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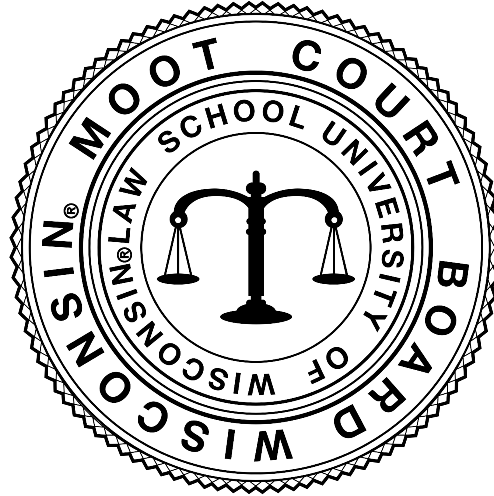


Evan A. Evans Constitutional Law Moot Court Competition Problem

February 17-19, 2023

975 BASCOM MALL, MADISON, WI 53706, ATTN: MOOT COURT BOARD

EVANSCOMPETITION@GMAIL.COM

EVAN A. EVANS MOOT COURT COMPETITION PROBLEM 2023

December 27, 2022

To Our 2023 Competitors:

We hope that you are excited to explore current topics in constitutional law raised by this year's problem. To minimize confusion, we have provided the following guiding principles to help you argue the issues raised by the materials in the record:

(1) Only consider affirmative action cases decided prior to December 27, 2022. Assume that oral arguments from any affirmative action cases that are currently pending before the United States Supreme Court are unavailable for purposes of this competition.
(2) A diverse student body in higher education is a compelling governmental interest that should not be challenged.
(3) Do not conduct research about Bovine-19 or the development of the vaccine.
(4) Merten does not qualify for the University's medical exemption to the vaccine requirement.
(5) Given his credentials, Merten would have been admitted to Remington if (1) he were a member of an underrepresented group, and (2) he had provided proof of his Bovine-19 vaccination. Assume Merten has standing to challenge Remington's Affirmative Action policy and Remington's vaccine mandate.

Good luck and have fun!

In The

Supreme Court of the United States

No. 18-2005

JUSTIN MERTEN,

Petitioner,

v.

THE UNIVERSITY OF REMINGTON

Respondent.

On Petition for Writ of Certiorari to United States Court of Appeals for the Fourteenth Circuit.

ORDER

Petition for writ of certiorari to the United States Court of Appeals for the Fourteenth Circuit granted. The questions to be addressed are:

(1) Does a public university's affirmative action plan that uses race as a "plus" factor in admissions violate the Fourteenth Amendment?
(2) Does a public university's vaccine requirement violate an applicant's First Amendment rights when the applicant is denied a religious exemption?

Briefs on the merits shall be due no later than January 27, 2023. Oral arguments will be held before the Supreme Court of the United States on February 17, 2023.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF BASCOM

JUSTIN MERTEN,
Plaintiff,
v.

Case No. 18-CV-2629

THE UNIVERSITY OF REMINGTON,
Defendant.

OPINION and ORDER

DECIDED NOVEMBER 14, 2021

PINCKNEY, Judge:

Plaintiff, Justin Merten, brings two claims stemming from related incidents. First, Merten alleges that the University of Remington ("Remington" or "University"), Defendant, violated the Fourteenth Amendment by employing an affirmative action admissions policy that uses race as a "plus" factor for admissions. Merten seeks admission to the incoming freshman class at the University and a permanent injunction against Remington using its affirmative action plan. Second, Merten alleges that Remington's vaccine requirement for all incoming students violated his Free Exercise of religion under the First Amendment. Merten seeks a permanent injunction against Remington's vaccine mandate as a condition of admission. Merten and Remington filed cross-motions for summary judgment on both claims. For the reasons explained below, both parties' motions are denied as to the Fourteenth Amendment claim. Defendant's motion is granted as to the First Amendment claim.

I. UNDISPUTED FACTS

A. Justin Merten's Application for Admission

Justin Merten is a 20-year-old Asian American man. He was raised in a liberal household and lived with his two parents and younger sister. His parents and sister identify as spiritual but not religious, and religion has never played a large role in their family's life. When he turned 18 years old, Merten moved out of his family home. At this time, he joined Pastafarianism and shifted away from his family's liberal viewpoints. Merten and his younger sister both received all medically recommended vaccinations for their ages while growing up. Merten has not received any new vaccines since turning 18, including the Bovine[1]-19 vaccine.

Merten applied for admission to the University of Remington, a state university, for the fall of 2021 term. He grew up nearby in Burnsville, a small town in the state of Remington, and had dreamt of attending his state university for as long as he could remember. While attending Burnsville High School, Merten was heavily involved in the school debate and speech teams and was a captain of the track team his senior year. Merten graduated in the top 15% of his graduating class of 152 with an unweighted GPA of 3.65 out of 4.00 and a score of 28 out of 36 on his ACT. Merten's statistics would have placed him in the bottom third of Remington's incoming freshman class in 2021.

Merten initially applied to Remington through the early decision program. His application was deferred to the regular application cycle before ultimately being denied. Instead, Merten attended Remington Community College, where he is currently enrolled.

B. Affirmative Action

Before reaching the merits of this dispute, it is important to consider the historical background of Affirmative Action. Affirmative Action originates from the 1960s Civil Rights Movement. Civil Rights leaders argued that racism is baked into all of society's institutions, including the criminal legal system, housing, healthcare, and the education system. The Kennedy administration promoted Affirmative Action as a means to remedy historic injustices and heal past harms. In college admissions, this means considering the applicant's race in addition to their merits. Applicants from racial minority groups face systemic barriers to higher education that make it more challenging for these applicants to earn advanced degrees than their majority-group counterparts. Advocates argue that race-conscious admission programs are imperative to ensuring that students of color are not overlooked by a process that has historically undervalued their determination, accomplishments, and talents.

While the University of Remington has historically been a majority-white college since its founding in 1848, the City of Remington and its surrounding suburbs are 75% African American.

[1] Of or relating to cattle.

Over the past two decades, the university has made various attempts to help the school's racial demographics better reflect the demographics of the surrounding areas. For example, in 2012 Remington partnered with Remington Community College, which has a greater ratio of African American students relative to its white student population, to create pathways for Remington Community College students to matriculate to the University of Remington. Participating students had to attend the community college for two semesters and maintain certain academic criteria. Then they would be accepted to the university. This program did not result in a statistically significant increase in the number of African American students at the University of Remington and was not renewed when the initial funding ran out in 2015.

