No. 13-1401

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NATIVE AMERICAN COUNCIL OF TRIBES, *et al.*,

Plaintiffs-Appellees

v.

DOUGLAS WEBER, *et al.*,

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE

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INTEREST OF THE UNITED STATES

The Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc, protects prisoners' rights to religious expression. It bars state prison officials from substantially burdening inmates' religious exercise unless the restrictions are the least restrictive means of furthering a compelling governmental interest. 42 U.S.C. 2000cc-2(a). Congress gave both private plaintiffs and the

United States the authority to sue to enforce RLUIPA. See 42 U.S.C. 2000cc-2(f). Accordingly, the United States has a strong interest in ensuring that RLUIPA's requirements are properly and uniformly enforced.

STATEMENT OF THE ISSUES AND APPOSITE CASES

1. Whether prison administrators substantially burdened inmates' religious exercise, in violation of the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. 2000cc, when they decided tobacco use was "not traditional" in Native American Lakota worship and banned its use in religious ceremonies.

Cutter v. *Wilkinson*, 544 U.S. 709 (2005)

Gladson v. *Iowa Dep't of Corr.*, 551 F.3d 825 (8th Cir. 2009)

Van Wyhe v. *Reisch*, 581 F.3d 639 (8th Cir. 2009)

42 U.S.C. 2000cc-5(7)(A)

2. Whether prison administrators failed to show there were no less restrictive alternatives to a total tobacco ban.[1]

Cutter v. *Wilkinson*, 544 U.S. 709 (2005)

Fegans v. *Norris*, 537 F.3d 897 (8th Cir. 2008)

Warsoldier v. *Woodford*, 418 F.3d 989 (9th Cir. 2005)

[1] We will not address other aspects of this appeal.

STATEMENT OF THE CASE

RLUIPA prohibits state and local governments from imposing "a substantial burden on the religious exercise of a person residing in or confined to an institution" unless the government shows that the burden furthers "a compelling governmental interest" and does so by "the least restrictive means." 42 U.S.C. 2000cc-1(a). The statute thus "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter* v. *Wilkinson*, 544 U.S. 709, 721 (2005). It imposes the same obligation on state prison officials to accommodate religious liberties as federal prison officials have under the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. 2000bb *et seq.* It was the intent of RLUIPA's drafters that RLUIPA be construed consistent with RFRA and against the background of the Federal Bureau of Prisons' (BOP's) experience administering RFRA. See *Cutter*, 544 U.S. at 725-726.

STATEMENT OF THE FACTS

1. Facts

Native Americans use tobacco in their traditional rituals, either to make prayer offerings (called tobacco ties and tobacco flags) or to smoke in a sacred

pipe. Add. 7-11.[2] Many practitioners consider tobacco essential to native worship. Add. 7-13. One witness in this case said removing tobacco from ceremonies is "almost like taking a Bible away from the church." Add. 11; Tr. 51, Doc. 170 at 51. He also explained that "[e]ach [tobacco] tie represents a certain prayer" and compared them to beads on a rosary. Tr. 53, Doc. 170 at 53. Prison officials have acknowledged that "tobacco is important to [plaintiffs'] religion." Add. 15, 20. About 27% of South Dakota's prison population is Native American. Add. 3.

Before 1998, any inmate in the South Dakota prison system was allowed to smoke. In 2000, South Dakota banned all tobacco use in its prisons, except for ritual use in Native-American ceremonies. Add. 3. In 2004, prison officials consulted various traditional Native-American religious leaders and concluded that it would change the tobacco mixture allowed in ceremonies to 50% tobacco and 50% red willow bark. Add. 4. In 2003 or 2005, prison officials changed their policy of allowing Native-American practitioners to keep tobacco in their cells and instead required that it be checked out from a prison office for ceremonies. Add. 3-4. In 2005 prison officials further decreased the tobacco in the mixture to 25% and then, in 2009, banned all tobacco use. Add. 5; Exh. 133. They did not

[2] "Doc. _" refers to documents filed in the district court by docket number. "Tr. _" refers to pages in the consecutively paginated trial transcript. "Exh." refers to exhibits filed at trial. "Br. _" refers to pages in the defendants' opening brief. "Add. _" refers to pages in the defendants' addendum filed concurrently with the opening brief.

consider further diluting the tobacco blend, for example to 10%. Tr. 310, Doc. 170-1 at 105.

Prison officials identified security concerns supporting the ban, as tobacco was being traded in a black market in the prison. Add. 16. During the time when Native-American practitioners were allowed to use tobacco, and especially when they were allowed to keep it in their cells, the tobacco was sometimes used outside of ceremonies. Add. 16-17; Tr. 137, Doc. 170 at 137; Tr. 551, Doc. 170-2 at 86; Tr. 551, Doc. 170-2 at 86. When it was mixed with red willow bark, inmates would pick out or sift out the tobacco. Add. 17, 39 & n.26; see also Tr. 188, Doc. 170 at 188; Tr. 234, Doc. 170-1 at 29. In one instance, ceremonial tobacco was stolen from a prison office where it was stored between ceremonies. Tr. 464, Doc. 170-1 at 259; Tr. 561, Doc. 170-2 at 96.

