court's decisions in *Love v. Reed*, 216 F.3d 682, 689 (8th Cir. 2000); *Patel v. U.S. Bureau of Prisons*, 515 F.3d 807 (8th Cir. 2008); and *Runningbird v. Weber*, 198 Fed. Appx. 576 (8th Cir. 2006), *affirming* 2005 U.S. Dist. LEXIS 25234 (D.S.D. 2005). The United States neither cites to nor discusses any of these decisions. The inmates cite but do not discuss *Patel*, and mention *Runningbird* only by stating that it involved a limit on ceremonial tobacco, not a ban. (Appellees' Br. at 31, 33.) Thus, neither brief responded to the essence of the argument, that providing cansasa without some percentage of additional commercial tobacco for use in Lakota spiritual ceremonies does not constitute a substantial burden given the many ways in which Native American inmates in South Dakota are allowed to practice traditional spirituality. (Appellants' Br. at 53-55.)

The argument of the United States implies that if a spiritual practice is based on a sincerely-held belief, then prohibiting that practice constitutes a substantial burden, per se. (*See* Amicus Br. at 17 (arguing that if one accepts the plaintiffs' beliefs as sincere, then the ban significantly inhibits or constrains their religious expression).) Thus, "[c]ourts enforcing the statute may not decide the relative importance of sincerely held religious

tenets or practices." (Amicus Br. at 13-14.) Weber and Kaemingk do not dispute this proposition, but the inmates are still arguing on appeal that tobacco is "essential" to their understanding of Lakota spirituality, and the district court's decision contains extended discussion of the centrality of tobacco to traditional Lakota spirituality. (Appellees' Br. at 25 ("Tobacco is an essential sacrament in the Lakota religion."); Add. at 34-40 (discussion captioned as "Nature of the Religious Beliefs").) Weber and Kaemingk concede that the inmates believe that tobacco is traditional to their spirituality and they do not challenge the testimony of Richard Moves Camp.[9]

Rather than addressing the argument Weber and Kaemingk made in their brief, the United States argues that they took sides in a dispute about whether tobacco is traditional to Lakota spirituality. "Prison officials consulted spiritual leaders, discovered a doctrinal disagreement about tobacco use, and then took a side in the religious debate . . . ." (Amicus Br. at 16.) While true that the Warden's letter referred to the request from

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[9]The inmates' argument is confused on this issue. Even though they argue that RLUIPA bars inquiry into whether a particular belief or practice is central (Appellees' Br. at 30), they also argue that "the district court's finding that tobacco is a central or fundamental part of the traditional Lakota religion is not clearly erroneous." (*Id.* at 32.)

spiritual leaders that tobacco be removed from the prisons, and while true that Jennifer Wagner's message to staff referred to "honoring the request of the respected Medicine Men" (*see* Amicus Br. at 16), it is not true that in 2009, prison officials took sides in a doctrinal disagreement. Instead, the evidence is undisputed that Sidney Has No Horses, whom Mary Montoya considered the inmates' invited spiritual leader (Tr. at 3.480), told the Warden that Lakota inmates should not smoke tobacco in the ceremonial pipe, but should use only cansasa, and prison officials verified that other spiritual leaders who had been invited to the DOC by NACT agreed with him. No evidence exists that they knew at the time that Creek, Brings Plenty, or any other inmate would object to the decision on doctrinal grounds, or that they "discovered a doctrinal disagreement." They know now, through this lawsuit, that Creek and Brings Plenty, supported by Richard Moves Camp, disagree with Has No Horses, Stone, Two Dogs, and Charlie White Elk, but there is no evidence that in banning tobacco they intended to take sides in a doctrinal dispute and were motivated by a religious justification.

The inmates similarly do not engage the argument made by Weber and Kaemingk. Instead, they argue that the "defendants' argument on this

issue boils down its suggestion that cansasa (red willow bark) should be deemed on appeal as an acceptable substitute for tobacco in the plaintiffs' Lakota religious ceremonies." (Appellees' Br. at 31.) Again, this is a straw man. Cansasa is not a substitute for anything. It is undisputed that some Lakota spiritual leaders use only cansasa for spiritual ceremonies and that cansasa is itself traditional in Lakota spirituality, but it also undisputed that Moves Camp testified that some percentage of commercial tobacco is required in the mixture. The Court need not decide in favor of one side or the other to conclude that the ban is not a substantial burden. Rather, the question is whether accepting Moves Camp's testimony as true, does the tobacco ban itself significantly inhibit or constrain religious conduct such that Native American inmates in the custody of the DOC have "no consistent and dependable way" to observe traditional Lakota spirituality, considered in the context of all of the opportunities they are afforded in prison. Weber and Kaemingk respectfully maintain that the answer to that question, based on the decision in *Runningbird*, is no.