In the fall of 2016, the University created a Diversity and Inclusion office and appointed Margaret States, an African American woman, as Dean of the new office. Since her appointment, States has prioritized increasing student body diversity to increase differing viewpoints on campus and make the student body better reflect the city's non-student demographics. To achieve this objective, States has used recruitment and marketing tactics and has partnered with majority racial-minority high schools throughout the state. Most of her efforts to improve student diversity were focused on creating the University of Remington's new affirmative action plan.

Remington's affirmative action plan does not employ racial quotas, but it does view race as a "plus" factor that can benefit certain applicants. At the first stage of the admissions process, each application is read by at least one admissions officer. The admissions officer rates applicants on six dimensions: (1) academic, (2) athletic, (3) extracurricular, (4) school support, (5) personal, and (6) overall ratings. Race does not play a direct role in determining applicants' ratings for the first five categories. Race can indirectly influence the personal rating if an applicant shares an especially compelling story about overcoming racism or adversity to achieve academic success. However, race can directly impact an applicant's overall rating through a new affirmative action process that Remington calls "tips."

"Tips" are plus factors that can tip an applicant into the school's admitted class. An applicant who would otherwise be rejected could be tipped into the admitted group for several reasons, including but not limited to unusually appealing personal traits, outstanding capacity for leadership, creative ability, athletic ability, and geographic, racial, or economic factors. Under this new policy, a large percentage of the University of Remington's admitted African American and Latino applicants received an offer because of the tips system.

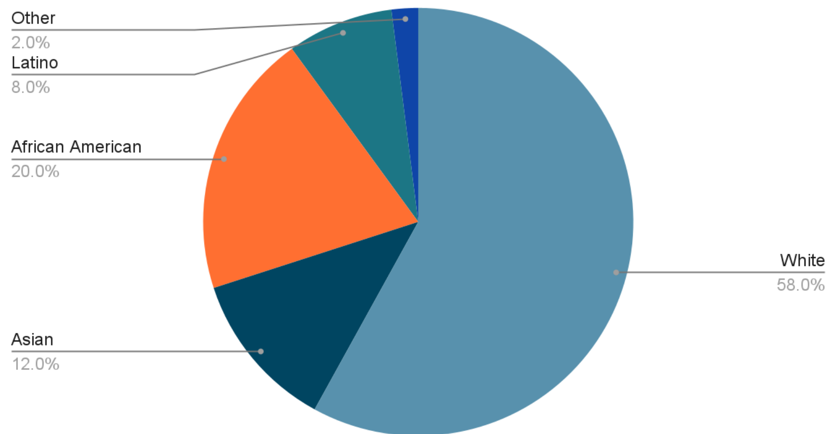
Although Remington rejects the majority of all undergraduate applicants, the rejection rate for Asian American students relative to the number of Asian American applicants is higher than the

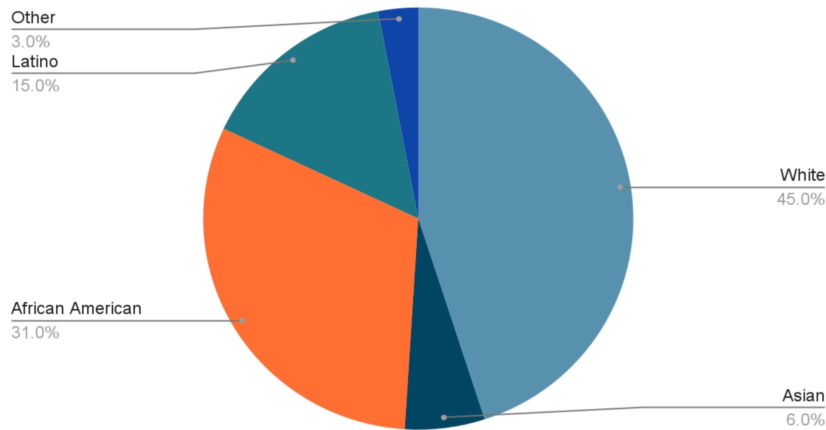
rate of rejection for any other racial group. This is because, on average, Asian American applicants receive lower scores for their personal and overall ratings than their African American and Latino counterparts. Critics of Remington's affirmative action policy argue that these ratings are subjective, and Asian American applicants are rated lower because of admissions officers' implicit biases. Nevertheless, the parties agree that the affirmative action policy only impacts the middle tier of applicants. Exceptional applicants are admitted regardless of the University's admissions policy, and the chances of admission for applicants far below the University's ordinary standards are unlikely to be impacted by the affirmative action policy.

After Merten initiated his lawsuit against Remington, Margaret States released the following statement on behalf of the University: "The University proudly stands by its race-conscious admissions program. Some attention to race in admissions is necessary to ensure greater student body diversity and to remedy past harms for groups of applicants that are historically discriminated against. Greater enrollment of minority students works to deconstruct racial stereotypes and promote cross-racial engagement and understanding. Fostering educational diversity is essential to creating more tolerant, free-thinking, and well-rounded college graduates, which in turn benefits all of society."

Since implementing the new affirmative action plan, Remington has seen a significant shift in the racial composition of its students. Though the school's efforts increased the number of African American students, Latino students, and the total number of students who identify as part of a racial minority, the number of Asian American students has decreased. Remington regularly sends students a survey to determine their viewpoints on a wide array of issues. The survey also asks students to self-report their racial identity, if comfortable, so that university administrators can gauge the student body demographics. The results of the most recent survey are displayed in the following two charts.[2]

[2] The upperclassmen were admitted to the university before the affirmative action program was implemented, and the underclassmen were admitted after the program was enacted. The parties concede to the accuracy of the self-reported data.





C. The Bovine-19 Vaccination

Like many colleges, the University of Remington mandates certain requirements as conditions of admission. Remington requires applicants for admission to provide proof that they have received several vaccinations prior to enrollment. Recently, the university began requiring applicants to demonstrate that they have been vaccinated against the Bovine-19 virus. Justin Merten was part of the first application cycle to which this requirement applied, in the fall of 2021. Remington's admissions policy states that it will waive the vaccination requirements for any applicants who can show that they are unable to receive the required vaccine for medical reasons or because of their sincere religious objections.