To control contraband, the prison conducts random searches, strip searches all inmates after they visit with outsiders, and keeps dogs trained to detect tobacco and other substances. Tr. 541, Doc. 170-2 at 76; Tr. 596, Doc. 170-2 at 131. Guards did not directly supervise prisoners making tobacco ties. Tr. 254, Doc. 170-1 at 49. Instead, the guards used a camera system and sometimes searched inmates after ceremonies. Tr. 97, Doc. 170 at 97; Tr. 316, Doc. 170-1 at 111.

Despite these precautions, prison officials cited several cases of tobacco smuggling. Many involved commercial tobacco, rather than the ceremonial mix

brought into the prison for Native-American ceremonies. Add. 16, 28-29; Tr. 94, 139, Doc. 170 at 94, 139. Visitors, volunteers, and employees brought illicit tobacco into the prison. Tr. 94, Doc. 170 at 94; Tr. 235, Doc. 170-1 at 30; Exh. 133. In most cases they cited, defendants did not show whether tobacco contraband came from Native-American ceremonies or from other sources. Tr. 186, Doc. 170 at 186; Tr. 280, Doc. 170-1 at 75; Tr. 351, Doc. 170-1 at 146; Tr. 551, Doc. 170-2 at 86. After the tobacco ban, tobacco trafficking was still a problem. Tr. 235, Doc. 170-1 at 30; Tr. 591, Doc. 170-2 at 126. Officials claimed that there were "[l]ess write-ups" for tobacco after the ban, but they did not give numbers to show how many incidents occurred before and after the ban. Tr. 257, Doc. 170-1 at 52; Add. 29. The record establishes that commercial tobacco unrelated to Native-American worship was traded and continues to be traded as contraband. Tr. 235, Doc. 170-1 at 30; Tr. 590-591, Doc. 170-2 at 125-126.

Prison officials also explained that they decided to ban tobacco on the advice of Native-American spiritual leaders. Add. 15. An Associate Warden said that she "decided to follow the advice of the respected medicine men and spiritual leaders and remove tobacco from Native American ceremonies." Add. 15 (citation omitted). The Warden sent a letter to tribal liaisons, explaining that

> tobacco is not traditional to the Lakota/Dakota ceremonies and * * * is too addictive to be used for ceremonies. [Spiritual leaders] have requested that tobacco be removed from Native American Ceremonies so that the

> participants of these ceremonies will focus on their spiritual paths and not abusing [sic] the tobacco.

Add. 18 (quoting Exh. 103). One prison official advised other officials that "[w]hen inmates come to you to complain, please remind them that we are honoring the request of the respected Medicine Men and are going back to their traditional ways." Add. 19 (emphasis and citation omitted). At trial, the Warden admitted "there are differing opinions from various medicine men," and that not all tribal leaders supported the ban. Add. 18.

Prison officials also stated they considered other prisons' practices before banning the tobacco. An Associate Warden said she looked into practices in Minnesota (which allows Native Americans to use some tobacco) and Nebraska (which does not allow tobacco). Tr. 237, Doc. 170-1 at 32; Exh. 3. She spoke to officials at Minnesota's prison system about their policies. Tr. 237-238, 287-288, Doc. 170-1 at 32-33, 82-83; Tr. 583, 590, Doc. 170-2 at 118, 125. At trial, she explained that she had recently learned North Dakota did not allow tobacco. Tr. 237, Doc. 170-1 at 32.

Many other prisons allow ritual tobacco use. The BOP requires each of its institutions to develop procedures to accommodate Native-American practices, including designating areas authorized for tobacco use and procedures for "procuring, storing, and using tobacco for rituals." Doc. 173-1 at 21. Minnesota allows limited amounts of tobacco during "scheduled events" in "designated secure

location[s]," such as the sweat lodge or religious resource center. Exh. 3; Tr. 26, Doc. 170 at 26. It allows inmates to carry tobacco if it is "permanently shut" in medicine bags or tobacco ties, otherwise tobacco must be transported by volunteers. Exh. 3; Add. 30. Wisconsin, California, Pennsylvania, West Virginia, and other states also accommodate some ritual tobacco. Doc. 173 at 29-30; Tr. 26, Doc. 170 at 26; Add. 30, 55-56 and cases cited therein.

2. Procedural History

Native-American prisoners at the South Dakota State Penitentiary sued prison officials, claiming violations of RLUIPA.[3] Add. 1, 3. They claimed that the tobacco ban substantially burdened their religious expression, and sought injunctive relief to be allowed to use tobacco in supervised religious ceremonies in prison. Add. 2.

