UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

NATIVE AMERICAN COUNCIL OF TRIBES, BLAINE BRINGS PLENTY, BRIAN DUBRAY, and CLAYTON CREEK, Plaintiffs, v. DOUGLAS WEBER, Warden of the South Dakota State Penitentiary, and TIMOTHY REISCH, Secretary of the South Dakota Department of Corrections, Defendants.	Case: 4:09-cv-04182-KES **STATEMENT OF INTEREST OF THE UNITED STATES**

I. INTRODUCTION

The United States files this statement of interest, pursuant to 28 U.S.C. § 517, because this litigation implicates the proper interpretation and application of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. § 2000cc (RLUIPA). Congress gave both private plaintiffs and the United States the authority to bring suit to protect the federal religious rights of individuals confined to institutions. *See* 42 U.S.C. § 2000cc-2(f). Accordingly, the United States has a strong interest in ensuring that RLUIPA's requirements are vigorously and uniformly enforced.

The South Dakota State Penitentiary (SDSP) and the South Dakota Department of Corrections (DOC) deny Native American prisoners access to

tobacco for use in religious services. SDSP began denying tobacco use to Native American prisoners in October 2009, when it instituted a total ban on tobacco. At trial, there was conflicting evidence on the importance of tobacco use in Native American religious rituals. *See* defs.' post trial br. at 4-6 ("It is undisputed that Native American spiritual leaders disagree whether it is essential to use tobacco in the ceremonial pipe or in tobacco ties"). Defendants contend that, although there is conflicting evidence on the importance of tobacco use in Native American religious exercise, the total tobacco ban does not substantially burden Native American religious practice.[1] *See* defs.' post trial br. at 16-21.

Defendants' position is contrary to the plain language of RLUIPA, Supreme Court precedent, and the position the United States has previously taken on this issue. *See* 42 U.S.C. § 2000cc-5(7)(A); *see also Emp't Div., Dep't of Human Res. v. Smith*, 494 U.S. 872, 886-87 (1990); statement of interest of the United States filed in *Limbaugh v. Thompson*, Civ. No. 2:93-cv1404-WHA (M.D. AL), pp. 4-8 (available at http://www.justice.gov/crt/about/spl/documents/limbaugh_SOI_04-08-11.pdf). Defendants' argument that plaintiffs are not substantially burdened by the tobacco ban is, in actuality, a request for a judicial determination of the importance and centrality of tobacco use to the plaintiffs' religious practice. This determination, however, is explicitly forbidden by RLUIPA and relevant case law, and this court should decline to undertake such a task.

[1] In their post trial brief, defendants also argue that the tobacco ban furthers a compelling government interest and is the least restrictive means of advancing that interest. The United States does not address either of those arguments in this statement of interest.

II. BACKGROUND

Plaintiffs are the Native American Council of Tribes ("NACT") and Native American prisoners[2] at the South Dakota state prison who, before October 2009, were allowed by SDSP and the DOC to use tobacco in religious ceremonies. *See* defs.' post trial br. at 13-14. When defendants instituted the tobacco ban in October 2009, defendants stated that they were doing so because tobacco was not "traditional" to Native American religious practice. In a letter dated October 19, 2009, announcing the total ban on tobacco, Warden Weber wrote to the local Native American community that certain spiritual leaders "have brought to our attention that tobacco is not traditional to the Lakota/Dakota ceremonies . . . ." Defs.' Ex. 103. Additionally, in an e-mail to DOC staff, SDSP Associate Warden Jennifer Wagner wrote that "[w]hen inmates come to you to complain [about the tobacco ban] please remind them that we are honoring the request of the respected Medicine Men and are going back to their traditional ways." Defs.' Ex. 108.

On December 9, 2009, shortly after defendants instituted the ban on tobacco, plaintiffs filed suit. Trial was held in district court for the District of South Dakota March 27, 28, and 29, 2012.

At trial, plaintiffs introduced evidence of the importance of tobacco to Native American religious practice. *See* trial tr. at 51:10-52:3; trial tr. at 84:5-12;

[2] Plaintiffs are practitioners of Lakota spirituality. Lakota is part of a confederation of Sioux tribes whose land lies in North and South Dakota. The largest percentage of Native American population at SDSP is comprised by Lakota, Dakota, and Nakota. For the purpose of this statement of interest, the term "Native American" is used to define plaintiffs and other similarly situated.

trial tr. at 153:13-154:3; trial tr. at 389:17-23. Indeed, defendants concede that some Native American spiritual leaders believe that tobacco use is essential in Native American religious rituals. *See* defs.' post trial br. at 4-6 ("It is undisputed that Native American spiritual leaders disagree whether it is essential to use tobacco in the ceremonial pipe or in tobacco ties"); defs.' post trial br. at 21 ("Here, the record establishes that for some Lakota, a mixture of tobacco and cansasa is used in spiritual ceremonies, for others, only cansasa is used"). Warden Weber acknowledged at trial that "there are differing opinions out there from different medicine men" regarding the use of tobacco. *See* trial tr. at 577:21-22.

