



June 17, 2018

[Trustee Name/Address Block]

Dear [Trustee],

On behalf of the Officers and Board of [Sycamore Trust](#), I attach a [Petition](#) from alumni and others of the Notre Dame family urging you to:

- (1) End promptly the provision of abortifacients and contraceptives by the University's insurers to its students and employees;
- 2) Adhere to the University's long-standing policy against covering contraceptives in its health insurance programs; and
- (3) End promptly the University's enabling employees to secure cut-rate abortifacients through the University's Flexible Savings Program.

We also attach an "[Open Letter to Father Jenkins from Notre Dame Alumni Attorneys](#)" respecting what they term "a collection of apparent flat-out misrepresentations" by the University to the courts in the Obamacare mandate litigation. The signatories call for a judicial inquiry in the absence of an exculpatory explanation.

We continue to collect signatures on both documents – there are at the moment 1,158 on the first and 110 attorneys on the second – but we send them to you now because contraceptives are scheduled to be included in the employee program next month and in the student program in August.

The imminence of the July date prompts us also to suggest that, if you need additional time, you take whatever steps your lawyers prescribe to forestall objections if you remove contraceptives after the new policies go into effect.

The question of inclusion of contraceptives in the University's health insurance programs is straightforward and, we think, really rhetorical. It is:

Should Notre Dame of its own accord put in the hands of its employees and students the means to commit actions the Catholic Church teaches are gravely sinful – both contraception and the illicit sex it facilitates?

Your choice is between the policy Dr. Affleck-Graves swore to the courts was Notre Dame's and the directly opposite policy Father Jenkins has announced.

guardian of the grotto

Compare,

Dr. Affleck-Graves, affidavit of December 9, 2013: “Notre Dame’s Catholic beliefs prohibit it from paying for, facilitating access to, and/or becoming entangled in the provision of abortion-producing products, contraceptives, or sterilization.

With,

Father Jenkins’s statement of February 7, 2018: “The University will provide coverage in the University’s own insurance plans for simple contraceptives.”

We leave largely to the Petition the reasons why Notre Dame, as a Catholic school, should adhere to its long-standing policy against covering contraceptives in its health insurance programs. We do urge you to examine also our recent bulletins, “[Conveniently Blind](#)” and “[School For Scandal](#),” disclosing that, contrary to Father Jenkins’s representation, Notre Dame’s programs will cover many contraceptives that cause abortions; that the scandal will be exacerbated by the prescription and provision of contraceptives on campus; and that the student reaction has included the distribution of over a thousand contraceptives on campus and demands for full availability of contraceptives to all students.

In addition, we think the data showing the sexually charged environment at the University are pertinent to the University’s tolerance of fornication that would be implied by its supplying contraceptives to students. If you have been given the University’s most recent “Sexual Climate” survey, you will have seen that responses from somewhat less than half of the students reported 91 rapes during the preceding twelve months, or about 10 a month assuming they occurred during the school year. “Deeply troubling” indeed, as the University said.

But there is more to be said about the evident abuse of the judicial process by the University than is in the lawyer’s Open Letter, and we think we should say it since you are responsible for preserving the University’s integrity and since there is the real prospect of a judicial inquiry, as we show later.

We think it clear that Father Jenkins’s actions since the Trump administration settled with Notre Dame last year demonstrate that the affidavit of Dr. Affleck-Graves and the representations of counsel were false, whether they knew it or not. Those multiple representations were, in short, that a “deeply and sincerely held core tenet of Notre Dame’s religion” is that contraception is a “serious moral wrong,” and that accordingly “Notre Dame’s Catholic beliefs prohibit it from facilitating access to contraception.”

This description of University policy cannot be squared with Father Jenkins's refusal to this day to accept the exemption tendered by the Trump administration last October in settlement of the litigation. The University has thereby compelled its insurers to continue providing free contraceptives notwithstanding its professions to the court that its “deeply and sincerely held Catholic beliefs prohibit it” from doing just that.



And now Father Jenkins proposes in effect to double down in flouting the University's representations by having the University itself provide the contraceptives.

Why would Notre Dame launch such a pretend lawsuit? We believe the answer lies in events in the closing months of 2013 that were not, but should have been, disclosed to the court. Here is what happened:

When the Obama Administration proposed the so-called “accommodation” amendments to the regulations in 2012 in an attempt to pacify religious organizations, the USCCB and many others weighed in against them, so when they became final in June of 2013 scores of religious organizations were poised to, and did, sue.

But not Notre Dame. It did not renew the lawsuit it had brought before the “accommodation.” Instead, it quietly decided to comply. The University advised employees in an October 9 description of the 2014 insurance program, “Our third party administrator, Meritain Health, will be offering contraception coverage” and “will be providing information directly to eligible members.”

Less than two months later, however, the University reversed itself. It sued on December 3, just before the regulations went into effect on January 1, 2014.