The case was tried before a judge. Add. 2; Doc. 170. The United States filed a statement of interest, arguing that prison officials had improperly incorporated their own interpretation of Lakota religion into prison policies. Add. 2. The district court found that the defendants' tobacco ban "was implemented to effectuate what defendants believed was the advice of the medicine men and

[3] Plaintiffs made other claims not at issue on appeal. The Native American Counsel of Tribes (a non-profit organization which helps organize religious ceremonies at the prisons) also sued, but the district court dismissed the organization as a plaintiff in the RLUIPA claim. Doc. 67 at 21-22.

spiritual leaders regarding the Lakota religion rather than due to security reasons," and that "[d]efendants essentially enforced what they determined to be the more 'traditional' Lakota belief." Add. 47. The court ruled that state prison officials may not determine which of plaintiffs' religious observances were orthodox and therefore "permissible." Add. 48 (quoting *Grayson* v. *Schuler*, 666 F.3d 450, 453-455 (7th Cir. 2012)). The court explained that differences among Native-American religious leaders did not weaken plaintiffs' claims, "because a religious practice does not need to be a universal practice for adherents of a particular faith." Add. 37.

The court stated that prison officials had presented security concerns, including tobacco's use on the black market, as justification for the total tobacco ban. Add. 16-17. But the court found that defendants had not shown a compelling governmental interest in banning all tobacco use, and that even if there were such an interest, the prison officials had not shown the prison had chosen the least restrictive means of furthering that interest. Add. 48. The court found that defendants did not "seriously consider" alternatives, such as imposing more restrictive security at ceremonies, further limiting ceremonies that use tobacco, controlling who could transport tobacco to ceremonies, or further reducing the amount of tobacco in the mixture. Add. 48-49.

The court pointed out that federal prisons, and other states' prisons, accommodated religious tobacco use. It reviewed written policies for the BOP and for Minnesota's prisons, as well as published decisions reviewing other prisons' accommodation of tobacco. Add. 6 n.7, 30, 54-55; Exh. 3; Doc. 173 at 29-30; Doc. 173-1. The court held that other prisons' accommodation of ritual tobacco use undermined defendants' argument that a total tobacco ban was the least restrictive means of controlling contraband in South Dakota's prisons, "in the absence of any explanation * * * of significant differences" between South Dakota's prisons and those that permitted ceremonial tobacco. Add. 54-55 (quoting *Spratt* v. *Rhode Island Dep't of Corr.*, 482 F.3d 33, 42 (1st Cir. 2007)); see also Add. 30.

The district court sought to bring the parties into agreement about how tobacco could be accommodated. Add. 59. When this failed, the court issued a remedial order requiring prison officials to allow limited use of tobacco in sweat lodge ceremonies, pipe ceremonies, and tobacco ties and flags. Add. 60-61, 63-67. The court ruled that a 1% tobacco mixture be permitted, and specified that it could be provided and transported by volunteers rather than kept on site. Add. 63-64.

SUMMARY OF ARGUMENT

The district court properly concluded that South Dakota's prison officials may not base their decision to ban ritual tobacco on their own judgment of whether

tobacco use is compelled by, traditional in, or otherwise essential to plaintiffs' Lakota worship. RLUIPA protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). The statute does not require prisoners to offer doctrinal justifications to support their religious exercise, and state institutions cannot appropriately evaluate doctrinal claims. Instead of dictating what is true or orthodox within a faith, officials may evaluate only whether plaintiffs' professed belief is truly and sincerely held. Here, even South Dakota prison officials do not question plaintiffs' claim that tobacco has a place in Native-American rituals and is important to plaintiffs' religious practices. Accordingly, the prison's total ban on ritual tobacco use substantially burdens plaintiffs' religious practices because it significantly constrains their religious conduct.

The court also properly concluded that prison officials had not shown that the total ban on ritual tobacco use is the least restrictive means available for controlling contraband tobacco. A prison may impose a substantial burden on religious conduct in order to protect security or other compelling interests, but it must show its policy is the least restrictive one available and must rebut plaintiffs' evidence of less restrictive alternatives. Congress imposed RLUIPA's least-restrictive-means test to ensure real scrutiny of prison officials' justifications for failure to adopt less restrictive alternatives.

Evidence that other prisons routinely accommodate ceremonial tobacco is especially powerful proof that South Dakota's policies are not the least restrictive ones available. Several state prisons, and the federal prison system, allow ritual tobacco use. Defendants did not explain how their prisons differed from the many which accommodate ritual tobacco use, despite all having the same compelling interest in security and control of contraband. The court properly rejected prison officials' conclusory statements that such policies would not work in South Dakota.

ARGUMENT

I

THE DISTRICT COURT PROPERLY REJECTED PRISON OFFICIALS' CLAIM THAT THE PRISON MAY BAR RITUAL TOBACCO USE IT DEEMS UNORTHODOX OR "NOT TRADITIONAL"

RLUIPA "protects institutionalized persons who are unable freely to attend to their religious needs and are therefore dependent on the government's permission and accommodation for exercise of their religion." *Cutter* v. *Wilkinson*, 544 U.S. 709, 721 (2005). It bars prisons from imposing a substantial burden on religious practice unless the prison shows (1) that the burden is justified by a compelling state interest and (2) that there are no less restrictive means available to advance the compelling interest. A prison rule substantially burdens prisoners' religious exercise if it "significantly inhibits or constrains their conduct

or expression" or "meaningfully curtails their ability to express adherence to their faith." *Gladson* v. *Iowa Dep't of Corr.*, 551 F.3d 825, 834 (8th Cir. 2009). Once plaintiffs have shown that a rule substantially burdens their religious practice, the burden of proof shifts to the prison to prove that its policy furthers a compelling governmental interest and does so by the least restrictive means. See 42 U.S.C. 2000cc-2(b), 2000cc-5(2).

