

AN OPEN LETTER TO FATHER JENKINS
FROM NOTRE DAME ALUMNI ATTORNEYS

Dear Father Jenkins:

We write as attorneys and Notre Dame alumni out of deep concern over what appears to be abuse by the university of the judicial process in its legal challenge to the Obamacare abortifacient/contraceptive mandate. This is a serious matter, and we do not believe it should simply be allowed to pass. If there is an explanation, it should be given. If there is not, appropriate action should be taken to prevent a recurrence and to restore the university's reputation with the courts and the public.

If a judicial inquiry is appropriate, it should be held.

The problem, as you know, came to light when, in the wake of the Trump administration's offering Notre Dame what it had sought in the litigation – an exemption from the mandate – the University instead announced that its health plan contractors would continue providing free abortifacients and contraceptives to its students and employees. It is voluntarily continuing under the "accommodation" procedure that it sued to enjoin. It is now doing voluntarily precisely what it said it could not do in good conscience and without giving scandal, particularly to its students.

The representations to the courts that now appear to have been false were forceful, multiple, and essential. They were designed to show in the strongest possible language that the mandate imposed a substantial burden on Notre Dame's religious liberty. Unless it did, Notre Dame had no business in court.

These representations appeared in the affidavit of Dr. John Affleck Graves, Executive Vice President of the university. He described with considerable eloquence how the mandate required actions contrary to the conscience of an authentically Catholic university. Unfortunately, that school turns out not to be Notre Dame.

Here are key extracts:

I, John Affleck-Graves, being duly sworn, declare and state as follows:

10. Notre Dame provides a distinctive voice in higher education that is at once rigorously intellectual and unapologetically committed to the moral principles and ethics of the Catholic Church.

12. In accordance with the Ex Corde Ecclesiae, Notre Dame believes and teaches that "besides the teaching, research and services common to all Universities," it must "bring[] to its task the inspiration and light of the Christian message." "Catholic teaching and discipline are to influence all university activities," and "[a]ny official action or commitment of the University [must] be in accord with its Catholic identity." "In a word, being both a University and Catholic, it must be both a community of scholars representing various branches of human knowledge, and an academic institution in which Catholicism is vitally present and operative."

14. One outgrowth of belief in human life and dignity is the Church's well – established belief that “[h]uman life must be respected and protected absolutely from the moment of conception.” CCC 2270. As a result, the Church believes that abortion is prohibited and that it cannot facilitate, endorse, or appear to endorse the provision of abortion-inducing products. CCC 2271 – 72.

17. It is a core tenet of Notre Dame's religion that abortion, contraception, and sterilization are serious moral wrongs.

18. Notre Dame's religious beliefs regarding the sanctity of human life and the dignity of all persons are deeply and sincerely held.

19. Additionally, the Catholic moral tradition forbids “scandal,” which in the theological context is defined as encouraging by words or example other persons to engage in wrongdoing. “Scandal is an attitude or behavior which leads another to do evil. The person who gives scandal becomes his neighbor's tempter.” CCC 2284. Scandal is particularly grave when associated with those “who by nature or office are obliged to teach and educate others.” CCC 2285. Scandal in this sense can be caused not only when an individual or institution deliberately acts to commit or condone some wrongdoing, but also when it appears to do so through its actions. It is Notre Dame's sincerely held religious belief that it cannot become entangled with, or appear to facilitate, endorse, or accept, that which it believes to be contrary to Catholic faith.

20. Notre Dame's Catholic beliefs, therefore, prohibit it from paying for, facilitating access to, and/or becoming entangled in the provision of abortion-inducing products, contraception, sterilization, or related counseling (the “objectionable products and services”).

42. Thus, the U.S. Government Mandate, even in its revised form, forces Notre Dame to violate its religious beliefs by making Notre Dame the vehicle by which “free” abortion-inducing products, contraception, sterilization, and related counseling would be delivered to Notre Dame's employees and students. The U.S. Government Mandate violates Notre Dame's right of conscience by forcing it to participate in an employer – based scheme to provide insurance coverage to which it strenuously objects on moral and religious grounds.

46. Some have argued that the accommodation in the Final Rule does not compel Notre Dame to act against its beliefs because third parties are purportedly “arranging” the “payments.” However, what is germane is that in both scenarios, Notre Dame's decision to provide a group health plan, and execution of the self – certification, triggers the provision of “free” objectionable coverage to Notre Dame's employees in a manner contrary to its beliefs. The provision of the objectionable products and services is directly tied to Notre Dame's insurance policies and Notre Dame's self – certification, and the objectionable “payments” are available only so long as an employee or student is on Notre Dame's health plans. Thus, Notre Dame's employee and student health plans are the vehicle by which “free” abortion-inducing

products, contraception, sterilization, and related counseling would be delivered to Notre Dame's employees and students.