III. ARGUMENT

RLUIPA provides persons in institutional settings with an important framework for challenging restrictions on their religious exercise. Under the statute, when a plaintiff shows that a governmental authority has placed a substantial burden on the plaintiff's religious exercise, the governmental authority must prove that the restrictions further a compelling government interest and that the means used to restrict religious exercise is the least restrictive alternative. 42 U.S.C. § 2000cc-2(b). The Eighth Circuit has made it clear that "[b]y enacting RLUIPA, Congress established a statutory free exercise claim encompassing a higher standard of review than that which applied to constitutional free exercise claim." *Gladson v. Iowa Dep't of Corr.*, 551 F.3d 825, 832 (8th Cir. 2009).

Once a prisoner produces prima facie evidence to support a claim by showing that a government practice has substantially burdened the prisoner's exercise of religion, the government then bears the burden of persuasion on every other element of the RLUIPA claim. *Van Wyhe v. Reisch,* 581 F.3d 639, 649 (8th Cir. 2009). To do so, the government must show that the total ban on tobacco is in actual furtherance of a cited compelling interest – a tangential or tenuous relationship between the policy and the interest is insufficient. *See* 42 U.S.C. § 2000cc-1(a); *see also* 146 Cong. Rec. 16698, 16699 (2000) (joint statement of Sens. Hatch and Kennedy on RLUIPA) (hereinafter joint statement) ("[I]nadequately formulated prison regulations and policies grounded on mere speculation, exaggerated fears, or post-hoc rationalizations will not suffice to meet the act's requirements" (quoting S. Rep. 103-11 at 10 (1993))); *Spratt v. Rhode Island Dep't of Corr.,* 482 F.3d 33, 39 (1st Cir. 2007) ("[M]erely stating a compelling interest does not satisfy the [State's] burden on this element of RLUIPA").

Defendants must also show that burdening of religious exercise is the least restrictive means of furthering the compelling governmental interest. In order to meet their burden under this element of the RLUIPA analysis, defendants must demonstrate that they have considered and rejected less restrictive alternatives. *See, e.g., Murphy v. Mo. Dep't of Corr.,* 372 F.3d 979, 989 (8th Cir. 2004) ("It is not clear that MDOC seriously considered any other alternatives, nor were any explored before the district court."); *see also Warsoldier v. Woodford*, 418 F.3d

989, 99 (9th Cir. 2005) ("CDC cannot meet its burden to prove least restrictive means unless it demonstrates that it has actually considered and rejected the efficacy of less restrictive measures before adopting the challenged practice").

If the alternatives suggested by the plaintiff are employed elsewhere, defendants must show why these alternatives cannot be implemented to accommodate the plaintiff's request. *See Spratt*, 482 F.3d at 42 (Although "evidence of policies at one prison is not conclusive proof that the same policies would work at another institution," absent significant differences between the defendant system and the federal prison system, federal Bureau of Prisons policy is relevant); *Warsoldier*, 418 F.3d at 1000 ("[W]e have found comparisons between institutions analytically useful when considering whether the government is employing the least restrictive means. Indeed, the failure of defendant to explain why another institution with the same compelling interests was able to accommodate the same religious practices may constitute a failure to establish that defendants was using the least restrictive means."); *see also Procunier v. Martinez*, 416 U.S. 396, 414 n.14 (1974) ("[T]he policies followed at other well-run institutions would be relevant to a determination of the need for a particular type of restriction").

In demonstrating why a less restrictive alternative is unworkable, defendants must show that their concerns are based on real evidence and not "grounded on mere speculation, exaggerated fears, or post-hoc rationalizations." joint statement, 146 Cong. Rec. at 16699; *see also Warsoldier,* 418 F.3d at 1000

("[P]rison officials must set forth detailed evidence, tailored to the situation before the court, that identified the failing in the alternatives advanced by the prisoner").