**5. The district court erred in refusing Exhibit 149.**

The inmates' brief is dismissive of this issue. It does not acknowledge the applicable standard, which required the district court to

consider the reason for failing to disclose the exhibit earlier, the importance of the exhibit, the opposing party's need for time to prepare, and whether a continuance would be useful. *Life Plus Int'l v. Brown*, 317 F.3d 799, 803-04 (8th Cir. 2003). It does not acknowledge the cases holding that exclusion of evidence is a harsh penalty and should be used sparingly. (Appellants' Br. at 59-60.) It is undisputed that the disciplinary reports were relevant, and that the inmates continue to argue on appeal that Weber and Kaemingk presented insufficiently-documented evidence of disciplinary problems and security concerns related to tobacco abuse. As shown in footnote 6 of this reply brief, Exhibit 149 contains documentary reports expressly responsive to the inmates' concerns on appeal. The district court erred in excluding the evidence, which can be considered by this Court on appeal without remand. (*See* Appellants' Br. at 60-61.)

**6. The remedial order violates the PLRA.**

The inmates treat lightly the statutory limits imposed by the Prison Litigation Reform Act, 18 U.S.C. § 3626(a)(1), on the district court's remedial order. They do not acknowledge this Court's decision in *Hines v. Anderson*, 547 F.3d 915 (8th Cir. 2008), which makes clear that whether relief is narrowly tailored is independent of the ongoing violation the relief

is intended to remedy. *Id.* at 920, 921. "The statute 'limits remedies to those necessary to remedy the proven violation of federal rights.'" *Tyler v. Murphy*, 135 F.3d 594, 596 (8th Cir. 1998) (quoting H.R. Rep. No. 104-21, at 24 n.2 (1995)). Thus, each aspect of the remedial order must be necessary to remedy the RLUIPA violation that the district court found.

The order requires that inmates be allowed to use commercial tobacco in making ties and flags. This was a significant issue at trial, with evidence of ongoing abuses that the DOC was unable to prevent. (Appellants' Br. at 63.) In particular, the Warden testified that he could prevent tobacco from being removed during the process of making ties and flags only by having one officer in the room per inmate, but "[o]f course that's not feasible." (Tr. at 3.562.) The district court, however, ordered relief without regard to the evidence proving an inability to police the process. The inmates assert that the limit of 1%, the requirement that tobacco for ties and flags be ground, and the use of video surveillance means that the relief is narrowly tailored (Appellees' Br. at 54), but there is no evidentiary basis to conclude that any of these limits would control tobacco abuse in making ties and flags. The tobacco was ground before and still removed from the mixture (Tr. at 2.254-56; Ex. 117), video surveillance was ineffective in the room where ties and

flags are made (Tr. at 2.254-55), and the percentage of tobacco in the mix does not change the fact that it is still tobacco. As Weber testified, "[i]n 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 to do some sometimes less-than-honorable things." (Tr. at 3.563.) The inmates have no answer for this.

For the same reasons, the absence of any limit on the amount of tobacco is problematic. The remedial order does not limit the number of ceremonies at which tobacco can be smoked, does not limit the number of inmates who may participate in a ceremony, and does not limit the number of inmates who can make ties and flags. No evidence exists that limiting the percentage of tobacco in the mixture, without addressing the amount of tobacco, will not result in the same abuse that existed before. Weber and Kaemingk proposed a limit of ½ teaspoon per cup per 30 inmates. (App. 6, ¶ 5.) Under the PLRA, the district court could not reject this proposal without finding that it would violate RLUIPA. *See Hines*, 547 F.3d at 921.

The other limits that Weber and Kaemingk proposed should have been included in the remedial order for similar reasons. Their absence means that the order is not narrowly drawn as required by the PLRA.

## Conclusion

Weber and Kaemingk proved that the State has a compelling governmental interest in maintaining order and security that was frustrated by allowing tobacco for Native American ceremonial use, and the inmates did not show substantial evidence in the record that the tobacco ban was an exaggerated response to the problems caused by tobacco trafficking. Weber and Kaemingk also proved, especially through the Warden's testimony, that after nine years of failure, banning tobacco was the least restrictive means of achieving that objective. Because the district court's opinion cannot be reconciled with the decisions in *Fowler*, *Fegans*, and *Hamilton,* these cases are dispositive of these issues, and a sufficient basis for reversal. Weber and Kaemingk respectfully request that the judgment be reversed and the remedial order vacated.

Dated this 3rd day of July, 2013.

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**Certificate of Compliance**

I certify that this brief contains 6,443 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 3rd day of July, 2013.

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

**Certificate of Service**

I hereby certify that on the 3rd day of July, 2013, I electronically filed the foregoing Appellants' Reply 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:

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