RLUIPA protects sincere religious practices even if they are idiosyncratic or unorthodox. "[N]o 'doctrinal justification' is required to support the religious practice allegedly infringed," *Gladson*, 551 F.3d at 833; see also *Van Wyhe* v. *Reisch*, 581 F.3d 639, 657 (8th Cir. 2009) (courts should not "demand doctrinal justification to support the desired religious exercise" in an RLUIPA claim), cert. denied, 130 S. Ct. 3323 (2010), and 131 S. Ct. 2149 (2011). The Supreme Court has stated that government officials are not in a position, constitutionally, to "question * * * the validity of particular litigants' interpretations of [their] creeds." *Hernandez* v. *Commissioner*, 490 U.S. 680, 699 (1989) (evaluating whether tax laws substantially burdened plaintiff's religion in violation of the First Amendment).

RLUIPA defines "religious exercise" broadly to include "any exercise of religion, whether or not compelled by, or central to, a system of religious belief." 42 U.S.C. 2000cc-5(7)(A). Courts enforcing the statute may not decide the relative

importance of sincerely held religious tenets or practices. "What principle of law or logic can be brought to bear to contradict a believer's assertion that a particular act is 'central' to his personal faith?" *Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 887 (1990).

Accordingly, while prison officials may "inquir[e] into the *sincerity* of [the plaintiff's] professed religiosity," *Cutter*, 544 U.S. at 725 n.13 (emphasis added), they may not decide whether a belief system *requires* a particular practice, see *Smith*, 494 U.S. at 886-887; see also *id.* at 887 ("Repeatedly and in many different contexts, we have warned that courts must not presume to determine the place of a particular belief in a religion."). The Supreme Court has explained in other religion cases that government officials may decide whether "a belief is * * * 'truly held,'" but not "the 'truth' of a belief." *United States* v. *Seeger*, 380 U.S. 163, 185 (1965).

Along these lines, courts have held that RLUIPA broadly protects individual religious practices, regardless of whether the practices are followed by all in the same faith. For example, the Seventh Circuit held that RLUIPA covered an inmate's request for a vegetarian diet, rejecting officials' arguments that the prisoner's religion did not include dietary restrictions. *Koger* v. *Bryan*, 523 F.3d 789, 794, 798 (2008). Koger could not meet the prison's requirement that an application for a religious diet include a letter from "a 'Rabbi-Imam, etc.,'" or

show that his religion, Ordo Templi Orientis, required a special diet. *Id*. at 794. Some of the faith's practitioners adopted dietary restrictions individually as a spiritual discipline. *Ibid*. The court held that, when they rejected Koger's request, "the prison officials would have required him to establish exactly what RLUIPA does not require – that his requested diet was 'compelled by' or 'central to' his faith." *Id*. at 798 (quoting 42 U.S.C. 2000cc-5(7)(A)). Similarly, the Seventh Circuit has concluded that a prison could not force an inmate to cut his long hair, which he professed his African-Hebrew-Israelite religion required, on the premise that only those whose faith "'officially' require[s] the wearing of dreadlocks [may] wear them." *Grayson* v. *Schuler*, 666 F.3d 450, 453 (7th Cir. 2012).

This Court recently rejected similar arguments in *Newingham* v. *Magness*, 364 F. App'x 298, 300 (8th Cir. 2010). In that case, a Muslim prisoner believed the Qur'an required him to pray with a prayer rug. *Ibid*. Prison officials denied his request and relied on their Islamic coordinator's opinion that "a prayer rug is a 'convenience,' not a religious 'requirement'" for Muslims. *Ibid*. This Court reversed the district court's decision in the prison's favor, holding that RLUIPA does not demand a prisoner give doctrinal justification for his religious exercise. *Id*. at 300-301.

In this case, prison officials justified their restrictions, at least in part, by concluding that "tobacco is not traditional to the Lakota/Dakota ceremonies."

Add. 18 (citation omitted). Prison officials consulted spiritual leaders, discovered a doctrinal disagreement about tobacco use, and then took a side in the religious debate, claiming "[spiritual leaders] have requested that tobacco be removed from Native American Ceremonies." Add. 18 (citation omitted). Even though prison officials acknowledged that tobacco has some religious significance for plaintiffs (Add. 15), they claimed they were "honoring the request of the respected Medicine Men and are going back to their traditional ways." Add. 19 (emphasis and citation omitted). This conclusion is not only incorrect (see Doc. 170 at 51, 80, 84, 153-154); it is, more importantly, impermissible. The state contravened the Supreme Court's mandate that states may not evaluate "the validity of particular litigants' interpretations of [their] creeds." *Hernandez*, 490 U.S. at 699.