The Bovine-19 virus can be incubated in certain Charolais beef cattle and is sometimes passed to humans when the meat is ingested raw. Infected humans can easily pass it to other humans. For example, transmissions have occurred by simply shaking hands or sitting next to an infected

individual for as little as fifteen minutes. Though harmless to the cattle, infected humans have been documented to exhibit a range of symptoms. These include, but are not limited to, fever or chills, cough, shortness of breath, fatigue, headache, and nausea or vomiting. Severe cases of Bovine-19 have led to death. The first case of the Bovine-19 virus was discovered in humans in December, 2019. Found to have originated from a herd of infected cattle in the Great Plains region of the United States, the virus quickly spread across the country and eventually most of the world. The World Health Organization, a specialized agency of the United Nations dedicated to promoting international public health, declared Bovine-19 a pandemic in March of 2020.

To combat the Bovine-19 virus and pandemic, the World Health Organization began to create a Bovine-19 vaccine in May of 2020. The vaccine was developed by using fetal fibroblast cells, which are cells that bind skin and other connective tissue together. Fibroblast cells were originally obtained from the elective termination of two pregnancies in the 1960s. All fibroblast cells used since then, including the ones used to develop the Bovine-19 vaccine, have been grown in a lab from the original cells obtained in the 1960s. In December of 2020, the Bovine-19 vaccine was approved for commercial use in the United States. Though originally only available to people who were determined high-risk for severe cases of the virus, the vaccine is now free and widely available to anyone who wants to receive it.

Justin Merten claims that he is an active member of the Pastafarian religion and routinely practices its teachings. Pastafarians believe that an undetectable Pasta Alien created the universe. Much like other religious practices, Pastafarians believe in a heaven and a hell, and worship on their holy day, which occurs on Fridays. Around the time of Christmas, Hanukkah, and Kwanzaa, Pastafarians celebrate a holiday called "Holiday." During Holiday, Pastafarians worship camels, which they revere as divine beings, by giving them offerings of wheat and barley. Pastafarians believe that camels were the first of the Pasta Alien's creations.

Pastafarians worship from a holy book called *The Gospel of the Pasta Alien*. Their central commandments include:

<u>It's Better If You Do</u>

1. It's Better If You Find A Thing You Are Good At
2. It's Better If You Live in Harmony With the World
3. It's Better If You Make Art
4. It's Better If You Lead An Untethered Life
5. It's Better If You Work Together

<u>It's Better If You Don't</u>

1. It’s Better If You Don’t Put People In Cages
2. It’s Better If You Don’t Work Too Much
3. It’s Better If You Don’t Value Possessions
4. It’s Better If You Don’t Hurt Others
5. It’s Better If You Don’t Censor Things
– *The Gospel of the Pasta Alien*.

Pastafarians claim to have over ten thousand followers worldwide as of 2022, with their numbers rapidly growing. In January 2014, a member of the Pomfret, New York Town Council wore a colander on his head while taking the oath of office in honor of the Pastafarian practice. In 2016, an individual in Madison, Wisconsin was permitted to wear a colander when taking his DMV photo. Multiple couples in New Zealand have been married under Pastafarianism.

Skeptics have argued that Pastafarianism is not a real religion. Many call it a “satirical religion,” often in the context of Pastafarianism being used as a political statement. This argument is not without basis, as the Pastafarianism founder first mentioned the religion when arguing the time allocation between evolution and intelligent design theory in public school science classes. Critics have characterized *The Gospel of the Pasta Alien* as welcomed comedic relief in the overly serious debate between science and superstition. Pastafarians vigorously deny the claim that their religion is satire.

Because of the use of fibroblast cells to develop the Bovine-19 vaccine, there have been strong religious objections to the vaccine. The most outspoken religious group has been Pastafarians, who claim that the use of fibroblast cells in creating vaccines is contrary to one of their central commandments: It’s Better If You Don’t Hurt Others. Because of this, Pastafarian leaders advise their followers against receiving the Bovine-19 vaccine. Though Pastafarianism has consistently had followers since its founding, its membership has expanded since the Bovine-19 vaccine was created. Proponents of the Bovine-19 vaccine criticize new Pastafarian members as being insincere in their religious beliefs. Additionally, they argue that the vaccine has saved millions of lives, thus outweighing any harm done to others while producing the vaccine.

Merten has received all vaccinations necessary for admission to Remington except for the Bovine-19 vaccine. He submitted proof of the vaccinations that he has received with his application for admission. The University of Remington Admission Committee reached out to Merten to inquire about his Bovine-19 vaccination status. Merten informed the Committee that he did not receive the vaccine because of sincere religious objections related to his participation in Pastafarianism. After reviewing Merten’s claim, the Committee responded that he did not qualify for the exemption and his application would be flagged as incomplete unless and until they received the requisite proof of vaccination. Merten did not respond to the committee or

receive the Bovine-19 vaccine. Months later, Merten was informed that he was denied admission to the University.

D. Other Considerations

The Court also reviewed relevant Tweets,[3] attached as Exhibit A, University of Remington School Newspaper clipping, attached as Exhibit B, and University Chancellor Statement, attached as Exhibit C. The authenticity of these documents is not in dispute.

II. STANDARD FOR SUMMARY JUDGMENT

The court shall grant summary judgment if the moving party "shows that there is no genuine dispute of material fact, and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). In deciding whether to grant summary judgment, the court views all facts and draws all inferences in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

III. DISCUSSION

Justin Merten asserts two claims against the University of Remington:

(1) First, that the University of Remington's affirmative action plan violated his Fourteenth Amendment rights.
(2) Second, that the University of Remington's vaccination requirement violated his First Amendment rights.

Merten and Remington filed cross-motions for summary judgment on both claims. Merten's claim that the University of Remington violated his Fourteenth Amendment right to Equal Protection will be addressed first, followed by Merten's Free Exercise Clause claim under the First Amendment.

A. Fourteenth Amendment Affirmative Action Claim

For his Fourteenth Amendment claim challenging the University of Remington's Affirmative Action policy, Merten alleges that Remington violated his Fourteenth Amendment rights by considering race as a plus factor for admission, which disadvantages Asian American applicants. The Court denies both Merten and Remington's motions for summary judgment on the Fourteenth Amendment claim.