Here, defendants contend that the tobacco ban does not substantially burden plaintiffs' religious exercise, and they also argue that the tobacco ban furthers a compelling government interest and is the least restrictive means of furthering that interest. In this statement of interest, the United States only addresses defendants' argument that plaintiffs' religious exercise is not substantially burdened by the ban on tobacco. Defendants' argument, like the holdings of the courts upon which the argument depends, requires a determination about the centrality or importance of tobacco use in Native American religious tradition, a determination that is expressly forbidden by RLUIPA and Supreme Court precedent.

RLUIPA guarantees a right to "religious exercise," which it defines as "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); *see also Van Wyhe v. Reisch*, 581 F.3d 639, 656 (8th Cir. 2009) ("RLUIPA's broad protection of 'religious exercise' extends even to religious practices that are not 'compelled by, or central to' a certain belief system) (citations omitted). This is consistent with the First Amendment's requirement that courts are not to judge the merits or centrality of specific religious practices. *See Emp't Div., Dept. of Human Res. v. Smith*, 494 U.S. 872, 886-87 (1990) ("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 or the plausibility of a religious claim"); *Presbyterian Church v. Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 450 (1969) (holding that the First Amendment "forbids civil courts" from the "interpretation of particular church doctrines and the importance of those doctrines to the religion"); *Fowler v. Rhode Island*, 345 U.S. 67, 70 (1953) ("it is no business of the courts to say that what is a religious practice or activity is not religion under the protection of the First Amendment"); *Vetter v. Farmland Indus.*, 884 F. Supp. 1287, 1306 (N.D. Iowa 1995) (a court may not determine which practices are mandated or prohibited by a tenet of the religion; the court may neither determine what the tenets of a particular religion are, nor decide whether a particular practice is or is not required by the tenets of a religion). The only appropriate avenue for judicial inquiry is whether an institution's policy interferes with an exercise of a religion. Whether the practice is universal to adherents of a particular faith is of no consequence. *See Thomas v. Review Bd.*, 450 U.S. 707, 715-16 (1982) (finding that even under the less protective First Amendment free exercise doctrine, "… it is not within the judicial function and judicial competence to inquire whether the petitioner or his fellow worker more correctly perceived the commands of their common faith. Courts are not arbiters of scriptural interpretation.").[3] Courts must apply a broad, inclusive standard

[3] Of course, courts are permitted to examine the sincerity of religious belief under RLUIPA. *Cutter v. Wilkinson*, 544 U.S. 709, 725 n.13 (2005) ("[RLUIPA] does not preclude inquiry into the sincerity of a prisoner's professed religiosity.").

when determining whether a religious exercise is burdened, rather than conducting their own assessments of the importance of the exercise.

In instituting the tobacco ban, defendants appear not to have applied the broad, inclusive standard of religious exercise required by RLUIPA. Instead, defendants based their decision, at least in part, on the determination that tobacco use is not "traditional" to Native American religious exercise. RLUIPA's broad protection of religious exercise prohibits defendants from engaging in this judgment, however; defendants may not determine what is "traditional" or "orthodox" within a certain religious tradition. *Cf. Grayson v. Schuler*, 666 F.3d 450, 453-55 (7th Cir. 2012) ("Prison officials may not determine which religious observances are permissible because orthodox") (citations omitted).

Likewise, courts are also prohibited from determining what is essential to a religious practice or tradition. During the trial in this case, plaintiffs and defendants spent an extensive amount of time arguing about whether tobacco use is important to Native American religious exercise. As Congress recognized in crafting RLUIPA, however, and as the Supreme Court has repeatedly stated, this is not a justiciable inquiry. *See* 42 U.S.C. § 2000cc-5(7)(A); *Thomas*, 450 U.S. at 715-16. Indeed, defendants acknowledge that "Native American spiritual leaders disagree whether it is essential to use tobacco in the ceremonial pipe or in tobacco ties," *see* defs.' post trial br. at 4-6, but they nevertheless argue that this court can decide that the tobacco ban does not substantially burden plaintiffs' religious exercise. *See* defs.' post trial br. at 16-21. The court should decline this

invitation to determine the importance of tobacco use to practitioners of Native American religions. *Smith*, 494 U.S. at 886-87. Accordingly, the court should also reject defendants' argument that they have not placed a substantial burden on plaintiffs' religious exercise.

IV. CONCLUSION

For the foregoing reasons, the court should reject defendants' position that plaintiffs' religious exercise is not substantially burdened by the tobacco ban, because this position depends on an inquiry that is prohibited by RLUIPA and Supreme Court precedent.

Date: July 10, 2012

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on July 10, 2012, a true and correct copy of the foregoing was served upon the following person(s), by placing the same in the service indicated, addressed as follows:

Pamela R. Bollweg
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