Why did it do that? The answer, we believe, is that Father Jenkins attended the November meeting of the USCCB where some leading bishops urged him to have Notre Dame, the country’s most prominent Catholic university, join the litigation.

We believe this to be true based on multiple sources and Father Jenkins's silence when we put the question to him, most recently in this February 12, 2018, message from Bill Dempsey:

Dear Father Jenkins,

I am assembling facts pertinent to a possible Rule 11 proceeding, and I want to be sure I have given you an adequate opportunity to comment where appropriate. My understanding is that you attended the U.S. Bishops’ General Assembly in Baltimore in November of 2013 and that one or more of the participants urged you to have Notre Dame institute a lawsuit challenging the Obamacare mandate. I am confident about this; but, as I say, I want you to have an opportunity to respond if you wish.

This episode should have been disclosed to Judge Simon when he pressed for an explanation of Notre Dame’s long delay in filing suit. He would doubtless have been even more insistent if he had known that the University had decided to comply less than two months before.

Instead, Notre Dame submitted another affidavit by Dr. Affleck-Graves in which he cited the complexity of the issues and uncertainty about the insurers’ plans, none of which impressed Judge Simon. In his opinion denying Notre Dame an injunction, he said, “The affidavit detailing excuses for the late filing of this lawsuit are frankly a little hard to swallow.”



The short of it is that, in reversing his decision to comply with the mandate, Father Jenkins changed his position but evidently not his mind.

And there is still more to support that conclusion. It is suggestive, for example, that Dr. Affleck-Graves rather than Father Jenkins swore to the affidavit submitted to the court.

Then, after the court refused to grant an injunction, Father Jenkins contradicted Dr. Affleck-Graves in declaring, "[I don't see this as a scandal because we are not giving out contraceptives.](#)" That was the government's argument.

Finally, Father Jenkins's effort to explain why he has decided to do what the University told the court it could never do in good conscience is revelatory.

In his letter of February 7, to faculty, he said: "Some will ask why the University sued the government over the provision of contraceptive drugs and services only now to provide contraceptives in its plan. What we sincerely and firmly fought for in court was the ability, as a Catholic institution, to make decisions about the provision of health care consistent with Catholic principles."

But that is not what Notre Dame told the court it would "fight for." The notion that the government must simply leave to Notre Dame the "decisions about the provision of health care" is frivolous. What Notre Dame alleged was that the mandate imposed a "substantial burden" on the exercise of its religion – the statutory standard – not that it might, much less that it was none of the government's business. And what "some will ask" is why the provision of contraceptives is suddenly no burden at all.

We have gone into detail on this question of misrepresentation both because of its importance and because we want you to know what we would say in suggesting to the court a Rule 11 inquiry should it come to that, which we surely hope it does not.

A concluding word about Rule 11: Rule 11 of the Federal Rules of Civil Procedure authorizes a federal court to inquire into whether a party has been guilty of misrepresentations to the court and to impose sanctions if it has. While we were not parties to the litigation and do not have standing to file a motion, we can bring the matter to the attention of Judge Simon for the 100-plus Notre Dame alumni attorneys and he can take action on his own if he wishes.

Moreover, we would of course provide our submission to counsel for the parties, who would have standing to file a Rule 11 motion. Those parties were the Secretary of Health and Human Services and several Notre Dame graduate students represented by Americans United for Separation of Church and State.

We should note that Americans United knew, as Judge Simon did not, that Notre Dame reversed position at the end of 2013. Questioning Notre Dame's sincerity, the American United lawyer, Gregory Lipper, raised the point in questioning Notre Dame's sincerity in the Court of Appeals; and in a recent essay in "Law, Religion, and Health in the United States" (p.6) he recounted

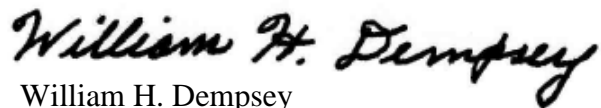


Father Jenkins's calling the accommodation a "welcome step" and saying that "going along" with it would not "compromise our conscience," and he related how Notre Dame had in fact "gone along" in October of 2013 only to sue in December. He thought the urging of "a powerful alumni group" might have been the reason. He would doubtless be interested in the real reason.

We close by reminding you of the "[strong objection](#)" to Father Jenkins's decision by Notre Dame's bishop, the Most Rev. Kevin C. Rhoades. And Cardinal James Dolan, who may have been among those who spoke to Father Jenkins in Baltimore as chair of the USCCB, was "[baffled](#)" by Notre Dame's "It wasn't all that important to us, anyway" attitude.

The Fellows of the University are expressly charged by its statutes with maintaining its Catholic identity, and the Trustees' fiduciary duty is to secure Notre Dame's Mission as a Catholic university. The issues raised here implicate important questions of institutional integrity and cooperation with grave evil. We urge you to keep faith with both Church and State by ratifying Dr. Affleck-Graves's representations to the court as the past, present, and future policy of the University of Notre Dame.

Respectfully,



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President
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On behalf of the Officers and Directors of Sycamore Trust:

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