

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 so, as it was with respect to employees. Notre Dame's counsel told the courts 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 the attention of the Fellows and 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 embrace the government's proffer of an exemption and end the provision of abortifacients and contraceptives to student 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, the University plays an essential role in the provision of abortifacients and contraceptives to students and employees. The moral responsibility for the consequent abortions and use of contraceptives is what Dr. Affleck-Graves was talking about.

We conclude with several ancillary points.

First, we do not question Dr. Affleck-Graves's sincerity. It appears, rather, that whoever in governance is in charge of this matter – whether you, the Fellows, or the board – did not share his convictions. It may be suggestive that Dr. Affleck-Graves, the third ranking university officer, signed the affidavit rather than you or Provost Burish.

Nor do we suggest that Jones Day, Notre Dame's law firm and one of the nation's finest, is in any way at fault. Jones Day deserves high praise for representing a number of plaintiffs in these cases with skill and dedication and at what has doubtless been great cost. For our part, had we represented Notre Dame we would think it poor recompense for the University to turn down what we had won for it and to becloud the legitimacy of the lawsuit we had brought at its behest.

Finally, 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 appropriate. 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.

Edmund J. Adams
Notre Dame Law School 1963

Noel J. Augustyn
Notre Dame Law School 1974

(Rev.) Gerald J. Bednar, J.D., Ph.D.
Notre Dame Law School 1974

David P. Bender, Jr.
Notre Dame 1978
Southwestern Law School 1985

John M. Bowens
Notre Dame 1970
Georgetown Law Center 1973

Thomas J. Burger
Notre Dame 1982
Notre Dame Law School 1986)

William C. Burtis, Jr.
Notre Dame 1959
Cornell University Law School 1962

Michael T. Carroll
Notre Dame 1968, 1972 (MBA)
Cleveland Marshall Law School 1977
John Marshall Law School 2003, 2006 (LLMs)

Robert Emmett Cater
Notre Dame 1952
St. Mary's University Law School 1961

Gabrielle Arrieh Comeaux
Notre Dame 1988
Georgetown University Law Center 1991

Neil B. Connelly
Notre Dame 1974
New England School of Law 1979

Charles Cruikshank
Notre Dame 1963
Gonzaga University Law School 1975

William H. Dempsey
Notre Dame 1952
Yale Law School 1955

Thomas M. Dixon
Notre Dame 1984
Notre Dame Law School 1993

William J. Dolan
Notre Dame Law School 1974

Thomas E. Dugan 1972
Marquette University Law School 1978

David B. Ermine
Notre Dame 1989
University of Pennsylvania Law School 1995

S. Marc Flannery
Notre Dame 1974
University of San Francisco School of Law 1980

Alfred Eric Gade
Notre Dame 1960
University of Michigan Law School 1963

John P. Ginty
Notre Dame 1988
Rutgers Law School 2003

John W. Graves
Notre Dame 1957
University of Kentucky Law School 1963

Michael Green
Notre Dame Law School 1996

David G. Hemminger
Notre Dame Law School 1965

Thomas M. Hicks
Notre Dame MBA 1986
Southwestern University School of Law 1994

Timothy E. Kapshandy
Notre Dame Law School 1981

Marisela B. Kapshandy
Notre Dame Law School 1981

Daniel J. Kelly
Notre Dame 1994
Ave Maria School of Law 2003

Katherine Kersten
Notre Dame 1973
University of Minnesota Law School 1982

Elizabeth Kirk
Notre Dame Law School 1996

William W. Kirk
Notre Dame 1984
Notre Dame Law School 1991

John A. Klebba
Notre Dame Law School 1983

David M. Kothman
Notre Dame 1982

John M. Lamberti
Notre Dame 1963
Suffolk Law School 1968

Phillip K. Lauro
Notre Dame 1989
Georgetown University Law Center 1992

John E. Madigan
Notre Dame 1984
Vanderbilt School of Law 1987

Richard P. Maggi
Notre Dame 1973
Seton Hall University Law School 1976

Steven Martinek
Notre Dame 1971
Notre Dame Law School 1974

Marcia M. McBrien
Notre Dame 1981
University of Michigan Law School 1987

David J. McCarthy
Notre Dame 1974
George Mason Law School 1980

Anne McDonald
Notre Dame Law School 2018

John J. McHugh, III
Notre Dame 1973
Notre Dame Law School 1976

Robert A. Michalak
Notre Dame 1967
Loyola University Chicago School of Law

John Melia Kennedy
Notre Dame BSME, 1956
Fordham Law School 1965

Christina K. Mooney
Notre Dame 1978
University of Cincinnati Law School 1981

Martin E. Mooney
Notre Dame Law School 1976

Lawrence H. Kyte, Jr,
Notre Dame 1960
University of Virginia Law School 1963

William L. LaBre
Notre Dame Law School 1977

Dennis S. Makin
Notre Dame 1966
Notre Dame Law School 1969

Kevin McCarthy
Notre Dame 1970
Indiana University Law School 1973

Francis X. Meaney
Notre Dame 1954
Harvard Law School 1960

Rev. Scott Medlock
Notre Dame 1977
Notre Dame Law School 1983

Paul Noland
Notre Dame 1956
De Paul University School of Law 1963

Michael D. Novy
Notre Dame 1967
John Marshall School of Law 1978

Jack Palma
Notre Dame 2002
Notre Dame Law School 2005

William H. Rooney
Notre Dame 1980
Yale Law School 1983

Richard F. Russell
Notre Dame 1964
Notre Dame Law School 1972

Robert Schmiede
Notre Dame 1963
Notre Dame Law School 1966

Richard S. Shea
Notre Dame 1989
University of Denver College of Law 1995

R. Michael Sullivan
Notre Dame 1988
University of Kentucky College of Law 1991

Joseph J. Sperber III
Notre Dame 1964
Georgetown University Law Center 1967

James M. Thunder
Notre Dame 1972
Georgetown University Law Center 1977

Joseph M. Toddy
Notre Dame 1979
University of Delaware Law School 1984

Charles F. Vandegrift
Notre Dame 1956
University of San Diego Law School 1973

John M. Walsh
Notre Dame 1961
Case-Western Reserve Law School 1964

H. Patrick Weber
Notre Dame 1971
Notre Dame Law School 1974

Gabriela Ana Weigel
Notre Dame Law School 2017