47. Moreover, the Final Rule compels Notre Dame to pay for, facilitate access to, and/or become entangled in the provision of objectionable drugs and services in ways that will lead many to think Notre Dame condones these services, and hence undermines the role of Notre Dame, a Catholic educational institution, to educate others on a matter of religious and moral significance. It is incumbent upon Notre Dame to extricate itself from any process that leads others to violate the faith. The accommodation does not extricate Notre Dame from the process. The Mandate and its "accommodation" would thus involve Notre Dame in scandal in a manner that would violate its religious beliefs.

50. Similarly, to avoid scandal, Notre Dame cannot appear to endorse the litany of concepts that underlie the U.S. Government Mandate and that are contrary to its religious beliefs: e.g. , (i) that it is a moral societal goal to encourage a reduction in the overall cost of health care by reducing the number of mothers or children who may require expensive post childbirth care, (ii) that pregnancy is a condition for which there should be "preventive services", and (iii) that increased access to contraception, sterilization, and/or abortion – inducing drugs as proposed by the Government necessarily improves public health.

51. It is Notre Dame's sincerely held religious belief that it cannot become entangled with, or appear to facilitate, endorse, or accept, that which it believes to be contrary to the Catholic faith. The U.S. Government Mandate requires Notre Dame to subsidize the objectionable products and services and directly participate in a way that causes scandal. **Thus, Notre Dame believes that its participation in the U.S. Government Mandate would cause scandal and therefore Notre Dame cannot comply with the Mandate consistent with its religious beliefs.**

54. Because of its religious beliefs, Notre Dame believes that it may not pay for, facilitate access to, and/or become entangled with the provision of contraception, sterilization, abortion, or related counseling, including by contracting with a third party that will, as a result, provide or procure the objectionable products and services for Notre Dame's employees and students.

57. The U.S. Government Mandate, therefore, imposes a substantial burden on Notre Dame's religious beliefs.

/s/ John Affleck Graves
JOHN AFFLECK GRAVES
STATE OF INDIANA
COUNTY OF SOUTH BEND

Sworn to and subscribed before me this 9th day of December, 2013

This now appears to be a collection of flat-out misrepresentations. Notre Dame by all appearances took the time of the courts and the government with a pretend lawsuit.

To be sure, there was before this reason to doubt the depth of the University's commitment. At the outset, the trial judge was skeptical of the University's explanation of why it brought suit at the last minute after having announced that it would comply with the mandate.

Then, when Notre Dame decided to comply with the mandate after having been denied a restraining order, you said in a student town hall meeting, "I don't see this as a scandal because we are not giving out contraceptives," which was precisely the government's position.

Finally and most telling, the University established a student health insurance program with the mandate when it was under no legal obligation to do so, as it was with respect to employees. Notre Dame's counsel told the court s it did this out of "competitive necessity," which scarcely helped.

But nothing signaled complete repudiation by the University of all it had so earnestly sworn to the courts. If, then, there is some explanation that will absolve the University from the charge of playing fast and loose with the courts or mitigate to some degree its blame, we urge you to provide it.

If there is not, then the matter seems to us to be quite serious enough to demand action by the Fellows or the Board of Trustees. It will be brought to their attention in due course. Remedial action should be taken, an accounting given to the Notre Dame community, and thoughtful consideration given to how amends might be made to the courts.

As to concrete measures, the most obvious and effective would be to exercise the right given the University by the government to end the provision of abortifacients and contraceptives to students and employees, as you indicated initially you would do. This would rehabilitate the lawsuit insofar as is possible and would rescue Notre Dame and individuals in governance from being complicit with evil in the way so powerfully described by Dr. Affleck-Graves. As matters stand, it is because of Notre Dame that students and employees receive abortifacients and contraceptives. . The moral responsibility for the consequent abortions and use of contraceptives is what Dr. Affleck-Graves was talking about.

Though we hope it does not come to it, Rule 11 of the Federal Rules of Civil Procedure does provide a means for federal courts to determine if there have been misrepresentations by litigants and, if so, what to do about it. A court can invoke the procedure on its own initiative. Given the wide publicity accorded the university's turnabout, Court of Appeals judges Hamilton and Flaum and District Judge Simon (Judge Posner having retired) might think a Rule 11 hearing desirable. Presumably you would welcome this if it would show that Notre Dame had acted with propriety throughout.

We end as we began, with a profession of our deep concern over what appears to be a misuse of the judicial system by our alma mater. We seek an exculpatory explanation or,

failing that, remedial action to restore a proper relationship between Notre Dame and the courts.

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