The prison officials here impermissibly assessed "[t]he truth of [plaintiffs'] belief," *Cutter*, 544 U.S. at 725 n.13 (citation and internal quotation marks omitted), and decided that tobacco use is not "compelled by, or central to" plaintiffs' "system of religious belief," 42 U.S.C. 2000cc-5(7)(A). Plaintiffs testified otherwise. Doc. 170 at 80, 84, 153-154. Prison officials may not "presume to determine the place of a particular belief," such as the importance of tobacco use, in plaintiffs' religion. *Smith*, 494 U.S. at 886-887, and may not dictate which practices they believe "will focus [plaintiffs] on their spiritual paths," Add. 18 (citation omitted).

Because the state prison imposed its own interpretation of Lakota spirituality on the plaintiffs and banned tobacco, defendants have substantially burdened the sincerely held religious beliefs of plaintiff inmates. Defendants argue that "[t]he tobacco ban is not a substantial burden on the inmates' ability to practice traditional Lakota spirituality" because inmates may instead use what it deems an acceptable substitute, red willow bark, in their observances. Br. 28. This is precisely the type of religiously-based governmental judgment RLUIPA, and the Constitution, forbid. See 42 U.S.C. 2000cc-5(7)(A). If one accepts the plaintiffs' beliefs as sincere, and defendants did not rebut plaintiffs' evidence on this issue, the tobacco ban "significantly inhibits or constrains [the inmates' religious] conduct or expression." *Gladson*, 551 F.3d at 834.

II

THE DISTRICT COURT PROPERLY EVALUATED PRISON OFFICIALS' ARGUMENTS THAT THERE WERE NO LESS RESTRICTIVE ALTERNATIVES TO THE TOTAL TOBACCO BAN

In enacting RLUIPA and predecessor laws, Congress replaced the rational basis scrutiny that would apply to a First Amendment challenge in this context with tougher scrutiny over institutional refusal to accommodate religious practice. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 714-717 (2005). Specifically, RLUIPA set up a "least restrictive means" test, incorporating the standard used in religious freedom case law prior to *Employment Division, Department of Human Resources*

v. *Smith*, 494 U.S. 872 (1990). See, *e.g.*, *Benning* v. *Georgia*, 391 F.3d 1299, 1306 (11th Cir. 2004); accord *World Outreach Conference Ctr.* v. *City of Chicago*, 591 F.3d 531, 534 (7th Cir. 2009).

Once an inmate has shown that the prison's restrictions substantially burden his religious practice, the burden shifts and prison officials must show that the policy furthers a compelling governmental interest and uses the least restrictive means to do so. See 42 U.S.C. 2000cc-1(a)(2), 2000cc-2(b), 2000cc-5(2). Certainly prisons have compelling governmental interests in security and in the safety of prisoners and guards. See *Cutter*, 544 U.S. at 725 n.13. Controlling contraband is among a prison's legitimate security concerns. *Hamilton* v. *Schriro*, 74 F.3d 1545, 1555 (8th Cir.), cert. denied, 519 U.S. 874 (1996). The question in this case, then, is whether South Dakota has employed the least restrictive means of controlling tobacco contraband.[4]

Congress assigned prison officials this burden to ensure significant scrutiny of their decisions that restrict religious liberty. This standard, which continues to apply in other First Amendment contexts, requires a court to do more than simply determine whether a government policy plausibly advances a compelling interest

[4] It is not the case, as defendants repeatedly state (Br. 2-3, 15) (emphasis added) that allowing tobacco for Native American spiritual ceremonies "*created* a black market" for tobacco. Tobacco unrelated to Native American worship was and continues to be traded as contraband. Tr. 235, Doc. 170-1 at 30; Tr. 591, Doc. 170-2 at 126.

to any degree. Rather, a court, after considering viable alternatives, must verify that the challenged policy imposes the least on religious liberty. As the Supreme Court explained in applying the "least restrictive means" test in the free speech context, "[t]he purpose of the test is not to consider whether the challenged restriction has some effect in achieving" the government's goal "regardless of the restriction it imposes. The purpose of the test is to ensure that speech is restricted no further than necessary to achieve the goal." *Ashcroft* v. *American Civil Liberties Union*, 542 U.S. 656, 666 (2004). A court "should ask whether the challenged regulation is the least restrictive means among available, effective alternatives." *Ibid*. While courts "must give due deference to the expertise of prison officials in establishing regulations to maintain prison safety and security," *Fowler* v. *Crawford*, 534 F.3d 931, 938 (8th Cir. 2008) (citation omitted), cert. denied, 129 S. Ct. 1585 (2009), prison officials must do "more than merely assert a security concern" to meet their burden. *Murphy* v. *Missouri Dep't of Corr.*, 372 F.3d 979, 988 (8th Cir.), cert. denied, 543 U.S. 991 (2004). They may not rely on "conclusory statements and post hoc rationalizations for their conduct." *Hamilton*, 74 F.3d at 1554 n.10.

