

## FAQs

### *1) What are the core legal issues that the lawsuit is based on?*

There are three core issues:

**A. The First Amendment** protects religious freedom and the autonomy of religious organizations like Bishop O’Gorman in carrying their unique religious missions. The Supreme Court has repeatedly affirmed that religious institutions enjoy autonomy with respect to internal management decisions that are essential to their central mission. The Court has also affirmed that a component of that autonomy is the selection of individuals who play key roles. The recent decision in *Our Lady of Guadalupe School v. Morrissey-Berru* affirms that Catholic schools have an autonomy in employing teachers as they (teachers) are critical to the mission of transmitting the Faith to the students. The same is true of other critical staff members without whom we cannot function. More broadly, Catholic schools enjoy an autonomy with regard to their own internal management decisions. The ETS, however, intrudes on this autonomy that the First Amendment affords to religious institutions.

**B. The Religious Freedom Restoration Act (RFRA)** also places a high hurdle for the government before it substantially burdens the exercise of religion. RFRA protects not just individual Catholics but also Catholic apostolates and schools. Under RFRA, the government substantially burdens an individual’s exercise of religion if it presents a choice between modifying one’s belief and facing severe penalties. OSHA will substantially burden the Bishop O’Gorman’s exercise of our Catholic faith.

The RFRA also requires the government to justify this intrusion on religious exercise under the “strict scrutiny” test, an exceedingly high bar. The government bears the burden to show that there is a compelling government interest and that it is using a narrowly tailored method to further that interest. OSHA’s sweeping mandate is not narrowly tailored.

**C.** There are other important **structural limits** on the federal government. In our civil society, we are governed by a government of laws, not of men. Thus, the federal government is a government of enumerated powers. Under the Commerce Clause of the Constitution, Congress does not have the power to force individual citizens to submit to medical procedures like vaccinations. And even if it did, Congress could not have delegated such a sweeping authority away to OSHA such that it (OSHA) could unilaterally characterize some employees as workplace hazards. These structural protections are just as crucial to protecting the freedom of religious institutions as the First Amendment or RFRA.

### *2) What is the purpose of the lawsuit the Bishop O’Gorman has filed against OSHA?*

To preserve the legal protections that have been set forth in federal law for the benefit of entities such as Bishop O’Gorman. Therefore, Bishop O’Gorman is asking the Court to affirm that Catholic schools have a constitutional and statutory right to apply Church teachings in its employment practices and policies and to promote the use of right reason among its employees by asserting that,

- i. As a general rule, free and informed consent is required prior to all medical treatments and procedures, including vaccination.
- ii. All individuals have the right to freely follow their conscience and must not be forced to act contrary to their conscience, i.e., to be compelled to do something they believe to be wrong. Nor must they be prevented from acting according to their consciences, especially in religious matters, provided that just public order can be respected.

- iii. The right to freedom of conscience and religious freedom is based on the inherent dignity of the human person.

### **3) *Why are the Bishop O’Gorman schools weighing in on the complicated topic of vaccines?***

Bishop O’Gorman has not sought out this issue. In fact, the federal government chose to exercise its authority in an effort to compel behaviors of employers, including religious nonprofit employers such as Bishop O’Gorman and, in turn, individual citizens. It has done so by levying the burden of fines against the employer the magnitude of which would be financially devastating to the employers.

In seeking remedy from the Court, Bishop O’Gorman is advocating for principles that are rooted in the gifts of reason, free will, and faith that God has given each of us. Bishop O’Gorman is simply affirming two consistent and important theological truths:

- i. it is *permissible* to get the vaccine under certain circumstances, *and*
- ii. it is *permissible* for people of good faith to object in obedience of their well-formed conscience.

Bishop O’Gorman affirms that the choice to be vaccinated is a personal decision. Without disregarding each person’s obligation to the common good, people of good faith can choose to be vaccinated or choose to remain unvaccinated. These choices should be respected; the federal government has not been given the authority by the people to make that choice for American workers.

### **4) *Are the Bishop O’Gorman schools “anti-vaccine”?***

Absolutely not. Per the accompanying statement, Bishop O’Gorman sees a tremendous good that has come from the development and utilization of the COVID-19 vaccinations.