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[3] Tweets are short messages posted on the social media platform Twitter. Tweets may contain text, photos, videos, or links. Users often post tweets to express personal opinions or beliefs.

a. Fourteenth Amendment

As a public university that receives federal funding, the University of Remington must comply with 42 U.S.C. § 2000(d)[4] and the Fourteenth Amendment of the United States Constitution. The Fourteenth Amendment provides in relevant part that "[n]o state shall make or enforce any law which … [denies] any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV, § 1. Since racial minority groups are considered a suspect class,[5] race-based classifications are afforded Fourteenth Amendment protection. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *see also United States v. Carolene Products Co.*, 304 U.S. 144 (1938). The United States Supreme Court has long held that affirmative action programs at public universities violate the Fourteenth Amendment's Equal Protection Clause when the policies use strict racial quotas that set aside a certain number of seats for applicants of color. *See Bakke*, 438 U.S. 265. In contrast, the Supreme Court has upheld holistic affirmative action policies that consider race as one factor among many for admissions. *See Grutter v. Bollinger*, 539 U.S. 306 (2003).

b. Strict Scrutiny Standard

The Fourteenth Amendment permits benign use of race in state decisions, such as affirmative action, when the use of race meets the appropriate level of heightened judicial scrutiny. *Bakke*, 438 U.S. 265. The Supreme Court has held that courts must use strict judicial scrutiny to determine whether the use of race in race-conscious admission programs for public colleges and universities is benign. *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013). Under strict scrutiny, a public college may only use race as a factor for admissions when the admission program is narrowly tailored to further a compelling governmental interest. *Id.* at 310.

c. Compelling Governmental Interest

Numerous courts of all levels have repeatedly upheld affirmative action programs at public colleges and universities. The United States Supreme Court most recently upheld a race-conscious admissions program in 2016. *See Fisher v. Univ. of Tex.*, 579 U.S. 365 (2016) (holding that the Court of Appeals for the Fifth Circuit correctly upheld the University of Texas at Austin's race-conscious undergraduate admissions program under strict scrutiny). Many of these cases find that educational diversity is a compelling interest that justifies taking account of race as one factor among many in admissions decisions.

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[4] Also known as Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000(d) prohibits any organization or program that receives federal financial assistance from discriminating on the basis of race, color, or national origin.

[5] Suspect classes are often discrete and insular. A group is considered discrete when it is easy for non-members to identify members as part of the group, and it is insular when the group is hived-off from other groups in society. Kenji Yoshino, *The Gay Tipping Point*, 57 UCLA L. REV. 1537 (2010).

Courts must give judicial deference to universities' reasoned explanations of the decision to pursue student body diversity. *Fisher*, 570 U.S. 297 at 310 (2013). Speaking as an agent of the University of Remington, Dean Margaret States[6] identified student body diversity as a goal of the school's affirmative action plan. Relying on *Grutter v. Bollinger*, Remington argues that research shows that society as a whole benefits when students emerge from college better prepared for a diverse workforce. *See Grutter*, 539 U.S. at 330 ("[N]umerous studies show that student body diversity promotes learning outcomes, and 'better prepares students for an increasingly diverse workforce and society, and better prepares them as professionals'"). This Court is bound by Supreme Court precedent holding that diversity in higher education is a compelling governmental interest. *Bakke*, 438 U.S. 265 (1978). According to the student body survey data that Remington collected, the number of students who identify as members of racial minority groups has significantly increased since implementing the new admissions program.

Dean Margaret States also made brief reference to the purpose of Remington's affirmative action plan as being related to remedying past harms. While remedying past specifically proven acts of discrimination could constitute a compelling state interest that merits differentiation on the basis of race, *see, e.g.*, *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), remedying societal discrimination in general or achieving demographic representation are too amorphous and thus not compelling interests. *Bakke*, 438 U.S. 265 (1978); *Adarand Constructors v. Pena*, 515 U.S. 200, 220 (1995). Neither the University nor Dean States have supplied express findings to suggest that the university has itself discriminated in the past or how its current admissions program could remedy that past discrimination. Thus, there is a genuine dispute of material fact regarding whether the University of Remington's efforts to remedy past harms fulfill a compelling governmental interest.

Accordingly, there is no genuine dispute of material fact that promoting student body diversity is a compelling governmental interest that the University of Remington may constitutionally pursue. Strict scrutiny, however, is only satisfied if the University's race-conscious admissions policy is narrowly tailored to serve that compelling interest.

d. Narrowly Tailored

This court agrees with Remington's argument that courts should give universities substantial but not total leeway in devising their race-conscious admission programs. However, unlike for the compelling governmental interest prong, courts do not have to give universities any judicial

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[6] The parties have conceded that Dean States's statements accurately reflect the University of Remington's admissions program.

deference in determining whether the use of race in admissions processes is narrowly tailored. *Fisher*, 570 U.S. 297 (2013).

The University of Remington has not produced sufficient evidence that its affirmative action policy is narrowly tailored to promote student body diversity. Further, Merten argues that Remington's race-conscious admissions program is harmful to diversity. As represented by the student survey data that the university supplied, though the overall number of racial minority student enrollment has increased, the enrollment rate of Asian Americans has decreased.

Additionally, Remington has not made enough of an effort to promote a race-neutral way to achieve its stated goals. Examples of race-neutral approaches to increasing diversity in college admissions could include preferences based on socioeconomic status; top 10 programs, which admit students who graduate near the top of their high school classes; the elimination of preferences for children of alumni and major donors, who tend to be white; decreasing the emphasis on GPA or standardized test scores; or even a lottery system. *Fisher*, 579 U.S. 365 (2016); *Grutter*, 539 U.S. at 322. Here, there is no evidence to suggest that the University of Remington attempted to implement any of the above examples.

The University of Remington argues that society's collective interest in creating college-educated individuals that respect and draw from all parts of society justifies giving a slight advantage to individual college applicants from certain racial backgrounds. However, this court refuses to address that question without evidence that providing a racial advantage is the best way to promote that societal interest. The University must offer more evidence of how its affirmative action policy is narrowly tailored to achieving its goal of student body diversity.

Additionally, Merten has not provided sufficient evidence of how the University's Affirmative Action policy unconstitutionally discriminates against Asian American applicants. Thus, both parties' motions for summary judgment are denied as to the Fourteenth Amendment claim.