A prison does not have to refute every available option. The prisoner bears the burden of showing "what, if any, less restrictive means remain unexplored." *Hamilton*, 74 F.3d at 1556. Once the prisoner produces evidence that less

restrictive alternatives exist, prison officials must at least show that they have "actually considered and rejected the efficacy of" those alternatives. *Warsoldier v. Woodford*, 418 F.3d 989, 999 (9th Cir. 2005); see, *e.g.*, *Washington* v. *Klem*, 497 F.3d 272, 284 (3d Cir. 2007) (prison "must consider and reject other means before it can conclude that the policy chosen is the least restrictive means"). 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. The court is obligated to "ensure that the record supports the conclusion that the government's chosen method of regulation is least restrictive and that none of the proffered alternative schemes would be less restrictive while still satisfactorily advancing the compelling governmental interests." *United States* v. *Wilgus*, 638 F.3d 1274, 1289 (10th Cir. 2011) (applying the identical standard of RFRA, 42 U.S.C. 2000bb).

Congress, in enacting RLUIPA, was "mindful of the urgency of discipline, order, safety, and security in penal institutions." *Cutter*, 544 U.S. at 723. But Congress passed RLUIPA in part because prisons' rules against contraband sometimes restrict religious practices unnecessarily. Congress reviewed evidence, for example, that Michigan prisons prohibited Chanukah candles, and that facilities in Oklahoma restricted the Catholic use of sacramental wine for celebration of Mass. See *Cutter*, 544 U.S. at 717 n.5 (citing Hearing on Protecting Religious

Freedom After *Boerne* v. *Flores* before the Subcommittee on the Constitution of the House Committee on the Judiciary, 105th Cong., 2d Sess., Pt. 3, p. 41 (1998) (statement of Isaac M. Jaroslawicz, Director of Legal Affairs for the Aleph Institute) and *id.*, Pt. 2, at 58-59 (prepared statement of Donald W. Brooks, Reverend, Diocese of Tulsa, Oklahoma)).

In this case, while the court found that the prison officials said their main reason for banning tobacco was their belief it was "not traditional" in Lakota worship (Add. 18, 45) officials also presented evidence of security issues related to contraband tobacco. Add. 16, 28-29. They pointed to problems with prisoners (Indians and non-Indians alike) smuggling in commercial tobacco unrelated to Native-American worship. These instances do not, however, support a total ban on ritual tobacco use. The prison has not shown how a ban on ceremonial tobacco would help the prison control these separate instances of non-ceremonial tobacco smuggled in from outside. See Br. 43 n.16 (noting a recent tobacco violation after the ban).

Admittedly, defendants identified some violations involving ceremonial tobacco. But the incidents were far fewer than defendants would have this Court believe. Once, tobacco intended for ceremonies was stolen from a prison office. Tr. 464, Doc. 170-1 at 259; Tr. 561. While defendants state (Br. 32) that they offered "considerable evidence" of other problems "caused by tobacco associated

with spiritual ceremonies," the individual incidents defendants cite mostly involve contraband that came from either non-religious sources or from unidentified sources. For example, defendants claim that inmates Brings Plenty and Creek were disciplined for "possessing tobacco, which both had access to as pipe carriers." Br. 32; see also Br. 12-13. Of the six specific incidents defendants cited in support, only two involve ceremonial tobacco, and two involve contraband cigarette rolling papers, which are not used in Indian worship and could not have been obtained through ceremonies. Tr. 137-138, 186, 188, Doc. 170 at 137-138, 186, 188.[5] For another Native-American inmate, Marcel Boyd, defendants point to a 2012 incident where he hid tobacco in balloons. Exh. 139; Tr. 236, Doc. 170-1 at 31; Br. 42-43. This incident happened after the tobacco ban and, accordingly, the tobacco could not have been diverted from mixtures allowed in ceremonies. The violation cannot serve as evidence that inmates smuggled tobacco when it was

[5] Defendants also claim that a list of Native-American practitioners barred from using ceremonial tobacco because of a tobacco violation supports their decision. Br. 35 (citing Exh. 146). The list covers a 13-month period for the entire prison system. It identifies 33 inmates who had a tobacco violation. But it does not show the source of any contraband tobacco, nor how serious the violations were, nor whether any involved ceremonial tobacco. Exh. 104; Exh. 146; Tr. 191, Doc. 170 at 191; Tr. 276, Doc. 170-1 at 71; Add. 46 n.30; see also Br. 47 (noting there are 941 Native-American inmates in defendants' custody). Inmates could be placed on the list for any tobacco violation, even one involving chewing tobacco or cigarettes, which are never used in ceremonies. Tr. 276, Doc. 170-1 at 71; Exh. 134.

permitted in ceremonies, nor does it show that banning ritual tobacco use will succeed in solving ongoing contraband problems.

A few instances of ceremonial tobacco being abused or stolen over roughly a decade hardly shows that a total tobacco ban is necessary for controlling the use of ceremonial tobacco as contraband. Cf. *Warsoldier*, 418 F.3d at 1000 (holding that a somewhat higher incidence of assault in men's prisons as compared to women's did not justify different hair length restrictions in the two prisons).

