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By FedEx, facsimile: (574) 631-7428, and e-mail: [president@nd.edu](mailto:president@nd.edu)

Rev. John I. Jenkins, C.S.C.  
President  
University of Notre Dame  
400 Main Building  
Notre Dame, Indiana 46556

Dear Rev. Jenkins:

The National Women's Law Center and Americans United for Separation of Church and State write this letter in response to your February 7, 2018, announcement that in July and August of this year the University will terminate insurance coverage for certain FDA-approved methods of contraception. NWLC and Americans United have twice represented Notre Dame students in their quest to maintain the contraceptive coverage to which they are entitled under the Affordable Care Act, and we denounce this latest attempt by the University to interfere with students' access to critical preventive health coverage. The University's decision threatens the health and economic security of students and staff and is not in accordance with law.

The only authority that Notre Dame has publicly invoked for its decision to withdraw comprehensive contraceptive coverage is a reference to an undisclosed settlement agreement with the U.S. government. Notre Dame apparently contends that this "favorable" settlement gives "the University, its insurers and third party administrators the option of an exemption from providing" coverage for all methods of FDA-approved contraception.<sup>1</sup> Yet no private settlement agreement with the government could authorize the University to deny its students and employees the contraceptive coverage guaranteed to them by the Affordable Care Act.

NWLC and Americans United represented Notre Dame students as intervenor-defendants in Notre Dame's lawsuit challenging the ACA's

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<sup>1</sup> Rev. John I. Jenkins Letter to Aetna Student Enrollees, University of Notre Dame Office of the President, at 1 (Feb. 7, 2018).

contraceptive-coverage requirement,<sup>2</sup> but we were excluded from any and all alleged settlement discussions. We therefore must insist, on behalf of our clients and for the benefit of all students and faculty, that the University explain its legal rationale for its decision to withdraw coverage, including the terms of any purported settlement and any other authorities that the University is invoking to support that decision.

The University's decision to terminate contraceptive coverage flouts the Affordable Care Act and two federal injunctions.<sup>3</sup> In May 2016, the U.S. Supreme Court made clear that women covered by the University's health plans must be able to "obtain, without cost, the full range of FDA approved contraceptives," as required by the Affordable Care Act.<sup>4</sup> The University's obligation to cover *all* FDA-approved contraceptive methods remains in effect today. And the University cannot rely on the Trump Administration's October 2017 issuance of two interim final rules purporting to expand religious exemptions to the contraceptive-coverage requirement, because implementation of those rules has been blocked by two nationwide preliminary injunctions.<sup>5</sup> Thus, the University must comply with the law in effect before the rules were issued,<sup>6</sup> meaning that the University must continue providing full contraceptive coverage to employees, students, and their dependents.

The February 7, 2018, announcement is not merely illegal. It is also dangerous to women; it relies on faulty science; and it needlessly infringes on the religious freedom of University students and staff whose views on contraception differ from that of the University administration. The announcement fails to clarify which contraceptive methods will continue to be covered and which will not, except to say that the University will not cover what it describes as "abortion-inducing drugs."<sup>7</sup> Yet that phrase is not a medical term; on the contrary, the contention that certain forms of birth control cause abortion has been universally discredited by the medical community.<sup>8</sup> University students and staff are left guessing which methods

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<sup>2</sup> See *Univ. of Notre Dame v. Price*, No. 13-3853 (7th Cir.) (voluntarily dismissed without settlement agreement Oct. 17, 2017).

<sup>3</sup> *Pennsylvania v. Trump*, -- F. Supp. 3d --, No. CV 17-4540, 2017 WL 6398465, at \*15 (E.D. Pa. Dec. 15, 2017) (enjoining rules that purported to allow religiously affiliated institutions to avoid complying with Affordable Care Act); *California v. Health & Human Servs.*, -- F. Supp. 3d --, No. 17-CV-05783-HSG, 2017 WL 6524627 (N.D. Cal. Dec. 21, 2017) (same).

<sup>4</sup> *Univ. of Notre Dame v. Burwell*, 136 S. Ct. 2007 (2016); see also *Zubik v. Burwell*, 136 S. Ct. 1557, 1560 (2016) (requiring government to "ensur[e] that women covered by petitioners' health plans receive full and equal health coverage, including contraceptive coverage" (internal quotation marks omitted)).

<sup>5</sup> See *supra*, note 4.

<sup>6</sup> *California v. Health & Human Servs.*, 2017 WL 6524627, at \*17.

<sup>7</sup> See *supra*, note 1, at 2 & 3.