In fact, Bishop O’Gorman has employees who have received the COVID-19 vaccine and others who have not. This case is simply about the government stepping in and telling Bishop O’Gorman how it must make its own personnel decisions. The lawsuit has been filed on the basis that we believe this use of government authority to be unlawful.

### **5) *Are the Bishop O’Gorman Schools out of step with Pope Francis?***

No. Although the Pope has encouraged Catholics to get the COVID-19 vaccine, the Vatican—with the Pope’s approval—also noted that vaccination must be voluntary. More importantly, this is about the government stepping in and telling religious organizations who they can and can’t hire and who they must fire, or be subject to enormous punitive fines. We respect our employees’ consciences—as Catholic teaching requires us to do—and cannot allow the government to step in and make these decisions for our employees. Consistent with Pope Francis, Bishop O’Gorman may encourage the use of vaccinations but cannot require their use. This is the essential distinction that the federal government has failed to uphold.

Therefore, in making the decision to participate in this lawsuit, Bishop O’Gorman is demonstrating proper respect for the religious or conscience-based conclusions made by its employees. Hence, Bishop O’Gorman is in step with Catholic teaching, including on the importance of conscience.

### **6) *Isn’t weekly testing a reasonable accommodation?***

No. To accept it as a reasonable accommodation is to concede that the federal government’s authority should extend into directing the personnel practices of Bishop O’Gorman. And as discussed previously, religious institutions enjoy autonomy with respect to internal management decisions that are essential to their central mission. In every instance where testing is done during the school day, Bishop O’Gorman must provide a substitute during that absence. That absence restricts the ability of that individual to freely share their faith and harms the overall mission of Bishop O’Gorman. We seek relief from the Court because the federal government is attempting to overreach its authority.

The practicalities of the accommodation, when quantified, are not reasonable. First, they require the Bishop O’Gorman to obtain personal health information about its employees. This intrudes on the employee-employer relationship. Secondly, there is actual costs involved with having to pay for weekly testing and to provide paid time off to go obtain the testing. Thirdly, the accommodation comes with it the requirement of having to wear a mask while at the worksite. This raises issues of discrimination and concerns over judgements being made about employees and/or their personal decisions to not receive a vaccination. This is particularly relevant given the data that shows natural immunity is effective at warding off subsequent infections.

**7) *What is the role of a well-formed conscience?***

Conscience is especially important for Catholics, and Catholics are bound to obey their well-formed conscience. Consistent with this teaching, and also federal law, Bishop O’Gorman respects employees’ freedoms regarding their medical decisions. OSHA commandeers Bishop O’Gorman into an illegitimate arm of the government that intrudes on people’s medical privacy. Bishop O’Gorman cannot and will not do that.

**8) *Why is the Bishop O’Gorman Schools filing suit and not the Diocese?***

The ETS only applies to employers who have 100 employees or more. Bishop O’Gorman is the only employer in the Diocese under the administrative authority of the Bishop (parishes, schools, retreat centers, etc.) that has over 100 employees.

Having said that, OSHA has explained that the ability of employers to administer its requirement is the rationale for the 100 employee requirement. It goes on to state that the agency is taking additional time to study the feasibility of smaller employer groups to implement the requirement. Thus, other Diocesan and parish ministries may face the same requirement at a later point.

**9) *What about vaccination requirements for students?***

There is no burden placed on schools in South Dakota law. Instead, the burden is placed on students (SDCL 13-28-7.1). This distinction is critical as the ETS places the burden unto Bishop O’Gorman as an employer. This is a misuse of federal authority.

In addition, consistent with the joint teaching letter issued by the Bishops of South Dakota, Bishop DeGrood has directed that the religious exemption allowed for in South Dakota law be acknowledged by our Catholic schools, provided the parents have demonstrated a serious reasons for refusing immunization against dangerous contagious diseases. These reasons must be considered with a proper Christian concern for personal health, the health of children and others who are vulnerable, public health, and the common good.

**10) *What about requirements by other Catholic employers that their employees be vaccinated?***

An essential distinction is that requirements announced by other Catholic employers prior to the ETS taking effect, as private employers, they chose freely to require their employees to become vaccinated. Their decision to require vaccinations was not issued in response to a government mandate. As has been stated above, the lawsuit was filed in response to the federal government’s unlawful use of authority. It was not filed on the basis of vaccines.