Prison officials state that tobacco can be fought over or traded (Br. 32-33) but such problems will no doubt continue with contraband tobacco from other sources regardless of whether the ban on use of ceremonial tobacco continues. A *total* ban on ritual tobacco, even the 1% mixture at issue here, is hardly the least restrictive means of controlling contraband tobacco. It is, instead, an "exaggerated * * * response" to general problems with tobacco as contraband. See *Fegans* v. *Norris*, 537 F.3d 897, 903 (8th Cir. 2008).

Furthermore, it is not enough that prison officials assert that the prison is somewhat safer with a total tobacco ban than it might be without one. As the Supreme Court has noted in the First Amendment context, "the test does not begin with the status quo of existing regulations, then ask whether the challenged restriction has some additional ability to achieve [the government's] legitimate interest. Any restriction * * * could be justified under that analysis." *Ashcroft*,

542 U.S. at 666. The prison must show that the tobacco ban is *necessary* to control contraband. Here, prison officials did not satisfy their burden of showing why other, less restrictive means would be ineffective at controlling the few instances of misuse of ceremonial tobacco that have occurred.

In particular, defendants have not shown why the prison cannot accommodate ritual tobacco use as other prisons do. Practices in other prisons are powerful "evidence as to the feasibility of implementing a less restrictive means of achieving prison safety and security," *Hamilton*, 74 F.3d at 1557 n.15, necessarily increasing prison officials' burden to submit countervailing evidence. A prison's claim that a specific restriction on religious exercise is the least restrictive means of advancing compelling governmental interests is significantly undermined by evidence that many other prisons, with the same compelling interests, allow the practice at issue. See *Fowler*, 534 F.3d at 941 (reasoning that other prisons' actions are relevant, although not controlling as to what prison officials can do in their own institutions). As the Ninth Circuit explained, "[s]urely * * * other state and federal prison systems have the same compelling interest in maintaining prison security, ensuring public safety, and protecting inmate health." *Warsoldier*, 418 F.3d at 1000. The Supreme Court has acknowledged, in the First Amendment context, that "policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction." *Procunier* v.

Martinez, 416 U.S. 396, 414 n.14 (1974), overruled on other grounds by *Thornburgh* v. *Abbott*, 490 U.S. 401, 413 (1989).

The practices in the federal prison system are particularly relevant. The BOP "has managed the largest correctional system in the Nation under the same heightened scrutiny standard as RLUIPA without compromising prison security, public safety, or the constitutional rights of other prisoners," *Cutter*, 544 U.S. at 725 (quoting U.S. Br. at 24, No. 03-9877). Congress passed RLUIPA after considering the BOP's experience under RFRA. See 146 Cong. Rec. 16,700 (2000) (letter from Dep't of Justice to Sen. Hatch, explaining that "we do not believe [RLUIPA] would have an unreasonable impact on prison operations" because compliance with RFRA "has not been an unreasonable burden to the Federal prison system").

In *Warsoldier*, for example, the court held the state prison's hair length regulations were likely not the least restrictive means of protecting security because "other prison systems, including the Federal Bureau of Prisons, do not have such hair length policies or, if they do, provide religious exemptions." 418 F.3d at 999. The First Circuit has explained that federal prison policies accommodating religious needs suggest that a state prison could implement similar policies. *Spratt* v. *Rhode Island Dep't of Corr.*, 482 F.3d 33, 42 (2007); see also *Koger* v. *Bryan*, 523 F.3d 789, 800 (7th Cir. 2008) (noting that the federal prisons

use less restrictive means for granting a prisoner a religious diet); cf. *Turner* v. *Safley*, 482 U.S. 78, 93 (1987) (upholding restriction on prisoner correspondence in the face of a First Amendment challenge in part because "[o]ther well-run prison systems, including the Federal Bureau of Prisons, have concluded that substantially similar restrictions on inmate correspondence were necessary to protect institutional order and security").

In this case, the district court found Native-American practitioners nationwide benefit from "widespread allowance of tobacco in prisons," and stated that Federal prisons, in particular, permit "ritual use of tobacco." Add. 57; Doc. 173-1 at 21. As the district court explained, "[i]n the RLUIPA context, the BOP's ability to accommodate religious exercise with less restrictive alternatives provides evidence of the feasibility of such measures in state prison systems." Add. 54-55. The court also cited several examples of state prisons that allow ritual tobacco use, and noted defendants had identified only two examples of prisons that imposed a total ban. Add. 30, 55; Exh. 3.

Of course, a prison may always show that its circumstances differ from prisons where the religious accommodation is allowed. Federal policies are relevant "in the absence of any explanation by [the prison] of significant differences * * * that would render the federal policy unworkable." *Spratt*, 482 F.3d at 42; see also *Fegans*, 537 F.3d at 905 (approving stricter grooming

standards in state's male prisons than in its female prison based on specific differences in prison conditions).