B. First Amendment Free Exercise of Religion Claim

For the First Amendment freedom of religion claim, Merten alleges that Defendant Remington violated his First Amendment rights by requiring proof of Bovine-19 vaccination as a condition of admission. Remington contends that Merten does not qualify for the vaccine's religious exemption because Merten's beliefs are not religious in nature. Thus, Remington argues, Merten is not protected by the First Amendment and moves for summary judgment. This Court agrees and grants Remington's motion for summary judgment on the First Amendment claim.

a. First Amendment

The First Amendment provides in relevant part that "Congress shall make no law … prohibiting the free exercise [of religion]." U.S. Const. amend. I. The First Amendment has been incorporated by the Fourteenth Amendment to apply to the states. *Gitlow v. New York*, 268 U.S. 652, 667–68 (1925).

The United States Supreme Court held that "religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit First Amendment protection." *Thomas v. Rev. Bd. of Ind. Emp. Sec.*, 450 U.S. 707, 714 (1981). If there is any doubt about whether a particular set of beliefs constitutes a religion, the court must err on the side of freedom to find that the beliefs do constitute a religion. *United States v. Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995), *aff'd*, 95 F.3d 1475 (10th Cir. 1996). Courts may not consider whether the party's purportedly religious beliefs are true or false. *United States v. Ballard*, 322 U.S. 78, 85–88 (1944). "Judges are not oracles of theological verity, and the Founders did not intend for them to be declarants of religious orthodoxy." *Africa v. Pennsylvania*, 662 F.2d 1025, 1030 (3d Cir. 1981).

However, the principle of religion must not be limitless. Various courts have struggled to find the limit of religion when "confronted with cultural beliefs; secular philosophies such as scientism, evolutionism, and objectivism; and institutions like the 'Church of Cognizance' or 'Church of Marijuana.'" *Cavanaugh v. Bartelt*, 178 F. Supp. 3d 819, 828 (D. Neb. 2016), *aff'd*, (Sept. 7, 2016). *See also, e.g., Daniel Chapter One v. Fed. Trade Comm'n*, 405 F. App'x 505, 506 (D.C. Cir. 2010) (ruling scientism is not a religion under the scope of the Establishment Clause); *Peloza v. Capistrano Unified Sch. Dist*., 37 F.3d 517, 521 (9th Cir. 1994) (evolutionism or secular humanism are not religions for Establishment Clause purposes); *United States v. Zielinski*, No. 1:11–cr–533, 2013 WL 2636104, at *13–15 (N.D.N.Y. June 11, 2013); *Harrison v. Watts*, 609 F. Supp. 2d 561, 572–73 (E.D. Va. 2009) (ruling that objectivism is not a religion for the purposes of the RFRA). "Not every enterprise cloaking itself in the name of religion" meets the criteria necessary to be afforded First Amendment protection as a religion. *Founding Church of Scientology v. United States*, 409 F.2d 1146, 1160 (D.C. Cir. 1969).

Under the relevant case law for the free exercise of religion, two threshold requirements must be met before beliefs that are alleged to be religious in nature are accorded First Amendment protection. *Wisconsin v. Yoder*, 406 U.S. 205, 216 (1972). A court's task is to decide whether the avowed beliefs are (1) sincerely held, and (2) religious in nature, in the claimant's scheme of things. *United States v. Seeger*, 380 U.S. 163, 185 (1965). If either of these two elements fail, the

court does not have to consider whether the plaintiff's First Amendment rights were infringed. *Id.*

b. Sincerely Held Beliefs

There is no controlling opinion in this jurisdiction on what constitutes a sincerely held belief. However, other jurisdictions consider how long a person has believed something and how consistently they have followed those beliefs. *See Sourbeer v. Robinson*, 791 F.2d 1094, 1102 (3rd Cir. 1986); *Vaughn v. Garrison*, 534 F. Supp. 90, 92 (E.D.N.C. 1981). The court may consider whether an individual has acted contrary to those beliefs. *See, e.g., EEOC v. Ilona of Hungary, Inc*., 108 F.3d 1569, 1575 (7th Cir. 1997) (holding that a Seventh-day Adventist employee's previous absence of faith and subsequent loss of faith did not prove that his religious beliefs were insincere at the time that he refused to work on the Sabbath).

Merten's beliefs are likely sincerely held. He has been practicing Pastafarianism since before the creation of the Bovine-19 vaccine, and he does so routinely. Thus, this element of First Amendment protection is met.

c. Beliefs that are Religious in Nature

To merit First Amendment protection, the alleged beliefs must also be religious, in the claimant's scheme of things. *Seeger*, 380 U.S. at 185. Merten's Pastafarian beliefs are not religious in nature.

The United States Supreme Court has never defined religion. In *Meyers*, the Court recognized that the Religious Freedom of Restoration Act (RFRA)[7] defines religion the same way that federal courts have defined religion under the First Amendment. *United States v. Meyers*, 906 F. Supp. 1494, 1499 (D. Wyo. 1995), *aff'd*, 95 F.3d 1475 (10th Cir. 1996). The Court cataloged many factors that courts have used to determine whether a set of beliefs qualifies as a religion subject to First Amendment analysis. *Id.* These factors are enumerated below.

"1) Ultimate Ideas: Religious beliefs often address fundamental questions about life, purpose, and death. As one court has put it, 'a religion addresses fundamental and ultimate questions having to do with deep and imponderable matters.' (Citing *Africa,* 662 F.2d at 1032). These matters may include existential matters, such as man's perception of life; ontological matters, such as man's sense of being; teleological matters, such as man's purpose in life; and cosmological matters, such as man's place in the universe.

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[7] This act was overturned as it relates to the states, but not the federal government. Since the University of Remington receives federal funding, the RFRA applies.

2) Metaphysical Beliefs: Religious beliefs often are ‘metaphysical’ that is, they address a reality which transcends the physical and immediately apparent world. Adherents to many religions believe that there is another dimension, place, mode, or temporality, and they often believe that these places are inhabited by spirits, souls, forces, deities, and other sorts of inchoate or intangible entities.
3) Moral or Ethical System: Religious beliefs often prescribe a particular manner of acting, or way of life, that is ‘moral’ or ‘ethical’. In other words, these beliefs often describe certain acts in normative terms, such as ‘right and wrong,” ‘good and evil,’ or ‘just and unjust.’ The beliefs then proscribe those acts that are ‘wrong,’ ‘evil,’ or ‘unjust.’ A moral or ethical belief structure also may create duties—duties often imposed by some higher power, force, or spirit—that require the believer to abnegate elemental self-interest.
4) Comprehensiveness of Beliefs: Another hallmark of ‘religious’ ideas is that they are comprehensive. More often than not, such beliefs provide a telos, an overarching array of beliefs that coalesce to provide the believer with answers to many, if not most, of the problems and concerns that confront humans. In other words, religious beliefs generally are not confined to one question or a single teaching. Citing *Africa,* 662 F.2d at 1035.
5) Accouterments of Religion: By analogy to many of the established or recognized religions, the presence of the following external signs may indicate that a particular set of beliefs is ‘religious’:

> a. Founder, Prophet, or Teacher: Many religions have been wholly founded or significantly influenced by a deity, teacher, seer, or prophet who is considered to be divine, enlightened, gifted, or blessed.
> b. Important Writings: Most religions embrace seminal, elemental, fundamental, or sacred writings. These writings often include creeds, tenets, precepts, parables, commandments, prayers, scriptures, catechisms, chants, rites, or mantras.
> c. Gathering Places: Many religions designate particular structures or places as sacred, holy, or significant. These sites often serve as gathering places for believers. They include physical structures, such as churches, mosques, temples, pyramids, synagogues, or shrines; and natural places, such as springs, rivers, forests, plains, or mountains.
> d. Keepers of Knowledge: Most religions have clergy, ministers, priests, reverends, monks, shamans, teachers, or sages. By virtue of their enlightenment, experience, education, or training, these people are keepers and purveyors of religious knowledge.
> e. Ceremonies and Rituals: Most religions include some form of ceremony, ritual, liturgy, sacrament, or protocol. These acts, statements, and movements are prescribed by the religion and are imbued with transcendent significance.

> f. Structure or Organization: Many religions have a congregation or group of believers who are led, supervised, or counseled by a hierarchy of teachers, clergy, sages, priests, etc.
> g. Holidays: As is etymologically evident, many religions celebrate, observe, or mark 'holy,' sacred, or important days, weeks, or months.
> h. Diet or Fasting: Religions often prescribe or prohibit the eating of certain foods and the drinking of certain liquids on particular days or during particular times.
> i. Appearance and Clothing: Some religions prescribe the manner in which believers should maintain their physical appearance, and other religions prescribe the type of clothing that believers should wear.
> j. Propagation: Most religious groups, thinking that they have something worthwhile or essential to offer non-believers, attempt to propagate their views and persuade others of their correctness. This is sometimes called "mission work," "witnessing," "converting," or proselytizing."

Id. at 1502.

Nevertheless, this court recognizes that it cannot rely solely on established or recognized religions to determine whether a new and unique set of beliefs merits inclusion. Thus, this court again emphasizes that no one of these factors is dispositive, and the factors should be seen as criteria that, if minimally satisfied, counsel the inclusion of beliefs within the term "religion." *Malnak v. Yogi*, 592 F.2d 197, 207 (3d Cir. 1979).

Perhaps because of its relatively small following, there is little precedent for whether the Church of Pastafarianism is a recognized religion. Though this court hesitates to decide whether Pastafarianism is a religion, the court must nonetheless make this distinction to determine whether Merten is protected by the First Amendment.

This court agrees with the District Court of Nebraska, that Pastafarianism is not a religion within the parameters of the relevant constitutional jurisprudence. *Cavanaugh*, 178 F. Supp. 3d 819. Rather, it is a parody of religion, intended to advance an argument about science, the evolution of life, and the place of religion in public health and safety. Those are important issues, and Pastafarianism contains a serious argument, but that does not mean that the trappings of the satire used to make that argument are entitled to heightened status of religious protection. Pastafarianism has been used as a political statement since its founding when the founder used the religion to argue the time allocation between evolution and intelligent design theory in science classes in public schools.

Therefore, the University of Remington did not violate Merten's First Amendment rights by denying him exemption to the University's vaccine requirement.

ORDER:

Both parties' motions for summary judgment on the Fourteenth Amendment affirmative action claim are denied. Remington's motion for summary judgment on the First Amendment claim is granted. This judgment is for liability only, with relief to be decided at a later hearing.

1. There is a genuine dispute of material fact regarding whether Remington's affirmative action policy violated Merten's Fourteenth Amendment rights.
2. Remington's Bovine-19 vaccine mandate did not violate Merten's First Amendment rights.

United States Court of Appeals
for the Fourteenth Circuit

No. 18-2005

JUSTIN MERTEN,

Plaintiff-Appellant/
Cross-Respondent,

v.

THE UNIVERSITY OF REMINGTON,

Defendant-Respondent/
Cross-Appellant.

Appeal from the United States District Court for the
Western District of Bascom.
No. 18-CV-2629 – Pinckney, *Judge*.

DECIDED AUGUST 4, 2022

Before MIFFLIN, *Chief Judge*, and GORHAM and CARROLL, *Circuit Judges*.

CARROLL, *Circuit Judge*.

I. STATEMENT OF FACTS

The District Court provided a comprehensive statement of the facts for this case, and we incorporate that statement in full. We also reviewed relevant Tweets, attached as Exhibit A, University of Remington School Newspaper clipping, attached as Exhibit B, and University Chancellor Statement, attached as Exhibit C.

II. PROCEDURAL POSTURE

Justin Merten, an applicant to the University of Remington for the fall 2021 term, sued the University of Remington ("Remington" or "University") for violating his Fourteenth Amendment and First Amendment rights with its Affirmative Action policy and vaccine mandate, respectively. Both parties moved for summary judgment on both claims. The District Court for the Western District of Bascom denied both parties' motions on the Fourteenth Amendment claim and granted the University's motion on the First Amendment claim. Both parties now appeal the District Court's decision as to the Fourteenth Amendment claim, and Merten appeals the District Court's decision as to the First Amendment claim.

We review the District Court's grant of summary judgment de novo, "applying the same legal standards as the district court and viewing all facts and reasonable inferences therefrom in the light most favorable to the nonmoving party." *T-Mobile Northeast LLC v. City Council of Newport News*, 674 F.3d 380, 384–85 (4th Cir. 2012).

III. FOURTEENTH AMENDMENT CLAIM

Merten and the University of Remington both appeal the District Court's order denying their cross-motions for summary judgment on the Fourteenth Amendment claim. Merten argues that the affirmative action policy Remington uses for admission decisions violates the Fourteenth Amendment's Equal Protection Clause. We agree, and accordingly, we reverse the denial of Merten's motion for summary judgment.