<sup>8</sup> The medical and scientific communities define pregnancy as established only at the conclusion of implantation of a fertilized egg. See OBSTETRIC-GYNECOLOGIC TERMINOLOGY: WITH SECTION ON NEONATOLOGY AND GLOSSARY OF CONGENITAL ABNORMALITIES 299, 327 (E.G. Hughes, ed., F.A. Davis Co. 1972); *Statement on Contraceptive Methods* (Am. Coll. of

of contraception will remain covered. Women need clarity, not confusion, about their continued health coverage, and no woman should lose coverage for effective and needed health care. Moreover, the University's belief about which contraceptives it thinks are abortion-inducing may not comport with the beliefs of University employees and students and their dependents, which means that the University is foisting its own misinformed beliefs on the University's religiously and culturally diverse community.

The decision further jeopardizes the health and economic security of the University's students and staff by increasing cost barriers to critical preventive health care, particularly if the University intends to terminate coverage of the most effective (and expensive) methods of birth control, such as IUDs or implants.<sup>9</sup> One of our Notre Dame student-clients uses an IUD not just to prevent pregnancy but also to treat a chronic medical condition. The University's decision threatens her ability to get continuing access to this needed treatment. By undermining women's ability to address medical conditions and to avoid unintended pregnancy, the University's actions also thwart students' educational opportunities and employees' professional

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Obstetricians & Gynecologists, Wash., D.C., Jul. 1998). *See also, e.g.*, K. Gemzell-Danielsson et al., *Emergency Contraception— Mechanisms of Action*, 87 *CONTRACEPTION* 300, 305 (2013) (Plan B and ella function by inhibiting or postponing ovulation; they do not prevent fertilization or implantation); Cecilia Berger et al., *Effects Of Ulipristal Acetate On Human Embryo Attachment And Endometrial Cell Gene Expression In An In Vitro Co-Culture System*, 30 *HUMAN REPRODUCTION* 4, 6 (2015) (ella does not affect human embryo implantation process); M.F. Natavio et al., *Temporal Changes in Cervical Mucus After Insertion of the Levonorgestrel-Releasing Intrauterine System*, 87 *CONTRACEPTION* 430-31 (2013) (levonorgestrel-releasing intrauterine system (LNG-IUS) works primarily by thickening the cervical mucus, thereby preventing sperm from reaching the egg); I. Barbosa et al., *Ovarian function after seven years' use of a levonorgestrel IUD*, *ADV CONTRACEPT.* 1995;11:85-95 (levonorgestrel released by LNG-IUS impairs ovulation); M.E. Ortiz et al., *Copper-T Intrauterine Device and Levonorgestrel Intrauterine System: Biological Bases of their Mechanism of Action*. 75 *CONTRACEPTION* 528 (2007) (copper IUD releases copper ions toxic to sperm, impacting motility and viability of sperm and impairing fertilizing capability; belief that mechanism of action of IUDs in women is destruction of embryos in uterus is not supported by empirical evidence).

<sup>9</sup> *See, e.g.*, Kelly R. Culwell & Joe Feinglass, *Changes in Prescription Contraceptive Use, 1995-2002*, 110 *OBSTET. & GYN.* 1371, 1378 (2007) (insurance coverage a "major factor" for a woman when choosing contraceptive method); Guttmacher Inst., *Testimony of Guttmacher Institute Submitted to the Committee on Preventive Services for Women*, 8 (Jan. 12, 2011), <http://www.guttmacher.org/pubs/CPSW-testimony.pdf> ("Several studies indicate that costs play a key role in the contraceptive behavior of substantial numbers of U.S. women."); Jeffrey Peipert et al., *Preventing Unintended Pregnancies by Providing No-Cost Contraception*, 120 *OBSTET. & GYNECOL.* 1291, 1291 (2012) (when over 9,000 study participants were offered the choice of any contraceptive method at no cost, 75% chose long-acting methods, such as the IUD or implant); Megan L. Kavanaugh et al., *Perceived and Insurance-Related Barriers to the Provision of Contraceptive Services in U.S. Abortion Care Settings*, 21 *WOMEN'S HEALTH ISSUES* S26, S26 (3d Suppl. 2011) (finding that cost can be a barrier to the selection and use of long-acting reversible contraceptives and other effective forms of contraceptives, such as the patch, pills, and the ring); Debbie Postlethwaite et al., *A Comparison of Contraceptive Procurement Pre- and Post-Benefit Change*, 76 *CONTRACEPTION* 360, 360 (2007) (elimination of cost-sharing for contraceptives at Kaiser Permanente Northern California resulted in significant increases in the use of the most effective forms of contraceptives).

advancement. Such outcomes should be antithetical to the core mission of an institution of higher learning.

Notwithstanding any alleged settlement agreement, the University must continue to provide coverage for the full range of FDA-approved contraception in student and faculty health-insurance plans.

NWLC and Americans United intend to monitor these developments, and we will consider all options to ensure that there is no unlawful interference with our clients' access to contraceptive coverage.

Sincerely,



Fatima Goss Graves  
President and CEO, National Women's Law Center



Richard B. Katskee, Legal Director  
Americans United for Separation of Church and State