The prison, however, bears the burden of showing those differences. *Spratt*, 482 F.3d at 42. Officials here, for example, could have explained how their circumstances differ in ways that would "render * * * unworkable" another prison's policy. *Ibid*. Defendants could have presented witnesses to testify about other prisons' conditions, allowing defendants to differentiate South Dakota's prisons. Instead, defendants simply speculated that no policy that allows ceremonial tobacco would work. In their brief, defendants offer no meaningful comparisons but simply state, without elaboration, that the South Dakota prisons have a greater percentage of Native-American prisoners than do prisons in other states. Br. 9; see also Doc. 176 at 16. That by itself hardly differentiates the prisons in any meaningful way. Defendants bore the burden to show why the prison could not follow the widespread practice. It was not up to plaintiffs to prove that prisons accommodating ritual tobacco use were similar to South Dakota's prisons, and the court need not simply accept the prison officials' assertions here, without explanation, that policies in use elsewhere could not be implemented. Conclusory statements are insufficient to meet the state's burden of proof. See *Warsoldier*, 418 F.3d at 998-999; *Murphy*, 372 F.3d at 988-989.

Contrary to defendants' assertions (Br. 36-37), this case differs from this Court's decision in *Fowler*. In that case – as here – the prison pointed to legitimate safety concerns. But in *Fowler* the prison met its burden to show its policies were the least restrictive means of promoting security. Fowler had identified only one prison which had safely accommodated the sweat lodge ceremony he had requested – and that ceremony had been discontinued after security conditions changed. *Fowler*, 534 F.3d at 936, 942-943. Officials explained how their prison differed from the one which had allowed a sweat lodge, rebutting the prisoner's RLUIPA claim by showing "different institutional circumstances" and "material difference[s]" between the two prisons. *Id.* at 939, 942 & n.12.[6] The prisoner in *Fowler* did not present any other significant evidence to show that there was a less restrictive means to ensure security while meeting his religious needs. *Id*. at 940-942.[7]

Similarly, this Court's decision in *Hamilton* does not require reversal here. In that case, this Court noted that testimony about other prisons showed there were significant security problems with the sweat lodge ceremony the prisoner requested. 74 F.3d at 1557 n.15. And in concluding that there were no less

[6] Indeed, this Court pointed to evidence that sweat lodge ceremonies had caused significant problems at other prisons. *Fowler*, 534 F.3d at 939.

[7] Incidentally, the prison in *Fowler* did permit ritual smoking. 534 F.3d at 940.

restrictive alternatives to the grooming regulations plaintiff challenged, this Court cited examples of several other prisons with similar rules. *Id*. at 1555 n.12. This Court concluded that "Hamilton has failed to enlighten us as to any viable less restrictive means" for accommodating his religious needs. *Id*. at 1556.

Furthermore, this case is not like *Fegans*, as the prison system in that case carefully considered extensive evidence of "other policies" in various prison systems before imposing the challenged restrictions on hair length. *Fegans*, 537 F.3d at 904-905; see Br. 38-39. Prison officials in that case prepared "a memorandum detailing the hair and grooming policies of five other States and the Federal Bureau of Prisons," used it "in formulating [its] policy," and "considered other alternatives during their deliberations." *Fegans*, 537 F.3d at 905 n.3. Officials presented specific evidence to rebut the prisoner's claims that they could adopt policies like those in other prisons, explaining in particular how their men's prisons differed from their women's prison, where long hair was allowed. *Id*. at 904-905 & n.2. The women prisoners were housed in one unit, so there were no transfers and less opportunity for escapes or smuggling. *Id*. at 904. Also, the district court credited officials' unrebutted testimony that the women prisoners were not as prone to escape or smuggle in contraband. *Id*. at 905.

Here, in contrast, prison officials implemented the tobacco ban after considering practices at only two prisons, and it appears they actually consulted

prison officials at only one. They did not give the court any reason why they could not employ less restrictive policies as do other prisons, much less point out "material difference[s]" between their prison and the many, including the federal, prisons that allow some ritual tobacco. *Fowler*, 534 F.3d at 942 n.12. While a prison need not "refute every conceivable option in order to satisfy the least restrictive means prong," *Hamilton*, 74 F.3d at 1556, prison officials bear the burden of refuting the evidence presented. See *ibid*. The prison did not rebut that evidence here, and accordingly, the district court properly concluded that defendants had not shown why they could not adopt policies similar to those at other prisons. See *Warsoldier*, 418 F.3d at 1000 (holding prison has not shown its regulations are the least restrictive means of assuring security where it "offers no explanation" for why it cannot adopt policies like those in other prisons).

CONCLUSION

This court should affirm the district court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type volume limitation imposed by Fed. R. App. P. 32(a)(7)(B) and 29(d). The brief was prepared using Microsoft Word 2007 and contains no more than 6,800 words of proportionally spaced text. The type face is Times New Roman, 14-point font.

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Date: June 26, 2013

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2013, I submitted the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE with the Case Manger, Yvette Lisenby, Yvette_Lisenby@ca8.uscourts.gov, via electronic mail for filing with the United States Court of Appeals for the Eighth Circuit and service on counsel of record.

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