Race-based classifications are afforded Fourteenth Amendment protection. *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978); *see also United States v. Carolene Products*, 304 U.S. 144 (1938). The Fourteenth Amendment provides in part that "[n]o state shall make or enforce any law which … [denies] any person within its jurisdiction equal protection of the laws." U.S. Const. amend. XIV, § 1. The Fourteenth Amendment permits state decisions, such as affirmative action, to differentiate on the basis of race when the use of race meets the appropriate level of heightened judicial scrutiny. *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). The Supreme Court has held that courts must use strict scrutiny to determine whether a public college or university's use of race in admission decisions is permissible. *Fisher v. Univ. of Tex.*, 570 U.S. 297 (2013). Under strict scrutiny, a public college or university may only use race as a factor for admissions when the admission program is narrowly tailored to furthering a compelling governmental interest. *Id.* at 310. We incorporate the District Court's reasoning that Remington's stated goal of student body diversity is a compelling governmental interest.

The University of Remington's race-conscious admissions policy is not narrowly tailored to increasing the university's student body diversity. *Fisher*, 570 U.S. at 310 (2013). The narrow

tailoring requirement is not met if there is significant over-inclusion or under-inclusion. *Fullilove v. Klutznick*, 448 U.S. 448, 487 (1980). Here, Remington's Affirmative Action policy is underinclusive, as it increases diversity for African American and Latino students but decreases diversity for Asian American students. The parties concede that Remington's Affirmative Action policy has significantly decreased the enrollment of Asian American students. This disadvantages Asian American applicants like Merten in a way that the Equal Protection Clause is designed to prevent. U.S. Const. amend. XIV, § 1. The University's "tips" system improperly emphasizes subjective traits, which enables implicit biases against Asian American applicants to impact admissions decisions. Asian American applicants receive lower average scores for their personal and overall ratings than African American and Latino applicants because of the policy's subjectivity. Consequently, the rejection rate for Asian American students relative to the number of Asian American applicants is higher than the rate of rejection for any other racial group. Because the University's Affirmative Action policy is underinclusive, the policy is unconstitutional under strict scrutiny.

Each applicant should be judged as an individual rather than as a representative of their racial or ethnic group. Racial preferences in college admissions are unfair, unneeded, and unconstitutional. The purpose of the Civil Rights movement was to eliminate singling out people on the basis of race. Favoring one race necessarily disfavors another.

Thus, Remington's Affirmative Action policy is held unconstitutional under the Fourteenth Amendment's Equal Protection Clause. The District Court's denial of Merten's motion on the Affirmative Action claim is reversed.

IV. FIRST AMENDMENT FREE EXERCISE CLAIM

Merten appeals the District Court's order granting Remington summary judgment on the First Amendment Free Exercise claim. Merten argues that Remington's vaccine requirement violated his First Amendment rights. We agree with Merten, and accordingly, we reverse and grant Merten summary judgment as a matter of law.

Courts are tasked with deciding whether the avowed beliefs are (1) sincerely held, and (2) religious in nature, in the claimant's scheme of things. *United States v. Seeger*, 380 U.S. 163, 185 (1965). We agree with the District Court's assessment that Merten's avowed beliefs regarding Pastafarianism are sincerely held.

When determining whether the beliefs are religious in nature, courts may consider numerous factors. These include, but are not limited to, ultimate ideas, a moral or ethical system, and the

accouterments of religion. *United States v. Meyers*, 906 F. Supp. 1494, 1502 (D. Wyo. 1995), *aff'd*, 95 F.3d 1475 (10th Cir. 1996). Merten has provided copious evidence that Pastafarianism is a religion. For example, Pastafarians believe in the ultimate ideas of heaven and hell. They have the moral or ethical creation story regarding camels. Pastafarians even have accouterments of religion, including a Holy Book of central commandments, which contains five guidelines for "It's Better If You Do" and five guidelines for "It's Better If You Don't," and celebrating "Holiday." Because Merten's avowed beliefs meet these guidelines, the District Court's denial of summary judgment was improper.

In addition to protecting the free exercise of religion, the First Amendment also prohibits Congress from making a law that respects "an establishment of religion." U.S. Const. amend. I. The separation of church and state has become foundational to our free society. Permitting courts to decide that someone's avowed religious beliefs do not constitute a real religion, *see Seeger*, 380 U.S. 163, may delegitimize the person's beliefs in a way that the First Amendment aims to prevent.

For the foregoing reasons, the District Court's denial of Merten's motions for summary judgment on the Fourteenth Amendment and the First Amendment claims are **REVERSED.** Merten is granted summary judgment on both claims, with the question of relief and damages remanded to the District Court.

Mifflin, *Circuit Judge*, dissenting as to **Parts III and IV**:

The majority erroneously struck down the University of Remington's affirmative action policy and has set a dangerous precedent while doing so.

The majority states that the university's affirmative action program fails because it is not narrowly tailored to achieve student body diversity. However, narrow tailoring does not require the exhaustion of every conceivable race-neutral alternative; the school only must demonstrate it previously made a serious, good faith effort to achieve a race-neutral alternative. *Grutter v. Bollinger*, 539 U.S. 306 (2003). A university's good faith is presumed without a showing to the contrary. *Id.* at 321, (*citing Regents of Univ. of Cal. v. Bakke*, 438 U.S. at 318–19). The University of Remington had previously made a good faith effort to increase campus diversity by partnering with the Remington Community College in 2012 to allow community college students to matriculate to the university. Dean States has also revised the school's marketing tactics and

partnered with lower-income high schools to target different demographics. Thus, the school's admission policy is narrowly tailored to the goal of increasing racial diversity.

The social and policy impacts of this ruling should not be overlooked. The majority effectively overturns more than forty years of legal precedent that granted colleges and universities the freedom and flexibility to create diverse campus communities, impacting all race-conscious admission programs, not just the University of Remington's. This will likely reduce the number of African American and Latino students at nearly every selective college and graduate school, with more Asian American and white students gaining admission instead. Since college education provides a pipeline to leadership in our country, this decision will influence the types of people who will have access to those opportunities.

Anti-Asian American bias exists. However, anti-Asian bias cannot be taken as dispositive proof that affirmative action is anti-Asian.

Regarding the First Amendment claim, the majority failed to adequately address why Merten's beliefs about Pastafarianism are sincerely held. Although the truth of a belief must not be questioned, "there remains the significant question whether it is 'truly held.'" *United States v. Seeger*, 380 U.S. 163, 185 (1965). Each case requires a fact-based inquiry regarding the claimant's threshold of sincerity. *Id*. This is a question of fact for a jury to decide, and the majority improperly usurped the fact-finding role. Thus, I would have denied Merten's motion as to the Free Exercise claim.

Exhibit A: Tweets

Our affirmative action policy aims to promote diversity and remedy past harms. Each applicant must also comply with health requirements for the safety and wellbeing of all students and staff. Please see our website for more information about these and other school policies.

12:00 PM · Oct 26, 2021

256 Retweets **89** Quote Tweets **3,067** Likes

My son was wrongfully denied admission to Remington! He has the grades and the resume to get in, but because of an Anti-Asian admission policy, his spot was given away. Diversity isn't just about African American and Latino students! #Justice4Justin

2:35 PM · Sep 26, 2021

315 Retweets **64** Quote Tweets **4K** Likes

Remington makes exemptions to their vaccine requirement for genuine religious objections. They waived my requirement when I was applying! Pastafarianism isn't a real religion, and Merten doesn't get special treatment. #ImWithRem

3:03 PM · Sep 2, 2021

52 Retweets **14** Quote Tweets **755** Likes

Exhibit B: University of Remington School Newspaper Clipping

The Remington
HERALD

About Staff Newsletter

Remedying past harms or creating new ones?

The University prepares to face 2021 denied applicant Justin Merten in an upcoming Supreme Court showdown.

by Vanessa Navarro · October 28, 2022.

This coming term, the University of Remington will be heading to the Supreme Court in a battle against fall, 2021, denied applicant Justin Merten. Merten, originally from Burnsville, Remington, was a star athlete in high school. He led his team to a regional championship in track and field. Merten was also a quarter finalist for the Remington state qualifiers for his high school speech team. When Merten applied to the University, he thought he was a sure admit given his success in extracurriculars, despite his GPA and ACT being in the bottom third of the incoming class. Merten, an Asian-American, filed suit claiming he was discriminated against for his race.

Merten's primary contention is that the University admitted students with the same grades and same qualifications as him. The only difference, Merten claims, is their race. Merten claims that his seat was given to others because he is not a member of an underrepresented group. "This is a complete violation of my rights," Merten said. "Had I been born Hispanic, or Latinx I would have gotten in, but because I am an Asian American, I have a disadvantage. I was discriminated against," Merten continued.

Affirmative Action remains a hot button issue on campus with strong advocacy on both sides. Dean States, head of the University's diversity initiative, stated "The University of Remington has never considered race alone when deciding admissions. Rather, Remington interprets diversity holistically. This includes admitting students with different political perspectives, socio-economic backgrounds, cultural backgrounds, and life experiences." Professor Yecker of the University of Remington Law School disagrees with the University's use of affirmative action. Professor Yecker gave a statement to the Remington Herald: "The reasons the University has given for their affirmative action plan are nothing more than pretext for race-based admissions, and thus discrimination."

Students are split on the issue. Connor Wick commented that affirmative action might be doing more harm than good, “I think affirmative action creates a stigma that some individuals were only admitted because of their race. I think everyone on campus is super smart. This is the top public college in the state, and everyone got the grades to be here. Having a stigma for the reason people are here might hurt them psychologically.” Juan Mendez disagrees, “We need a diverse student body where everyone benefits from the different perspectives in the classroom. I have learned so much from peers in my classrooms. Not only that, but affirmative action in college admissions can improve the representation of historically excluded groups.”

The Supreme Court is set to hear arguments on February 17th. The Remington Herald will provide live updates during oral argument. But for now, the fate of affirmative action is up in the air.

“No government ought to be without censors: and where the press is free, no one ever will.” - Thomas Jefferson

This article was published on 12/1/2022

Exhibit C: University Chancellor Statement

University of Remington
NEWS

Explore Topics Campus News

Chancellor statement on legal challenge to university's vaccine mandate

November 4, 2022

Chancellor Danielle Thompson shared the following statement on Nov. 4.

The Bovine-19 pandemic is an ongoing global pandemic of the Bovine-19 disease. The novel virus was first identified from an outbreak in the Great Plains Region of the United States in December of 2019. The World Health Organization declared the outbreak of Bovine-19 as a public health emergency of international concern in January of 2020 and a pandemic in March of 2020. As of November 1, 2022, the pandemic had caused more than 638 million cases and 6.62 million confirmed deaths, making it one of the deadliest in history.

The University of Remington prides itself on being a national leader in creating safe working and learning environments. The ability to provide high quality education, research, and creative experiences remains our top priority. Widespread vaccination is the primary and most effective tool to protect our community while advancing our educational mission. The Bovine-19 vaccine has been proven safe and effective in reducing severe disease and death from the virus.

Following the recommendations of our nation's leading health experts, the University decided to require the Bovine-19 vaccine for faculty and students. We concluded that a vaccine mandate was the most appropriate course of action. This decision did not come lightly. It was based on guidance from our own Health and Well-Being Working Group as well as the American College Health Association recommendation that all on-campus college students be required to be vaccinated. Requiring students to be vaccinated against Bovine-19 was an important addition to our health policies, and one that we believe has enhanced campus safety. Receiving the Bovine-19 vaccine is a key step people can take to protect themselves, their friends and family, and our campus community. The University of Remington remains sensitive to individuals' specific circumstances and continues to provide exemptions for medical and religious reasons.

Any individual requesting an exemption must submit an accommodation request form along with appropriate documentation for approval.

The University of Remington has a global footprint, with students coming from all over the world to join our classrooms. Students have various health backgrounds and susceptibility to Bovine-19. Our vaccine mandate is meant to create equitable access for all our students.

The University fosters a dynamic and engaging environment. The proximity of students to one another should not be a risk, but rather a benefit to their health and learning environment. This is particularly unique to college campuses, given the close living quarters in which many students live. Remington's primary responsibility is to educate students, which is simply not possible if students are ill.

We were pleased to learn the District Court correctly upheld our health policy. This is an immeasurable benefit to faculty and students, particularly those who are the most vulnerable to severe cases of Bovine-19. The District Court acknowledged that the university has a right to legitimize an applicant's religious exemption. This crucial acknowledgement allows the University to continue to protect its students.

We thank our students, faculty, and staff for continuing to work with us during these unpredictable times. For any questions on where to get vaccinated, or more information on the safety of vaccines, contact student health services at studenthealth@remington.edu.

Sincerely,
Chancellor Thompson